GAME LAW GUIDE

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GAME LAW GUIDE

DISCUSSING

The New York State Conservation Law

AS TO

Forests, Fish and Game

BY

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INTRODUCTION

"All are but parts of one stupendous whole;
Whose body nature is; and God, the soul."

The romance and the scope of the conservation scheme can perhaps happily be gathered from those lines of Pope. Earth and her waters and the fullness thereof, the State, within the reaches of its jurisdiction, has taken under wing and all of that wild wealth known as our natural resources has become its ward.

The Conservation Law is subdivided as follows:

Article I. Short Title.
II. Department of Conservation.
III. General Provisions.
IV. Lands and Forests.
V. Fish and Game.
VI. Hydraulic Development.
VII. River Improvement.
VIIa. River Regulation by Storage Reservoirs.
VIII. Drainage.
IX. Water Supply.
IXa. Union Water Districts.

While the more practical minded may attach greater importance to such branches as the extension of commercial forestation, hydraulics, drainage, and water supply, to the lovers of the life which is free from crowds and carking cares, the activities of those divisions in chief charge of *forests, fish* and *game,* furnish a quicker fascination.

This book is devoted to a discussion of Article IV on Lands and Forests, and Article V on Fish and Game,

together with such other legislation as bears immediately upon the interests, rights and liabilities of the owner of the land and those who hunt or fish thereon. And particular attention has been paid to the unsettled question of property rights in fish and game and to the mixed matter of posted lands.

The law will of course be amended annually, but annotations on the margin will keep it abreast of changes. At the back of the book will be found blank pages for memoranda as to the catch or kill of fish and game.

The protection of the forests against fires and commercial foes is from every standpoint, indispensable.

The value of insectivorous birds can be appreciated from the fact that the authorities of Pennsylvania have estimated that it requires 3,600 tons of insects to feed the birds in that State one single day. According to the United States Department of Agriculture there is a loss of at least 10 per cent of the entire crop each year due to insect pests and that loss amounts to $1,000,000,000. In some of the southern states they have come to the conclusion that cotton cannot be successfully raised without the co-operation of the quail which largely feed upon boll-weevil. It has been stated that one quail in one year will devour one and one-half tons of bugs and insects. Farmers in this State are gradually realizing that the pheasant because of his voracity and capacity for potato bugs and cabbage worms more than compensates them for the grain he eats.

The food value of the fish and game legitimately taken in the State during any year would amount toward the millions. It was estimated from statistics taken that in Pennsylvania in 1914 there were legally killed at least 400,000 ruffed grouse, 2,000,000 rabbits, 37,000 quail, 225,000 squirrels, 17,000 woodcock, 37,000 water fowl, 9,500 raccoons, 400 bears, and 1,100 deer, aside from other game, furbearing animals and fish.

As compared with the sums expended by sportsmen in the effort to kill fish and game the appropriations made for their propagation and protection are pitifully inadequate. The Pennsylvania authorities conservatively estimated that in 1914 at least the sum of $4,000,000 in actual cash was expended in that State in the effort to destroy fish and game.

Similar conditions exist in this State and the co-operation of all interested in the permanence of sport must be forthcoming.

No class of men is more immediately concerned with the growth of conservation than the proprietors of the land who in the main are the farmers of the State. With the exception of the public properties in the forest preserve and elsewhere, they are in virtual control of the natural open. Upon their premises must be kept intact and widened out the timber growths which furnish cover for the game and husband the waters upon which the fish supply depends. Over their holdings course the streams and in many cases lie the waters which must be kept stocked to afford the angler his sport.

In recognition of this bond between it and the farmer, the State, along with other things, offers him its aid by furnishing at cost all kinds of trees for forestation purposes. Under the profitable supervision of the Commission, the areas which are of doubtful value for uses of cultivation may be gradually retimbered and by conforming to the beneficial provisions of the law, the owner of forested and reforested lands can both lumber them and have them to a large extent, exempted from taxation. The land owner who actually occupies and cultivates his land or the lessees doing likewise and the members of their immediate families, are not required to procure licenses in order to enjoy the hunting on it although the State, if it saw fit, might refuse them this exemption altogether. The exclusive fishing and hunting rights which are an incident to the ownership of the land the

law protects with might and main. By properly posting his lands the owner may hold liable civilly in exemplary damages and criminally for misdemeanor, any one who trespasses against those rights without his waiver or consent. The law requires the hunter to exhibit to the owner for inspection on demand, his hunting license, thus enabling trespassers and perpetrators of malicious mischiefs to be identified, arrested and brought to book.

In return for these concessions, it is not asking too much of the beneficiaries to assist in every reasonable way the enforcement of the law no matter whom it hits or hurts. The other interests of the farmer demand it, for lawlessness of any kind begets a disregard of rights.

In the interests of sport, the sportsmen should support the Commission in every legitimate way and particularly should they observe the rights and even the preferences of the owners of the land. If every farmer in the State should avail himself of the provisions of Part XI of Article V and because of the lawless acts which are so frequently committed, should enforce the law which protects his rights, against all comers, there would be little hunting or fishing outside of public lands and waters for those who were not in position and disposed to trade the favors with him. For any such condition of affairs the sportsmen alone will be responsible.

No man can be said to be more generous or responsive to right treatment or the application of the golden rule than the average farm owner. The right to fish and to hunt upon his property is a valuable privilege and those who deem it otherwise would do well to abandon the sport. To have what would otherwise be a trespass, waived in one's favor is worth at least a genuine appreciation and some sportsmen are wholesouled enough to share with the farmer who is too busy or otherwise unable to get afield or astream the spoils which except for his concession they would go without.

It is unreasonable to expect a sportsman to be familiar with the whole law on fish and game. The big game

hunter is likely to be less interested in small game; the bird hunter is usually indifferent to quadrupeds; and the game fish angler is not as a rule concerned enough about net fishing to ascertain to what extent it lawfully may be carried on. But every person can reasonably acquaint himself with all the law as to his particular "hobby" and should have it in the volume of his head.

The authorities of Oklahoma concede that in that State the best observers of the law are the dispossessed heirs of all our natural resources, the Indians.

The line of demarcation between alleged sport and avowed piracy is shadowy and obscured. But it may be safely stated that the true sportsman is he who relentlessly enforces the law and the rights of the man by whose grace he is afield or astream against not only self but others. More than that, his maxim should be:

> "The law may allow much that honor prohibits;
> But prohibits nothing which honor allows."

Upon the basis of such a test, all of us are pirates with perhaps the advantage or disadvantage of degree. But all can make an effort to meet that measure and:

It is to those prodigal lovers of the natural and spiritual open, who in its exploitation, earn health of brain and brawn, add years to youth, come close to nature's heart and consequently near to God; who in a "life exempt from public haunt," unmarred by mammon, where "Adam's penalty—the season's difference" gives only brace and thrill, hear voices in the silence; and whether on the hills or in the woods or by the musical meanders and mother o'pearl waters of capricious streams, observe a soul in every scene and catch a melody in every noise that's known; and who, above all else, on every tramp, deem full respect of other's rights the foremost due and call a modest spoil of feathers, fur or fins within the law and honor fairly won, the crown, but not the sum of all the charms of sport, that this modest volume offers its appeal.

CHAPTER

ORGANIZATION AND GENERAL POWERS OF THE COMMISSION

One of the interesting parts of the law is that dealing with the organization of the Commission and the Department.

The Conservation Commission with its principal office at Albany, N. Y., consists of a single commissioner in chief executive and administrative charge of the department. The term Commission when used in Article VII on River Improvement means a body or board comprised of the conservation commissioner, the attorney-general, and the state engineer or their respectively designated deputies.

See section 380-1.

The commissioner is appointed by the governor upon confirmation by the Senate for a term of six years and is removable by him upon sustained charges of inefficiency, neglect or misconduct in office after notice and a hearing. The office is not yet a constitutional one.

The Commission appoints to hold office during its pleasure, a secretary, a deputy commissioner, a superintendent of forests, and assistant superintendent of forests, a division engineer and two assistant engineers.

The attorney-general appoints and assigns to the Commission a deputy attorney-general and such assistants as may be necessary.

The Conservation Department is comprised of three divisions:

The Division of Lands and Forests with jurisdiction over tree culture, reforestation, parks, reservations and lands is in chief charge of the Superintendent of Forests.

The Division of Waters in control of water storage,

hydraulic development, water supply, river improvement, drainage, irrigation and the navigation of waters outside of the canals is in chief charge of the Division Engineer.

The Division of Fish and Game in charge of fish and game including shell fish and the protection and propagation thereof is in chief charge of the Chief Game Protector.

In view of the fact that no man can well serve both conservation and mammon, the law makes ineligible to the positions of commissioner, deputy commissioner, secretary or chief of a department division, any person engaged in the business of lumbering in any forest preserve county or the distribution or sale of water or any business in the conduct of which hydraulic power is used.

The present personnel of the Commission, Department and appointees in the exempt, competitive and non-competitive classes of the civil service is too extensive to be included in a work of this character. The rosters of the fish and game protective force and of the forest fire protective force are contained in the compilations of the law published annually by the Commission.

The commissioner, secretary, deputy commissioner, superintendent of forests, assistant superintendent of forests, chief game protector, deputy chief game protector and division engineer, in addition to salaries, receive necessary actual expenses and disbursements.

Annual reports are made by the Commission to the Legislature covering the different branches of its work, a brief description of lands purchased, statistics as to fires, trespasses on State lands and a brief summary of litigation, and reports setting forth the work of the department are published and distributed and can be secured on application.

The inquiries, investigations and hearings authorized by law, to be held by the Commission may be held by or before the commissioner, the deputy commissioner or any chief of a division and may also be held by or before any officer or employee of the department designated by

written order filed in the office of the Commission. Every order or decision made by one other than the commissioner in order to become that of the Commission must be confirmed and ordered filed by him. Oaths may be administered by any one of the foregoing incumbents holding hearings or investigations.

Aside from such investigations as are pertinent under Article VI on Hydraulic Development, Article VII on River Improvement, Article VIIa on River Regulations by Storage Reservoirs, Article VIII on Drainage and Article IX on Water Supply, hearings are provided for by section 152 on additional protection and by section 153 on fish and game closes. Many other matters are the proper subjects of hearings such as fishways under section 291 and care of forests under section 50.

By Section 20, it is provided that:

> The conservation commission shall have the power, for the state, to initiate and conduct of its own motion any proceeding provided for in any article of this chapter, for the construction of improvements, or development of natural resources, for the public health or safety or welfare or any of them and if a petition is presented by any person or persons or by a corporation municipal or otherwise under any such article, the commission may in its discretion extend the scope of such proceeding to and including any or all improvements or *developments of natural resources* which may be done under all or any provisions or provision of this chapter and if any part of the procedure governing the matters concerning which the petition is presented cannot be made applicable in all respects to the subject matter of the proceeding as thus extended, then the procedure peculiar to such additional matters as provided for in this chapter shall be adopted to the extent necessary.

It seems that an appeal to the Supreme Court lies from any order or decision of the Commission taking the form of an application to have vacated or modified the order of the Commission.

Matter of Deposit, 131 A. D. 403.

These practically limitless powers would not *appear*, however, to permit the Commission to institute inquiries, proceedings or investigations as to reported violations of the law as to fish and game, in the nature of "John Doe" proceedings. Such authority is expressly conferred upon the Oregon Commissioners by section 54 of the Oregon statute in order to get cross lots to the facts and avoid frivolous indictments or prosecutions.

The broad powers of the commission in the matter of subpoenas and requiring the attendance of witnesses in such proceedings are set forth in Section 24:

> The commission shall have the power to subpoena and require the attendance in this state of witnesses and the production by them of books and papers pertinent to the investigations and inquiries which it is authorized to make under any article of this chapter, and to examine them and such public records as it shall require in relation thereto, and for the purposes of such examinations the conservation commission shall possess all the powers conferred by the legislative law upon a committee of the legislature or by the code of civil procedure upon a board or committee, and may invoke the power of any court of record in the state to compel the attendance and testifying of witnesses and the production by them of books and papers as aforesaid.

See section 854 of the Code of Civil Procedure and article 4 of the Legislative Law.

Section 25 provides as follows as to the immunity of witnesses sworn in these proceedings:

> No person shall be *excused* from testifying or from producing any books or papers in any investigation or inquiry by or upon any hearing before the commission or any commissioner, when ordered to do so by the commission, upon the ground that the testimony or evidence, books or documents required of him may tend to *incriminate* him or subject him to *penalty* or *forfeiture*, but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing *concerning* which he shall under oath have testified or produced documentary evidence; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any *perjury* committed by him in his testimony. Nothing

herein contained is intended to give, or shall be construed as in any manner giving unto any corporation, immunity of any kind.

See authorities cited under section 35, chapter XVII on Procedure.

The duty of the Commission as to investigations of the water resources of the State is set forth in Section 21:

It shall be the duty of the commission to continue investigations of the water resources of the state, including the systematic gaging of rainfall and stream flow throughout the state, so as to complete a comprehensive system for the entire state, for the conservation, development, regulation and use of the waters in each of the principal watersheds of the state with reference to the accomplishments of the following *public uses and purposes:*

1. The prevention of floods and the protection of the public health and safety in the watershed.

2. The supply of pure and wholesome water from the watershed to municipalities and the inhabitants thereof and the disposal of sewage.

3. Drainage and irrigation.

4. The development, conservation and utilization of water power in the watershed and to create a revenue for the state.

5. The protection of the *public right of navigation.*

It shall be the duty of the commission to investigate the possibilities of improving and extending navigation in rivers, lakes and other water courses and bodies of water outside the canal system in each such watershed, including an investigation into the character of such waters and the use thereof for navigation and with the view of collecting data *to determine the upstream limits* of the public right of navigation, and to report from time to time the result of such investigations to the end that a complete plan will be presented for the economical and comprehensive development of all water resources, for all of the aforesaid purposes, in each of the principal watersheds of the state; and each of said purposes is hereby declared to be a *public use* or is continued as a *public use.* It shall investigate and report as to the privileges heretofore granted affecting the use of the waters aforesaid and as to the terms of such privileges and whether the conditions thereof have been complied with or the terms expired or whether revocable and investigate and report as to the diversion rights in streams heretofore *acquired by the state* and as to the use being made of the waters affected thereby.

Each such plan for any watershed shall set forth the developments already made and authorized to be made in such watershed for one or more such purposes, whether by the state or otherwise, and the extent to which any such existing or authorized development may be improved, enlarged or extended so as to increase or extend its efficiency for any of the aforesaid purposes, to the end that all developments in each watershed for all such purposes may be co-ordinated and unified, the rights of the state asserted and utilized so as to combine the most economical construction, maintenance and operation, and the most efficient service, with the production of the largest net revenue and public benefit to the state which may be practicable.

While the waters of the State are subject to federal regulations as to commerce, it was held by the Attorney-General in 1912, Vol. II, Page 601, that at that point the authority of the federal government stopped and that otherwise, matters of conservation and water rights were within the sole power and province of the State.

It is important to note that nothing is mentioned in Section 21 as to any public right of fishing or fowling in or on socalled navigable waters.

See chapter XVIII.

Toward the public purposes referred to in Section 21, it is provided in Section 22:

No structure for impounding water, not a part of the canal system of the state and no dock, pier, wharf or other structure used as a landing place on waters not a part of the canal system of the state, shall be erected or reconstructed by any public authority or by any private person or corporation without *notice* to the commission nor shall any such structure be erected, reconstructed or maintained without complying with such *conditions* as the commission may by order prescribe for safeguarding life or property against danger therefrom. No order made by the commission shall be deemed to authorize any invasion of any property rights, public or private, by any person in carrying out the requirements of such order. The commission shall have power, whenever in its judgment public safety shall so require, and after a hearing either *on its own motion* or *upon complaint,* to make and serve an order directing any person, corporation, officer or board, constructing, maintaining or using any structure hereinbefore referred to, to remove, repair or reconstruct the same within such reasonable time

and in such manner as shall be specified in such order, and it shall be the duty of every such person, corporation, officer or board to obey, observe and comply with such order and with the conditions prescribed by the commission for safeguarding life or property against danger, therefrom, and every person, corporation, officer or board failing, omitting or neglecting so to do or who hereafter erects or reconstructs any such structures herein before referred to, without submitting to said commission and obtaining its approval of plans and specifications for such structures when required so to do by order of the commission or who hereafter fails to remove, erect or reconstruct the same in accordance with the plans and specifications so approved shall *forfeit* to the people of the state a sum not to exceed *five hundred dollars* to be fixed by the court for each and every offense; every violation of any such order shall be a separate and distinct offense, and, in case of a continuing violation, *every day's continuance* thereof shall be and be deemed to be a separate and distinct offense. This section shall not apply to a dam where the area draining into the pond formed thereby does not exceed *one square mile,* unless the dam is more than *ten feet* in height above the *natural bed* of the stream at any point or unless the quantity of water which the dam impounds *exceeds one million gallons;* nor to a dock, pier, wharf or other structure under the jurisdiction of the department of docks in a city of the first class.

Section 22 applies both to the marine district and the inland waters of the State and has an important bearing on such structures as unwarrantably interfere with fishing along the shore of *public waters* and the dams on streams and other bodies of water erected in the aid of fishing and fowling.

See also sections 290 and 291 on dams, etc., on the inland waters of the State treated in chapter XIX.

Actions to recover penalties under Section 22 may be brought to recover all incurred up to the time of the commencement thereof and the right to recover any other penalty shall not be waived thereby.

Moneys recovered in such actions shall be paid into the State Treasury to the credit of the *general fund.*

The penalty provided in Section 22 is one of the few exceptions referred to in Section 182 covering generally the matter of penalties.

CHAPTER II

LANDS AND FORESTS

The wide powers of the Commission with reference to lands and forests are mainly directed toward the development of timber lands as the basic sources of the water supply with all which that involves.

Article IV might properly be divided into two parts; the first dealing with the maintenance and perpetuation under the constitution, of the forest preserve; and the second treating of the improvement and reforestation of other lands for the purposes both of conservation and of commerce.

To keep the forest preserve lands wild and as far as possible in their aboriginal condition, with all their natural standing growths and all the fallen tangles and accumulations, in protection of the water supply and as a natural cover for the game there found and propagating is the primary object. To attain this end, it will doubtless be necessary for the State to purchase all the privately owned lands within the so-called blue lines marking the boundaries of the Adirondack and Catskill parks and protect them absolutely against the axe and fires.

See section 50, subdivision 6.

A secondary, but important object is the development on the other lands of the State suitable therefor of a supply of timber primarily for commercial purposes and incidentally in aid of water sources, fish supply and game cover. This scheme requires the whole-souled sympathy and co-operation of the land owners of the State in order

that the timber now growing may be kept intact and developed and other lands adaptable, reforested.

Both of these arms of the project immediately concern the sportsman for game must have natural cover and fish must have unpolluted water, and the well governed exploitation of timber resources is a conservation both of fish and game.

Article VII, Section 7 of the State Constitution provides as to the forest preserve as follows:

> The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

The keeping of the preserve as wild lands has been interpreted as preventing not only the removal of growing, but also of dead, fallen and burnt timber; the exploitation of mineral and stone deposits; and the appropriation of water power together with any sales of any materials, including buildings.

See Report of Attorney-General, 1903, page 364.
See Report of Attorney-General, 1910, page 770.
See section 61, subdivision 8.

The socalled Long Sault Development Company grant under Chapter 355 of the Laws of 1907 for the purpose of developing water power on the St. Lawrence river was held to be violative of the forest preserve in that it included the bed of the river within its confines.

See Report of Attorney-General, 1912, vol. II, page 576.

The general constitutional principle has been applied in many cases of which the following are a choice:

Adirondack R. R. Co. v. Indian River Co., 27 A. D. 326.
People v. Adirondack Railroad Co., 160 N. Y. 225.
People v. Brooklyn Cooperage Co., 187 N. Y. 142.
Matter of Long Sault Development Co., 212 N. Y. 1.
People v. Santa Clara Lumber Co., 213 N. Y. 61.

The general domain embraced in the forest preserve is described in Section 62, Subdivision 1:

> The forest preserve shall include the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster and Sullivan except
>
> (a) Lands within the limits of any village or city and
>
> (b) Lands not wild lands acquired by the state on foreclosure of mortgages made to loan commissioners.

Lands acquired by the State on tax sales if lying within the lines are to be deemed a part of the forest preserve.

See Report of Attorney-General, 1911, vol. II, page 254.

"Village" as used in this section means an incorporated village.

See General Construction Law, section 54.

The important tracts within the blue lines are the Adirondack Park and the Catskill Park; other tracts of note are the Saint Lawrence Reservation and the John Brown Farm. These parcels are definitely described by metes and bounds in Section 62, Subdivisions 2, 3, 4, and 5.

All lands within the parks now owned or which may hereafter be acquired by the State are to be forever reserved and maintained for the use of the people. Lands within or adjacent to the parks, privately owned, are subject to certain provisions of the law and may be acquired by the commission pursuant to Section 50, Subdivision 6.

See Section 54, Subdivision 1, which provides for the closing of the territory within the fire towns against fishing and hunting in times of drought, and Section 193 on the use of dogs in the parks, or forests inhabited by

deer. Adirondack *maps* may be secured upon application to the Commission.

The forest preserve is to be distinguished from properties covered by the Public Lands Law, particularly Article II on Crown Lands, Article III on Unappropriated State Lands, Article IV on Abandoned Canal Lands, Article V on Escheated Lands and the matter of Grants of Land under Water, covered by Article VI. It has no reference to barge canal lands.

This discussion is also apart from Articles III-VI of the Navigation Law covering the Hudson River and other waters of the State and the use of rivers and streams as *public highways.*

The Commission has no jurisdiction over the Palisades Interstate Park comprising lands on the west side of the Hudson River in the States of New York and New Jersey appropriated for and devoted to scenic and other purposes under Chapter 97 of the Laws of 1895 and acts amendatory thereof except to co-operate with the commissioners in charge of the same in the matter of the protection of forests, fish and game therein.

The Cuba reservation as defined by Section 62, Subdivision 6, includes all lands owned by the State surrounding Cuba lake in the counties of Allegany and Cattaraugus.

The other important definitions in the light of which most of the provisions of Article IV must be construed are contained in Section 62, Subdivisions 7, 8, 9, 10, 11, 12 and 13:

> Person includes a copartnership, joint-stock company or corporation.
>
> *Forest land* includes not only lands which may be covered with tree growth, but also lands which are best adapted to forests.
>
> *Forest fire* is a fire which is not only burning forest or woodlands, but which, if permitted to extend, would burn forest or upon forest lands.
>
> *Fire towns* are as follows: All towns in Hamilton county; the towns of Altona, Ausable, Black Brook, Dannemora, Ellenburg and

Saranac, Clinton county; the towns of Andes, Colchester, Hancock and Middletown, Delaware county; the towns of Chesterfield, Elizabethtown, Jay, Keene, Lewis, Minerva, Moriah, Newcomb, North Elba, North Hudson, Saint Armand, Schroon and Wilmington, Essex county; the towns of Altamont, Belmont, Brighton, Duane, Franklin, Harriettstown, Santa Clara and Waverly, Franklin county; the towns of Bleecker, Caroga, Mayfield and Stratford, Fulton county; the towns of Hunter, Jewett, Lexington and Windham, Greene county; the towns of Ohio, Russia, Salisbury, Webb and Wilmurt, Herkimer county; the towns of Croghan, Diana, Greig, Lyonsdale and Watson, Lewis county; the towns of Forestport and Remsen, Oneida county; the towns of Corinth, Day, Edinburg and Hadley, Saratoga county; the towns of Clare, Clifton, Colton, Fine, Hopkinton, Parishville, Piercefield, Pitcairn, Saint Lawrence county; the towns of Neversink, Rockland, Sullivan county; the towns of Denning, Gardiner, Hardenburgh, Olive, Rochester, Shandaken, Shawangunk, Warwarsing and Woodstock, Ulster county; the towns of Bolton, Caldwell, Chester, Hague, Horicon, Johnsburgh, Luzerne, Queensbury, Stony Creek, Thurman and Warrensburgh, Warren county; the towns of Dresden, Fort Ann and Putnam, Washington county.

Right of way is land adjacent to the tracks of a railroad and shall be construed to be fifty feet in width on each side of the center of the track but if the company own a lesser width it shall include the entire width owned by them.

A fire *patrolman* shall be an able-bodied man whose duty is to patrol a given portion of right of way for the purpose of detecting promptly any fires which may be caused by the operation of the railroad, or other fires which may occur upon such portion of the right of way, and secure their extinguishment.

Railroad or railroad company includes all common carriers, logging or lumbering roads for public or private uses wherever the motive power is generated by steam.

An enumeration of the powers of the Commission as to lands and forests is contained in Section 50, Subdivisions 1-30:

The commission shall, for the purpose of carrying out the provisions of this article, have the following power, duty and authority:

Have the care, custody and control of the several preserves, parks and other state lands described in this article.

Make *necessary rules and regulations* to secure proper enforcement of the provisions hereof.

Establish, operate and maintain nurseries for the production of trees to be used in reforestation. Such trees may be used to reforest any land owned by the state; *supplied to owners of private land at a price not exceeding cost of production;* or used for planting on public lands under such terms as may be deemed to be for the public benefit.

It has been held that the State has no authority to furnish trees to owners of private lands free of charge.

Attorney-General's Report, 1910, page 761.

The Pennsylvania commission is by statute authorized to distribute trees to applicants free of charge except the expense of boxing and shipping.

Prepare, print, post or distribute printed matter relating to forestry.

Make investigations or experiments with regard to forestry questions.

Purchase, subject to the approval of the governor, lands, forests, rights in timber or any interest therein, situated within the Adirondack or the Catskill parks or lands contiguous, connected with or adjacent to either park.

The exercise of this power will make possible the retrieval from private ownership of many tracts essential to the scheme of developing the forest preserve.

Receive and accept in the name of the people of the state, by gift or devise, the fee or other estate therein of lands or timber or both, for forestry purposes.

Examine the forest lands under the charge of the several state institutions, boards or other management for the purpose of advising and co-operating in securing proper forest management of such lands.

Employ, with the approval of the superintendent of prisons, convicts committed to any penal institution or, with the approval of the governing board thereof, the inmates of other institutions, for the purpose of *producing or planting trees.* Such portion of the proceeds of the sale of trees grown at state institutions, as the commission determines is equitable, may be paid over to that institution.

It has been held that convict labor may be employed in the propagation of trees for reforestation purposes.

Attorney-General's Report, 1911, vol. II, page 649.

Propagate trees and shrubs for the several state institutions or for planting along improved highways. Any common carrier may transport trees or shrubs grown by the state at a *rate less* than the established tariff.

Bring any action or proceeding for the following purposes:

(a) Any action or proceeding, for the purpose of enforcing the state's rights or interests in real property, which an owner of land would be entitled to bring in like cases.

(b) Such actions or proceedings as may be necessary to insure the enforcement of the provisions of this article.

(c) To determine in trespass, *ejectment* or other suitable actions the *title to any land claimed adversely to the state.*

(d) Bring proceedings before the comptroller or bring actions to *cancel tax sales* or to *set aside cancellations of tax sales.*

This authority is particularly available for the removal of squatters on State lands and the clearance of State title from all clouds.

The advisability of not *waiving* default in tax sales that the State might *acquire* title for non-payment of taxes was urged by the Attorney-General in 1911, Vol. II, Page 95.

May compromise or adjust any judgment or claims arising out of violations of any provisions of this article, *except where title to land is involved.*

In the case of People v. Santa Clara Lumber Co., 213 N. Y. 61, it was held that the former forest, fish and game commissioner had no right to stipulate in compromise of an action involving title to lands that upon conveyance or release to the State of such disputed title and of title to other lands owned by them, the claimants could dispose of and remove timber from the lands so conveyed.

This decision was based squarely upon the constitutional principle already referred to and the section as it

now reads definitely and expressly excludes from the field of compromises any litigation involving the *title to land.*

Moreover by Section 9 it is provided that no action, suit or proceeding in which the title to lands of the State in the forest preserve counties shall be involved shall be, *withdrawn* or *discontinued,* nor shall judgment therein against the State be entered on consent except on special permission of the court on which application all the terms and conditions of the settlement shall be fully stated in writing and the reasons therefor set forth at length.

See chapter XVII on Procedure.

Have the custody of all abstracts of title, papers, contracts or memoranda relating thereto, except original deeds to the state, for any lands purchased for forest preserve purposes.

Examine *private forest lands* for the purpose of advising the owners as to the proper methods of forest management.

Survey, map and determine *boundaries* of lands owned by the state.

Maintain a system of forest fire protection in the fire towns and such other areas as the commission determines necessary.

Purchase necessary equipment, tools or supplies, employ men or incur other expenses as may be necessary to furnish adequate forest fire protection.

Establish, maintain, equip and operate forest fire observation stations, telephone lines or other structures therefor as the public interest requires.

Make contracts, agreements or purchases either for construction, operation or maintenance of telephone lines for fire protection purposes. Any telephone company may grant the state a preferred rate.

With consent of the owner build or improve fire roads, ditches, trails or fire lines. No action for trespass shall lie on account of injury to private property on such account, if the act is performed in the protection of the forests from fire.

Appoint necessary employees to perform such duties as are required by this article.

May order *removed from service,* on forty-eight hours' notice, any railroad locomotive, operating in the fire towns, not properly equipped with fire protective devices.

May grant an extension of time in which owners may comply with subdivision two of section fifty-four, when the commission is satisfied that such an extension of time will not endanger the forests to fire, but in no case shall an extension be granted for a period of more than six weeks from the time of cutting.

May *relieve railroads* from maintaining railroad fire patrol, or clearing rights of way when in the judgment of the commission the absence of such patrol or clearing will not subject the forests to fire menace.

May request the public service commission to *hear and determine* whether any railroad, person or company operating railroad locomotives through forest land is using such devices and precautions against the setting of forest fires, as the public interest requires.

May designate persons who shall have authority to issue permits as required by subdivision five, section fifty-four.

May enter into working agreements with land owners for the purpose of securing better forest fire protection in the fire towns.

May make rules, regulations and issue permits for the temporary use of the forest preserve.

See Rules at the close of this chapter.

Shall have such other powers and duties as are provided by law.

Reimburse employees for actual and necessary expenses incurred while upon official business.

The officers and employees authorized to administer the provisions of Article IV are enumerated and their duties, etc., defined in Section 51:

1. A *superintendent of forests,* who shall receive an annual salary of four thousand dollars per annum and who shall, subject to the direction of the commission, administer all of the provisions of this article.

2. An *assistant superintendent of forests,* who shall receive a salary of two thousand five hundred dollars per annum; and who shall assist the superintendent of forests in the performance of his duties, and, in the absence or inability of the latter, shall have power to act in his place.

3. A *chief land surveyor,* who shall receive a salary of two thousand four hundred dollars per annum; and who shall, under the direction of the superintendent of forests, have charge of of locating and determining the boundaries of state land.

4. *Five foresters,* who shall perform such duties in reforesting, fire protection, surveys, investigations, preparation of publications and other branches of forestry as may be required.

5. Such *assistant foresters* as may be required, who shall assist the foresters in their duties, and perform such other duties as may be assigned them.

6. A *forest pathologist,* who shall examine forest trees with respect to disease, and carry on such studies as may be deemed advisable in connection with diseases attacking or liable to attack forest trees in this state. The forest pathologist shall have pursued a thorough course in forest pathology.

7. *Two chief railroad inspectors,* who shall inspect railroad locomotives and other engines, railroad rights-of-way, and perform such other duties as may be assigned them. They must be familiar with the construction of locomotives and experienced in their operation.

8. A *land clerk* at two thousand dollars per annum, who shall be employed in filing and preparing records of state's title to lands and perform such other duties as may be assigned him.

9. An *auditor of fire accounts,* who shall receive a salary of one thousand eight hundred dollars per annum. He shall audit fire bills and accounts of the forestry bureau, and perform such other duties as may be required. He shall execute and file with the comptroller a bond to the people of the state in the sum of five thousand dollars for the faithful performance of his duties and that he will account for and pay over pursuant to law all moneys received by him.

10. *Five district forest rangers,* who shall receive a salary of fifteen hundred dollars per annum, and each of whom shall have charge of a certain portion of the fire towns, to be known as a fire district, for the purpose of securing forest fire protection and preventing trespass upon state land.

11. Such *forest rangers* as may be necessary, to be employed in the fire towns at monthly salaries of not exceeding seventy-five dollars; the salary of such employees shall be fixed and determined by the conservation commission.

12. Such *observers* as may be required to operate the forest fire observation stations, to be employed at a monthly compensation of not exceeding seventy-five dollars including allowance for expenses. The conservation commission shall fix and determine the compensation of these employees.

13. Necessary *fire wardens,* who shall, when fires are actually burning, have power and authority to take steps to extinguish

fires. They shall be paid at the rate of twenty-five cents per hour for time actually employed.

14. District forest rangers, forest rangers, observers, fire wardens and game protectors or any other officer charged with the duty of fire fighting may, when necessary, *employ men* who shall be paid at the rate of *fifteen cents per hour* and *teams* to fight forest fires, and also engage other men to be known as *foremen* for particular fires to direct the work of men engaged in fighting such fires. Such *foremen* shall be paid at the rate of *twenty-five cents per hour* for time actually employed. These employees may incur other necessary expenses in connection with extinguishing forest fires. *They shall have the power to summon any male person of the age of eighteen years and upwards to assist in fighting such fires, and any person so summoned shall forthwith proceed to help extinguish the fire as directed by the person summoning him.*

15. The employees enumerated in subdivisions one, two, four and five of this section shall be trained foresters. The positions enumerated in subdivisions one and two shall in case of vacancy be filled by promotion examination. The employees enumerated in subdivisions one, two, three, four, five, six, seven and eight of this section shall be under the competitive civil service classification. Those persons employed under subdivisions eleven, twelve and thirteen of this section, who are temporary, occasional or emergency employees, shall not be under competitive civil service classification.

16. The employees enumerated in subdivisions one, two, three, four, seven, ten, eleven and twelve of this section shall have the *power to arrest without warrant any person committing a misdemeanor under the provisions of this article,* and may take such persons immediately before a magistrate having jurisdiction for trial, and exercise such other powers of peace officers as may be necessary for the enforcement of the provisions of this article. No employees shall compromise or settle any violation of this article without the order of the commission.

Compare section 169 on compromises by game protectors.

In the case of People v. Klock, 55 M. 46 (1907), decided on the basis of Article VII, Section 7, of the State Constitution and Section 222 of the Forest, Fish and Game Law, it was held that a person who paid money to a State game protector for logs cut on State lands embraced within the forest preserve was chargeable with knowl-

edge of the want of authority in the protector to receive it and the latter's assertion of his right to do so was not a fraudulent representation of a fact for which he could be indicted for grand larceny.

See People v. Gaylord, 139 A. D. 814.

This settlement was made out of court and without the sanction of the Commission and the money paid, amounting to $3,750, never reached the proper authorities.

The following classification of Fire Districts for the purpose of protecting the forests from fire is made by Section 52:

> The commission, for the prevention of forest fires and the extinguishment of fires burning or threatening forests, shall, in the *fire towns,* maintain a force of *forest rangers, observers and fire wardens.* It shall maintain an approved fire protective system, including fire observation stations and other equipment necessary to prevent and extinguish forest fires. The territory included within the *fire towns* shall be divided into *fire districts,* each of which shall be in charge of a *district forest ranger.*
>
> The commission may establish a forest fire protective system in *such other parts of the state* as it may deem necessary where there are contiguous areas of forest land aggregating *seventy-five thousand acres or upwards.* In such regions the commission may establish, equip and operate fire observation stations with the necessary accessories, prepare and post fire notices, organize a fire protective force, and require the *town authorities* to perform their duties in forest fire protection. If the town supervisor fails to certify to the conservation commission by February fifteenth of any year a list of the fire wardens for such town then the conservation commission may appoint necessary fire wardens.
>
> In the towns other than the fire towns the *town supervisor* shall be *superintendent of fires* in his town and he shall be charged with the duty of preventing and extinguishing forest fires. He shall have the power and is hereby required to appoint necessary and competent *fire wardens.* On or before February fifteenth of each year, the town supervisor shall state to the commission, in writing, the names of the persons whom he appoints to act as fire wardens during the current calendar year.

See chapter 158 of the Laws of 1916.

In order to finance and carry into effect the provisions of this article the following is prescribed by Section 53:

The state comptroller shall have, subject to the *approval of the governor,* the authority to make, on behalf of the state, a *temporary loan not exceeding one hundred thousand dollars in any fiscal year,* for the use of the conservation commission in protecting the forests and extinguishing fires as provided by this article upon the certification of the conservation commission that an emergency exists whereby through insufficiency of appropriations it is found to be impossible to protect the forests from fire. The comptroller shall thereupon borrow such sums as may be directed by the governor for such purposes and shall report such transactions to the legislature which shall thereupon appropriate the moneys borrowed. Section thirty-five of the finance law shall not apply to any indebtedness so incurred.

All salaries and other expenses incurred by the commission and its employees in protecting the forests in the fire towns from fire shall be paid by the state.

One-half of all expense incurred under subdivision two of this section in extinguishing fires actually burning, except salaries and expenses of regular employees, shall be a charge *upon the town* in which the fire burned. The commission shall, on or before November twentieth of each year, transmit to the clerk of the board of supervisors of each county containing fire towns a summary statement of expenses incurred together with the amount charged against each town in such county. The said clerk shall immediately deliver such statement to the board of supervisors who shall thereupon levy the said amount due from each town to the state upon the taxable property of such town by including the said amount in the sums to be raised and collected in the next levy and assessment of taxes therein, and the same shall be collected as other town taxes are collected and the amount due the state shall be paid by the supervisor to the conservation commission on or before May first following the levy thereof.

If any person incurs expenses fighting *forest fires in a fire town,* the commission may upon the receipt of satisfactory proof and accounts filed in its offices within sixty days from the time the expense was incurred *audit and pay* all or such portion thereof as in its judgment the public interest requires.

Any moneys necessarily expended by the state, a municipality, or any person in fighting forest fires may be *sued for* by the state, municipality or person expending the same and recovered from the *person causing the fire.* Such actions may be maintained

in addition to other actions for damages or penalties and may be demanded in the same or separate actions.

Towns other than fire towns may raise necessary funds for prevention and extinguishment of forest fires in their towns either by levy or by the supervisor making temporary loan.

The comptroller may upon request of the conservation commission advance, not to exceed five thousand dollars at any time, to said commission for the purpose of facilitating payment of fire accounts.

Important provisions for the protection of forests from fire are made by Section 54 and it is essential to note that unless the statute is by terms limited to a particular territory such as fire towns or towns adjacent to them, it is applicable to all forest lands in the State:

1. *Proclamation by governor.* Whenever, by reason of *drought,* the *forests of the state* are in danger of fires which may be caused by *hunters, fishermen, trappers, or campers,* the governor shall have the power to determine and shall determine and declare that such pursuits are contrary to the public interest, and shall have the further authority to *forbid by proclamation* any person or persons carrying on such pursuits in so much of the territory included within the *fire towns* as he deems the public interest requires. Such proclamation shall be in full force and effect at the expiration of *twenty-four hours* after notice is given in the manner the governor may determine.

The force of this provision is to be borne in mind in connection with the *open season* on fish and game in the territory referred to and is to be read with Section 176 discussed in Chapter VI.

2. *Top lopping evergreen trees.* Every person who shall within any of the *fire towns* fell or cause to be felled or permit to be felled any evergreen tree for sale or other purposes shall cut off or cause to be cut off from the said tree at the time of felling the said tree, unless otherwise authorized by the commission before the trees are felled, all the limbs thereof up to a point where the trunk of said tree has a longest diameter which does not exceed three inches, unless the said tree be felled for sale and use with the limbs thereon or for use with the limbs thereon.

3. *Fires generally.* No fires shall be set on or near *forest land*

and left *unquenched;* no fire shall be set which will endanger the *property of another;* no person shall set forest land on fire; no person shall negligently suffer fire on his *own property* to extend to *property of another;* no person shall use combustible *gun wads* or carry *naked torches* on *forest lands;* no fire shall be set in or near *forest land* in connection with camping without all inflammable material having first been removed for a distance of *three feet around* the fire; no person shall drop, throw, or otherwise scatter *lighted matches, burning cigars, cigarettes or tobacco;* no person shall deface or destroy any *notice* posted containing forest fire warnings, laws, or rules and regulations.

4. *Unpiloted hot air balloons.* No unpiloted hot air balloons shall be sent up in any *fire town* or in a *town adjacent thereto.*

5. *Fires to clear land.* No person shall set or cause to be set fire for the purpose of clearing land or burning logs, brush, stumps, or dry grass, in any of the *fire towns,* without first having obtained from the commission a written *permit* so to do. If such burning is done near forest lands and if there is danger of the fire spreading, a person designated to issue such permits must be *present.*

6. *Protection on steam plants.* No device for generating power which burns *wood, coke, lignite or coal* shall be operated in, through or near forest land, unless the escape of *sparks, cinders, or coals* shall be *prevented* in such manner as may be required by the commission.

7. *Material adjoining rights of way.* In *fire towns* brush, logs, slash or other inflammable material shall not hereafter be left within *twenty-five feet* of the right of way of a railroad or within *twenty feet* of the right of way of a public highway and constitutes a fire hazard, the conservation commission may order the owner to remove the same within *twenty days.*

8. *Deposit of inflammable material.* No person shall deposit or leave in any of the *fire towns,* brush or inflammable material upon the right of way of highways.

See section 1900 of the Penal Law.

In this connection the provisions of Section 1421 of the Penal Law are applicable and vital:

A person who, under circumstances not amounting to arson in any of its degrees:

1. Wilfully burns or sets fire to any grain, grass or growing crop, or standing timber, or to any buildings, fixtures or appurtenances to real property of another; or

2. Wilfully sets fire to, or assists another to set fire to any wild, waste or forest lands, belonging to the state or to another person whereby such forests are injured or endangered;

Is guilty of a felony and is punishable by imprisonment for not more than ten years or by a fine not more than two thousand dollars, or by both.

In order to secure proper protection to the forests from fire the railroads which operate through such territory are subject to the following restrictions as set forth in Section 55:

1. *Railroad patrol.* All railroads shall, on such parts of their rights of way as are operated through *forest lands,* maintain from April first to November fifteenth of each year a sufficient number of competent fire patrolmen unless relieved by the commission. The railroad shall file in the office of the commission on or before April first of each year a complete list of such patrol indicating the names of the men, their post-office addresses and portion of right of way assigned each patrolman. If any changes are subsequently made similar data shall be furnished on request of the commission.

2. *Clearing rights of way.* The right of way of all railroads which are operated through *forest lands* shall be kept cleared of all *inflammable material* whenever required by the commission.

3. *Locomotives to be equipped.* No locomotive shall be operated unless equipped with *fire protective devices* of ashpan and front end which have been approved by the commission. Such devices shall be maintained and properly used.

4. *Reports of fires.* A verified report of every *forest fire* which originates on the *right of way* or within *two hundred feet* thereof in any of the *fire towns or protected forest lands,* shall be prepared by the railroad concerned, upon blanks furnished by the commission, and filed in the office of the commission within ten days after such fire occurs.

5. *Examination of engine and records.* Every railroad company shall examine each coal burning locomotive each day it is operated between March first and December first, and record the condition of the fire protective devices in a book kept for that purpose. Such book shall be kept on file and be accessible to inspectors of the conservation commission.

6. *Deposit of coals, et cetera. Fire, live coals or hot ashes* shall not be deposited unless properly protected upon any track or right of way on or near forest land.

7. *Use of protective devices.* Employees of a railroad shall at all times use in a proper and effective manner the *fire protective appliances* provided by such railroad.

The provisions of the above section are generally applicable to all railroads operating through all forest lands in the State.

See People v. Long Island R. R. Co., 126 A. D. 477, 194 N. Y. 130 (1909).

In case of damage by forest fire negligently caused the injured party may maintain actions in accordance with such of the following provisions of Section 56 as are applicable thereto and shall have redress therefor:

1. *Injury to state lands.* Any person who causes a fire which burns on or over state lands shall be liable to the state for *treble damages* and, in addition, to a penalty of *ten dollars* for *every tree* killed by such fire.

2. *Injury to municipal or private lands.* Any person who causes a fire which burns on or over lands belonging to *another person* or to a *municipality* shall be liable to the party injured for *actual damages* in case of fire *negligently* caused or for damages at the rate of *one dollar* for *each tree* killed or destroyed in case of fire *wilfully* caused.

3. *Recovery for damages from fires.* The state, a municipality or any person may sue for and recover under subdivisions *one* or *two* of this section, however distant from the place where the fire *was set or started* and notwithstanding the same may have burned *over and across* several separate, intervening and distinct tracts, parcels or ownerships of land.

While a general liability for fires exists apart from the statute, on the ground of negligence, this section, particularly Subdivision 3, appears definitely to have disposed of the doctrine laid down in the cases of Ryan v. New York Central R. Co. 35 N. Y. 210 (1866), and Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353, and such authorities as have followed them to the effect that distance,

intervening tracts, etc., may destroy the liability. It has also settled the matter of the measure of damages.

See O'Neil v. N. Y., O. & W. R. Co., 115 N. Y. 579.

People v. N. Y. C. & H. R. R. R. Co., 213 N. Y. 136 (1914).
People v. L. I. R. R. Co., 149 A. D. 765 (208 N. Y. 541).

4. *Method of computing value of state property.* Damages to *state lands and timber* shall be ascertained and determined at the same rate of value as if such property were *privately* owned.

5. *Prima facie cause on right of way.* The fact that a fire *originates* upon the right of way of a railroad shall be *prima facie* evidence that the fire was caused by *negligence* of the railroad company.

6. *Prima facie cause in clearing lands.* Whenever a fire has been set for the purpose specified in subdivision *five* of section *fifty-four* in any of the *fire towns* it shall be *prima facie evidence* that the fire was started by the *owner* or *occupant* of the land.

In order to encourage and secure from land owners, generally, more intimate co-operation in reaching results under Article IV, it is provided by Section 57:

In consideration of the public benefit to be derived from the planting and growing of forest trees, and to the end that the growth of forest trees may be encouraged, and the water supply of the state protected and conserved, and that floods may be prevented, the owner of any *waste, denuded or wild forest lands,* of the area of *five acres or upwards,* within the state, which are *unsuitable* for agricultural purposes, who shall agree with the commission to set apart for reforestation or for forest tree culture, the whole, or any specific portion of such waste, denuded or wild forest lands, of the area of *five acres or upwards,* may apply to the conservation commission, in manner and form to be prescribed by it, to have such lands *separately classified* as lands suitable for reforestation or underplanting within the purposes and provisions of this section.

Each application for such classification shall be accompanied by a *plot and description* of the land, and shall state the area, character and location thereof, and such other information in reference thereto as the commission may require; such application shall be accompanied by a *certificate* of the assessors of the tax district or districts in which said lands are located, which shall set

forth the *assessed valuation* of said lands for the last *five years* preceding the date of such application; or if said lands have not been separately assessed during any part of said period or the timber has been removed therefrom at any time during said period of five years, by a sworn statement of the assessors of the *value of said lands,* which lands shall be valued at the same rate as other waste, denuded or wild forest lands in said tax district similarly situated, such application shall also contain a declaration that the owner intends to reforest or underplant the lands described in such application with such number and kind of trees per acre and in such manner as the commission shall specify, and to comply with all reasonable rules and regulations of the commission in reference to future care and management of said lands and trees.

If it appears from said application and certificate or sworn statement that said lands are *suitable for reforestation or underplanting purposes* and have not been assessed during the period of *five years* next preceding the date of such application at an average valuation of more than *five dollars per acre,* or that similar lands in said vicinity have not been assessed for more than *five dollars per acre,* the said commission shall, as soon as practicable after the receipt of such application, cause an examination to be made of the land for the purpose of determining whether or not it is of a character suitable to be reforested or underplanted and to be classified as such.

After such examination if the commission shall determine that such lands are suitable for reforestation or underplanting, it is hereby empowered to enter into a written agreement with the owner, which agreement shall be to the effect that the commission will furnish said owner, at a price not to *exceed cost of production,* trees to be set out upon said lands, the kind and number to be prescribed by the commission, and to be set forth in said agreement; that the owner will set out upon said land the number and kind of trees per acre designated by the commission; and that said land will not be used for any purpose other than forestry purposes, during the period of exemption, without the consent of the commission; and that said lands and the trees thereon will be managed and protected at all times during the period of said exemption in accordance with the directions and instructions of the commission.

Said agreement shall be *recorded* in the office of the county clerk of the county where the lands are situated, and the provisions thereof shall be deemed to be and be *covenants running with the land.* Within *one year* after the making of such agreement, said lands shall be planted by the owner with the number and kind of

trees specified therein; and the owner shall file with the commission an *affidavit* making due proof of such planting, which affidavit shall remain on file in the office of said commission. Upon the filing of such affidavit the commission shall cause an inspection of such lands to be made by a competent forester who shall make and file with said commission a written report of such inspection. If the commission is satisfied from said affidavit and report that the lands have been forested in good faith as provided in said agreement, it shall make and execute a certificate under its seal, and file the same with the *county treasurer* of the county in which the lands or any part thereof so forested are located, which certificate shall set forth a description of said lands, the area and the owner thereof, the town in which the same are situated, a statement that the land has been separately classified for taxation in accordance with the provisions of this section and a valuation in excess of which, said lands shall not be assessed for the period of *thirty-five years,* which valuation shall not in any event be greater than the average valuation at which the same lands were assessed for the last five years preceding the date of said application, or the value of such lands as appears by the aforesaid sworn statements of the assessors of such tax district, and a statement that the trees and timber thereon shall be exempt from taxation during said period.

Upon the filing of such certificate it shall be the duty of the county treasurer to file with the assessors of each tax district in which the lands described are located, a certified copy thereof, and the assessors of such tax district shall place the lands according to the description contained in said certificate upon the next assessment-roll, prepared for the assessment of lands within such tax district, at a valuation *not to exceed the amount* stated in said certificate, and not to exceed the assessed valuation of *similar lands* in said tax district; and said assessors shall insert upon the margin of said assessment-roll opposite the description of said lands, a statement that said lands shall not be assessed during the period of *thirty-five years* at a value in excess of said amount and that the *trees and timber* growing upon said land shall be *wholly exempted* from taxation during said period; and said assessors shall also insert upon the margin of said assessment-roll the date of expiration of said exemption. Such lands shall be assessed and continue to be assessed, and carried in such manner, upon the assessment-rolls of such towns until the *end* of the exemption period.

In the event that lands so classified shall, in the judgment of the commission, *cease to be used exclusively* for forestry purposes

to the extent provided in the agreement between the conservation commission and the owner, or that said owner has violated its terms, or any reasonable rules and regulations of the commission in respect to the use of or the cutting of timber on said lands, the exemption from taxation provided in this section shall *no longer apply;* or at the election of the commission such owner may be also *restrained* from said acts by injunction; and the assessors having jurisdiction shall, upon the direction of the commission, assess said lands against the owner at the value, and in the manner provided by the tax law for general assessment of land.

The planting or underplanting of a tract in forest trees in compliance with the agreement as provided in this section shall be taken and deemed to be an *acceptance by the owner* of the exemption privileges herein granted and of the conditions herein imposed; and in consideration of the public benefit to be derived from the planting, underplanting, cultivation and growth of such trees the exemption of such trees from taxation and the taxation of land upon which such trees are grown as herein provided, shall be continued and is *hereby assured;* and the right to such exemption and taxation shall be inviolable and irrevocable as a contract obligation of the state, so long as the owner of the land so planted shall fully comply with and perform the conditions of such contract not exceeding said period of thirty-five years.

Supplemental to the above enactment are Sections 16 and 17 of the Tax Law.

Section 16 provides for certain exemptions and reductions in assessment of lands *planted* with trees for *forestry purposes* or in other words *reforested lands:*

Whenever the owner of lands, to the extent of one *or more acres and not exceeding one hundred acres,* shall plant the same for forestry purposes with trees to the number of not less than *eight hundred to the acre,* and whenever the owner of *existing forest or brush lands* to the extent of *one or more acres* and not exceeding *one hundred acres,* shall *underplant* the same with trees, to the number of not less than *three hundred to the acre,* and proof of that fact shall be filed with the assessors of the tax district or districts in which such lands are situated as hereinafter provided, such lands so forested shall be exempt from assessment and taxation for any purpose for a period of *thirty-five years* from the date of the levying of taxes thereon immediately following such planting, and such existing *forest or brush lands* so *underplanted* shall be assessed at the rate of *fifty per centum* of the

assessable valuation of such land exclusive of any forest growth thereon for a period of *thirty-five years* from the date of the levying of taxes thereon immediately following such underplanting.

The owner or owners of lands forested as above provided, in order to secure the benefits of this section, shall file with the conservation commission an affidavit making the due proof of such planting or underplanting and setting forth an accurate description of such lands, the town and county in which the same are situated, the number of trees planted or underplanted to the acre and the number of acres so forested, which affidavit shall remain on file in the office of said commission. Upon the filing of such affidavit it shall be the duty of the conservation commission to cause an inspection of such forested lands to be made by a competent forester or other employee of said commission who shall make and file with said commission a written report of such inspection.

If the commission is satisfied from the said affidavit and the report of inspection that the lands have been forested as above provided, in good faith and by adequate methods to produce a forest plantation, and are entitled to the exemption of assessment or to a reduction of assessment as provided in this section, it shall make and execute a *certificate* under the seal of its office, and file the same with the county treasurer of the county in which the lands so forested are located, which certificate shall set forth a *description* of the lands affected by this section, the area and owner or owners thereof, the town or towns in which the same are situated, the description upon the last assessment-roll which included said lands, the period of exemption or reduction of assessment to which such lands are entitled and the date of the expiration of such exemption or reduction of assessment. Upon the filing of such certificate it shall be the duty of the *county treasurer* to file with the assessors of the tax district in which the lands described therein are located within *ten days* after the receipt thereof a certified copy of such certificate, and the assessors of such tax district shall place the lands according to the description contained in said certificate upon the next assessment-roll prepared for the assessment of lands within such tax district, and shall *exempt, or reduce the assessment upon,* the lands so described as hereinbefore provided, and shall insert upon the margin of said assessment-roll opposite the description of said lands, a statement that in accordance with the provisions of this section of the tax law said lands are exempt from taxation or that the assessment thereof is reduced fifty per centum as the case may be and insert also in the margin the date of the expiration of such exemption or reduction of assessment and such lands shall continue to be exempted, assessed and carried in such manner upon the

assessment-rolls of such town until the date of the expiration of such exemption or reduction of assessment.

Lands which have been forested as above provided within *three years* prior to the taking effect of this section may come within its provisions if application therefor is made to the conservation commission within *one year* from the time when this section takes effect, but except as provided by this section the period of exemption or reduction as certified to by the conservation commission shall not exceed the period of *thirty-five years* from the date of the original planting. Lands situated within *twenty miles* of the corporate limits of a city of the first class, or within *ten miles* of the corporate limits of a city of the second class, or within *five miles* of the corporate limits of a city of the third class, or within *one mile* of the corporate limits of an incorporated village shall not be entitled to the exemption or reduction of assessment provided for by this section.

In the event that lands exempted or reduced in taxation as above provided shall, by act of the owner or otherwise, at any time during the period of exemption or reduction in taxation cease to be used exclusively as a forest plantation to the extent provided by this section to entitle such land to the privileges of this section, the said exemption and reduction in taxation provided for in this section shall no longer apply and the assessors having jurisdiction are hereby empowered and directed to assess the said lands at the value and in the manner provided by the tax law for the general assessment of land.

If any land exempted under this section continues to be used exclusively for the growth of a planted forest after the expiration of the period of exemption provided hereby, the land shall be assessed at its true value and the timber growth thereon shall be exempt from taxation, except if such timber shall be cut before the land has been duly assessed and taxes regularly paid for five consecutive years after the exemption period has expired, such timber growth shall be subject to a tax of *five per centum* of the estimated stumpage value at the time of cutting, unless such cuttings are thinnings for stimulating growth and have been made under the *supervision* of the conservation commission.

Whenever the owner shall propose to make any cutting of such timber growth for a purpose other than for thinning as above provided, he shall give *thirty days' notice* to the assessors of the tax district on which the land is located, who shall forthwith assess the stumpage value of such proposed cutting, and such owner shall pay to the collector of the town in which such land is situated before cutting such timber five per centum of such assessed valuation. If such owner shall fail to give such *notice and pay* such taxes he shall be liable to a

penalty of three times the amount of such tax and the supervisor of the town may bring an action to recover the same for the benefit of the town in any court of competent jurisdiction.

Section 17 provides for somewhat similar exemption and reduction in assessment of lands maintained as wood lots or *lands kept* forested:

In order to encourage the maintenance of *wood lots* by private owners and the practice of forestry in the management thereof, the owner of any tract of land in the state, not exceeding *fifty acres,* which is occupied by a *natural or planted growth of trees,* or by both, which shall not be situated within *twenty miles* of the corporate limits of a city of the first class, nor within *ten miles* of the corporate limits of a city of the second class, nor within *five miles* of the corporate limits of a city of the third class, nor within *one mile* of the corporate limits of an incorporated village, may apply to the conservation commission in manner and form to be prescribed by it, to have such land separately classified for taxation. Application for such classification shall be made in duplicate and accompanied by a plot and description of the land, and such other information as the commission may require. Upon the filing of such application it shall be the duty of the commission to cause an inspection of such land to be made by a competent forester for the purpose of determining whether or not it is of a suitable character to be so classified.

If the commission shall determine that such land is suitable to be so classified, it shall submit to the owner a plan for the further management of said land and trees and shall make and execute a certificate under the seal of the commission and file the same with the county treasurer of the county in which the land is located, which certificate shall set forth a description and plot of the land so classified, the area and the owner thereof, the town or towns in which the same is situated, and that the land has been separately classified for taxation in accordance with the provisions of this section. Upon the filing of such certificate it shall be the duty of the county treasurer to file with the assessors of the tax district in which the land described therein is located, within ten days after receipt thereof, a certified copy of such certificate. So long as the land so classified is maintained as a wood lot, and the owner thereof faithfully complies with all the provisions of this section and the instructions of the commission, it shall be assessed at not to exceed ten dollars per acre and taxed annually on that basis. In fixing the value of said lands for assessment, the assessors shall in no case take into account the value of the trees

growing thereon, and said land shall not be assessed at a value greater than other similar lands within the same tax district.

The assessors of each tax district where said land so classified is located shall insert upon the margin of said assessment and opposite the description of such land a statement that said land is assessed in accordance with the provisions of this section. In the event that land so classified as above prescribed shall at any time by act of the owner or otherwise cease, in the judgment of the commission, to be used exclusively as a wood lot to the extent provided by this section to entitle the owner of such land to the privileges of this section, the exemption and valuation in taxation provided for in this section shall no longer apply and the assessors having jurisdiction shall, upon the direction of the commission, assess the said land at the value and in the manner provided by the tax law for the general assessment of land.

Whenever the owner shall propose to cut any *live trees* from said land, except for *firewood or building material for the domestic use* of said owner or his tenant, he shall give the commission at least *thirty days'* notice prior to the time he desires to begin cutting, who shall designate for the owner the kind and number of trees, if any, most suitable to be cut for the purpose for which they are desired, and the cutting and removal of the trees so designated shall be in accordance with the instructions of said commission.

After such trees are cut and before their removal from the land, the owner shall make an accurate measurement or count of all of the trees cut and file with the assessors of the tax district a verified, true and accurate return of such measurement or count and of the variety and value of the trees so cut. The assessors shall forthwith assess the *stumpage value* of the timber so cut, and such owner shall pay to the tax collector of the town in which such land is situated, before the removal of any such timber, *five per centum* of such valuation. If such owner shall fail to give such notices and pay such taxes he shall be liable to a penalty of three times the amount of such tax, and the supervisor of the town may bring an action to recover the same for the benefit of the town in any court of competent jurisdiction.

Wherever possible within the limitations of the law and wherever practicable, every owner of land in the State should avail himself of the benefits of these provisions. The primary advantage is his and the aid afforded the conservation scheme can work him only profit in more forms than one.

Here is also presented to associations organized for the advancement of the cause of fish and game a choice

chance to co-operate with the Commission and the farmer by encouraging the grasp of these opportunities and giving reasonable financial aid to the establishment and maintenance of those forest growths which shelter and assure all wild life.

The development of forest lands may be taken up by counties, cities, towns or school districts and they may acquire by purchase or gift or take over lands in their possession within their boundaries and use them for forestry purposes as provided in Section 60:

1. *Power and authority.* The governing board of a county, city, town or school district may *appropriate money or issue bonds* either for purchase of lands for the purposes herein provided, to establish forest plantations or for the care and management of forests. Such boards may undertake such work at regular or special meetings by *majority vote* of such board after *two weeks'* public notice setting forth the fact that such plan is contemplated and that moneys are to be appropriated for such purpose.

2. *Assistance and trees.* The conservation commission may assist and advise such board in its reforesting work, and the commission may furnish trees for reforesting such *publicly owned* lands *without charge* provided they are planted in accordance with the instructions of the commission.

3. *Use.* Such governing board shall have full power and authority to acquire, maintain, manage and operate such forests for the *benefit of the inhabitants of its district.*

4. *Revenue.* The net income from such lands shall be paid into the general fund of such municipal division and shall be used only upon order of its governing board.

Over and above the foregoing propositions the Commission by Section 59 has, with the approval of the governor, power and authority to appropriate real property as follows:

1. Purposes: (a) The *commission* may *enter upon* and *take possession* of any *lands or waters or both,* or of any forests and rights in timber upon such lands, or upon any part, or portion thereof, within the *Adirondack or Catskill parks or adjacent thereto,* the appropriation of which, in the judgment of said commission, shall be necessary for *public park purposes,* or for

the protection and conservation of the *lands, forests* and *waters* within the state, and

See section 50, subdivision 6.

(b) May *enter upon* and *take possession* of any *lands or waters or both,* within the state that may be necessary, in the judgment of said commission, for the purpose of artificial *propagation of food and game fish* for *restocking the public waters* of the state.

See chapter IV on general powers as to fish and game.

2. *Description of land.* An accurate description of such property so entered upon and appropriated shall be made by the commission, who shall certify under its seal that the description is correct, and shall endorse thereon a *notice* that the property described therein is *appropriated* by the people of the state of New York for the *purpose described* in this section. The original of such description and certificate shall be filed in the office of the secretary of state. The conservation commission may make such additional copies of this certificate and description as may be necessary and certify the same.

3. *Service of notice.* The said commission shall thereupon cause a *duplicate* of said description and certificate, with notice of the date of filing thereof in the office of said secretary of state, to be served on the *owner or owners* of the lands, forests and rights in timber upon such lands and waters so appropriated; and from the *time of such service* the entry upon and appropriation by the people of the state of the property described in such notice shall be deemed *complete,* and thereupon such property shall become, and be, the property of the people of the state. Such notice shall be *conclusive evidence* of any entry and appropriation by the state; but the service of such notice shall raise no *presumption* that the lands, forests, and rights in timber upon such lands described therein are *private property.*

4. *Manner of service.* Service of the notice and papers provided for under subdivision three must be *personal* if the person to be served can be found within the state. If the person to be served falls within any of the classes mentioned in section four hundred and thirty-eight of the code of civil procedure, the provisions of article second, title one of chapter five of the code of civil procedure relating to the service of a summons in an action in the supreme court, shall apply, so far as practicable, to the service of such notice and papers.

5. *Description and certificates to be recorded.* Said commission shall thereupon cause a duplicate of such description, cer-

tificate, and notice of filing, with an affidavit of due service thereof on such owner or owners, to be recorded in the books used for recording deeds in the office of the *clerk of any county* in this state in which any of the property described therein may be situated; and the record of such notice, and of such proof of service, shall be *presumptive evidence* of due service thereof.

6. *Adjustment of claims by agreement.* Claims for the value of the property appropriated, and for legal damages caused by any such appropriation, may be adjusted by the commission, if the amount thereof can be agreed upon with the owner or owners thereof. Upon making any such adjustment and agreement the commission shall deliver to the comptroller a certificate stating the amount due to said owner on account of such appropriation of his land or other property, and the amount so fixed shall be paid by the treasurer upon the warrant of the comptroller.

7. *Court of claims, jurisdiction of.* If the commission and the owner or owners of the property so appropriated fail to agree upon the value of such property, or upon the amount of legal damages resulting from such appropriation, within *one year* after the service of the notice and papers provided for in section sixty-eight of this chapter, such owner may, within *two years* after the service of such notice and papers, present to the court of claims a claim for the value of such land and legal damages; and said court shall have jurisdiction to hear and determine such claim and render judgment thereon. Upon filing in the office of said commission and in the office of the comptroller, a certified copy of the judgment of the court of claims, and a certificate of the attorney-general that no appeal from such judgment has been or will be taken by the state, or if an appeal has been taken, a certified copy of the final judgment of the appellate court affirming in whole or in part the judgment of the court of claims, the comptroller shall issue his warrant for the payment of the amount due the claimant by such judgment, with interest from the date of the judgment until the thirtieth day after the entry of such final judgment, and such amount shall be paid by the treasurer.

8. *Court of claims to examine property.* The court of claims, if requested by the claimant or the attorney-general, shall examine the real property affected by the claim of damages for the appropriation thereof and take testimony in relation thereto in the county where such property or a part thereto is situated.

9. *Owner may reserve timber on land appropriated.* 1. The owner of land taken under this article may, with the written consent of the conservation commission, and within the limitations hereinafter prescribed, reserve trees thereon not less than *eight*

inches in diameter, breast high, at the time of the service of the notice provided the removal of such trees will not destroy the forest cover. Such reservation must be exercised within *six months* after the service upon the owner of a notice of the appropriation, by the owner serving upon such commission a written notice that he elects to reserve such trees. If such notice be not served by the owner within the time above specified he shall be deemed to have waived his right to such reservation, and such trees shall thereupon become and be the *property* of the state. The presentation of a claim to the court of claims before the service of a notice of reservation shall be deemed a *waiver* of the right to such reservation.

10. *Reservation on lands purchased.* Land acquired by purchase may be taken subject to the reservation of the trees thereon down to *eight inches in diameter, breast high,* at the time of such purchase, with the right to the owner to remove the same within the time specified in the next section, or upon agreement between the commission and the owner, subject to any lease, mortgage, or other incumbrance, not extending fifteen years beyond the date of acquisition. The amount or value of any such lien, incumbrance or timber reservation, upon land so purchased, shall be deducted from the purchase price thereof.

11. *Right to reserve timber restricted.* The right to reserve timber, and the manner of exercising and consummating such right, are subject to the following restrictions, limitations and conditions:

(a) Timber within *twenty rods* of a lake, pond or river cannot be reserved. Under the supervision of the commission roads may be cut or built across or through such excepted space of twenty rods, for the purpose of removing trees from adjoining lands, and the person reserving such timber on the adjoining lands, his legal representatives or assigns, shall have the right, which right shall be deemed a part of such reservation, to construct such roads, through and across such excepted strip, as may be necessary to remove the timber so reserved; but in constructing such roads only such trees shall be cut as are within the limits of such roads. The commission may prescribe the manner of all such roads and may permit the use of any dead, down or other necessary timber for the construction only of roads, skidways, lumber camps, or for fuel, which right shall also be deemed a part of the soft wood timber reservation by the owner. No trees or timber shall be cut for the construction of roads, camps or other purposes, *except* such as are *reserved by the owner,* or for which permission to cut has been given as provided in this section.

(b) All timber reserved by the owner must be removed from the land within *fifteen years* after the service of notice of reservation or the making of the contract of purchase, subject to reasonable regulations to be prescribed by the commission; such land shall not be cut over *more than once,* and said commission may prescribe reasonable regulations for the purpose of enforcing this limitation. All timber reserved, and not removed from the land within such time, shall thereupon become and be the property of the *state* and all title or claim thereto by the original owner, his legal representatives or assigns, shall thereupon be deemed *abandoned.*

12. *Compensation for reserved timber lands.* A person who reserves timber as provided in this article shall not be entitled to any compensation for the value of the land purchased or taken and appropriated by the state, or for any damages caused thereby until

(a) The timber so reserved is all removed and the object of the reservation fully consummated; or

(b) The time limited for the removal of such timber has fully lapsed or the right to remove any more timber is waived by a written instrument filed with said commission; and

(c) Said commission is satisfied that no *trespass* on state lands has been committed by such owner, or his assigns, or legal representatives; that no timber or other property of the state, not so reserved, has been *taken, removed, destroyed, or injured* by him or them, and that a cause of action in behalf of the state does not exist against him or them for any alleged trespass or other injury to the property or interests of the state; and

(d) That the owner, his assignee or other legal representatives, has fully *complied* with all rules, regulations and requirements of said commission concerning the use of streams, or other property of the state, for the purpose of removing such timber. Provided, however, that said commission may at any time by its certificate filed with the comptroller direct the payment to the owner of such land, his legal representatives or assigns, of the compensation therefor, or a part thereof at such time and upon such conditions as may be set forth in the certificate.

13. *Timber reserved; value of land; how determined.* If timber be reserved, its *value* at the time of making an agreement between the owner and said commission for the value of the land so appropriated, and the legal damages caused thereby, or at the time of the presentation to the court of claims of a claim for such value and damages, shall be *taken into consideration* in

determining the compensation to be awarded to the owner on account of such appropriation either by such agreement or by the judgment rendered upon such a claim.

14. *Adjustment of claims for trespass or other injuries.* In cases of trespasses or other injuries to lands or property purchased or acquired by the state the commission may settle and adjust any claims for damages due to the state on account of any such trespasses or other injuries to property or interests of the state, or penalties incurred by reason of such trespasses or otherwise, and the amount of such damages or penalties so adjusted shall be *deducted* from the original compensation agreed to be paid for the land, or for damages, or from a judgment rendered by the court of claims on account of the appropriation of such land. A judgment recovered by the state for such a trespass or for a penalty shall otherwise be *deducted* from the amount of such compensation or judgment.

15. *Judgments.* When a judgment for damages is rendered for the appropriation of any lands or waters for the purposes specified in this article, and it appears that there is any lien or incumbrance upon the property so appropriated, the amount of such lien shall be stated in the judgment, and the comptroller may deposit the amount awarded to the claimant in any bank in which moneys belonging to the state may be deposited, to the account of such judgment, to be paid and distributed to the persons entitled to the same as directed by the judgment.

16. *Warrants.* A warrant shall not be drawn by the comptroller for the amount of compensation agreed upon between the owner and said commission, nor for the amount of a judgment rendered by the court of claims, until a *further certificate* by the commission is filed with the comptroller to the effect that the owner has not *reserved* any timber and that he, his assignee or other representative, has *complied* with the provisions of this article, or has otherwise become entitled to receive the amount of the purchase price, award or judgment.

17. *Interest.* If timber is reserved upon land purchased or appropriated as provided by this article, *interest* is not payable upon the purchase price, or the compensation which may be awarded for the value of such land, or for damages caused by such appropriation, except as provided in subdivision seven of this section.

18. *Costs and disbursements; when offer made.* If an offer is made by said commission for the value of land appropriated or for damages caused by such appropriation, and such offer is *not*

accepted, and the recovery in the court of claims *exceeds* the offer, the claimant is entitled to *costs and disbursements* as in an action in the supreme court, which shall be allowed and taxed by the court of claims and included in its judgment. If in such a case the recovery in the court of claims *does not exceed* the offer, costs and disbursements to be taxed shall be awarded *in favor of the state against the claimant* and deducted from the amount awarded to him; or if no amount is awarded, judgment shall be entered in favor of the state against the claimant for such costs and disbursements. If any offer is not accepted, it cannot be given in evidence on the trial.

19. *Removal of timber; use of streams.* Persons entitled to cut and remove timber under this article may use streams or other waters of the state within the forest preserve counties for the purpose of removing such timber, under such regulations and conditions as may be prescribed or imposed by the commission. The persons using such waters shall be liable for all damages suffered by the state or any person caused by such use.

In order to protect the *lands described* in this article the following provisions of Section 61 apply:

1. *Trees or timber.* No person shall cut, remove or destroy any trees or timber or other property thereon or enter upon such lands with intent so to do.

2. *Structures.* No buildings shall be erected, used or maintained upon the forest preserve except under *permits* from the commission.

3. *Agricultural use.* No person shall use any portion of the forest preserve for agricultural purposes, nor shall cattle or domestic animals of any kind be permitted to graze thereon.

4. *Deposit rubbish.* No person shall deposit or leave thereon any rubbish or other waste material.

5. *Transfer or lease.* No person shall lease, transfer or accept any lease or transfer of any lands in the forest preserve or of any improvements thereon.

6. *Dispose of improvements.* The commission may dispose of any improvements upon the forest preserve under such conditions as it deems to be to the public interest.

7. *Reforested lands.* No person shall injure or cause to be injured any *trees planted for the purpose of reforestation.*

8. *Removal of materials generally.* No person shall remove any material belonging to the state from the state lands without the authorization of the commission.

The terms of the above section apply more particularly to the present and future forest preserve; but they also cover all lands within the embrace of the article and especially all trees planted in accordance with it.

In the case of People v. Gaylord, 139 App. Div. 814 (1910) it was held:

Trees standing or growing upon the forest preserve or State land are property within the meaning of the statute covering larceny although the constitution provides that such lands shall be forever occupied as wild lands and that timber shall not be sold or removed therefrom.

Such timber cannot be deemed property without a value because of such constitutional provision.

It is therefore larceny for one to cut and remove from the preserve or State lands the timber growing thereon.

Compare People v. Klock, 55 M. 46.

The manufacturers of timber and the consumers of round wood or timber or wood for commercial purposes are required to report to the Commission annually, when called upon to do so, on blanks furnished, the amount of such materials used or made from trees grown in the state during the year.

See section 58.

In enforcement of the provisions of Article IV, fines and penalties are fixed by Section 63:

1. Any person who violates any provision of this article or who fails to perform any duty imposed by any provision thereof shall be guilty of a *misdemeanor,* and shall be liable or punishable by a *fine* of not less than *ten* nor more than *one hundred* dollars, or by imprisonment of not less than *ten* nor more than *one hundred* days, or by *both* such fine and imprisonment.

2. The violation of any of the following provisions shall subject the person guilty thereof to the following penalties in addition to those provided in subdivision one, of this section; section *fifty-four,* subdivision *two,* penalty of *two dollars* per tree; for failure

to comply with the provisions of subdivision *six* of section *fifty-four,* penalty of *twenty-five* dollars per day; for violation of the several subdivisions of section *fifty-five* as follows: subdivisions *one* and *two, ten dollars per mile per day;* subdivision *three, one hundred dollars per day per locomotive;* subdivision *five,* penalty of *twenty-five dollars per day per place* and penalty of *one hundred dollars* for failure to show record of inspector; for violation of subdivision *six, one hundred dollars* for each offense.

3. Any person who molests, injures, removes, destroys or withholds supplies or other material maintained for forest fire protection purposes shall be guilty of a *misdemeanor.*

4. Any person who *sets fire* wilfully in violation of section fifty-four, subdivision three shall be guilty of a *felony.*

5. Any person who cuts or causes to be cut any tree or trees upon the *forest preserve* shall be liable to a penalty of *ten dollars* per tree or *treble damages or both.*

6. In default of the payment of any fine or penalty imposed under this section, the defendant may be committed to jail until such fine or penalty is paid, but the term of confinement shall not exceed *one day* for *each dollar* of fine imposed.

The statute now clears away all such objections as were made in People v. L. I. R. R. Co., 208 N. Y. 541 and People v. N. Y. C. R. R. Co., 213 N. Y. 136 on the measure of damages and the maximum of penalties. See the discussion of fines, penalties and procedure in Chapter XVII.

It may be well, however, at this juncture, to note that a criminal prosecution whether resulting in conviction or acquittal is not a bar to the subsequent civil action for the recovery of the penalty as distinguished from the fine.

People v. Snyder, 90 A. D. 422.

The repeal by Chapter 451 of the Laws of 1916, or any law or part thereof heretofore in force, does not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time when such repeal took effect, but the same may be enjoyed, asserted,

enforced, prosecuted or inflicted as fully and to the same extent as if such repeal had not taken place.

See section 64.
See section 94 of the General Construction Law.

Chapter 451 of the Laws of 1916 took effect May 9, 1916.

Section 33 provides:

> Rules and regulations established by the commission for the enforcement of the provisions of article four of this chapter shall be entered by the commission in its book of minutes and at least three copies thereof *posted* in public places in the towns in which such rules and regulations apply, at least *thirty days* before the same shall take effect.
>
> Any person who violates any provision of any rule or regulation so established by the commission, pursuant to the provisions of this section shall be guilty of a *misdemeanor* and shall, upon conviction, be subject to a fine of not to exceed *one hundred dollars* or imprisonment for not more than *thirty days* or by *both* such fine and imprisonment.

GENERAL REGULATIONS COVERING THE USE OF STATE LANDS

The following rules and regulations are of general application to the State land under the jurisdiction of the Conservation Commission, and are to govern all of those who make use of this land. Regulations of special or local application may be adopted from time to time:

1. No fires except for cooking, warmth or smudge purposes are permitted. No fire shall be lighted until all inflammable material is removed to prevent its spread.

2. Lighted matches, cigars, or cigarettes or burning tobacco must not be deposited or left where they may cause fires.

3. No official sign posted or structure maintained under permit shall be defaced. Peeling of bark or injuring trees is prohibited. Dead or down wood may be used for fuel by temporary campers.

4. Camps and adjacent grounds must be maintained in a clean and sanitary condition. Garbage and refuse must be either buried, removed or burned. Waste materials must not be thrown into the waters, or waters polluted.

5. Each camper on islands of Lake George, St. Lawrence Reservation or other much frequented places, must provide a plentiful supply of chloride of lime and dirt, for disinfecting and covering any latrine used by him. All latrines must be cleaned and the contents burned or buried

at frequent intervals, in such manner as to prevent offensive odors, and above all to *avoid pollution of the water supply.*

6. Canvas tents without platforms for use during short periods may be placed without a permit, but not in a trail or within 150 feet of any spring used for water supply.

7. No tents (except those described under rule 6) or wooden structures shall be erected, or maintained, except under written permission. Tar paper shall not be used, except for roofs of open camps erected under a permit. Structures erected under (a), (b) or (c) become the property of the State. The structures for which permits may be granted are as follows:

(a) Open camps for transient use not to be occupied by the same person or persons more than three nights in succession or more than ten nights in any year.

(b) Open camps for use of campers, hunters or fishermen may be occupied for reasonable periods.

(c) Permanent tent platforms for summer camping purposes. Permit granted to use while occupied in good faith. Platform to be left for future use. When not in use permits may be given others to use.

(d) Temporary tent platforms for summer camping. The platform to be erected and removed simultaneously with the tent.

(e) Portable canvas houses for summer camping.

8. No one may claim any particular site from year to year or the exclusive use of the same.

9. The use of the forest preserve or the improvements thereon for private revenue or commercial purposes is prohibited.

10. Any unoccupied tent or structure may be removed by the Commission.

11. At St. Lawrence Reservation, where fireplaces are provided, fires must not be kindled elsewhere, nor shall tents on these islands be pitched less than 200 feet from any public fireplace or boat landing.

12. No boat is entitled to the exclusive use of any dock built by the State. There must be free access for boats at all times.

13. Dancing in any building erected by the State is prohibited.

14. All campers will be held responsible for compliance with these rules, and any person responsible for injury of State property will be held liable for damages and penalties.

CHAPTER III

OWNERSHIP OF GAME

The principle of *ownership* as applied to animals conceded to be *wild,* upon which Article V is built, presents three distinct features:

First—Federal control.
Second—State control.
Third—Private property rights.

Federal Control

By virtue of its claimed *sovereign* rights over and interest in certain classes of wild animals particularly *migratory birds,* the federal government has by statute declared the fact and the extent of its jurisdiction.

The Lacey Act, Chapter 553 of the Laws of 1900 (31 Stat. 187), enacted to enlarge the powers of the department of agriculture, prohibit transportation by interstate commerce of game killed in violation of local laws and for other purposes, declares:

> That the duties and powers of the department of agriculture are hereby enlarged so as to include the preservation, distribution, introduction, and restoration of game birds and other wild birds. The secretary of agriculture is hereby authorized to adopt such measures as may be necessary to carry out the purposes of this act and to purchase such game birds and other wild birds as may be required therefor, subject, however, to the laws of the various states and territories.
>
> The object and purpose of this act is to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct, and also to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed.

The secretary of agriculture shall from time to time collect and publish useful information as to the propagation, uses, and preservation of such birds.

And the secretary of agriculture shall make and publish all needful rules and regulations for carrying out the purposes of this act, and shall expend for said purposes such sums as congress may appropriate therefor.

That all dead bodies or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals and birds had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This act shall not prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowl.

Compare sections 178 and 179 of the Conservation Law.

Chapter 231 of the U. S. Penal Laws (35 Stat. 1137), sections 241, 242, 243 and 244 further provides:

§ **241**. The importation into the United States, or any territory or district thereof, of the mongoose, the so-called "flying foxes" or fruit bats, the English sparrow, the starling, and such other birds and animals as the secretary of agriculture may from time to time declare to be injurious to the interests of agriculture or horticulture, is hereby prohibited; and all such birds and animals shall, upon arrival at any port of the United States, be destroyed or returned at the expense of the owner.

No person shall import into the United States or into any territory or district thereof, any foreign wild animals or bird, except under special permit from the secretary of agriculture: Provided, That nothing in this section shall restrict the importation of natural history specimens for museums or scientific collections, or of certain cage birds, such as domesticated canaries, parrots or such other birds as the secretary of agriculture may designate.

The secretary of the treasury is hereby authorized to make regulations for carrying into effect the provisions of this section.

§ **242**. It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier to transport

from any state, territory, or district of the United States, to any other state, territory, or district thereof, any foreign animals or birds, the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed or shipped in violation of the laws of the state, territory, or district in which the same were killed, or from which they were shipped: Provided, That nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is not prohibited by law in the state, territory, or district in which the same are captured or killed: Provided further, That nothing herein shall prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowls.

§ **243.** All packages containing the dead bodies, or the plumage, or parts thereof, of game animals, or game or other wild birds, when shipped in interstate or foreign commerce, shall be plainly and clearly marked, so that the name and address of the shipper, and the nature of the contents, may be readily ascertained on an inspection of the outside of such package.

§ **244.** For each evasion or violation of any provision of the three sections last preceding, the shipper shall be fined not more than two hundred dollars; the consignee knowingly receiving such articles so shipped and transported in violation of said sections shall be fined not more than two hundred dollars; and the carrier knowingly carrying or transporting the same in violation of said sections shall be fined not more than two hundred dollars.

The above sections 241, 242, 243, 244 take the place of sections 2, 3 and 4 of the Lacey Act.

The plumage provision of the tariff act of 1913 (38 Stat. 148 and 155), as to rates, also provides:

Feathers and downs, on the skin or otherwise, crude or not dressed, colored or otherwise advanced or manufactured in any manner, not especially provided for in this section, 20 per centum ad valorem; when dressed, colored, or otherwise advanced or manufactured in any manner, and not suitable for use as millinery ornaments, artificial and ornamental fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this section, 60 per centum ad valorem; boas, boutonnieres, wreaths, and all articles not specially provided for in this section, composed wholly or in chief value of any of the feathers, flowers, leaves, or other material herein mentioned, 60 per centum ad valorem: Provided, That the importation of aigrettes, egret plumes or so-called osprey plumes, and the feathers,

quills, heads, wings, tails, skins, or parts of skins, of wild birds, either raw or manufactured, and not for scientific or educational purposes, is hereby prohibited; but this provision shall not apply to the feathers or plumes of ostriches, or to the feathers or plumes of domestic fowls of any kind.

Venison, and other game, 1½ cents per pound; game birds, dressed, 30 per centum ad valorem.

FREE LIST

Eggs of poultry, birds, fish, and insects (except fish roe preserved for good purposes): Provided, however, That the importation of eggs of game birds or eggs not used for food, except specimens for scientific collections, is prohibited: Provided further, That the importation of eggs of game birds for purposes of propagation is hereby authorized, under rules and regulations to be prescribed by the Secretary of the Treasury.

Birds and land and water fowls not specially provided for in this section.

Compare section 180 of the Conservation Law.

The constitutionality of the Lacey Act has been unqualifiedly upheld in the cases of Rupert against United States, 181 Fed. 87, and Silz against Hesterberg, 211 U. S. 31, as a proper exercise of the federal police power and a valid regulation of interstate and international commerce.

The Weeks-McLean Law, socalled, making appropriations for the Department of Agriculture, approved March 4, 1913 (37 Stat. 847), dealing among other things with migratory birds, both game and insectivorous, provides as follows:

All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other *migratory game* and *insectivorous* birds which in their northern and southern migrations *pass through* or do not *remain permanently the entire year* within the borders of any *state or territory,* shall hereafter be deemed to be within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided for.

The Department of Agriculture is hereby authorized and directed to adopt suitable regulations to give effect to the previous paragraph by prescribing and fixing closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight, thereby enabling the department to select and designate suitable districts

for different portions of the country, and it shall be unlawful to *shoot* or by any device *kill or seize and capture,* migratory birds within the protection of this law during said closed seasons, and any person who shall violate any of the provisions or regulations of this law for the protection of migratory birds shall be guilty of a *misdemeanor* and shall be fined not more than *$100* or imprisoned not more than *ninety days,* or *both,* in the discretion of the court.

The Department of Agriculture, after the preparation of said regulations, shall cause the same to be made public, and shall allow a period of *three months* in which said regulations may be examined and considered before *final adoption,* permitting, when deemed proper, *public hearings* thereon, and after final adoption shall cause the same to be engrossed and submitted to the President of the United States for approval: Provided, however, That nothing herein contained shall be deemed to affect or interfere with the *local laws* of the states and territories for the *protection* of *nonmigratory* game or other birds *resident* and *breeding* within their borders, not to prevent the states and territories from enacting *laws and regulations to promote and render efficient* the regulations of the Department of Agriculture provided under this statute.

The above classification of birds might be construed to exclude any water fowl which of recent years have because of the prohibition of spring shooting been more and more inclined to breed and winter here.

The purpose of the act seems to be to allow the states to give greater, but not less protection.

Pursuant to the provisions of this act the following regulations have been adopted and are effective from August 21, 1916:

REGULATION 1.— DEFINITIONS

For the purposes of these regulations the following shall be considered migratory game birds:

(a) *Anatidae* or waterfowl, including brant, wild ducks, geese, and swans.

Compare section 210 of the Conservation Law.

(b) *Gruidae* or cranes, including little brown, sandhill, and whooping cranes.

Compare section 219 of the Conservation Law.

(c) *Rallidae* or rails, including coots, gallinules, and sora and other rails.

Compare section 210 of the Conservation Law.

(d) *Limicolae* or shore birds, including avocets, curlew, dowitchers, godwits, knots, oyster catchers, phalaropes, plover, sandpipers, snipe, stilts, surf birds, turnstones, willet, woodcock, and yellowlegs.

Compare section 210 of the Conservation Law.

(e) *Columbidae* or pigeons, including doves and wild pigeons.

Compare section 219 of the Conservation Law.

For the purposes of these regulations the following shall be considered migratory insectivorous birds:

(f) Bobolinks, catbirds, chickadees, cuckoos, flickers, flycatchers, grosbeaks, hummingbirds, kinglets, martins, meadowlarks, nighthawks or bull bats, nuthatches, orioles, robins, shrikes, swallows, swifts, tanagers, titmice, thrushes, vireos, warblers, waxwings, whippoorwills, woodpeckers, and wrens *and all other perching birds which feed entirely or chiefly on insects.*

Compare section 219 of the Conservation Law.

Regulation 2.— Closed Season at Night

A daily closed season on all migratory game and insectivorous birds shall extend from *sunset to sunrise.*

Compare section 177-1 of the Conservation Law.

Regulation 3.— Closed Season on Insectivorous Birds

A closed season on migratory insectivorous birds shall continue throughout each year, except that the closed season on reedbirds or ricebirds in New Jersey, Pennsylvania, Delaware, Maryland, the District of Columbia, Virginia, North Carolina, South Carolina and Georgia shall commence November 1 and end August 31, next following, both dates inclusive: *Provided,* That nothing in this or any other of these regulations shall be construed to prevent the issue of permits for collecting birds for scientific purposes in accordance with the laws and regulations in force in the respective states and territories and the District of Columbia.

Regulation 4.— Closed Seasons on Certain Game Birds

A *closed season* shall continue until September 1, 1918, on the following migratory game birds: Band-tailed pigeons, little brown, sandhill, and whooping cranes, wood ducks, swans, curlew, willet, and *all shore*

birds except the black-breasted and golden plover, Wilson snipe or jacksnipe, woodcock, and the greater and lesser yellowlegs.

Compare sections 211 and 216 of the Conservation Law.

A *closed season* shall also continue until September 1, 1918, on rails in California and Vermont and until October 1, 1918 on woodcock in Illinois, Kentucky and Missouri and until September 1, 1918 on black-breasted and golden plover and greater and lesser yellowlegs in California and Utah.

REGULATION 5.— ZONES

The following *zones* for the protection of migratory game and insectivorous birds are hereby established.

Zone No. 1, the *breeding zone* comprising the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, *New York,* New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Kentucky, West Virginia, Michigan, Wisconsin, Minnesota, Iowa, North Dakota, South Dakota, Nebraska, Kansas, Missouri, Colorado, Wyoming, Montana, Idaho, Utah, Nevada, Oregon, and Washington — 31 states.

Zone No. 2, the *wintering zone* comprising the States of Delaware, Maryland, District of Columbia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Arkansas, Louisiana, Texas, Oklahoma, New Mexico, Arizona, and California — 17 states and the District of Columbia.

REGULATION 6.— CONSTRUCTION

For the purposes of regulations 7 and 8 each period of time therein prescribed as a *closed season* shall be construed to *include* the first and last day thereof.

Compare section 380, subd. 4, of the Conservation Law.

REGULATION 7.— CLOSED SEASONS IN ZONE NO. 1

Waterfowl, Coots and Gallinules.— The closed seasons on waterfowl, coots and gallinules in Zone one shall be as follows:

In Maine, New Hampshire, Vermont, Massachusetts, *New York* (except Long Island), Ohio, Michigan, Indiana, Kentucky, West Virginia, Illinois, Iowa, Kansas, Nebraska, and Missouri the closed season shall be between January 1, and September 15 next following;

Compare sections 211, 212 and 213 of the Conservation Law.

In Wisconsin, Minnesota, North Dakota, South Dakota, Montana, Idaho, Wyoming, and Colorado the closed season shall be between December 21 and September 6 next following; and

In Rhode Island, Connecticut, *Long Island,* New Jersey, Pennsylvania, Washington, Oregon, Utah, and Nevada the closed season shall be between January 16 and September 30 next following.

Rails other than Coots and Gallinules.— The closed season on sora and other rails, excluding coots and gallinules, in Zone one shall be between December 1 and August 31 next following, except as follows:

Exception: In Vermont the closed season shall continue until September 1 1918.

Compare section 213 of the Conservation Law.

Black-breasted and golden plover and greater and lesser yellowlegs.— The closed seasons on black-breasted and golden plover and greater and lesser yellowlegs in Zone one shall be as follows:

In Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, *New York,* and New Jersey the closed season shall be between December 1 and August 15 next following:

Compare sections 216 and 217 of the Conservation Law.

In Vermont, Pennsylvania, Ohio, West Virginia, Kentucky, Indiana, Michigan, Illinois, Iowa, Missouri, Kansas, Nebraska, Colorado, and Nevada the closed season shall be between December 16 and August 31 next following;

In Wisconsin, Minnesota, North Dakota, South Dakota, Montana, Idaho, and Wyoming the closed season shall be between December 21 and September 6 next following;

In Oregon and Washington the closed season shall be between December 16 and September 30 next following; and

In Utah the closed season shall continue until September 1, 1918.

Jacksnipe.— The closed seasons on jacksnipe or Wilson snipe in Zone one shall be as follows:

In Maine, New Hampshire, Vermont, Massachusetts, *New York,* (except Long Island), Ohio, West Virginia, Kentucky, Indiana, Michigan, Illinois, Iowa, Missouri, Kansas, and Nebraska the closed season shall be between January 1 and September 15 next following;

Compare sections 216 and 217 of the Conservation Law.

In Rhode Island, Connecticut, *Long Island,* New Jersey, Pennsylvania, Washington, Oregon, Nevada, and Utah the closed season shall be between January 16 and September 30 next following; and

In Wisconsin, Minnesota, North Dakota, South Dakota, Montana, Idaho, Wyoming, and Colorado the closed season shall be between December 21 and September 6 next following.

Woodcock.— The closed season on woodcock in Zone one shall be

between December 1 and September 30 next following, except as follows:

Exceptions: In Illinois, Kentucky, and Missouri the closed season shall continue until October 1, 1918.

Compare sections 216 and 217 of the Conservation Law.

REGULATION 8.— CLOSED SEASON IN ZONE NO. 2

Waterfowl, Coots and Gallinules.— The closed seasons on waterfowl, coots and gallinules in Zone two shall be as follows:

In Delaware, Maryland, District of Columbia, Virginia, North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Arkansas, and Louisiana the closed season shall be between February 1 and October 31 next following; and

In Oklahoma, Texas, New Mexico, Arizona, and California the closed season shall be between February 1 and October 15 next following.

Rails, other than Coots and Gallinules.— The closed season on sora and other rails, excluding coots and gallinules, in Zone two shall be between December 1 and August 31 next following, except as follows:

Exceptions: In Louisiana the closed season shall be between February 1 and October 31; and

In California the closed season shall continue until September 1, 1918.

Black-breasted and golden plover and greater and lesser yellowlegs.— The closed seasons on black-breasted and golden plover and greater and lesser yellowlegs in Zone two shall be as follows:

In Delaware, Maryland, District of Columbia, and Virginia the closed season shall be between December 1 and August 15 next following;

In South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas the closed season shall be between February 1 and October 31 next following;

In North Carolina, Tennessee, Arkansas, Oklahoma, New Mexico, and Arizona the closed season shall be between December 16 and August 31 next following; and

In California the closed season shall continue until September 1, 1918.

Jacksnipe.— The closed seasons on jacksnipe or Wilson snipe in Zone two shall be as follows:

In Delaware, Maryland, District of Columbia, Virginia, North Carolina, South Carolina, Georgia, Florida, Tennessee, Alabama, Mississippi, Arkansas, and Louisiana the closed season shall be between February 1 and October 31 next following; and

In Oklahoma, Texas, New Mexico, Arizona, and California the closed season shall be between February 1 and October 15 next following.

Woodcock.— The closed season on woodcock in Zone two shall be between January 1 and October 31 next following.

REGULATION 9.— HEARINGS

Persons recommending changes in the regulations or desiring to submit evidence in person or by attorney as to the necessity for such changes should make application to the Secretary of Agriculture. Hearings will be arranged and due notice thereof given by publication or otherwise as may be deemed appropriate. Persons recommending changes should be prepared to show the necessity for such action and to submit evidence other than that based on reasons of personal convenience or a desire to kill game during a longer open season.

REPEAL

Except in respect to offenses theretofore committed, on and after the date of the approval by the President of the foregoing regulations such regulations shall supersede the regulations for the protection of migratory birds approved and proclaimed October first, one thousand nine hundred and thirteen (38 Stat., 1960), as amended by regulations for the protection of migratory birds approved and proclaimed August thirty-first, one thousand nine hundred and fourteen (38 Stat., 2024), as further amended by regulations for the protection of migratory birds approved and proclaimed October first, one thousand nine hundred and fourteen (38 Stat., 2032).

While the Lacey Act has been uniformly sustained as constitutional, the Weeks-McLean Law and the REGULATIONS adopted by the Department of Agriculture have not fared as well.

There have been numerous prosecutions for violations of these regulations resulting in conviction and the imposition of the appropriate penalties.

In 1914, in an unreported South Dakota case (United States v. Shaw), the migratory bird law was upheld, but in the case of United States against Shauver, 214 Federal Reporter 154 (1914), an Arkansas case, the law was declared unconstitutional.

The defendant was indicted for a violation committed in the form of "spring shooting" of water fowl. A demurrer was interposed and on the argument Judge Trieber rendered a decision of which the following is a synopsis:

"A federal court will declare an act of Congress unconstitutional only when the question is practically free

from real doubt and the mere fact that the statute goes to the verge of the constitutional power is not enough, but it must appear clearly that it is beyond that power before a court will declare it void."

"The states retain the police power which they as sovereign nations possessed prior to the adoption of the national constitution so far as such powers pertain to the internal affairs of the states."

"The United States possesses power analogous to the police power of the states which every sovereign nation possesses as to its own property and power to carry into effect powers conferred on it by the constitution."

"The act of March 4, 1913, ch. 145, 37 Stat. 847, protecting migratory birds and game cannot be sustained as an exercise of the implied powers of the national government though it is impossible for any state to enact laws for the protection of migratory wild game and only the national government can do it with any fair degree of success."

"Migratory birds are not when on their usual migration, the property of the U. S. within Const. Art. 4, Section 3, Sub. 2 empowering congress to adopt rules respecting the territory or other property of the United States, but they are the property of the states in their sovereign capacity as the representative and for the benefit of all the people in common and Act March 4, 1913, protecting migratory birds cannot be sustained as an exercise by congress of the right to adopt regulations for its property."

"The act is invalid because not authorized expressly or by necessary implication by the Constitution."

"The act cannot be sustained as an exercise by Congress of the power to regulate interstate commerce."

Among the many authorities cited in the opinion written in the case are Rupert against United State and Silz against Hesterberg, the two cases in which the constitutionality of the Lacey Act has been upheld.

The Attorney-General of the State of New York in 1913 along kindred lines and upon some of the same authorities rendered an opinion to the effect that the federal migratory bird law was unconstitutional.

See Attorney-General Reports, 1913, vol. II, page 645.

The Shauver case was removed to the Supreme Court of the United States on the government's writ of error and was argued before such of the judges as were then sitting on October 16, 1915. On February 28, 1916, the case was, by order of the court, restored to the docket for re-argument and no decision has yet been reached.

One of the interesting points pressed before the Supreme Court is that if Congress has the power and the right to distribute seeds and disseminate the means of exterminating insect pests, the protection of migratory birds is but a corollary of this authority.

If the law and the regulations are invalidated the defects unless insurmountable will be met by amendments or original legislation. In the event that the objections found, if any, are absolutely fatal, pending cases and those in which the time to appeal has not expired will be abandoned and all others will become closed incidents and the only recourse will be the amendment of the U. S. Constitution unless the recent treaty entered into between Canada and the United States disposes of the constitutional question.

Hopeful of the outcome on this same old issue of *state rights,* the devotees of the law — and in that class are included all real sportsmen — have been looking forward to the establishment and enforcement of a federal season limit on all migratory game birds and regardless of the the decision in the Shauver case, the successful negotiation of a treaty with the Canadian government for a thorough co-operation along these lines. This latter project has proved not over difficult for the statute of the province of Ontario has for some time provided that the

Lieutenant-Governor in council might make regulations prohibiting the hunting, shooting or sale of any migratory game which he may deem to be at any time in danger of extinction, for the same period and in the same manner as the same is at any time forbidden in any two or more of the United States of America, one of such states being New York, Pennsylvania or Michigan.

See part II, section 8, subdivision 6 of the Ontario Game and Fishery Laws.

Such a *treaty* has but recently become an assured *fact* and will, it is claimed, largely dispose of all questions of *state rights*. It is worth noting at this point that the federal law provides for no civil penalty, the punishment for an offense regardless of its extent or enormity being a fine or imprisonment or both. It differs from the CONSERVATION LAW also in that there is no distinction between a violation which involves one bird and one which involves a number of them and in that it does not cover attempts or lesser acts and does not restrict possession or prescribe a limit.

The federal law is enforced by indictment only and the limitation within which prosecution may be commenced is three years from the time of the commission of the offense.

See U. S. Statutes, title 13, chapter 19, section 1044.
Compare chapter XVII on Procedure.

The federal regulations are at present enforced by federal wardens in the different states.

STATE CONTROL

In discussing this important and fascinating phase of the law, *three* distinct propositions must be borne in mind among which clear and clean cut differentiations should be made:

First.— The socalled *state ownership* of wild animals or the right, title and interest of the *state* in and to them as against all *individuals,* whether owners of land or otherwise — subject of course to federal jurisdiction over migratory birds.

Second.— The *rule of the chase* involving property rights in and to wild animals as among or between *individuals* when the rights and claims of the State are *waived* in favor of the *lawful* taker who does not invade the *legal rights of others.*

Third.— The peculiar property rights in and to wild animals vested in the *owner of the soil* on which they are found, subject to State regulation.

The *second* and *third* features of this question will be discussed in Chapter XVIII.

With these three principles kept ever to the fore, it is believed that the apparent conflicts among such cases as People v. Doxtater, 75 Hun, 472; Rockefeller v. Lamora, 85 A. D. 254; Matter of Deposit, 131 A. D. 403; Pierson v. Post, 3 Caines, 175, and the English authority Blades v. Higgs, 11 H. L. Cases, 621, can be brought to reconciliation.

It may be stated by way of preface that the original and ultimate absolute title to all property whether real or personal is in the sovereign state.

2 Blackstone, 409.
New York State Constitution, article I, section 10.
Johnson v. Spencer, 107 N. Y. 185.

While in some particulars the principles of property as applicable to wild animals may properly be said to taste of those which govern real estate, yet in the main, the philosophy pertaining to property of a personal character controls in so far as the peculiar nature of animals as property allows.

Under the earlier conditions of mankind, the human family had in common a dominion over and consequently

a *quasi* property in all the unreclaimed animals of the earth.

2 Blackstone, 403.

Notwithstanding the fact that the right to take that species of property known as fish and game was a natural right originally practically unrestricted by law, wild animals have always been in a sense deemed the property of the sovereign and from remote times the right and power of the State to regulate and control their capture has been recognized and variously asserted.

2 Blackstone, 403.
Justinian Book 2.

At one time in ancient Greece, Solon the law giver, observing that the Athenians devoted themselves to the chase, to the neglect and detriment of the arts, forbade the hunting and killing of game.

Geer v. Connecticut, 161 U. S. 519.

Under the Civil Law of Rome wild animals were considered the property of the *state* and under the COMMON LAW of England they were deemed the property of the *Crown.*

By the early English *common law* whales and sturgeon were deemed "royal fish" and if thrown on shore became instanter, crown possessions.

1 Blackstone, 290.

Originally under the *common law* this socalled title to wild animals seems to have been regarded as vested in the sovereign as a personal prerogative and traces of this idea are still discoverable in the provisions of the statutes of the province of New Brunswick on *fishery leases* and those of Ontario on *fishing in navigable waters.*

However on the grant by King John in 1215 of MAGNA CARTA and the CHARTER OF THE FOR-

EST in 1225 by Henry III, the rights of the sovereign in unreclaimed wild animals were limited and the rule of the ROMAN LAW restricting the sovereign power to a control and regulation of their taking became the COMMON LAW of England.

2 Blackstone, 414.
State v. Mallory, 67 L. R. A. 773.
Geer v. Connecticut, 161 U. S. 519.

The rule of the CIVIL LAW recognizing this qualified title of the sovereign in wild animals having been to all intents and purposes adopted by the English COMMON LAW, became the rule in the United States. At any rate, the *civil law* states followed the principle of the *civil law* and the *common law* states followed that of the *common law*. The uniform gist of all authorities appears to be that the general title to wild animals within its borders, as far as they are capable of ownership is in the state not as a technical proprietor, but in its collective sovereign capacity as the representative and for the benefit of all its citizens in common.

For this reason it has been said that neither fish, birds or quadrupeds (*ferae naturae*) belong to the state in the sense that the state can without express provision of law *sell* them or pursue them into other states to capture and recover them.

Rossmiller v State, 114 Wisconsin, 169.
Roberts v. Fullerton, 117 Wisconsin, 222.
Compare sections 154, 155, 156, 157, 158.

Wild animals have also been entitled *wards* of which the State is guardian. They have been said to be a property in trust for the benefit of all the people.

A cloud of cases might be cited on these propositions, but a few pivotal authorities in addition to those already quoted will suffice:

Ex parte Maier, 37 Pacific Reports, 402.
Phelps v. Racey, 60 N. Y. 10.

Commonwealth v Papsone, 232 U. S. 138.
Magner v. People, 97 Illinois, 320.
Garcia v. Gunn, 119 California, 315.
People v. Bootman, 180 N. Y. 7.
State v. Nergaard, 124 Wisconsin 414.

As the immense value of this wild wealth has become more and more appreciated from the standpoints of the maintained balances of nature, the beneficent work of insectivorous birds and the importance of the food and fur supply which it affords, the taking of such animals has come to be considered more as a privilege than an inherent right the world over and this favor rests with the government to extend, regulate and control.

These animals become the subjects of private ownership only so far as the people elect to make them so and the Legislature usually prescribes the point or limit where public proprietorship ends and that of the individual commences.

Kellogg v. King, 114 California, 378.

It is without doubt due to the nice nature of this property and the absence of a technical possession of them while in a state of nature that the taking of game animals in violation of the CONSERVATION LAW has not yet been technically declared to be what to all intents and purposes it is; to wit, a *larceny*.

This right is not such a proprietary one as carries with it any *liability* against the State for depredations done by wild animals although the State could if it saw fit become responsible for all such damage and this answerability the states of Massachusetts, New Hampshire and Vermont have largely assumed as to the havoc done by *deer*.

The protection and conservation of this vast property involves not only these peculiar rights of ownership, but also the exercise of that almost indefinably broad author-

ity of the State exerted on behalf of all which best subserves the public welfare, known as the *police power*.

See decisions cited above.
Sherlock v. Alling, 93 U. S. 99.
Cummings v. People, 211 Illinois, 393.
McCready v. Virginia, 94 U. S. 395.
Commonwealth v. McComb, 227 Pa. 377.
Lawton v. Steele, 152 U. S. 133.
Plumley v. Massachusetts, 155 U. S. 461.
People v. Hesterberg, 219 U. S. 31 (184 N. Y. 126).

The extent and limitation of this *police power* have been the subject of endless discussions in all the courts. It is uniformly conceded to include everything essential to public safety, health, morals and general welfare and to justify the destruction or abatement by summary methods of whatever may be regarded as a public nuisance. Wherever the public interest demands its exercise, a large discretion is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for their adequate protection.

See Lawton v. Steele.

The test appears to be whether an enactment has relation to the public welfare and practically all reasonable legislation legitimately aimed at the protection of wild animal life has been upheld as proper exercise of this wide power.

The authority of the State not only extends to wild animals in a *state of nature*, but follows them and for certain purposes applies after their legal capture.

Matter of Blardone, 115 S. W. 839.

The scope of this right and power covers such matters as licenses, open and close season, taking and manner of taking, bag limits, possession during and after open season, transportation, exportation, importation, sale,

confiscation of paraphernalia of all kinds and all of the many restrictive measures involved in the scheme of game conservation.

The right of fishing and hunting in waters lying between two states is usually regulated and controlled by treaty, but in the absence of such treaty, the right to fish and hunt on such waters to the middle thereof, lies within the control of the respective states.

19 Cyc. 1005.

By virtue of the foregoing principles and in terms corresponding largely to the text of the statutes of all the states, the Conservation Law in Section 175 declares:

> The *ownership* of, and the *title to all* fish, birds, and quadrupeds in the state of New York, not held by *private ownership, legally acquired,* is hereby declared to be in the state. No *fish, birds or quadrupeds* shall be caught, taken or killed in any manner or at any time or had in possession except the person so catching, taking or killing or having the same in possession shall *consent* that the *title* to such fish, birds and quadrupeds *shall be and remain* in the state of New York for the purpose of regulating and controlling the *use and disposition* of the same after such catching, taking or killing, except that the title to such fish, birds or quadrupeds *legally taken* shall *vest* in the person so taking or possessing the same, *subject to the restrictions and provisions of law.*

This declaration covers eggs of birds and spawn of fish.

The language in which the declaration of these principles is clothed varies more or less in the statutes of the various states, and it may be of interest to compare, for instance, Section 1 of the Oregon Game Code which reads as follows:

"No person shall at any time or in any manner acquire any property in, or subject to his dominion or control, any of the wild game animals, fur-bearing animals, game birds, non-game birds or game fish, or any part thereof, of the state of Oregon, but they shall always and under all circumstances be and remain the property of the state, except that by killing, catching or taking the same in the manner and for the

purpose herein authorized and during the period not herein prohibited the same may be used by any person at the time, and in the manner, and for the purpose herein expressly provided. Any person hunting or trapping for or having in possession any game animals, fur-bearing animals, game birds, non-game birds, or game fish at any time in any manner shall be deemed to consent that the title shall be and remain in the state for the purpose of regulating the use and disposition of the same, and such possession shall be deemed the consent of such person as aforesaid, whether said animals, birds or fish were taken within or without the state."

It is evident that these legislative declarations of ownership by the state of wild animals in their wild or natural state as well as after capture added nothing vital to the law as it existed before such provisions were enacted. As expressed in SECTION 382 they represent a restatement in statutory form of the existing law.

SECTION 175 of course excludes from its operation *domestic animals* (*domitae naturae*).

It also eliminates from its application animals *once wild* which have become domesticated or tamed (*mansuetae naturae*). This opens up a wide field of discussion, for animals once wild may be said to be presumed to remain so until they have lost the spark of liberty and developed what is known as *animus revertendi* (the disposition if freed to remain at or return home). If they have not acquired this characteristic and escape they would unless recovered and identified become and be claimed as wild animals.

The statute does not apply to *wild animals* (*ferae naturae*) held in private ownership *legally acquired.* This classification includes such animals so held as of the time when the act took effect (1912) and those subsequently so acquired. It would not exclude from the operation of the law *wild animals* taken in *close season* prior to 1912 nor to those taken during the *open season* and possessed *after its close without a license.* But it is doubtful if the commission would now enter into any

dispute as to the ownership of such animals possessed prior to April 15, 1912.

See chapter XVIII; sections 190, 372, 200, 159, etc.

If these enumerated excepted classes were not removed from the operation of the law the statute would doubtless be held unconstitutional as being in impairment of contractual rights and as taking private property without due process of law and just compensation.

United States Constitution, article I, section 10.
United States Constitution, amendment V.
New York State Constitution, article I, sections 6 and 7.
See the discussion of these animals in chapter XVIII.
See People v. Cohen, 91 A. D. 89.

The terms of the Wisconsin statute include all wild animals or creatures endowed with sensation and the power of voluntary motion. SECTION 175, however, does not at present expressly apply to such wild animals as are neither fish, flesh nor fowl, although frogs are listed as fish (Section 257) and turtles as quadrupeds (Section 202).

See Section 185 on *hunting licenses* where a *gun* is used.

Bees for instance as to which there is abundance of interesting law, are not covered by the statute nor are insects and reptiles generally.

See chapter XVIII.

The declaration particularly emphasizes *quadrupeds, birds and fish* and to such wild animals no one can acquire title especially as against the State or any person acting in good faith on its behalf except in strict compliance with the law.

See James v. Wood, 82 Me. 173.

CHAPTER IV

GENERAL POWERS AND DUTIES OF THE COMMISSION AS TO FISH AND GAME

Pursuant to the principles discussed in Chapter III, the State through the Legislature has prescribed the powers and duties of the Commission on its behalf as to fish and game in Section 150:

> The commission shall have charge, control and management of the propagation and distribution of food and game fish, shell-fish, crustacea, and game. It shall have the conduct and control of all hatching and biological stations and game farms owned, operated or hereafter acquired by the state. The commission shall have charge of the enforcement of all laws for the protection of fish, shell-fish, crustacea, birds, and quadrupeds; lands under water which have been or shall be designated, surveyed and mapped out pursuant to law, as oyster beds or shell-fish grounds, and power to grant leases of land under water for shell-fish culture according to law, to make rules regulating the inspection and examination of shell-fish, shell-fish grounds and the buildings used for storage; handling and shipments thereof; the floating of shell-fish; and the removal of shell-fish from beds which are in an unsanitary condition and their deposit upon unpolluted grounds; power to make *rules increasing the size of mesh of nets, regulating the transportation, importation, and exportation* of game, fish, shell-fish and crustacea, and the *taking of fish* in any manner, other than *angling,* except as *to migatory fish of the sea* within the limits of the marine district; the granting of *licenses* where the same are *prescribed by law,* the fixing of fees therefor and the terms thereof.
>
> See Section 59, subdivision 1, b.
> See Remington v. State, 116 A. D. 522.
> See Public Lands Law, article VI.

The State fish hatcheries and the fish which they at present distribute are:

ADIRONDACK, Saranac Inn Station — Brook Trout, Rainbow Trout, Lake Trout, Whitefish and Frostfish.

BATH, Bath — Brook Trout, Brown Trout, Rainbow Trout and Lake Trout.

CALEDONIA, Caledonia — Brook Trout, Brown Trout, Rainbow Trout, Lake Trout, Lake Herring, Pikeperch and Maskalonge.

CHAUTAUQUA, Bemis Point — Brook Trout, Lake Trout, Maskalonge, Lake Herring and Black Bass.

COLD SPRING HARBOR, Cold Spring Harbor — Brook Trout, Brown Trout, Rainbow Trout, Pikeperch, Smelt, Tomcod, Flatfish, Sea Bass, Scup, Whitefish, Blackfish, Blue Crab and Lobster.

DELAWARE, Margaretville — Brook Trout, Brown Trout and Rainbow Trout.

FULTON CHAIN, Old Forge — Brook Trout, Lake Trout, Whitefish, Frostfish and Land Locked Salmon.

LINLITHGO, Linlithgo — Brook Trout, Brown Trout, Rainbow Trout, Shad, Pikeperch, Lake Herring, River Herring, Black Bass and Yellow Perch.

ONEIDA, Constantia — Pikeperch, Tullibee, Whitefish, Lake Herring, Black Bass and Yellow Perch.

ST. LAWRENCE, Ogdensburg — Black Bass and Pikeperch.

WARRENSBURG, Warrensburg — Brook Trout.

By Chapter 632 of the Laws of 1916, the establishment of a hatchery at Dunkirk, Chautauqua county, is authorized for the purpose of propagating for the waters of Lake Erie and other waters of the State, white fish, lake trout, herring, blue pike and other fish.

The State game farms, at present devoted to the propagation of pheasants only, are:

SHERBURNE — Chenango County.

MIDDLE ISLAND — Suffolk County.

BROWNVILLE — Jefferson County.

Where a license is required by any section of the law the terms of its grant may be regulated by the Commission, and it seems that the Commission may by rule

require a license for any form of fishing except angling —barring the catching of migratory fish of the sea within the limits of the marine district—and prescribe the terms and conditions on which it may be granted.

See Rules and Regulations noted under different sections.

It is essential to observe at this point the force of Rules 34 and 35 as to the amendment and abrogation of rules, the issuance of licenses and the construction thereof:

> The *conservation commission* reserves the right to *alter, amend, or abrogate* any or all of its rules and regulations, and may adopt new ones at any time as the *commission* may deem expedient. Nothing contained in any of these *rules* and *regulations* shall be construed as *compelling* the *issuing* of a *license* to any person nor to *prevent* the *revoking* of such license at any time.
>
> No *license or permit* issued by the *commission* under Article 5 of the Conservation Law shall be deemed to authorize the licensee, or person to whom such a permit is issued, to *trespass* upon any private lands, or to do any injury thereto, or to *exclusively* occupy any land *owned* by the state, including lands under water, or to exclusively use any *public waters* of the state.

These rules as far as revocation is concerned do not apply to *hunting licenses.*

While it was held in Lewis v. State, 96 N. Y. 71, that the State was not liable for the negligence or misfeasance of its agents in those cases where by legislative enactment, it has not assumed such liability, it was stated in Remington v. State, 116 A. D. 522, that in view of the duty of the Commission to propagate and distribute food and game fish, it might be liable for trespasses committed for those purposes.

Compare section 59, subdivision 1 b.

The fish culturist appointed by the Commission has charge under its direction of the culture of fish and shell-fish. In addition to his salary of $4,000 per annum,

he is reimbursed his actual and necessary traveling expenses incurred in the performance of his duty.

See Section 151.

Over and above the general enactments protecting fish and game, provision for *additional protection* by order of the Commission on a basis of wide discretion is made in Section 152:

> 1. *Ten* or more *citizens* of the state may file with the commission a *petition* in writing requesting it to give to any species of *fish* other than migratory food fish of the sea including fish or *game birds or quadrupeds, protection* or *additional protection* to that afforded by the provisions of this article. Such petition shall state the *grounds* upon which such protection is considered necessary, and shall be *signed* by the petitioners who shall attach their *addresses.*

This applies to all fish except migratory food fish of the sea.

The Commission could order protection for fish, birds or quadrupeds not now protected.

No verification of the petition seems to be required, but it would add force and form.

> 2. If the commission shall after hearing petitioner *entertain* the petition, it shall hold a *public hearing* in the *locality or county* to be affected upon the allegations of such petition at such time and place within the locality or county *affected* as the commission may determine within *twenty days* from the filing thereof. At least *ten days* prior to such hearing *notice* thereof, stating the time and place at which such hearing shall be held, shall be *advertised* in a newspaper to be selected by the commission and *published* in the *counties or county* to be affected by such additional or other protection or if *less* than a whole county, in or near the *locality* which may be affected. Such notice shall contain a brief statement of the *grounds* upon which such application is made, and a copy thereof shall be *mailed* to each *petitioner* at the address given in such petition at least *ten* days before such hearing.

No *minimum acreage* of land or *length or size* of stream or body of water seems to be fixed.

3. If upon such hearing the commission shall determine that such species of fish or game, by reason of *disease, danger of extermination* or from any *other cause or reason,* requires such additional or other protection, in any *locality* or *throughout the state,* the commission shall have power by order to *prohibit or regulate* during the *open season* therefor, the taking of such species of fish or game. Such prohibition or regulation may be made *general* throughout the state or *confined* to a *particular part or district* thereof and the order shall fix the day when the same shall take effect and the commission shall sign and enter the order in its minute book.

4. At least *thirty days* before the day fixed for such order to take effect, copies of the same certified by the secretary to the commission shall be filed in the office of the clerk of each county containing a district or any part of a district to which the prohibition or regulation applies. At least *thirty days* before such order shall *take effect* the commission shall cause the same to be *published* in a newspaper in each county wherein such prohibition or regulation shall apply.

The Additional Orders Now in Force Are:

Species	County	Period	Expires
Pheasants	Herkimer	Two years	Oct. 1, 1918
Pheasants	Otsego	Two years	Oct. 1, 1918
Pheasants	Delaware	Two years	Oct. 1, 1917
Pheasants	Oneida	Two years	Oct. 1, 1918
Pheasants	Montgomery	Two years	Oct. 1, 1918
Pheasants	Lewis	Two years	Oct. 1, 1918
Pheasants	Warren	Two years	Oct. 1, 1918
Pheasants	St. Lawrence	Two years	Oct. 1, 1918
Pheasants	Franklin	Two years	Oct. 1, 1918
Pheasants	Clinton	Two years	Oct. 1, 1917
Pheasants	Essex	Two years	Oct. 1, 1918
Pheasants	Allegany	Two years	Oct. 21, 1917
Pheasants	Tioga	Two years	Oct. 1, 1917
Pheasants	Cattaraugus	Two years	Oct. 1, 1917
Pheasants	Chautauqua	Two years	Oct. 1, 1917
Pheasants	Erie	Two years	Oct. 1, 1918
Pheasants	Sullivan	Two years	Oct. 1, 1918
Cotton tail rabbits	Richmond	Oct. 1 to Nov. 14 and Jan. 1 to 31.	No date.
Cotton tail rabbits and varying hares.	Rockland	Oct. 1 to 31 and Jan. 1 to 31.	Oct. 1, 1918
Varying hares	Cattaraugus	Two years	Oct. 1, 1918
Black bass	Lake Erie and Niagara river	June 16 to June 30	No date.
Black bass	All waters in the towns of Chester, Horicon and Johnsburg, Warren county.	June 16 to July 15	June 15, 1917
Small mouth black bass.	Lake Bonaparte, Lewis county	June 16 to June 30	June 16, 1918
Black bass	Schroon and Paradox lakes	June 16 to July 15	June 15, 1917
Bass, pike, perch, pickerel and bullheads.	Grass Lake, towns of Alexandria and Rossie, counties of St. Lawrence and Jefferson.	Taking through ice prohibited.	Jan. 1, 1917
Pike and pike-perch.	Butterfield lake, Jefferson county.	Tip-ups prohibited	Jan. 1, 1917

THE ADDITIONAL ORDERS NOW IN FORCE ARE — Continued

SPECIES	County	Period	Expires
Ruffed grouse	Genesee	Two years	Oct. 1, 1918
Black, gray and fox squirrels.	Genesee	Two years	Oct. 1, 1918
Pike, pickerel and perch.	Clear lake, town of Alexandria, Jefferson county.	Tip-ups prohibited	Jan. 1, 1921
Pickerel and pike-perch.	Goodyear lake, town of Milford, Otsego county.	Feb. 1 to Mar. 1	Feb. 1, 1919
Pike, great northern pike and pickerel.	Town of Theresa, Jefferson county, Red lake, Hyde lake, Moon lake, Muscalonge lake.	Five years; five tip-ups only to be operated by one person between sunrise and sunset. Pickerel not less than 20 inches in length shall be taken or possessed.	Jan. 1, 1921
Pike-perch and pickerel.	Waters of Saratoga lake extending to Bryant's Bridge and waters of Lake Lonely, Saratoga county.	Three years; five tip-ups only to be operated by one person between 6 A. M. and 6 P. M.. Said tip-ups to be removed from water between the hours of 6 P. M. and 6 A. M.	
Tip-ups	Dutchess county	Tip-ups prohibited	Oct. 1, 1921
Brook trout	Otter creek, Dorsey creek, Skate creek, High Rock creek, Cage creek, Panther creek, Wolf creek, Robinson river, Glasby creek, Cranberry lake, inlet above High falls, Six Mile creek, Chair Rock creek, Sucker brook, East creek and Brandy creek, together with the tributaries thereto in the towns of Fine, Clifton and Colton in the county of St. Lawrence; and Cranberry lake inlet below High falls in said towns and county.	Four years	Sept. 1, 1920
Brook trout	Herkimer county, town of Russia. That the waters affected by this order are the waters of Buttermilk brook, Tainter brook, Wilts brook, Haughton brook, Bemis brook, Bingdyce brook, Smith brook and McAlister brook, in the town of Russia, county of Herkimer.	Two years from April 1917.	April 1, 1919
Pheasants	Putnam county	Two years	Oct. 1, 1918
Pheasants	Ulster county	Two years	Oct. 1, 1918

Further provision is made for the establishment of *fish and game closes* in Section 153:

The commission may, on *request* of a *majority* of the *town board* of any town or a *majority* of the *common council* of any *city,* by *order,* prohibit or regulate the taking of birds or game on *lands set aside, with the consent of the owner or owners thereof,* as bird and game refuges for a period of not to exceed *ten years.* On a *like request,* when *fish* have been or shall be placed in waters of a *town* or of a *city* at the *expense of the state,* the commission may

by order prohibit or regulate the taking of fish from such waters, for a period of not to exceed *three years*. At least *thirty days* before such order shall take effect, a copy of the same certified by the secretary to the commission shall be *filed* in the office of the clerk of the town or city in which the prohibition or regulation applies. *Printed notices at least one foot square* that such lands or streams have been *closed,* shall be *posted* along the *boundaries of the land,* or along the *shores or banks of the waters affected* not more than *fifty rods* apart measured along the said boundaries and along said banks.

Any person who shall violate or attempt to violate any such order shall be guilty of a *misdemeanor,* and shall, upon conviction, be subject to a *fine* of not to exceed *one hundred dollars,* or shall be *imprisoned* for not more than *thirty days, or both,* for each offense and in addition shall be liable to the *penalties* hereinafter provided for taking fish, birds or quadrupeds in the *close season.*

An affidavit of the fact of such *stocking* with fish or of *posting such notices* or a *certification* of such facts by a *game protector* when *filed* in the office of the commission shall be *presumptive evidence* of the facts stated therein and a copy of either when certified by the secretary to the commission shall be *competent evidence* in any action or proceeding for enforcement of any of the provisions of this section.

Compare section 182 as to penalties.
Compare sections 360 to 366 on matters of posting.

The affidavit, it seems, may be made by any person having knowledge of the stocking.

In connection with the subject-matter of both Sections 152 and 153, it has been held in the case of Vermont v. Theriault, 43 L. R. A. 290, that a person is not unlawfully deprived of his private rights where the State prohibits all fishing in his stream for a certain period of time.

In establishing a fish close the consent of the owner of the lands does not seem to be required as in like cases in Vermont, but it is doubtful if the Commission would without a hearing and an effort to secure such consent establish a close thereon. This particularly would be true in a case when the stream has not been stocked with the *consent* of the owner.

No minimum acreage of land, mileage of stream or size of waters is fixed.

Bird and game closes have been established in the following counties and towns:

COUNTY	TOWN
Otsego	Richfield Springs and Springfield Center.
Essex	Essex.
Essex	Essex.
Otsego	Oneonta.
Rensselaer	Berlin.
Oneida	Sangerfield.
Tioga	Owego.
Tioga	Owego.
Essex	Essex.
Westchester	New Castle.
Onondaga	Manlius.
Chemung	Big Flats.
Genesee	Bethany.
Rensselaer	Berlin.
Chenango	Including State Game Farm and surrounding territory.

Matters of fishing seem preferably to be disposed of through protective orders.

Compare section 366 on Game Refuges.

Both of these sections, 152 and 153, are to be considered with Section 12, subdivision 8, of the County Law, which authorizes the board of supervisors in any county of the State to:

"Provide for the protection and preservation subject to the laws of the state of wild animals, birds, and game and fish and shell-fish within the county; and prescribe and enforce the collection of penalties for the violation thereof."

See section 169 of the Conservation Law on the duty of *game protectors* to enforce these laws.

Compare section 4, subdivision 13, of chapter 194 of the Laws of 1849.

Compare section 1, subdivision 16, of chapter 482 of the Laws of 1875.

Compare section 12, subdivision 8, of chapter 686 of the Laws of 1892.

By Chapter 488 of the Laws of 1892, Forest, Fish and Game Law, Section 272, all laws or ordinances theretofore passed by any board of supervisors of any county in the State relating to birds, fish, shell-fish and wild animals, were repealed except those passed in Suffolk county as to salt water fishing.

Compare section 334 of the Conservation Law.

By Section 273 of Chapter 488 of the Laws of 1892, however, it was still provided:

"Boards of supervisors may pass at their annual session such laws and ordinances as shall afford additional protection to and further restrictions for the protection of birds, fish, shell fish and wild animals, except wild deer, and to prohibit the taking and killing of the same, but no such ordinance shall be operative until a duly authenticated copy thereof shall have been filed in the office of the clerk of the county, and published in the papers in such county in which the session laws are published and filed in the office of the secretary of state, and it shall be the duty of the secretary of state to furnish a copy of such ordinance to the chief game protector, and to print all such ordinances in the volume of session laws for the current year. No such ordinance shall take effect until the first day of May next after its passage."

The volumes of the Session Laws of 1893, 1894 and 1895 contain the lists of such laws and ordinances.

In 1895 in the case of People v. Fish, 89 Hun 163, upon an interpretation of both the County Law and the Forest, Fish and Game Law, it was held that the power conferred upon boards of supervisors extended only to the enactment of such restrictions and prohibitions as were additional to those contained in the general state laws or in special or local State laws which State laws it might be seen were not intended to and did not cover the whole subject or take it exclusively to themselves.

It was further stated that such supervisor's laws could not conflict with or override state legislation on the same subject.

The volumes of the Session Laws from 1896 inclusive on do not contain any such laws or ordinances passed by boards of supervisors and there evidently were none considered valid, due to this decision.

All of Chapter 488 of the Laws of 1892 was repealed by Chapter 20, of the Laws of 1900, Forest, Fish and Game Law, but the section of the County Law, for what reason it is hard to say, still remains apparently undisturbed.

In 1902, the Attorney-General in rendering an opinion on the interpretation of this section of the County Law in question merely referred to the case of People v. Fish and reiterated that additional restrictions apparently might be made by boards of supervisors provided *such restrictions* did not conflict with or override state legislation.

Attorney-General's Report, 1902, page 298.

This power vested in boards of supervisors whatever it is has been declared constitutional.

See New York State Constitution, article III, section 27

Smith v. Levinus, 8 N. Y. 472.
People v. Alden, 112 N. Y. 117.

This authority must however be so exercised as to make restrictions general in their application and cannot be used to create any *privileged class* as for instance those *within the county.*

Hallock v. Dominy, 7 Hun 52 (69 N. Y. 238).

The difficulty with this power of the board of supervisors is to determine in what respects it may be exercised and the lengths to which it can go. It would *appear* to authorize the establishment of close seasons, prohibit the use of certain kinds of guns, appoint and pay county protectors as is done in Maine, feed game birds and quadrupeds and make other provisions which might be

said to be consistent with the scheme of the law and not in conflict with it inasmuch as would they give greater and not less protection to fish and game.

This philosophy, however, is not supported by People v. Fish, for in that case a supervisor's law forbidding the netting of *menhaden* where the State law permitted it, was *condemned* in broad terms.

Because of its "*subjection*" and this uncertainty as to what would be deemed *covered* by the State law and what not and in view of the broad powers of the Commission as to additional protection, closes and refuges under the Conservation Law, it would seem altogether wise to *repeal* the section of the County Law for it appears to have been treated for practical purposes as valueless since the decision in People v. Fish.

In fact the purpose of the Conservation Law is to *cover* the subject of fish and game.

Another form of expression, which the so called state ownership of wild animals assumes is the authorized *seizure* and *confiscation* not only of the *animals* taken contrary to the law, but in many instances and to differing extents the confiscation and forfeiture of the *paraphernalia used* in the commission of the violation.

This exercise of the police power has apparently never been seriously questioned as far as the *animals acquired or possessed* in contravention of the statute are concerned, but it has been attacked as unconstitutional to the extent that the forfeiture of the *devices used* attached, and in the main, in vain.

A reference to at least a few of the authorities upon this vital proposition cannot be other than of surpassing interest and value, both from the standpoint of the police power in general and its exercise in this respect in particular.

In the case of Lawton v. Steele, 119 N. Y. 226 (1890), 152 U. S. 133, Chapter 317 of the Laws of 1883, Section

2, corresponding largely to the present Section 282 of the Conservation Law on *nets,* was challenged as in violation of the constitutional provision that no person shall be deprived of his property without due process of law. The defendant, a game protector, had seized and destroyed certain nets, the property of the plaintiff, used in violation of the law and the acts of the protector and the statute under which he justified himself were upheld both in the New York Court of Appeals and the Supreme Court of the United States upon grounds set forth in the following excerpts from the opinions written in those cases:

"The act in question declares that nets set in certain waters are public nuisances, and authorizes their summary destruction. The statute declares and defines a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests or to the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction.

There are numerous examples in recent legislation of the exercise of the legislative power to declare property held or used in violation of a particular statute, a public nuisance, although such possession and use before the statute were lawful.

The legislative power to regulate fishing in public waters has been exercised from the earliest period of the common law.

It has become a settled principle of public law that power resides in the several states to regulate and control the right of fishing in the public waters within their respective jurisdictions.

We think it was competent for the legislature, in exercising the power of regulation of this common and public right, to prohibit the taking of fish with nets in specified waters, and by its declaration, to make the setting of nets for that purpose a public nuisance.

The legislature in the act in question, acting upon the theory and upon the fact (for so it must be assumed) that fishing with nets in

prohibited waters is a public injury, have applied the doctrine of the common law to a case new in instance, but not in principle, and made the doing of the prohibited act a nuisance. This we think it could lawfully do.

The more difficult question arises upon the provision in the second section of the act of 1883, which authorizes any person, and makes it the duty of the game protector to abate the nuisance caused by nets set in violation of law, by their summary destruction.

The right of summary abatement of nuisances without judicial process or proceeding was an established principle of the common law long before the adoption of our constitution, and it has never been supposed that this common law principle was abrogated by the provision for the protection of life, liberty and property in our State Constitution, although the exercise of the right might result in the destruction of property.

The public remedy is ordinarily by indictment for the punishment of the offender, wherein on judgment of conviction the removal or destruction of the thing constituting the nuisance, if physical and tangible, may be adjudged, or by bill in equity filed in behalf of the people. But the remedy by judicial prosecution *in rem* or *in personam,* is not, we conceive, exclusive, where the statute in a particular case gives a remedy by summary abatement, and the remedy is appropriate to the object to be accomplished.

But as the legislature may declare nuisances, it may also, where the nuisance is physical and tangible, direct its summary abatement by executive officers, without the intervention of judicial proceedings, in cases analogous to those where the remedy by summary abatement existed at common law.

But the remedy by summary abatement cannot be extended beyond the purpose implied in the words, and must be confined to doing what is necessary to accomplish it. And here lies, we think, the stress of the question now presented. It cannot be denied that in many cases a nuisance can only be abated by the destruction of the property in which it consists. The cases of infected cargo or clothing and of impure and unwholesome food are plainly of this description. They are nuisances *per se,* and their abatement is their destruction. So, also, there can be little doubt, as we conceive, that obscene books or pictures, or implements only capable of an illegal use, may be destroyed as a part of the process of abating the nuisance they create, if so directed by statute. The keeping of a bawdy house, or house for the resort of lewd and dissolute people, is a nuisance at common law. But the tearing down of the building so kept would not be justified as the exercise of the power of summary abatement, and it would add nothing, we think, to the justification that a statute was produced authorizing

the destruction of the building summarily as a part of the remedy. The nuisance consists in the case supposed in the conduct of the owner or occupants of the house, in using or allowing it to be used for the immoral purpose, and the remedy would be to stop the use. This would be the only mode of abatement in such case known to the common law, and the destruction of the building for this purpose would have no sanction in common law or precedent.

But where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, as in the case of the float in the Albany basin (9 Wend. 571), or the nets in the present case the legislature may, we think, authorize its summary abatement by executive agencies without resort to judicial proceedings, and any injury or destruction of the property necessarily incident to the exercise of the summary jurisdiction interferes with no legal right of the owner. But the legislature cannot go further. It cannot decree the destruction or forfeiture of property used so as to constitute a nuisance as a punishment of the wrong, nor even, we think, to prevent a future illegal use of the property, it not being a nuisance *per se,* and appoint officers to execute its mandate. The plain reason is that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers, and under guise of exercising the power of summary abatement of nuisances, the legislature cannot take into its own hands the enforcement of the criminal or quasi-criminal law.

The inquiry in the present case comes to this: Whether the destruction of the nets set in violation of law, authorized and required by the act of 1883, is simply a proper, reasonable and necessary regulation for the abatement of the nuisance, or transcends that purpose, and is to be regarded as the imposition and infliction of a forfeiture of the owners' right of property in the nets, in the nature of a punishment. We regard the case as very near the border line, but we think the legislation may be fairly sustained on the ground that the destruction of nets so placed is a reasonable incident of the power to abate the nuisance.

It is conceivable that nets illegally set could, with the use of care, be removed without destroying them. But in view of their position, the difficulty attending their removal, the liability to injury in the process, their comparatively small value, we think the legislature could adjudge their destruction as a reasonable means of abating the nuisance.

It is insisted that the provision in the act of 1883 authorizes the destruction of nets found on the land, on shores or islands adjacent to waters, where taking of fish by nets is prohibited, and that this part

of the statute is in any view unconstitutional. Assuming this premise it is claimed that the whole section must fall, as the statute, if unconsitutional as to one provision, is unconstitutional as a whole. This is not, we think, the general rule of law, where provisions of a statute are separable, one of which only is void. On the contrary the general rule requires the court to sustain the valid provisions, while rejecting the others. Where the void matter is so blended with the good that they cannot be separated, or where the court can judicially see that the legislature only intended the statute to be enforced in its entirety, and that by rejecting part the general purpose of the statute would be defeated, the court, if compelled to defeat the main purpose of the statute, will not strive to save any part."

See the present reading of section 282 as to *presumptive* evidence.

One of the dissenting judges of the Supreme Court of the United States in the course of his opinion made the following statement:

"The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulations, nor forfeited for the *alleged* violation of law by its owner nor destroyed by way of penalty inflicted upon him without opportunity to be heard."

The Wisconsin act, a practical counterpart of Section 282, was upheld by the Wisconsin courts in the case of Bittenhaus v. Johnston, 32 L. R. A. 380, an extract from the opinion in the case reading as follows:

"The plaintiff having voluntarily put the nets to an unlawful use which made them public nuisances under the statute, is in no position to recover damages from the defendants for having as public officials obeyed the law in abating the nuisance by seizing and destroying the nets. Of course the plaintiff *had his right of action to determine* whether the nets were or were not in such *unlawful use*. We must hold that the plaintiff has not been deprived of his property without due process of law."

Chapter 383 of the Laws of 1896, which provided for the summary seizure of any boat or vessel used by one person in interference with oysters or other shell-fish belonging to *another* and for its forfeiture and sale by

an exclusive procedure before a justice of the peace with no provision for a jury trial, was held in the case of Colon v. Lisk, 153 N. Y. 188 (1897) to be in violation of Article I, Sections 2 and 6 of the New York State Constitution and the 14th Amendment to the United States Constitution, particularly on the ground that the act involved an unauthorized confiscation of something used in interference with *private* rights as distinguished from the *public* right, interest and welfare involved in Lawton v. Steele.

In the case is the following quotation from Lawton v. Steele, 152 U. S. 133:

"If authority to enact the statute under consideration existed, it was by virtue of the police power vested in the legislature. Under the power, persons and property may be subjected to necessary restraints and burdens to secure the general public good. That that power exists is undenied. That it is necessary to the proper maintenance of the government of the state and the general welfare of the community, must also be admitted. Although it includes everything essential to the safety, health, morals and general good of the public, it is by no means unlimited. To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

The case of McConnell v. McKillip, 65 L. R. A. 610 (1904), involved the test of the validity of a Nebraska statute which provided as follows:

"All guns, ammunition, dogs, blinds, and decoys, and any and all fishing tackle in actual use by any person or persons while hunting or fishing in this state without license or permit, when such license or permit is required by this act, shall be forfeited to the state; and it is

made the duty of the commissioner and every officer charged with the enforcement of this act to seize, sell, or dispose of the same in the manner provided for the sale or disposition of property on execution, and to pay over the proceeds thereof to the county treasury for the use of the school fund."

Under this act, guns were seized by a protector and an action in replevin was brought against him by the owner of the guns.

The Supreme Court of Nebraska in deciding the case and declaring the act unconstitutional rendered an opinion of which the following are partial quotations:

"The protection of wild animals suited for the purpose of food from indiscriminate slaughter by hunters has been the object of legislation from the most ancient times. The theory upon which the law-making power assumes to act is that all wild game belongs to the state in its sovereign capacity as a trustee for the whole of the public, and that consequently the state may, as a proper exercise of its police power, adopt such rules and regulations with reference to its preservation, and such penalties with reference to a violation of such regulations, as are necessary to accomplish the end desired,—the preservation to the people of the state of the pleasure, sport and profit derived from the hunting, pursuit and capture of wild animals living therein. In this case, the defendant in error, McKillip, admits that it is within the power of the state, in the just exercise of its police powers, to prohibit the killing of fish and game at certain seasons of the year, but denies that it has the right to take his property from him and confiscate it to the state without giving him his day in court. He contends that the police power in regard to the confiscation of guns, dogs, blinds, decoys and fishing tackle is upon exactly the some footing as the police power in regard to regulation of the sale of intoxicating liquors, and that, since before liquors which have been seized are destroyed there must be a judicial determination by a court as to whether the owner was engaged in unlawfully selling or keeping for sale intoxicating liquors, so there must be as to his property. He further contends that since the statute contains no provisions for determining whether the property was liable to condemnation for the criminal acts of those who had it in their possession, and since it merely authorized the game warden to seize the property without warrant or process, to condemn it without proof, and to sell it as upon execution, it deprives the plaintiff of the property rights which are guaranteed to him by the Constitution."

After a reference to and a discussion of several authorities, among them the Wisconsin case, Bittenhaus v. Johnston, and in chief the New York case, Lawton v. Steele, the opinion quotes from the latter case as decided by the United States Supreme Court to this extent:

"The main, and only real difficulty connected with the action in question, is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries is to be treated as a public nuisance 'and may be abated and summarily destroyed by any person; and it shall be the duty of each and every protector aforesaid, and every game constable, to seize, remove and forthwith destroy the same.' The legislature, however, undoubtedly possessed the power, not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. * * * In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic, distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle, to pull down houses in the path of conflagrations, the destruction of decayed fruit, or fish or unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and, if the object to be accomplished is conducive to the public interest, it may exercise a large liberty of choice in the means employed."

The opinion goes on to say:

"No case has been brought to our attention in which a court has construed a statute which provides for the seizure, forfeiture to the

state, and sale of property of the kind involved in this case which has been used in violation of the game laws. As a rule the statutes have declared nets and like devices which can only be used in violation of law to be public nuisances, and provided for their abatement by their destruction by public officers. The distinction between nets, which, under the laws of the states providing for their destruction, can only be used for an unlawful purpose, and firearms, which, under the laws of this and other states, may be used for many other purposes, innocent and lawful in their nature, is clearly apparent, and has been recognized by our legislature in the act under consideration. In 1, article 3 of this act, the legislature of the state has provided: 'Every net, seine, trap, explosive, poisonous or stupefying substance or device, used or intended for use in taking or killing game and fish in violation of this act is hereby declared to be a public nuisance, and may be abated and summarily destroyed by any person; and it shall be the duty of every such officer authorized to enforce this act to seize and summarily destroy the same, and no prosecution or suit shall be maintained for such destruction: Provided, that nothing in this subdivision shall be construed as authorizing the seizure or destruction of firearms, except as hereinafter provided.' The provisions of this section as to nets and like devices are substantially the same as those contained in the game laws of New York and Wisconsin, heretofore referred to, and with the conclusions of these courts with reference to laws of like nature we have no fault to find. But there is a broad distinction between this section and section 3 under which the plaintiff in error justifies. The legislature has not declared a gun to be a public nuisance and has not ordered its destruction as an abatement of the same. The seizure of the property provided for by this section is evidently intended, not only to put it out of the power of the offending person to carry on the destruction of game by depriving him of the implement of destruction, but also to operate as a penalty or punishment for an unlawful act committed by him. It is of the nature of a common-law forfeiture of goods upon conviction of a crime.

There is a clear and marked distinction between that species of property which can only be used for an illegal purpose, and which, therefore, may be declared a nuisance and summarily abated, and that which is innocent in its ordinary and proper use, and which only becomes illegal when used for an unlawful purpose. We know of no principle of law which justifies the seizure of property, innocent in itself, its forfeiture, and the transfer of the right of property in the same from one person to another as a punishment for crime, without the right of a hearing upon the guilt or innocence of the person charged before the forfeiture takes effect. If the property seized by a game

keeper or warden was a public nuisance, such as provided for in section 1, he had the right under the duties of his office at common law to abate the same without judicial process or proceeding; and the great weight of authority is to the effect that such common-law rights have not been abrogated or set aside by the provisions of the Constitution; if the property is of such a nature, that though innocent in itself and susceptible of a beneficial use, it has been perverted to an unlawful use, and is subject to forfeiture to the state as a penalty, no person has the right to deprive the owner of his property summarily, without affording opportunity for a hearing and without due process of law. The usual course of proceedings in such case has been either, as in admiralty and revenue proceedings, to seize the property, libel the same in a court of competent jurisdiction, and have it condemned by that court, or, as in criminal matters, to arrest the offender, and to provide that upon his conviction the forfeiture of the property to which the offender's guilt has been imputed, and to which the penalty attaches, should take place. These have been the methods of procedure for centuries. No other has been pointed out to us in the brief of the plaintiff in error. We are therefore constrained to the opinion that in so far as the section under consideration provides for the seizure, forfeiture and tansfer of title to property without a hearing upon the guilt or innocence of its owner, it violates the constitutional provisions. Whether or not a forfeiture can be provided for as a punishment for crime under our Constitution is a question not raised or decided in this case."

The *proved illegal use,* to which any device whether termed legal or illegal, is actually put seems to be the test as to whether forfeiture can properly be made to attach to it.

A *punt or swivel gun,* usually deemed an *illegal device,* when operated by one in possession of a hunting license could be *legally used* to take birds and quadrupeds *not protected by law.*

Minnow seines or nets to take *minnows* for one's personal use and not for sale or *landing nets* to secure *angled fish* can be *legally used* by any person *without a license.*

But barring the exception in Section 185, subdivision 8, *no gun of any kind can be legally used* to take wild birds

or quadrupeds, whether protected by law or not, *without a license* and full compliance with all the subdivisions of Section 185.

Such considerations as these have been urged to discount the distinction drawn in McConnell v. McKillip between *nets* and *guns*.

The Nebraska statute, however, provided for a *forfeiture* summary in character and not based upon conviction or confession of guilt, of that which the court held, could not be deemed a nuisance per se and was not declared by statute to be a nuisance.

The gist of these decisions appears to be to uphold and authorize as proper exercises of the police power with reference to the protection of the public property in fish and game:

First. The abatement *without trial or hearing* by *summary forfeiture and destruction,* of devices *used* which may properly be deemed or declared to be *nuisances per se,* such as *illegal devices.* See Section 282 on nets, Section 221 on snares, nets and traps for birds and Section 177–1 on guns not fired at arm's length from the shoulder.

Second. The abatement *without trial or hearing* by *summary forfeiture and destruction,* of devices *used,* made *nuisances by statute* where abatement reasonably or necessarily *involves destruction.*

See the same sections above referred to.

Third. The *forfeiture* to and *disposition of* by, the state, of devices *otherwise legal,* but *illegally used* or used in connection with a violation of the law *whether declared nuisances or not,* upon *conviction,* judgment or *confession* of the *unlawful use.*

In any event, it seems, the offender may test the validity of the exercise of the power upon the issue of *actual use of the device.*

Upon one or two or all three of the above principles, the statutes of practically all the states and all of the Canadian provinces more or less drastically provide for the seizure, confiscation and forfeiture of paraphernalia of all kinds.

The Pennsylvania statute provides for a conditional seizure and sale to satisfy the fine or penalty imposed in case of its non-payment, regardless of whether the offender suffers in addition by imprisonment or not:

"All guns, boats, decoys, dogs, game, and shooting paraphernalia, seized when such arrest is made shall be held subject to the determination of the proceedings instituted. Where the party accused is convicted all game seized shall be forfeited to the Commonwealth, and as soon as may be shall be forwarded to the most convenient hospital, or to a hospital designated by the Secretary of the Game Commission, for the use of the sick or injured therein. Unless the fine and costs are paid, all such seized guns, boats, decoys, dogs and shooting paraphernalia shall be sold at public auction, after advertising the same for five days, by at least five public handbills conspicuously posted in the city, borough, or township wherein the conviction was secured. The sale shall be held by or under the authority of the proper alderman, magistrate, or justice. The cost of such advertising shall be part of the costs of prosecution, and shall be collected as such. Any fund thus arising shall be applied first to the payment of the costs of prosecution, then to the payment of the fine imposed. The remainder, if any, shall be returned to the owner of the property seized. Where game, dogs, boats, decoys or shooting paraphernalia of any description shall be seized, and the owner thereof escapes arrest, and refuses to present himself and make claim to the property, all such game, after the lapse of three days after the seizure, shall be forfeited to the Commonwealth, and shall be sent to the most convenient hospital, for the purpose before indicated in this section. All guns, dogs, boats, decoys, and other shooting paraphernalia thus seized shall be held for a period of ten days; after which time, if the owner thereof fail to appear and defend himself against the charges made, such property shall be sold in the manner prescribed for the sale of seized property after conviction. The fund arising from such sale shall be applied as in the case of the sale after conviction. The fact that imprisonment is suffered by any person convicted of violating any provisions of this act shall not prevent the sale of guns, dogs, boats, decoys, or other shooting paraphernalia of any description, held as the property of the imprisoned party, and the application of the fund thus realized to the payment of the costs and the fine imposed."

The Oregon Statute provides:

"All guns, dogs, boats, traps, fishing apparatus and implements used in hunting or fishing or taking any of the wild animals, birds, or fish of the State of Oregon in violation of the law, shall be declared a public nuisance and shall be forfeited and shall be seized by any member of the State Board of Fish and Game Commissioners, by the State Game Warden, Master Fish Warden, or any deputy or any other officer charged with the enforcement of the game and fish laws of the State, and in case of conviction shall be held, proceeded with and disposed of as may be directed by the State Board of Fish and Game Commissioners; provided, that where deemed practicable, any game seized may be given away for charitable purposes; provided further, that any moneys derived from the sale of any seized guns, dogs, boats, traps, fishing apparatus, or implements shall be deposited in the game protection fund and used for the protection and propagation of any game animals, game birds or game fish of the State."

The Wisconsin Statute declares forfeited to the state as public nuisances:

"Any net of any kind when set, placed or found in any waters where such net is prohibited to be used.

Any seine or other devices, traps or contrivances set, placed, or found in any waters in a manner prohibited by any law relating to such waters.

Any gill net operated in inland lakes without a license, or without a metal tag, as required by law.

Except as authorized by license duly issued, any set line, cable, rope, or line with more than one fishline attached thereto, either directly or indirectly, or any fishline left in the water unattended by the person using the same, whether having one or more hooks attached.

Any building, enclosure, structure, or shelter placed, occupied or used on the ice of any waters in violation of this chapter.

Any screen set in public waters to prevent the free passage of fish, or set in any stream which has been stocked by state authorities.

Any net, spread upon or under the surface of any waters, which shall or might entrap, ensnare, or kill any wild bird.

Except as expressly authorized to be used any trap, snare, spring gun, or other device or contrivance which might entrap, ensnare, or kill any wild animal for which a close season is prescribed in this chapter.

Any boat, together with its machinery, sails, tackle and equipment, or any lamp, or light, or gun used in violation of this chapter.

Any pivot or swivel gun, or other firearm, not habitually held at arm's length and discharged from the shoulder, while the same is in unlawful use.

Any boat, floating raft, box, blind or decoys used or set in season for waterfowl, or in excess of the number authorized to be used, or more than two hundred feet from the weeds, rushes, or other vegetation in which the hunter is concealed.

Any dog found running deer at any time, or used in violation of this chapter.

Any ferret unlawfully used in hunting, catching, taking or killing rabbits."

Under the Wisconsin act, guns, etc., are confiscated every season.

Seizures and forfeitures generally are covered by Section 154 of the CONSERVATION LAW as follows:

> Whenever any *fish, birds, wild animals or parts thereof,* or any *devices used* in taking the same illegally, are found in the *possession* or under the *control* of a person *contrary to law,* said fish, birds, wild animals, or parts thereof, together with the *device or devices* used in taking the same, shall be *seized and confiscated* in the name of the state. The commission may *dispose* of such fish, birds or wild animals or *devices* in such manner as it *deems proper.*
>
> See section 222a.
>
> See section 1899 of the Penal Law; sections 685–691 of the Criminal Code.

This declaration covers essentially all *illegal devices* in reinforcement of Sections 177–1, 282 and 221, for the use of an illegal device is the worst form of *illegal use* of a device.

See section 322 on lobster traps.

The section is broad enough to embrace both animate and inanimate devices and would it seems include not only guns, tackle, boats, artificial stools, etc., but also such aids to taking as dogs, falcons, ferrets and live decoys.

Compare section 169 on powers of game protectors.

Whether any person, but a game protector could lawfully in *good faith* make the seizure on behalf of the state is a query but it would seem justifiable in the case of the animals upon proof of the violation and in the case of paraphernalia on proof of the *illegal use.*

The best considered authorities appear to hold that a public nuisance can be abated by an individual only where it obstructs his private right or interferes at the time with his enjoyment of a right common to many whereby he sustains a special injury.

Lawton v. Steele, 119 N. Y. 237.

On the other hand, the offender having acquired no title to the game so taken and having according to the statute forfeited to the state the paraphernalia used would be in a poor position to hold the person making the seizure, liable.

Compare James v. Wood, 82 Maine, 173, and the discussion under section 169, chapter XVI.

Section 154 based squarely upon *illegal use* of the device evidently contemplates a seizure by *game protectors* for purposes of evidence pending conviction or confession of or judgment in a civil action for, the violation; upon that presupposed basis, the confiscation and forfeiture attach to the *device* on the ground that it constitutes a nuisance by virtue of *illegal use* as well as perhaps a part of the *punishment* for the offense; and to the *game* for the reason that no title to it has been *acquired;* in the event the issue went against the state, no forfeiture could of course legally attach.

Compare section 182, on penalties.

It is stated in Rockefeller v. Lamora, 106 A. D. 348, that the people can have no interest in trespasses upon *posted lands* or *private parks* and to the extent that such holding is true, no forfeiture would attach to paraphernalia used by persons merely violating Part XI of the law.

The rights of the Commission in taking fish are set forth in Section 155:

> The *commission* may take fish with nets at such times and in such manner as it may deem proper for the artificial propagation of fish. The *commission* may also *remove, permit or cause to be removed* from *public or private waters,* fish which hinder or prevent the propagation of game or food fish. Such removal shall be effected by any means and under such regulations as the commission may provide. Fish taken under this section may be *disposed* of and *possessed* under such regulations as the commission may establish. Any person not in charge of a state net who shall handle or take fish while confined therein, or shall fish within one hundred feet of any leader or net in use by the state shall be guilty of a misdemeanor.

Compare sections 176 and 177-2.

It was held by the attorney-general in 1910 that the Commission could not issue a license to third person under the section as it then stood.

See Attorney-General's Report, 1910, page 774.

The permit now provided for should be carried by the person operating under it.

The Commission's powers in the matter of the purchase of fish eggs are governed by Section 156:

> The *commission* may *purchase* from any person, fish eggs, paying for the same in *cash,* or giving in *exchange* or in consideration therefor, a percentage of the young fish hatched or produced at any of the fish hatcheries of the state from the eggs so purchased; and the placing of such young fish in *waters on lands* of such persons shall not be deemed a *stocking* of such waters with fish by the state, or fish from state hatcheries.

Compare section 176 and 177-2.

Compare section 360 as to stocking with state fish.

The Wisconsin act has a provision to the following effect:

"Any person fishing in any of the waters of this state shall deliver, on demand, to the state conservation commission, or its deputies, or

authorized agents all kinds of fish, during the spawning season, for the purpose of being stripped of their eggs and milt; and the person receiving them shall, immediately after having stripped the fish, return them to the person from whom received. Any such person shall permit the commission, or its deputies, or authorized agents to enter any boats, docks, grounds or other places where such fish may be, for the purpose of stripping the same while alive, and shall render such assistance as may be necessary to expedite the work of the mixture of the eggs and milt for proper impregnation."

See section 235 as to netting in the Great Lakes.

The authority of the Commission to acquire beaver, deer, moose, elk, etc., is covered by Section 157:

> The commission may acquire by *gift, purchase or capture* a sufficient number of beaver, deer, moose or elk to stock the Adirondack region, and may care for and yard the same temporarily and liberate them in such region and at such times and places as it deems most conducive to their probable subsistence and increase. Deer may be taken alive at any time by the commission to restock the state's deer parks or to *exchange* for elk or moose.

See section 176.

As to the destruction of certain birds and quadrupeds committing depredations and damage, an important provision properly much less liberal than the acts of some other states is made by Section 158:

> In the event that any species of *birds* protected by the provisions of section *two hundred and nineteen* of this article, or *quadrupeds protected by law,* shall at any time, in any locality, become *destructive* of private or public property the *commission* shall have power in its *discretion* to direct any *game protector* or issue a *permit* to any *citizen* of the state to take such species of birds or quadrupeds and dispose of the same in such manner as the *commission* may provide. Such permit shall expire within *four months* after the date of issuance.

See section 176.

This section does not apply to game birds as defined by Section 211.

See section 219 as to non-game birds.

The Massachusetts statute includes pheasants and the laws of several of the states lay particular stress upon deer.

In a New Hampshire case, Aldrich v. Wright, 53 N. H. 398, involving the killing of minks in close season where they were pursuing and killing geese, it was held generally that the killing of wild animals in close season while they were pursuing and destroying domestic animals was not a violation of the game law.

See section 196 as to hares and rabbits.
See section 199 as to skunks.
See section 220 as to defacement of buildings.
See section 197 as to beaver.

A person operating under this section with a gun must comply with Section 185 on hunting licenses and should be compelled to carry upon his person the permit issued by the Commission.

This permit does not justify a trespass.

See rule 35.

Licenses to collect and possess specimens for propagation, scientific or exhibition purposes are provided for in Section 159:

> The *commission* may issue a license *revocable at its pleasure* to any person, permitting the holder to collect or possess fish, aquatic animals, quadrupeds, birds, birds' nests or eggs for *propagation, scientific or exhibition purposes.* Before such license is issued, every applicant *except a game protector,* duly chartered *museum or society* incorporated for scientific or public exhibition purposes, or an *officer* thereof, must file *written testimonials* from *two* well known scientific men; pay *one dollar* for the license and file a *bond* in the penal sum of *two hundred dollars* with *two* responsible *sureties,* to be approved by the commission, conditioned that he will not violate the provisions of this article or avail himself of the privileges of said license for purposes not herein set forth.

Any one may in a manner not amounting to disturbance of the wild animals photograph them during the close season without a license.

A person operating under such a license with a gun must comply with Section 185 on hunting licenses and should be compelled to carry on his person the license issued pursuant to this section.

This license does not justify a trespass.

See rule 35.
See sections 176 and 219.

The commission may also issue a license *revocable at pleasure* to any person, permitting such person to possess any species of fish, game birds, aquatic animals or quadrupeds, protected by this chapter, for *propagation* purposes, upon payment of a *license fee of one dollar.* The commission may, in its *discretion,* require a *bond* from such person, in such sum as the commission may determine, conditioned that he will not avail himself of the privileges of said license for purposes not herein set forth.

The commission may issue *permits* to enable persons to *ship* fish, aquatic animals, game and quadrupeds lawfully taken and possessed for propagation, scientific or educational purposes, under such regulations as the commission may prescribe.

Fish, aquatic animals, quadrupeds and game lawfully possessed under this section may be sold at any time by any person receiving a license under this section for propagation, scientific, educational or exhibition purposes *only.*

See rule 23.

Persons receiving a license under this section must *report* the result of operation thereunder *annually* to the commission, at the expiration of the license. Such license shall be in force for *one year only* from the date of issue and shall not be *transferable.*

This does not authorize the possession of fish or game taken in close season or distributed by the State.

Subdivision 2 of this section should be availed of by every association organized for or interested in fish and game propagation and protection. Rearing stations for developing purchased fish should be established through co-operation with the Commission and with the farmers

and upon leased land breeding farms for purchased game should be conducted.

See section 176 and 219.

The publication by the Commission of the laws on fish and game is covered by Section 160:

> As soon as practicable after the adjournment of the legislature in each year, the *commission* shall make a compilation of the laws relating to fish and game as amended at the date of such compilation, and properly index the same. Copies of said compilation sufficient in number for the purposes of this section shall be printed in pamphlet form of *pocket size,* under the direction of the clerks of the senate and assembly, and such clerks shall distribute them as follows: *one hundred* copies to each *senator; fifty copies* to each *assemblyman; twenty thousand copies* to the commission for general distribution. It shall be the duty of the *commission* to prepare and issue a *syllabus* of the said laws and to deliver to county, city and town clerks a supply sufficient for furnishing one copy to each person procuring a *hunting or trapping license,* and each such person shall be entitled to *one copy of said syllabus.*

CHAPTER V

HUNTING, TRAPPING AND FISHING LICENSES

The regulations and requirements as to licenses and the exaction of fees therefor in all sovereignties appear from the first to have been conceded to be proper exercises of the police power.

Kyle v. People, 80 N. E. 1081 (Ill.).
State v. Holcomb, 101 Pac. 1072 (Kansas).
Cummings v. People, 211 Ill. 392.

Aside from their *restrictive* and *revenue* features, licenses furnish the basis for the *identification* of persons in case of violation, trespass or mishap.

One of the foremost propositions to be borne in mind with reference to Section 185 on hunting and trapping licenses, is that no birds or quadrupeds or *wild* animals of *any kind* whether *protected by law or not* can be lawfully taken *with a gun* except in compliance with all of the provisions of the license section.

Another principle properly referred to at this point is that the law *technically* prohibits the taking of birds and quadrupeds *protected by law* with any other device than the type of *gun* allowed by statute except where the trapping of fur-bearing animals is permitted or special provision is otherwise made.

See sections 176 and 177, subdivision 1.

Thus, it is claimed, any person especially a minor, under the age of sixteen, is left free, *without the use of a gun,* to hunt or to trap, *without a license,* animals *not*

protected by law provided such animals are otherwise legally taken.

See section 177-1.

The language "*or engage in hunting or trapping*" together with the definitions of *hunting* and *taking* does not appear to overthrow that contention.

See section 185 subdivisions 1 and 5.

Section 185, subdivisions 1–15, provides:

> Subd. 1. No person or persons shall at any time *hunt, pursue or kill with a gun,* any wild *animals, fowl or birds* or *take with traps or other devices* any *fur bearing animals,* or engage in hunting or trapping except as herein provided, without first having procured a *license* so to do, and then only during the respective *periods* of the year when it shall be *lawful.*
>
> See sections 158 and 159.

This prohibition applies to game protectors and to *all persons.*

The Conservation Law contains no exact definition of what constitutes a *gun,* but according to Section 1896 of the Penal Law, it includes *firearms* of all kinds and all guns or instruments in which the *propelling force,* is *spring* or *air.*

Hunting is defined by Section 380, subdivision 27, as follows:

> "Hunting" includes *pursuing, shooting, killing, capturing* and *trapping* game or quadrupeds, and all *lesser acts* such as *disturbing, harrying,* or *worrying,* or *placing, setting, drawing* or *using* any *device* commonly used to take game or quadrupeds whether they *result in taking or not;* and includes every *attempt* to take and every *act of assistance* to any other person in taking or attempting to take game or quadrupeds.
>
> See section 380, subdivision 26, defining *taking* referred to under section 176.

The definition of hunting makes apparently equally liable with the hunter, his companions and those who "but follow to fill up the cry" unless they promptly repudiate any acts of violation by reporting the same to a game protector or the Commission.

Compare People v. White, 124 A. D. 79.

Any minor under the age of sixteen or other person, however, provided he does not use a gun, may, it seems, without a license lawfully accompany any person on a hunt, provided he does not actively participate in the actual *taking* of game.

There is no definition of *fur-bearing animals,* but of the quadrupeds *protected by law,* for which an *open season* is provided, they include *only* the *mink, raccoon, sable, skunk and muskrat.* All quadrupeds not protected by law which have a fur or pelt value might be so classified.

Excluded are all other quadrupeds *protected by law,* especially *beaver,* hares, rabbits, black, gray and fox squirrels.

See section 176.

The application for such license is provided for as follows:

Subd. 2. Said license shall be procured from any *county, city or town clerk* in the following manner, to wit: The applicant shall fill out a blank application to be furnished by the commission through the clerk of each county, city or town, stating name, age, occupation and place of residence and post office address of applicant, also whether a *citizen* of the United States or an *alien* and such other facts or descriptions as may be required by the commission. Said application shall be subscribed and *sworn to* by the applicant before any officer authorized to administer oaths in the state of New York. Any *false statement* contained in such *application* shall render the license *null and void.* Any person who shall make any *false statement* in an application for a license,

shall be deemed *guilty of perjury,* and, on conviction thereof, shall be subject to the penalties provided for the commission of perjury.

There is nothing which requires an applicant to procure his license from the clerk of the town, city or county where the applicant resides.

Any license proved to have been procured in violation of this subdivision is *no license* and entitles the holder to no protection.

Such perjury is punishable by imprisonment for a term not exceeding *ten years.*

See section 1633 of the Penal Law.

The fees for licenses are fixed as follows:

Subd. 3. Said applicant, if a *resident* of the state for *over six months* and a *citizen,* shall pay to the clerk countersigning and issuing the license the sum of *one dollar* as a license fee, together with the sum of *ten cents* as the fee of the county, city or town clerk for issuing such license, and if a *nonresident* of the state, or an *unnaturalized person* or an alien, resident or *nonresident,* shall pay to the clerk countersigning and issuing the license the sum of *ten dollars* together with the sum of *fifty cents* as a fee to the clerk.

The discrimination against the *non-residents* and *aliens* is based mainly upon the philosophy that as between the State and individuals whether citizens resident or non-resident or aliens, the permission to take wild animals which are the property of the State is a privilege extended to them rather than a vested property right.

Acts providing that no person shall at any time hunt with a gun any of the wild animals or birds which are protected during any part of the year without having procured a license are constitutional and a reasonable exercise of the police power for the protection of game.

Cummings v. People, 211 Ill. 392.

A landowner's right to take fish or game on his own land which inheres in him by reason of his ownership of the soil is a property right, subject, however, to the State's ownership of and title to wild animals and its regulations for the preservation and protection of fish and game.

State v. Mallory, 67 L. R. A. 773.

The title to wild game is in the State as against the individual irrespective of the ownership of the land on which it may be found and the State may prohibit or regulate the killing of game and impose greater restrictions upon non-residents than upon residents.

Cummings v. People, 211 Ill. 393.

In some of the states licenses can be issued to minors under the age of sixteen years who are not less than fourteen years and in some cases twelve years of age upon the written consent of parent or guardian.

The laws of all the states have grown severe with respect to *aliens*.

The New Jersey statute prohibits any unnaturalized foreign born person unless he owns real estate of the value of at least two thousand dollars above incumbrances, not only from hunting, but also from owning or possessing a shot gun or rifle of any make and provides for the confiscation of the guns.

The Pennsylvania statute is even more drastic and apparently makes no exception in favor of alien owners of real estate.

The Pennsylvania statute was tested in the case of Commonwealth v. Papsone, 231 Pa. Supreme Court 45, 232 U. S. 138.

The courts upheld the statute as constitutional and in the course of the decision, it was stated:

Nor does the provision of the fourteenth amendment which declares, "No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States," affect this defendant in any way, as he is not a citizen.

An alien while domiciled with us, is entitled to the protection of the laws and owes in return for this protection a temporary and local allegiance which continues during the period of his residence; 2 Am. & Eng. Enc. of Law 64. We legislate primarily for our own citizens in granting the special privileges that are independent of our inherent rights. The alien is prohibited from doing many things to which a native born or a naturalized citizen is entitled. He cannot exercise any political rights whatever, nor be compelled to fill any elective or appointive office. He is not qualified to serve as a juror; or to receive a license to sell liquor, hawk or peddle. A non-resident is not entitled to the benefit of our $300 exemption law. Each state has its own exemption laws for the benefit of its own citizens.

The privilege to hunt game has been limited to our own citizens, and as was said in Presser v. Illinois, 116 U. S. 252; "If the plaintiff in error has any such privilege he must be able to point to the provision of the constitution or statute of the United States by which it is conferred. For as was said by this Court in U. S. v. Cruikshank, 92 U. S. 542, the government of the United States, although it is within the scope of its powers, supreme and beyond the states, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or so secured are left to the exclusive protection of the state."

Whatever one may claim as a right, under the constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States. Whatever the constitution and laws of the United States entitles him to exemption from, he may claim as an exemption in respect to, and such a right or privilege is abridged whenever the state law interferes with any legitimate operation of Federal authority which concerns his interests, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the Federal Constitution or law. But the United States can neither grant nor secure to its citizens, rights or privileges, which are not expressly, or by reasonable implication, placed under its jurisdiction, and all not so placed are left to the exclusive protection of the states.

This defendant is not a citizen of the United States, nor of this Commonwealth. While he is within our jurisdiction he is entitled to the equal protection of the laws, subject to the limitations of the class of which he is a member.

Citizens of other states have no property right which entitles them to fish against the will of the state, a fortiori, the alien from whatever country he may come, has none whatever in the waters, or the fisheries

of the state. Like other privileges he enjoys as an alien, by permission of the state, he can only enjoy as much as the state vouchsafes to yield to him as a special privilege. To him it is not a property right, but is in the strictest sense a privilege or favor.

It was even held in the case of Commonwealth v. Maloof, 49 Pa. Superior Court 581, that the possession of a shotgun or rifle by an alien operating a shooting gallery was a violation of the act.

There is no express provision of the Conservation Law which prohibits the issuance of a license to *minors* under the age of sixteen.

While the Conservation Law contemplates the issuance of a license to an *alien,* there is grave question as to whether any alien can be entitled to be in possession of any gun *afield.*

The question of the use of guns by minors and aliens is covered by Sections 1896 and 1897 of the Penal Law, constituting what has been popularly termed The Sullivan Law, and the text of those sections is set forth here in full as being of both essence and interest in connection with the substance of this work:

1896. Making and disposing of dangerous weapons. A person who manufactures, or causes to be manufactured, or sells or keeps for sale, or offers or gives, or disposes of any instrument or weapon of the kind usually known as a slungshot, billy, sandclub or metal knuckles, to any person or a person who *offers, sells, loans, leases,* or *gives* any *gun, revolver, pistol* or *other firearm* or *any air gun, spring gun* or *other instrument* or *weapon* in which the *propelling force* is a *spring or air* or any instrument or weapon commonly known as a toy pistol or in or upon which any loaded or blank cartridges are used, or may be used, or any loaded or blank cartridges or ammunition therefor to any person under the age of *sixteen years* is guilty of a misdemeanor.

1897. A person who attempts to use against another, or who carries, or possesses, any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, metal knuckles, bludgeon, or who, with intent to use the same unlawfully against another, carries or possesses a dagger, dirk, dangerous knife, razor, stilletto, or any other dangerous or deadly instrument or weapon is

guilty of a misdemeanor, and if he has been previously convicted of any crime he is guilty of a felony.

A person who carries or possesses a bomb or bombshell, or who, with intent to use the same unlawfully against the person or property of another carries or possesses any explosive substance is guilty of a felony.

Any person under the age of sixteen years, who shall have, carry, or have in his possession, any of the articles named or described in the last section, which is forbidden therein to offer, sell, loan, lease or give to him, shall be guilty of juvenile delinquency.

Any person over the age of sixteen years, who shall have in his *possession* in any city, village or town of this state, any pistol, revolver or other firearm of a size which may be *concealed upon the person,* without a written license therefor, issued to him as hereinafter prescribed, shall be guilty of a *misdemeanor,* and if he has been previously convicted of any crime he shall be guilty of a *felony.*

Any person over the age of sixteen years, who shall have or carry *concealed upon his person* in any city, village or town of this state, any pistol, revolver, or other firearm without a written license therefor issued as hereinafter prescribed and licensing such possession and concealment, shall be guilty of a *misdemeanor,* and if he has been previously convicted of any crime he shall be guilty of a *felony.*

Any person not a citizen of the United States, unless authorized by license issued as hereinafter prescribed, who shall have or carry firearms, or any dangerous or deadly weapons in any place at any time, shall be guilty of a misdemeanor, and if he has been previously convicted of any crime he shall be guilty of a felony.

It shall be the duty of any magistrate in this state to whom an application therefor is made by a commissioner of correction of a city or by any warden, superintendent or head keeper of any state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted of or accused of crime, or offenses, or held as witnesses in criminal cases, to issue to each of such persons as may be designated in such applications, and who is in the regular employ in such institution of the state, or of any county, city, town or village therein, a license authorizing such person to have and carry concealed a pistol or revolver while such person remains in the said employ.

It shall be the duty of any magistrate in this state, upon application therefor, by any *householder, merchant, storekeeper* or *messenger* of any banking institution or express company in the state, and provided such magistrate is satisfied of the *good moral character* of the applicant, and provided that no other good cause exists for the denial of such application, to issue to such applicant a license to have and possess

a pistol or revolver, and authorizing him (a) if a *householder,* to have such weapon in his *dwelling,* and (b) if a *merchant,* or *storekeeper,* to have such weapon in his *place of business,* and (c) if a *messenger* of a banking institution or express company, to have and carry such weapon concealed while in the *employ* of such institution or express company.

In addition, it shall be lawful for any magistrate, upon proof before him that the person applying therefor is of *good moral character,* and that *proper cause exists* for the issuance thereof, to issue to such person a license to have and carry *concealed* a pistol or revolver without regard to *employment* or *place* of *possessing* such weapon, provided, however, *that no such license shall be issued to any alien, or to any person not a citizen of and usually resident in the state of New York, except by a judge or justice of a court of record in this state, who shall state in such license the particular reason for the issuance thereof, and the names of the persons certifying to the good moral character of the applicant.*

Any license issued in pursuance of the provisions of this section may be *limited* as to the date of expiration thereof and may be *vacated and canceled* at any time by the magistrate, judge or justice who issued the same or by any judge or justice of a court of record. Any license issued in pursuance of this section and not otherwise limited as to place or time or possession of such weapon, shall be effective *throughout the State of New York,* notwithstanding the provisions of any local law or ordinance.

This section shall not apply to the regular and ordinary transportation of firearms as merchandise, nor to sheriffs, policemen, or to other duly appointed peace officers, nor to duly authorized military or civil organizations, when parading, nor to the members thereof when going to and from the place of meeting of their respective organizations.

There are no fees therefor and the justice may issue the license regardless of the residence of the licensee. The license, it seems, need not be carried on the person.

Report of Attorney-General, 1913, Vol. II, page 579.
See section 169 on Powers of Game Protectors.
See section 1897-a of the Penal Law referred to under section 177-1 chapter VIII.

There appears to be nothing in these sections of the Penal Law which allows or provides for a *license* to, an *alien* to *carry a gun afield,* unless the license referred to in the ninth paragraph of Section 1897 issued by a judge of a court of record as to concealable weapons might be construed to cover non-concealable weapons.

The contention has been made that the Penal Law and Conservation Law should be so amended as to allow an alien upon the production of a license issued under the Penal Law and the presentation of his first naturalization papers, a special form of hunting license, but those most familiar with the alien's ingrained lawlessness as to fish and game and weapons, urge that no alien be permitted to fish or hunt at all, regardless of possible revenue lost.

The disposition of license fees is covered as follows:

> Subd. 4. The license fees above provided for shall be remitted by the city and town clerks on the first Tuesday of each month to the county clerk of the county, with duplicate schedules setting forth the name and residence of each licensee and the serial number of and the amount paid for each license issued. Such license fees, less three per centum thereof which the county clerk is hereby authorized to retain for his compensation, and the license fees received by the county clerk for issuing licenses from his office, less three per centum thereof for such compensation shall belong to the state and shall be remitted to the commission on the second Tuesday of each month with a duplicate of said schedule, and the fees so received by the commission shall be remitted by the commission to the state treasurer as are fines and penalities.

The contents of the license and the powers of the licensee under it are prescribed as follows:

> Subd. 5. Said license shall be issued in the name of the commission, and be sealed with the seal of the county, city or town in which the same is issued and be countersigned by the clerk issuing the same. Every license issued shall be *signed by the licensee in ink* on the face thereof. It shall entitle the person to whom issued to *hunt, pursue and kill game animals, fowl and birds and trap fur bearing animals* within the state at any time when or place where it shall be lawful to hunt, pursue, kill and take such game animals, fowl and birds in this state.
>
> See section 185, subdivision 1.

The hunting license *justifies no trespass upon private lands or waters.* In order that persons afield and par-

ticularly violators and trespassers may be identified, it is provided:

> Subd. 6. No person to whom a license has been issued shall be entitled to take *wild animals, fowl or birds, or trap fur bearing animals* in this state unless at the time of such *taking* he shall have such *license on his person,* and shall *exhibit the same for inspection* to any protector or other officer *or other person* requesting to see the same. Such licensee shall also wear in a conspicuous place on his clothing a *button* to be furnished by the commission through the clerks issuing licenses. Buttons shall be uniform in size and at least two inches in diameter and shall bear a number corresponding to the number of the license delivered to the applicant and such other matter as may be determined by the commission. The *failure* of the licensee at all times while *hunting, trapping or taking* wild animals, fowl or birds, to wear such button in a conspicuous place on his clothing shall cause a *forfeiture of his license.* Such person shall surrender upon demand his license and button to any game protector or other person duly authorized by the commission to receive the same. *No other or additional penalty* than the forfeiture of his hunting or trapping license, as herein provided, shall be suffered by a licensee failing to wear such button. But such forfeiture shall not operate to prevent a person from procuring *another license* as provided in this section. The provisions of this section with respect to the issuance of and the wearing of a button shall take effect *January first, nineteen hundred and seventeen.*

Failure of the licensee to sign, in ink, on the face of the license, it seems, technically renders him liable for the penalty.

See section 182, chapter XVII, on Procedure.

The license must be exhibited for inspection to any person whether protector, hunter, landowner or otherwise, upon request; and inspection means a reasonable opportunity to get from the license the number thereof, the name of the licensee and any other desired data.

The loss of the license on the trip is *technically* no defense.

Although hunting on the highway is prohibited by

Section 222, that fact furnishes no reason for refusing to comply with the above subdivision if the acts of the person upon whom the demand is made, come within the definition of *taking* or *hunting*.

By the Pennsylvania statute, the possession by any person upon the highway of a gun and the dead body of any bird or animal is presumptive evidence that such person is hunting.

The great difficulty is to determine by any definition or rule when a person is taking or hunting animals so as to require him to have upon his person and to *exhibit* his hunting license. He cannot be said to be hunting when the hunt is all done or before it has commenced. He may be merely target or trap shooting afield or shooting obnoxious *domestic* animals. The mere possession in hand of a gun or game, or both, would not necessarily constitute taking or hunting in the sense meant, for such possession *might* be under such circumstances as would render it *absurd* to claim that the person was hunting as for instance on trains or trolleys, in vehicles or on the streets of a city.

Strange to say, it was even held in the case of Cornwell v. Fraternal Accident Association, 6 North Dakota 201, that a person who had started to hunt certain game with a loaded gun at a season of the year when it was unlawful to hunt such game had not by such act committed the offense of attempting to kill such game. But this case arose on the question of whether the plaintiff had by the commission of a violation of the law forfeited his rights under an insurance policy.

It might reasonably be claimed that where a person is afield in a locality where game is likely to be found and equipped for taking it, he is *presumptively* hunting; and substantially to such effect are the statutes of West Virginia, Montana and Saskatchewan.

Regardless of technicalities it is *advisable* to carry the license at *all times* and under *all circumstances*.

However, at best, it must be admitted that whether a person is taking or hunting wild birds or quadrupeds or animals is a *question of fact* under all the circumstances surrounding the particular transaction.

See People v. Jacobs, 165 A. D. 721.

Subd. 7. Such license shall be void after the thirty-first day of December next succeeding its issuance.

As a concession to *actual bona fide occupants of farm lands,* an exception and exemption in their favor are made as follows:

Subd. 8. Provided that the owner or owners of farm land and their immediate family or families *occupying and cultivating the same,* or the lessee or lessees thereof and their immediate family or families who are *actually occupying and cultivating the same,* shall have the right to hunt, kill and take game or trap fur bearing animals on the farm land of which he or they are the *bona fide owners or lessees,* during the season when it is lawful to kill and take the same, *without procuring* such resident license; and further provided that *minors* under the age of *sixteen years* shall not be required to take out a *license to trap fur bearing animals.*

Section 380, subdivision 28, defines immediate family as follows:

"Immediate family" as used in subdivision eight of section one hundred and eighty-five of this chapter includes all persons who are related by blood, marriage or adoption and *domiciled* in the house of the owner or lessee.

This definition excludes guests and employees.

Lessees would appear to include those *working farm lands on shares.*

This exemption appears to hold good as to *citizens* and *aliens* alike provided they are *actual occupants.*

It seems that the exception does not apply to *non-resident* or *non-occupant* citizens.

The exemption does not apply to owners of *exclusive*

hunting *rights* apart from ownership of the farm land itself.

While the Legislature could remove this exemption altogether if it saw fit to do so and while licenses may be exacted from non-resident or non-occupant citizens even when hunting on lands which they own, it has been held in an Arkansas case that the Legislature of a state cannot *prohibit* the *non-resident citizen* owner of lands from hunting on them because of his non-residence alone.

The case of State v. Mallory, 67 L. R. A. 773, arose upon these facts: Mallory, a native of Virginia and a *bona fide* resident and citizen of Tennessee, owned a large tract of land in Arkansas, on which there was good hunting and fishing. The general assembly of Arkansas had passed a statute reading as follows: "It shall be unlawful for any person who is a non-resident of the state of Arkansas to shoot, hunt, fish or trap at any season of the year."

The statute was successfully attacked on the ground that it violated the Fourteenth Amendment of the Constitution of the United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

After referring to the principles of and the authorities on the *quasi* property rights in and to fish and game which vest in the owner of the land on which they are found subject to state regulation, the opinion concurred in by the majority of the judges concludes:

"We therefore conceive it to be settled by authority and by long recognition in the law that the owner of land has a right to take fish and wild game upon his own land, which inheres in him by reason of his ownership of the soil. It is not, however, an unqualified and absolute right, but is bounded by these limitations: That it must

always yield to the state's ownership and title, held for the purposes of regulation and preservation for the public use. These two ownerships or rights — that is to say, the general ownership of the state for one purpose, and the qualified or limited ownership of the individual, growing out of his ownership of the soil — are entirely consistent with each other, and in no wise conflict. The transitory nature of the property renders the benefits so diffusive that all may join in the enjoyment thereof, and for that reason the sovereign holds as the representative of the public so as to regulate and protect the common use. Still the right of the landowner to hunt and fish on his own lands is to that extent a special property right, though subordinate to the other.

"The cases of Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, and Organ v. State, 56 Ark. 267, 19 S. W. 840, are pressed upon our attention with great force and earnestness by the learned counsel for the state, as conclusive of the case at bar. In both those cases the general doctrine of state ownership of wild game and fish is declared, but the language of the courts in those cases, when limited to the question under consideration, as must always be done when testing the soundness of a declared doctrine, is undoubtedly correct, and in no degree inconsistent with the views herein expressed. The cases were almost identical upon the facts, being criminal prosecutions for the unlawful exportation of game out of the state in violation of a statute prohibiting the same. We see no reason whatever in the opinion we now express for receding from the law declared by this court in Organ v. State. On the contrary, we adhere to it. The fullest latitude of power in the state to regulate and preserve the game for the common enjoyment is conceded, and no private property right therein which we hold to exist can retard or obstruct the exercise of that undoubted power. But we have another and altogether different question to deal with in this case — whether finding that landowners have a right to hunt and fish upon their own lands, which is a property right, they are entitled to equal protection in the enjoyment of that right with other landowners, or whether it can be destroyed by a law passed under the guise of a police regulation to preserve the fish and game, and the right of enjoyment prohibited for the sole reason that they are nonresidents of the state. It is not the fact that appellee is excluded from enjoyment of the common right of the citizen to fish and hunt because of his nonresidence that he may complain, but of the exclusion by reason of his nonresidence from such special right which he should enjoy in common with other landowners. Does the curtailment of this right fall within the prohibition of the 14th Amendment? A complete answer to the inquiry is made in the affirmative when the

conclusion is reached that the right denied is a property right. Non-resident owners may be called upon to share the public burdens, and property rights in some instances must yield to the public demands; but the burden must rest equally upon all, and no discrimination in that respect be made against the nonresidents as such. Eldridge v. Trezevant, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345. In so far as the statute under consideration prevents the same enjoyment by appellee of the property right afforded the more fortunate resident landowner, it is a denial of "equal protection of the law," within the meaning of the constitutional guaranty, and cannot be enforced, and the taking away of this right because of his nonresidence is without due process of law."

See the important and interesting references to State v. Mallory in chapter XVIII.

Whether the license exacted from a non-resident could be made so exorbitant as to be prohibitive is a very pointed query in view of the fact that this case has never been interpreted as preventing the requirement of a license from a non-resident owner before hunting on his own land.

Strict prohibition against *alterations* or *transfer* of the license is made:

> Subd. 9. Any person who shall at any time *alter or change* in any *material* manner or *loan or transfer to another,* any license issued as aforesaid, shall be deemed guilty of *forgery in the second degree,* and, on conviction thereof, shall be punishable as provided in case of forgery in the second degree.

Forgery in the second degree is punishable by not to exceed *ten years'* imprisonment.

See section 888 of the Penal Law.
See chapter XVII on Procedure.

Special exceptions to general procedure are made as to the prosecution of both civil and criminal actions with respect to violations of the law as to licenses:

> Subd. 10. All prosecutions for a violation of the provisions of this article relating to *licenses* may be brought by *any person* upon *order* of the commission in the name of the people of the state of New York against any person or persons violating any of the

provisions of this article, so far as it *relates to licenses,* before any court of competent jurisdiction; and it is hereby made the *duty* of all *district attorneys* to see that the provisions of *this section* are enforced in their respective counties, and said district attorneys shall prosecute all offenders on receiving information of the violation of any of the provisions of this section; and it is hereby made the *duty* of all *sheriffs, deputy sheriffs, constables and police officers* to *inform* against and *prosecute* all persons who, there is reasonable cause to believe, are guilty of violating any of the provisions of this section. Nothing herein shall prevent the *commission* from prosecuting persons for violation of this section.

There seems to be no distinction made between civil and criminal actions.

Subd. 11. All moneys recovered in any *penal action* under this chapter, in so far as it relates to *licenses,* shall be remitted by the person or court recovering the same to the *commission; one-half* of the amount recovered in any *penal action* under this section, in so far as it relates to licenses, after all disbursements and expenses in relation to the same, including attorney's fees, shall have been paid, shall be paid to the *person filing the complaint* in such action by the state treasurer on approval of the commission, *unless such person is a regular game protector.*

Subd. 12. All bills for costs, disbursements and attorney's fees in any action or proceeding under this article relating to *licenses* shall be duly verified, presented to the commission, audited by said commission and paid on its approval by the state treasurer to the *person entitled to the same.*

The privileges extended by these provisions can be availed of by *any person* including those upon whom duties are laid except a *regular game protector.* The provisions appear to apply only to actions brought *upon order of the Commission.*

See chapter XVII, on Procedure.

Other provisions as to licenses are as follows:

Subd. 13. The *form* of the license shall be determined and the *license blank* prepared by the commission, and by it furnished through the *county clerks* of the several counties of the state to the *city and town clerks.*

Subd. 14. Clerk's reports. On the thirty-first day of December of each year the city and town clerks shall detach the stubs of licenses issued and forward the same securely attached to a *report of the number issued* and *the amount of license money received* to the *county clerk of the county,* whose duty it shall be to see that proper returns are made to him by all city and town clerks in his county, and to return to the *commission* all such stubs and reports with a *final report recapitulating and tabulating* the total number of licenses of all kinds issued in his county in the calendar year.

Subd. 15. The county clerk shall be reimbursed by the state for *postage and expressage* used in distributing licenses to city and town clerks and for his *monthly reports* required to be made to the commission; his bills therefor shall be presented, audited and paid as herein provided for other payments.

The only present provision as to licenses for angling is that contained in Section 188 requiring a license from non-residents fishing in fresh boundary waters:

Except as hereinafter provided, no person except a *bona fide resident of this state* for at least thirty days immediately prior to such taking, shall take any fish by *angling* in any of the fresh waters under the jurisdiction of the state of New York forming a part of the state *boundary* or through which the state boundary runs or shall engage in fishing in such waters without first having procured a license so to do. Said license shall be procured in the manner provided in section one hundred and eighty-five hereof. The applicant shall pay to the clerk the sum of two dollars as a license fee therefor, together with the sum of fifty cents as a fee to the clerk; provided, however, that a nonresident person under the age of *sixteen years, or a woman,* may take fish, by angling, without obtaining a fishing license. The provisions of section one hundred and eighty-five in so far as the same are applicable to licenses shall apply to all licenses issued under this section. If a resident of this state may lawfully fish in such part of said boundary waters as are not within the jurisdiction of the state of New York without being required to obtain a fishing license from the state or country having jurisdiction over the said waters, then a resident of such state or country may take fish in such part of said boundary waters as are within the jurisdiction of the state of New York without obtaining the nonresident fishing license provided for herein.

A majority of the states and the Canadian provinces have provided for separate or combination hunting and angling licenses, the fees therefor going immediately to a game and fish protection fund.

As a rule, minors up to a certain age, and all women, are exempted from the requirements as to the fishing license.

CHAPTER VI

THE BACKBONE OF THE LAW

SECTION 176

On behalf of the State and its so-called *ownership* of wild animals and in the exercise of the *police power* directed toward the protection of that ownership, the Legislature has prescribed a *blunderbuss, omnibus, blanket prohibition* against the *taking, etc.* of quadrupeds and birds and fish *protected by law* and the *taking* of fish *whether protected by law or not* except migratory food fish of the sea.

See section 177, subdivisions 1, 2.

This general prohibition is here and there *reinforced* by *particular* and *specific* prohibitions.

It is the intent of the law that *no quadruped or bird or fish protected by law* shall be taken, etc., and no *fish,* except migratory food fish of the sea, *whether protected by law or not* can be *taken,* without *violating* the law unless a *specific permission* as to the *particular animal in question* and the *particular manner of taking, etc.,* can be found in some *particular provision of the statute.*

See section 177, subdivisions 1, 2.

In other words for any act such as taking, possessing, buying, selling or transporting with reference to quadrupeds or birds or fish protected by law and *taking* fish whether protected by law or not, excepting migratory food fish of the sea, the person committing such act can be *prosecuted* under Section 176 as well as under a specific prohibitive section and his justification must be,

that by some *permissive* provision of the law the *act* in question is made *legal.*

This fundamental feature of the law upon which too much stress can not be laid was overlooked in the case of People v. Keenan, 80 M. 539, where the court in holding that *blue pike* could be taken with set lines, lost sight of the force of Section 176.

See section 254.

This principle was properly grasped and applied in the case of People v. Chamberlain, 92 M. 720, where it was held that the offense of taking rabbits with a ferret in violation of the specific prohibition contained in Section 196 was properly charged and prosecuted as a violation of Section 176.

See also People v. Bisbee, 90 M. 601, referred to under section 178.

The general prohibition contained in Section 176 is as follows:

> No person shall at any *time of the year, pursue, take, wound or kill, in any manner, number or quantity,* any *fish, quadrupeds or birds protected by law,* or *buy, sell, offer, or expose the same, or any part thereof for sale, transport or have the same in possession* except as *permitted by this article.* (*Nets* except in the marine district, *tip-ups, set and trap-lines, spears, grappling hooks, naked hooks, snatch hooks, eel weirs and eel pots* shall not be used to take *fish* except as *specifically permitted* in this article.) Any person *aiding* in any manner in such prohibited acts shall be deemed to have violated this section.

The general prohibition as far as fish *not protected by law* are concerned does not apply to sales.

See sections 158, 159.
See section 185, as to hunting licenses.
See section 177, subdivisions 1, 2.

This prohibition applies to the State authorities as well as all other persons.

See chapter III, on the powers of the commission as to fish and game.

The provisions of the Conservation Law in all of these respects have been held to govern Indians hunting or fishing upon reservation lands regardless of treaty rights.

People ex rel. Kennedy v. Becker, 215 N. Y. 42.
Ward v. Race Horse, 163 U. S. 504.

"Taking" and "possession" are not necessarily synonymous or convertible terms. For instance, a hunting license is required for the taking of animals with a gun but no hunting license is required for their possession after taking.

Taking is defined by Section 380, subdivision 26 as follows:

> *"Taking"* includes *pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting fish and game* and all *lesser acts* such as *disturbing, harrying or worrying,* or *placing, setting, drawing, or using any net or other device commonly used to take fish and game,* whether they *result in taking* or not; and includes every *attempt* to take and every *act of assistance* to any other person in taking or attempting to take fish or game. A person who *counsels, aids or assists* in a violation of any of the provisions of this article, or *knowingly shares* in any of the *proceeds* of said violation by *receiving* or *possessing* either fish, birds or game shall be deemed to have *incurred the penalties* provided in this article against the person guilty of such violation. Whenever taking is allowed by law, reference is had to taking by *lawful means* and in *lawful manner.*

The provision covers eggs of birds and spawn of fish.

In view of this provision as to *lesser acts* a person in whose company a violation is committed to escape all question of liability should, it seems, immediately inform

a game protector or the Commission and support the prosecution.

Compare People v. White, 124 A. D. 79.

Assuming that a person has complied with the law as to hunting and fishing license, the interpretation of this section next involves a consideration of open and close season.

Close season is defined by Section 380, subdivision 5:

> "*Close season*" is the time during which fish, fowl, birds and quadrupeds *cannot be taken.*

Open season is defined by Section 380, subdivision 4:

> "*Open season*" is the time during which fish, fowl, birds and quadrupeds *may be taken.* If in accordance with the provisions of this article the open season commences or ends on *Sunday,* it shall be deemed to commence or end as the case may be on the *Saturday* immediately preceding such Sunday.

This reference to Sunday is doubtless in deference to Section 2145 of the Penal Law:

"All *shooting, hunting, fishing, playing,* horse racing, gaming or other *public sports,* exercises or shows upon the first day of the week, and all noise *disturbing the peace of the day* are prohibited."

Rifle practice by the National Guard, if in the discretion of its officers necessary, has been held to be no violation of this section.

Attorney-General's Report, 1912, vol. II, page 341.

A violation of this section is *Sabbath breaking,* punishable as provided in Section 2142:

Sabbath breaking is a *misdemeanor,* punishable by a *fine* not less than *five dollars* and not more than *ten dollars,* or by *imprisonment* in a county jail not exceeding *five days,* or *by both,* but for a *second or other offense,* where the party shall have been previously convicted, it shall be punishable by a fine not less than *ten dollars* and not more

than *twenty dollars,* and by imprisonment in a county jail *not less* than *five* nor more than *twenty days.*

These provisions of the Penal Law relative to fishing were interpreted by the Court of Appeals in the case of People v. Moses, 140 N. Y. 214.

The defendant was fishing on Sunday in a *private lake* by *permission of the owner;* it did not appear that he created any *disorder* or that he *disturbed* the peace or that his acts were actually witnessed by any one except the *complainant,* but he was *convicted.* The Court of Appeals stood *three* for affirmance and *three* for reversal and Judge Maynard *decided* the case on the following concurring statement:

"Maynard, J., concurs in the result, upon the ground that there is sufficient evidence *in the record* to support a finding by the trial court that the act complained of was committed under such circumstance as to constitute a serious *interruption of the repose and religious liberty of the community.*"

Whatever arguments may be raised upon the interpretation of the Penal Law in the light of the decision in People v. Moses; regardless of written or unwritten law upon the question; notwithstanding the differences of opinion as to whether Sunday hunting or fishing is *malum prohibitum* (wrong only because prohibited) or *malum in se* (involving moral turpitude); over and above all reliance on the Gospel of St. Mark, Chapter 2, Verses 22–28, it still remains to be considered by those who are careless on this question that each Sunday could be absolutely *excluded from the open season* by the express terms of the Conservation Law or the prohibition could be made a part of the Game Law, as is the case in many of the states and Canadian provinces and formerly was in this State and under such circumstances it would be the *duty* of game protectors, as distinguished from their *privilege,* to enforce the prohibition.

The consideration of close season requires attention to such matters as fish and game closes, Section 153, fishways, Section 251, additional protective orders, Section 152, and the closing of the forest preserve in times of drought, Section 54, subdivision 1.

It involves Section 1906 of the Penal Law and the ordinances of cities and villages, prohibiting the discharge of firearms in public places.

Section 1425, subdivision 10 of the Penal Law makes it a misdemeanor where any person:

"Kills, wounds or traps any bird, deer, squirrel, rabbit or other animal within the limits of any *cemetery or public burying ground,* or of any public park or pleasure ground, or removes the young of any such animal, or the eggs of any such bird, from any cemetery, park or pleasure ground, or exposes for sale, or knowingly buys or sells any bird or animal so killed or taken."

At this point are also properly referred to the provisions of Section 222:

> Game shall not be taken on the lands purchased or condemned by any municipality within the state for the purpose of supplying any municipality *with water* and *protecting* the same from *pollution* and *contamination,* or on any *public highway,* except public highways *other than state or county highways* within the *forest preserve counties.*

The indirect manner in which Part XI of the Conservation Law relative to private parks, posted lands and game refuges affects this question is worth a reference and a reminder in this connection.

The provisions of Section 176 as to the sale of dead birds are bulwarked by Section 180:

> The *dead bodies of birds* belonging to all species or sub-species, *native to this state, protected by law* or belonging to any *family,* any *species or sub-species* of which is *native to this state and protected by law* shall not be sold, offered for sale, or possessed for sale for *food purposes* within this state whether taken *within or without this state,* except as provided by sections *three hundred and seventy-two* and *three hundred and seventy-three.*
>
> Compare sections 219 and 381.

All questions of sale of birds alive or dead are also covered by Section 176.

Possession in certain cases is made presumptive evidence of a violation of Section 176 by the terms of Section 181:

> *Possession* of quadrupeds, birds or fish or a part thereof, during the time when the *taking* of the same in this state is *prohibited,* or when the *possession* of the same after the *close of the open season is not permitted,* shall be *presumptive evidence* that the same was unlawfully taken by the possessor.
>
> Quadrupeds, birds or fish, lawfully taken and possessed in *one part* of the state, may be transported by the taker as provided by section one hundred and seventy-eight of this chapter and may be possessed by the taker in *any part of the state* for the same period of time during which they may be lawfully possessed *at the place where taken.*
>
> See chapter XIV, on transportation.

See the special provisions as to Long Island and any other localities.

For matters of *open season, limit, possession and sale,* see the particular sections dealing with particular quadrupeds, birds and fish.

Alleged gifts of fish or game where in fact a valuable consideration or *quid pro quo passes,* no matter by what *subterfuge,* are in violation of the statute.

Hunting or fishing for *non-salable* quadrupeds, birds or fish, *for hire* where the quarry is turned over to the *employer* is in violation of the law and is expressly made so by the statutes of several of the states

The statute of Ontario provides along such lines as follows:

> "No person shall for hire, gain or reward or hope thereof hunt, kill or shoot any game, or employ, hire or for valuable consideration induce any other person so to do; but this shall not apply to the bona fide employment of any person as guide to accompany a person lawfully hunting or shooting."

There is a similar provision in Maine as to fishing.

For the definition of *quadrupeds and birds protected by law,* see the discussion under Section 177, subdivision 1, and in Chapter VII, on insectivorous birds.

For the definitions concerning *fish* in connection with which the clause in *parenthesis* in Section 176 must be read, see Section 177, subdivision 2.

The questions of transportation, importation and exportation of fish and game are treated in Chapter XIV.

As to all the foregoing propositions, the application of Section 176 and Article V generally as stated in Section 381 must be borne in mind:

> In all cases where *possession, purchase or sale* of fish or game or of the flesh of any quadruped, bird or fish is unlawful, possession, purchase or sale of the *same species* of fish or game or of the flesh of the same species of quadruped, bird or fish *coming from or taken without the state,* shall be deemed to be and is, except as otherwise expressly provided herein, *unlawful.*

This section does not however apply to *transportation.*

There seems to be no prohibition against the baiting of traps used to take fur-bearing animals.

Where the taking *in any manner* is allowed it would not be construed to permit a form of taking which would unnecessarily *endanger* other animals which could not be taken in that fashion.

Poisoning animals would ordinarily be prohibited by Section 190 of the Penal Law.

Commission is synonymous with *Conservation Commission.*

Gender and *number* are to be disregarded in construing the law whenever necessary to carry out its spirit.

Person includes a co-partnership, jointstock company or corporation.

See sections 380–1, 2, 3.

A claim of agency is ordinarily no defense.

See Rule 6, sections 196, 201.

The Minnesota act provides:

The word "person" shall be deemed to include partnerships, associations and corporations, and no violation of any provisions of this chapter shall be excused for the reason that the prohibited act was done as the agent or employe of another, nor that it was committed by or through an agent or employe of the person charged.

CHAPTER VII

SONG, PLUME AND INSECTIVOROUS BIRDS

Wild birds protected by law as distinguished from birds included in *game protected by law* are dealt with in Section 219:

> *Wild birds* other than the *English sparrow, starling, crow, hawk, crow-blackbird, snow-owl, great horned owl, great blue heron, bittern and kingfisher* shall not be taken or possessed at any time, *dead or alive,* except under the *authority of a certificate* issued under this article. No part of the *plumage, skin or body* of any bird protected by this section or of any birds coming from *without the state,* whether belonging to the *same or a different species* from that *native* to the state of New York, provided such birds belong to the *same family* as those *protected by this article,* shall be sold or had in possession for sale. The provision of this section shall not apply to *game birds* for which an *open season* is provided in this article, or birds or parts thereof collected or possessed in accordance with the provisions of section *one hundred and fifty-nine.*
>
> See sections 158, 159, 180 and 181.
> See section 210, as to *game birds.*
> See chapter III, on Federal Laws and Regulations, as to migratory insectivorous birds.

Some of the birds *outlawed* by this section might be deemed to come within the protection of the *federal regulations* on the ground that they are *perching birds which feed entirely or chiefly upon insects.*

The *crow-blackbird* is one instance of this possibility.

The other kinds of *grackle* seem to be protected by both Section 219 and the federal regulations.

While the *redwing blackbird* is not protected fully by

the federal regulations (See regulation 3), it is absolutely protected by Section 219.

There is great variety among the statutes of the several states as to these *outlawed* birds, but those mentioned by Section 219 seem to have met with unanimous and universal condemnation.

The Oregon statute provides that crippled or helpless birds or animals may be killed by any person or may be captured and retained as pets where it can be shown that the taking or killing was for humane purposes or for the purpose of saving the life thereof, *provided* the authorities are immediately notified.

What birds are of the same family or species is a question for ornithologists.

Report of Attorney-General, 1910, page 390.
See section 381.

No wild birds not legally possessed prior to the enactment of the statute (1908), can be kept alive in captivity, except (1) the outlawed birds, (2) exotic or *foreign birds* not of the same *family* or *species* as *native* birds and (3) such as are kept by virtue of Section 159.

See section 175 and chapter XVIII, on Property Rights in Wild Animals.
See People v. Cohen, 91 A. D. 89.
See People v. Bootman, 40 M. 27.
See People v. Fishbough, 134 N. Y. 393.

The possession and sale of live canaries and parrots are expressly allowed by the Missouri statute.

It has been held that a golden eagle could not be kept in captivity.

Report of Attorney-General, 1902, page 179.

Plumage is defined by Section 380, subdivision 22, as follows:

"*Plumage*" includes *any part* of the *feathers, head, wings or tail* of any bird, and wherever the word occurs in this article ref-

erence is had to plumage of birds coming from *without the state* as well as to that obtained *within the state,* but it shall not be construed to apply to the feathers of *birds of paradise, ostriches, domestic fowl or domestic pigeons.*

See Tariff Act, chapter III.

Many of the states require *taxidermists* to procure licenses and subject that business to rigid inspection and regulation.

Section 220 further provides:

Nests of *wild birds* other than the *English sparrow, starling, crow, hawk, crow-blackbird, snow-owl, great horned owl and kingfisher* shall not be *robbed* or *wilfully destroyed* except when necessary to *protect buildings* or *prevent their defacement* or when taken under the *authority of the commission.*

See section 176.
See section 1425 of the Penal Law, subdivision 10.

This section applies to the nests of both *game* and *non-game* birds.

Note that this section does not except the nests of the *great blue heron* and *bittern.*

See sections 158 and 159.

Section 221 declares:

No *wild bird,* or *bird for which a close season* is provided, shall be *trapped, netted or snared,* or, if so taken, *possessed.* No *net, trap or snare* for taking *pheasants, grouse or quail,* shall be set, placed or used where such birds can be taken. Any such *net, trap or snare* is declared to be a *public nuisance,* and may be *summarily abated and destroyed by any person,* and it shall be the *duty* of every *protector* to *seize* and *destroy* any such device.

This section applies to both game and non-game birds.

See section 176.

Antwerp or homing *pigeons* while not strictly either game or non-game birds are protected by Section 218:

No person shall take or interfere with any *Antwerp or homing pigeon* if it have the *name of its owner* stamped upon its *wing*

or tail, or wear a *ring* or seamless *leg band* with its *registered number* stamped thereon, or have any other *distinguishing mark;* nor shall any person *remove* any such distinguishing mark from any such pigeon.

Chapter 107 of the Laws of 1875, which allowed the shooting of pigeons from trap provided that such pigeons after being shot, if still alive, should be immediately killed, was repealed by Chapter 61 of the Laws of 1902.

Such shooting was held not to be cruelty to animals in Commonwealth v. Lewis, 11 L. R. A. 522, but the contrary was held in Walters v. People, 33 L. R. A. 836, and Paine v. Bergh, 1 City Courts Reports 160.

See Ingham on Animals, 537–538.

The shooting from trap of the birds *outlawed* by Section 219 would doubtless be held to be cruelty to animals.

See Penal Law, sections 180–185.

Such shooting of such birds is expressly prohibited by the Iowa law.

CHAPTER VIII

THE TAKING OF GAME PROTECTED BY LAW

SECTION 177, SUBDIVISION 1

In reinforcement of Section 176 is Section 177, subdivision 1, with both its prohibitive and permissive features:

> Game *protected by law* shall only be taken in the day time *after sunrise* and *before sunset* with a *gun fired at arm's length, without rest,* unless *otherwise specifically permitted by this article.* A person may take *birds and quadrupeds,* during the *open season* therefor, *with the aid of a dog,* unless specifically *prohibited* by this article. Any duly organized association for the protection of game may *run field trials for dogs* at any time upon obtaining *written permission* from the Conservation Commission.
>
> See section 185, as to hunting licenses.

The different kinds of "*game*" are defined by Section 380, subdivisions 7, 9, 10 and 8:

> "*Game*" includes *wild game, game protected by law, domestic game* and *imported game.*
>
> "*Domestic game*" includes quadrupeds and birds mentioned in section *three hundred and seventy two.* (See section 372.)
>
> "*Imported game*" includes quadrupeds and birds mentioned in section *three hundred and seventy-three.* (See section 373.)
>
> "*Wild game*" and "*game protected by law*" include all *game* birds as defined and mentioned in section *two hundred and ten,* and all *quadrupeds* for which a *close season* is provided.

See Section 210 and particular sections on quadrupeds. Section 177, subdivision 1, has to do only with *wild game* or *game protected by law.*

In Klieforth v. State, 88 Wisconsin 163, where the statute prohibited shooting in the *night-time,* it was held that it was *day* while there was day light enough to discern a person's face, but this is not so under the Conservation Law nor is the test whether or not the flash of a gun can be seen.

Night-time or *night* includes the time from *sunset* to *sunrise.*

See section 220 of the Penal Law, and section 51 of the General Construction Law.

Day-time therefore excludes *dawn* before sunrise and *dusk* after sunset.

It is all important to note that no game birds whether *waterfowl, shore birds,* or *upland birds* and no *quadrupeds protected by law* unless otherwise specifically permitted by some subsequent section, can be taken *before sunrise* or *after sunset*; they are moreover to be taken only *after sunrise* and *before sunset.*

Actual *sunrise* and *sunset* often cannot be observed because of *topographical* or *weather* conditions, but the exact time of each can be easily determined by reference to any *standard almanac* and a reliable watch.

Emphasis is placed upon the use *only* of a *gun* of the *type* mentioned. This is primarily to exclude the use of the old punt or swivel gun and spring guns and has not been construed *absolutely* to exclude the use of *less* destructive, primitive hand-operated missile weapons such as a bow and arrow, a sling, sticks or stones or the use of hands.

See the definition of *guns* under section 185.

Restrictions are made by some states as to the use of rifles particularly those of high power and it has been urged that the use of high power rifles for hunting, except in the territory where deer may lawfully be taken, be prohibited in this state.

Some of the states limit shot guns to those of ten gauge and a few allow the use of eight gauge guns.

New Brunswick and Pennsylvania prohibit the use of *automatic,* but not the use of *pump* guns and rifles.

In the case of Commonwealth v. McComb, 227 Pa. 377, the Pennsylvania statute was attacked and the court in holding the act constitutional stated:

"It is but a decent respect due to the wisdom, integrity and patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proven beyond all reasonable doubt. A reasonable doubt must be solved in favor of the legislative action and the act be sustained.

The preservation of game and fish has always been treated as within the proper domain of the police power and laws, limiting the season when birds and wild animals may be killed, and had for sale, and prescribing the manner in which they may be taken, have been repeatedly upheld by the courts. The duty of preserving the fish and game of a State from extinction, by prohibiting exhaustive methods of taking it, or the use of destructive instruments as are likely to result in the extermination of the young as well as the mature, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.

It is within the province of the Legislature to prescribe the methods or instruments that may be used in taking game or fish and it is not unconstitutional for the Legislature of the state to forbid the use of a specially made gun such as the automatic. Nor are the courts concerned about a technical though trifling interference with the pleasure of a hunter, or the property interest of a gunmaker in deciding a question of public interest and welfare.

The swivel gun referred to in the Act of 1897, is described as a small cannon, revolving to a swivel so that it may maim or kill a number of game at a single discharge, but it is always under the direction and control of the operator. The automatic gun mentioned in this act is described as 'one that is fired from the shoulder, and the recoil developed by the exploded cartridge ejects the shell, cocks the hammer, and feeds in a fresh cartridge from a magazine into the chamber of the gun,' so that all that is required to discharge it is to pull the trigger. It is not necessary to justify the wisdom of the legislative enactment; the whole question has so frequently been the subject of discussion in the Legislature and Courts, and we must accept it as a result of their deliberations, that the automatic gun is not a proper weapon for the killing of game, within this Commonwealth. Nor are the Courts con-

cerned about a technical though trifling interference with the pleasure of a hunter, or the property interest of a gunmaker. Indeed, the source of the police power, as to game flows from the duty of the State to preserve for its people a valuable food supply."

In connection with the decision in this case however it would occur to the law-abiding sportsman that the type of gun used makes little difference provided its user does not exceed the limit.

The New Jersey statute prohibits the use of a shot gun or rifle holding more than two cartridges at one time or which may be fired more than twice without reloading.

The Virginia act prohibits the use of more than one gun by any person hunting waterfowl.

The use of silencers is prohibited in some of the states.

The Penal Law, Section 1897a, provides as to silencers:

"A person who sells or keeps for sale, or offers, or gives or disposes of, or who shall have or carry concealed upon his person any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or other firearms to be *silent* or intended to *lessen or muffle* the noise of the firing of any gun, revolver, pistol, or other firearms shall be guilty of a felony, punishable by imprisonment for not more than five years.

This section shall not apply to the regular and ordinary transportation of any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol, or other firearms to be silent or intended to lessen or muffle the noise of the firing of any gun, revolver, pistol, or other firearms, as merchandise, nor to sheriffs, policemen, or to other duly appointed peace officers, nor to duly authorized military or civil organizations, nor when parading, nor to the members thereof when going to and from the place of meeting of their respective organizations in practice."

See Section 192 prohibiting the use of dogs in hunting deer and Section 193 as to the use of dogs for other purposes in the Adirondack Park, Catskill Park and forests inhabited by deer.

There is nothing which allows the training of a dog afield during the *close season* except under the auspices of a duly organized association for the protection of game upon written permission from the Commission.

A provision similar to that made by many of the states fixing a certain period of from two to three weeks prior to the open season, for instance, from August 15th to September 1st, during which the owner of a dog or a licensed trainer without carrying a gun may take him afield for trial has been suggested.

The use of dogs in hunting protected game is altogether prohibited by the statute of South Dakota.

The Pennsylvania statute declares that any dog running at large during the close season and disturbing game may be killed by any person and shall be killed by a protector, unless the dog wears a collar and tag identifying the owner, and even such a dog, if found at large after notice to the owner, may be killed. The only exception made is that dogs accompanied by or under the control of their masters may be trained upon game birds and game animals except elk and deer from September 1st to March 1st, so long as no injury is inflicted upon such animals or birds.

It has been contended that the known owner or custodian of any dog thus collared and tagged should expressly be made liable by the Conservation Law for the dog's acts while running loose and disturbing game during the close season, as is the case in New Jersey and that ownerless dogs so running loose should be despatched however hard that may be upon the dog.

Compare section 193.

It is a fair question whether the owner of a dog is not now liable for the acts of such dog running loose particularly after knowledge or notice and the safest course is to keep hunting dogs at home except when afield under

the direction of responsible persons, in order to avoid any possibility of penalty.

All that has been said of dogs is doubly true of cats.

The statutes of some states put bounties on certain quadrupeds not protected by law.

The wearing of masks by persons hunting is prohibited by the Ontario statute.

Compare section 710 of the Penal Law.

The only restrictive provision as to the use of automobiles is contained in Section 222-a:

> No person while in an *automobile* shall take game; nor by aid or use of any *light or lights* carried thereon or attached thereto.

The Wisconsin statute includes motor cycles and all other vehicles.

No quadrupeds protected by law can be taken with traps except as particular sections permit it specifically or under the clause "in any manner."

Some of the states require trappers to visit their traps and to take any caught *animals* therefrom at least *once* in every *twenty-four hours.*

The definitions of "*taking*" and "*hunting*" do not include the term "*attract*" and for that reason there appears to be no restriction against advance feeding or baiting of wild animals unless forbidden by specific prohibition as in the case of deer.

See section 190, subd. 3.

Such acts are however generally prohibited by the statutes of some of the states.

CHAPTER IX

GAME QUADRUPEDS AND FUR-BEARING ANIMALS

Quadrupeds protected by law or those for which a close season is provided can be taken only as permitted by Section 177, subdivision 1, except where special provision is otherwise made.

See sections 176, 185, 158 and 159.

They may be taken from their usual haunts wherever found except where special prohibition is made, such as against taking deer while in the water or digging animals from holes.

Such quadrupeds as bears, wolves, foxes, woodchucks, weasels, red squirrels, chipmunks and the like being unprotected by law may be taken in any manner and under any circumstances not dangerous to other game.

One of the first permissive sections as to quadrupeds is Section 200 on the *propagation of fur-bearing animals:*

> All species of fur-bearing animals protected by this chapter may be *kept alive in captivity* at all times for purposes of *propagation and sale only,* provided a *license* so to do shall first have been obtained from the commission. Every person obtaining such license shall pay the commission the sum of *five dollars* as a license fee. No fur-bearing animals shall be thus kept which are taken *wild* during the *close season* for such fur-bearing animals, and such fur-bearing animals shall not be disposed of in any way during the *close season.*
>
> See section 159.

Section 200 must be read with Rules 27–30 inclusive:

27. Each application for a license to engage in the business of propagation and sale of fur-bearing animals shall be accompanied by a satis-

factory *bond* to the people of the state in the penal sum of *five hundred dollars,* conditioned that the applicant will not keep such fur-bearing animals which are taken wild during the close season for such fur-bearing animals and will not dispose of such fur-bearing animals in any way during the close season; that he will observe all of the prohibitions, restrictions and conditions imposed by the terms of the license to be issued and the provisions of section 200 of the conservation law.

28. If said bond is approved, and upon payment to it of a fee of *five dollars,* the commission shall issue to the applicant a license permitting him to keep fur-bearing animals under the provisions of said section for *one year* from a time therein stated, but no such license shall be issued to take effect during the *close season.*

In order to authorize the continuance of such licenses thereafter, the licensee shall *renew said bond* annually, and the fee for renewal shall be *five dollars.*

29. No person purchasing fur-bearing animals from such licensee shall have them in possession during the *close season,* even though purchased during the *open season,* unless such person shall have a *license under section 200* of the conservation law.

See section 159.

30. Any person violating the provisions of such bond, any rule or regulation of the commission or any of the provisions of section 200 of the Conservation Law shall forfeit his license and shall be denied the privilege of giving another bond.

DEER

Game Quadruped

There is no *statewide open season* for deer.

The open season limited as to territory is prescribed in Section 190:

1. Open season

Only *wild deer* having horns not less than *three inches* in length may be taken from *October first* to *November fifteenth,* both inclusive, and in *wholly inclosed deer parks* and in the counties of Clinton, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Oneida, Oswego, Saratoga, Saint Lawrence, Warren and Washington.

See section 192.

Does and fawns are protected. The socalled *"buck law"* has been condemned because of its failure to pro-

tect the doe, many of them being shot by mistake and left to rot in the woods, or to replenish the supply of deer, leaving too many does in proportion to the number of bucks. On the other hand, it has been vigorously supported because of its claimed increase of the number of deer and especially its tendency to reduce the number of casualties from shooting during the deer season. These arguments and data in support of them are well set forth in the Saskatchewan Report of 1914, pages 15–19.

2. Limit

A person may take *two* such wild deer in an open season, and the taker may *transport,* when accompanying the same, or possess for that purpose *one carcass or part thereof* at any one time, or he may transport the same as provided by *section one hundred and seventy-eight.*

See section 178, chapter XIV.

3. Manner of taking

Wild deer may be taken only on *land.* No *jacklight* or other *artificial light, trap, saltlick,* or other *device to entrap or entice deer,* shall be used, made or set, nor shall any deer be taken by aid or use thereof. Deer shall not be hunted, pursued or killed by any *dog of either sex.*

Deer upon the land may be shot from boats upon the water.

Each person engaged in hunting deer with a dog is separately liable for the penalty.

People v. White, 124 A. D. 79.

The above section contains the main exception to the permission granted by Section 177, subdivision 1, to take game with the aid of a dog.

See section 193.

§ 191. Possession of wild deer or venison

Wild deer or venison lawfully taken may be possessed from *October first to November twentieth,* both inclusive. A person may possess such deer or venison from *November twenty-first* to *February first,* both inclusive, provided a *license* so to do shall first be obtained from the commission. Every person obtaining such license shall pay to the commission a fee of *one dollar.* Deer

or venison so possessed shall at all times be *marked or tagged* in such manner as the commission may provide. If possession of deer is obtained for transportation *after October first* and before midnight of *November sixteenth,* it may lawfully remain in the possession of a common carrier the additional time necessary to *deliver* the same to its destination. Possession of deer or venison, or any part thereof, from *November sixteenth to February first,* both inclusive, shall be *presumptive evidence* that the same was unlawfully taken.

See section 181 on presumptive evidence.
See section 372 on breeding, sale and transportation of domesticated deer.

The philosophy of this section like others on possession after open season is well set forth in the case of People v. Gerber, 92 Hun, 554.

Rule 31 on the possession of venison reads as follows:

Applications for a license to possess venison during any calendar year, pursuant to the provisions of section 191 of the Conservation Law, must be made and the license granted on or before *November 20.*

The applicant shall at the time of filing his application for a license pay to the Commission a license fee of *one dollar* and such license shall be granted only to a person holding a *hunting and trapping license.*

A license shall permit the person killing the deer to possess the same for *consumption* and not otherwise, from *November 21* to *February 1,* both inclusive, provided that said deer or venison shall be *tagged* as follows:

Each quarter of said deer shall be tagged with a tag to be furnished by the Commission.

The Commission will also furnish with the license *duplicate coupons* which shall be filled out, signed and sworn to by the licensee; one coupon shall be *attached to the deer* and one coupon shall be *filed with the Commission* on or before November 24th of the same year; the tags shall be fastened and locked to each quarter and the coupon attached to said deer on or before *November 24th* next succeeding the date of killing.

Wild venison cannot be sold.

Wild deer are defined by Section 380, subdivision 11:

"*Wild deer*" includes all deer not *lawfully* held in *private ownership* in a *preserve wholly enclosed by a fence* as provided by section *three hundred seventy-two* hereof.

§ 192. Deer, open season, special.

Only wild deer having horns not less than *three inches* in length may be taken in Ulster county and in the towns of Neversink, Cochecton, Tusten, Highland, Lumberland, Forestburg, and Bethel, and all that section of the towns of Mamakating and Thompson, lying south of the Newburgh and Cochecton turnpike, in Sullivan county, and the town of Deerpark in Orange county, from *November first to November fifteenth,* both inclusive.

§ 193. Dogs to be licensed

No *dog of either sex* shall be *taken into* the Adirondack or the Catskill Park, or into *forests inhabited by deer,* or *harbored* or *possessed therein,* unless the owner shall first obtain a *license* for such dog from the commission, and pay a fee of *one dollar* therefor. The license shall be issued by the commission in its discretion and under such rules and regulations as it may deem advisable and shall terminate with the *calendar year* in which issued. A *metal tag* marked with a number corresponding to the number of the *license* shall be issued with the said license, and shall be attached to a collar and shall be at all times *worn by the dog so licensed.*

Dogs of either sex, *licensed* as herein provided, *shall not run at large* in the Adirondack or the Catskill Park or *forests inhabited by deer, unaccompanied by the owner.*

Any act committed or done contrary to the provisions of this section, or the neglect to perform any duty provided therein, shall be deemed a violation thereof for which the *owner* shall be liable.

Any person *may* and it shall be the *duty* of every game protector to *kill any dog of either sex pursuing or killing deer,* and no action for damages shall be maintained against the person for such killing. The prohibitions of this section shall not apply to *dogs upon lands actually farmed or cultivated by the owner* of such dog or within the limits of an *incorporated village or town, or a community* having a resident population of not less than one hundred individuals.

Section 380, subdivision 29, provides:

For the purposes of this chapter a *dog* shall be deemed to be *"at large"* when it is outside of the owner's residence or a fenced enclosure immediately surrounding or adjacent to such residence.

In an action for the penalty it is not necessary to prove *intent to violate* the statute. Prior to the amendment of 1916, it was also held that no person, even on his

own lands situated within the defined territory, could hunt any quadrupeds or birds with a dog.

People v. Redwood, 140 A. D. 814.

Barring the exception now provided for and the compliance with the license requirement, the same proposition still holds true.

WILD MOOSE, ELK, CARIBOU AND ANTELOPE

Game Quadrupeds

§ 194. Wild moose; elk; caribou and antelope

There shall be *no open season for wild moose, elk, caribou and antelope;* but they may be brought into the state for breeding purposes. The flesh or any portion of any such animal may be possessed or transported by the owner thereof, provided such animal was killed by the owner thereof, in a *private park within the state,* and further provided that the provisions of section *three hundred and seventy-two* in so far as the same are applicable are in all respects complied with.

Successful efforts to develop herds of these animals in the forest preserve are being carried on.

See sections 372 and 373 on the breeding, sale and transportation of these animals.
See sections 158 and 159.

BLACK, GRAY AND FOX SQUIRRELS

Game Quadrupeds

1. Open season

Black, gray and fox squirrels may be taken and possessed from *October first* to *November fifteenth,* both inclusive, except on Long Island, where they may be taken and possessed from *November first* to *December thirty-first,* both inclusive. No person shall take *black, gray or fox squirrels* within the *corporate limits of any city or village.*

2. Limit

A person may take *five* such squirrels, either all of one kind or partly of each, *in one day.*

See ordinances of cities and villages.
See section 222.
See section 1425, subdivision 10, of the Penal Law.

Red squirrels and chipmunks are not protected, but the *white* squirrels come within the statute if in fact they are *albino* black, gray or fox squirrels.

Squirrels cannot be sold.

There is no provision for their possession after the close of the season as in the cases of venison, waterfowl, upland birds and shore birds.

See section 181.
See sections 158 and 159.

HARES AND RABBITS
Game Quadrupeds

§ 196. 1. Open season

The open season for *varying hares* and *cottontail rabbits* shall be from *October first* to *January thirty-first,* both inclusive, except on Long Island where the open season for varying hares and cottontail rabbits shall be from *November first* to *December thirty-first,* both inclusive. The use of *ferrets* is at all times prohibited, except that the commission may by *resolution permit ferrets* to be used in particular counties. The *owners or occupants of inclosed or occupied farms and lands* or a person *duly authorized in writing* by such owner or occupant may take *except by use of ferrets* in any manner at any time and in any number varying hares and cottontail rabbits which are *injuring their property.* Except in counties where the use of ferrets is permitted by the conservation commission the *possession of ferrets afield* shall be *presumptive evidence* of their illegal use.

The counties in which the use of ferrets is by resolution allowed are determined from year to year by the Commission.

In Vermont the use of ferrets except to drive hares and rabbits from holes to be *shot at with a gun,* is prohibited. Wild hares and rabbits taken for the reason that they are injuring property if taken during the close season, or if taken during the open season other than in compliance with Section 177, subdivision 1, cannot be used or disposed of for food purposes.

There is no provision for the possession of hares and rabbits after the close of the season.

See section 181.
See sections 158 and 159.

2. Limit

A person may take *six* varying hares or cottontail rabbits either all of one kind or partly of each in *one day.*

3. Sale

Varying hares and *cottontail rabbits* may be *bought and sold* during the *open season* for the taking thereof and when brought from *without the state,* may be *bought and sold at any time* and in any number.

4. Breeding

Varying hares and cottontail rabbits when bred in captivity may be bought and sold for food purposes during the close season therefor, provided a license so to do shall have first been obtained from the commission, upon the payment to it of a license fee of five dollars a year. Varying hares and cottontail rabbits so bred may be bought and sold for food purposes during the close season, provided the same shall first have been tagged with an indestructible tag or seal which shall be supplied by the commission under such rules and regulations as it deems advisable.

See Protective Orders.

It is not necessary in an indictment or information to negative the force of the exception or proviso. The exceptions are matters of affirmative defense.

People v. Chamberlain, 92 M. 720.

BEAVER

Fur-bearing Animal

§ **197**. No person shall take or possess *beaver* at any time or molest or disturb any wild beaver or the dams, houses, homes or abiding places of same, except as permitted in section *one hundred and fifty-eight.*

See sections 159 and 200.

MINK, RACCOON AND SABLE

Fur-bearing **Animals**

§ **198.** *Mink, raccoon,* and *sable* may be taken either in the *daytime* or *at night* and *in any manner* and possessed from *November tenth* to *March fifteenth,* both inclusive.

See sections 158, 159 and 200.

There is no express provision for the possession of pelts after the close of the season although those lawfully possessed may be bought and sold at any time.

See sections 179 and 181.

SKUNK

Fur-bearing Animal

§ **199.** *Skunk* may be taken either in the *daytime or at night and in any manner,* but they shall not be taken from *holes or dens by digging, smoking or the use of chemicals,* and they may be possessed from *November tenth* to *February tenth,* both inclusive. *Skunks* which are *injuring property* or have become a nuisance may be taken *at any time in any manner.*

See sections 158, 159 and 200.
See sections 179 and 181.

Skunks taken on the ground that they are injuring property or have become a nuisance may be taken by *digging or the use of chemicals* during either the *open or close season,* but the *pelts* of skunks, *so taken* shall not be possessed or *sold.*

The pelts of skunks taken generally in any manner on the ground of *nuisance* during the close season cannot be sold, but they may be taken by the owner of the property in question or any person whom he authorizes.

See People v. Chamberlain, 92 M. 720, on matters of affirmative defense.

MUSKRAT

Fur-bearing Animal

§ **201.** *Muskrat* may be taken *in any manner,* except as herein prohibited, *day or night,* and possessed from *November tenth* to

April twentieth, both inclusive. *Muskrat houses* shall not be *molested, injured or disturbed at any time.* The taking of muskrats by *shooting is prohibited.*

See sections 158, 159 and 200.
See sections 179 and 181.

This prohibition as to shooting muskrats is the only exception to Section 177, subdivision 1, as to taking game protected by law *with a gun.*

As a general proposition, it has been held justifiable in defense of and to preserve property to kill wild fur-bearing animals protected by statute when the killing is done under a reasonable necessity.

2 Cyc. 420.
Ingham on Animals, 571.

But the pelts of such animals so killed during close season cannot be sold.

LAND TURTLES

Classed as Quadrupeds

§ 202. *Taking, killing or exposing for sale* of all land turtles or tortoises, including the *box turtle and the wood turtle,* is hereby *prohibited.*

The prohibition of this section does not apply to the common *mud or snapping turtles* nor does it apparently cover the common *painted tortoise.*

CHAPTER X

GAME BIRDS

See Federal Regulations

Game birds can be taken only in compliance with Sections 176 and 177, subdivision 1.

They may be taken in compliance with law from their usual haunts and wherever found except where particular permissive sections restrict the circumstances of taking in that respect as for instance in the case of *waterfowl.*

See section 211.

For the purposes of the Conservation Law, the following *only* are considered *game birds* as defined in Section 210:

The anatidae or water fowl, commonly known as geese, brant, swans and river and sea ducks;

The rallidae, commonly known as rails, American coots, mud hens and gallinules;

The gallinae, or upland game birds, commonly known as wild turkeys, grouse, prairie chickens, pheasants, partridges and quail.

The limicolae, or shore birds, commonly known as woodcock, snipe, plover, surfbirds, sandpipers, tatlers and curlews.

Compare Federal Regulations.

ANATIDAE OR WATER FOWL

See Federal Regulations

See sections 290 and 291, as to dams on the inland waters of the state.

§ 211. 1. Open season

Water fowl, wild and domestic, may be taken from *September sixteenth* to *January tenth*, both inclusive. They may be possessed from *September sixteenth* to *January fifteenth,* both inclusive. There shall be no open season for woodduck and swan.

The Federal Regulation 7 fixes the open season on water fowl, including *coots* and *gallinules* from September 16th to December 30th, inclusive, except on Long Island and restricts *taking,* but not *possession.*

See section 212.

2. Limit

A person may take during the open season, not to exceed *twenty-five water fowl* in the aggregate of all kinds in one day. Whenever *two or more persons* are occupying the same *boat, battery or blind,* not to exceed *forty water fowl* in the aggregate of all kinds, may be taken in one day by such persons.

The Federal regulation prescribes *no limit.* Persons *walking up* water fowl instead of using boat or blind may take *twenty-five* each in a day.

The Ontario act provides that no person shall take more than *two hundred wild ducks* in *any one year.*

The establishment of a *day* limit of not to exceed fifteen water fowl to *each person* as is the case in Massachusetts on *black ducks* and of a *season* limit of not to exceed *two hundred* water fowl has been urged.

3. Manner of taking

Water fowl may be taken during the open season from the *land,* from a *blind or floating device used to conceal the hunter* (other than a sail or power boat) from a *rowboat,* when the same is within *fifty feet of the shore or a natural growth of flags* or in *pursuit of wounded birds. Flocks of ducks* shall not be *pursued in fresh water* so as to *drive them away* from any neighborhood.

No provision of the law has been subject to more discussion and evasion than subdivision 3 of Section 211.

There is no definition of *land,* but land cannot be construed to include ice or *artificial* as distinguished from *natural* formations of any kind resting or reaching more than fifty feet from shore or a natural growth of flag, if

any hide or device to conceal the hunter exclusive of clothing is used.

The shooting from boats under power or sail is absolutely prohibited and shooting from a rowboat propelled by oars is limited to the *fifty-foot from shore* mark except when in *bona fide pursuit* of *crippled water fowl.*

There is no prohibition against acts committed by a person *on land* tending to *scare up* water fowl provided the acts are done between *sunrise and sunset.*

The Wisconsin act prohibits the use by one person or two or more persons acting together, of more than twenty-five decoys the farthest out to be not more than two hundred feet from the hide or blind.

There is nothing in the Conservation Law which *expressly permits* the use of either live bird or artificial *decoys.* But the use of decoys and their presence in the water before open season and between sunset and sunrise have not been questioned. Nor has *holding a place* with decoys been challenged as a prohibited lesser act.

Use of decoys has been claimed to constitute *" attracting "* rather than *" taking."*

WATER FOWL ON LONG ISLAND

See Federal Regulations

1. Open season

Water fowl on Long Island and the waters adjacent thereto may be taken from *October first* to *January tenth,* both inclusive.

2. Manner of taking

Water fowl may be taken by aid of any floating device other than sailboats or power boats, at *any distance* from shore on Long Island Sound, Shinnecock, Gardiner and Peconic bays, during the open season therefor, and except from *October first to October nineteenth,* both inclusive, in Great South Bay west of Smith's Point and east of the Nassau–Suffolk county line.

Federal Regulation 7 fixes the open season as to *water fowl* on Long Island from *October 1st* to *January 15th,* inclusive.

RALLIDAE

See Federal Regulations

§ 213. 1. Open season

Rails, American coots, mud hens and *gallinules* may be taken and possessed from *September sixteenth* to *December thirty-first,* both inclusive.

2. Limit

A person may take during the open season not to exceed *fifteen* of such birds in the aggregate of all kinds in one day. Whenever *two or more persons* are occupying the same *boat* or *blind,* not to exceed *twenty* of such birds shall be taken in the aggregate of all kinds in *one day* by such persons.

The Federal Regulation and the Conservation Law coincide on *coots* and *gallinules,* but on other *rallidae* the Federal Regulation fixes the open season from *September 1st* to *November 30th,* inclusive.

Rallidae cannot be possessed after the close of the season.

The restrictions of Section 211, subdivision 3, do not apply to the hunting of *rallidae.*

GALLINAE OR UPLAND GAME BIRDS

Section 214 provides as to upland game birds as follows:

Upland game birds may be *taken* as follows, and when so *taken* may be *possessed* during the *open season therefor* and for an *additional period of five days* next succeeding the said open season:

1. Quail

There shall be *no open season for quail* before *October first, nineteen hundred and eighteen.*

2. Grouse or partridge

October first to *November thirtieth* both inclusive. A person may take not to exceed *four* grouse or partridge in *one day* and *twenty* in the *open season.*

Grouse are defined by Section 380, subdivision 12:

"*Grouse*" includes *ruffed grouse, partridge* and every member of the *grouse family.*

This definition would include *capercailzie, ptarmigan, spruce grouse, blackcock,* etc., which might reach this State from Canada, New Hampshire or elsewhere.

3. Wild pheasants

On the *last two Thursdays* in the month of *October* and the *first two Thursdays* in the month of *November* and possessed during the period of time between the first open Thursday in October and the last open Thursday in November, inclusive. Only wild *male* pheasants may be taken. A person may take and possess not to exceed *three* wild male pheasants in the open season.

The introductory statement as to possession after close season governs subdivision 3 in that respect.

See *Protective Orders* in force in the various counties of the State. *Pheasants* are defined by Section 380, subdivision 19:

"Pheasants" includes *Hungarian dark-necked pheasant, ring-necked,* commonly called *English, Mongolian* or *Chinese pheasant.*

Silver and *golden* pheasants are not included. It has been contended that the taking of pheasants should be allowed from the 15th of October to the 15th of November and that if not to exceed five should be fixed as the season limit, there would be no more pheasants taken than are killed as the statute now stands.

4. Partridge

There shall be *no open season* for *Hungarian* or *European gray legged partridge.*

§ 215. Upland game birds on Long Island, special

Quail, pheasants, and *grouse* may be taken on *Long Island* from *November first* to *December thirty-first,* both inclusive. A person may take not to exceed *ten* quail, *six* male pheasants and *four* grouse in any *one day* and *fifty* quail, *thirty-six* male pheasants and *twenty* grouse, in the open season on Long Island.

LIMICOLAE OR SHORE BIRDS

See Federal Regulations

Section 216 provides as to shore birds:

Shore birds may be taken as follows, and when so *taken* may be *possessed* during the *open season therefor* and for an *additional period of the five days* next succeeding the said open season:

1. Woodcock

October first to *November fifteenth,* both inclusive. A person may take not to exceed *four* woodcock in one day and *twenty* in the open season.

Federal Regulation 7 fixes the open season on *woodcock* from *October 1st* to *November 30th,* inclusive.

2. Snipe, plover, surfbirds, sandpipers, tatlers and curlews

September sixteenth to *November thirtieth,* both inclusive. A person may take not to exceed *fifteen* shore birds in the aggregate of all kinds in *one day.* Whenever *two or more persons* are occupying the same *boat* or *blind* not to exceed *twenty-five* shore birds may be taken in the aggregate of all kinds in one day by such persons.

Federal Regulation 7 fixes the open season on *black-breasted* and *golden plover* and the *greater and lesser yellowlegs* from *August 16th to November 30th,* inclusive; and on *jacksnipe* or *Wilson snipe* from *September 16th* to *December 31st,* inclusive.

By Federal Regulation 4 a *closed season* is continued until *September 1st, 1918,* on *all shore birds,* except *black-breasted* or *golden plover, Wilson snipe* or *jacksnipe, woodcock* and the *greater and lesser yellow legs.*

Wilson snipe and *English* snipe are deemed *identical.*

The Federal Regulations *protect absolutely* until *September 1st, 1918,* all shore birds *not expressly excepted* and it is important to remember that this federal protection covers particularly the *smaller shore birds,* the *killdeer* and *upland plover.*

The restrictions of Section 211, subdivision 3, do not apply to the hunting of *shore birds.*

Persons *walking up* shore birds instead of shooting from blind or boat are entitled to fifteen birds each in a day.

§ 217. Shore birds on Long Island, special

Shore birds may be taken on Long Island as follows:

1. Woodcock

October fifteenth to *November thirtieth,* both inclusive.

2. Snipe, plover, surfbirds, sandpipers, tatlers and curlews

August first to *November thirtieth,* both inclusive.

CHAPTER XI

FISH

See sections 152, 153, 155, 156, 366 and 159.

In considering the subject of *fish* Section 176 at first glance apparently applies only to fish *protected by law.* The latter part of Section 176

> *Nets* except in the marine district, *tip-ups, set and trap lines, spears, grappling hooks, naked hooks, snatch hooks, eel weirs* and *eel pots* shall not be *used to take fish* except as *specifically permitted* in this article

must be read in connection with Section 177,

Subdivision 2:

> *Fish,* except migratory food fish of the sea, shall *only be taken by angling,* unless *otherwise specifically permitted* by this article. In case any *fish* or crustacea is *unintentionally taken* contrary to the prohibitions or restrictions contained in any of the provisions of this article, such *fish,* or crustacea shall be *immediately liberated and returned to the water, without unnecessary injury.* Whenever any fish under the *size limit* prescribed by the provisions of this article are received in transportation from another state or country, on whenever such *fish,* are taken in *gill nets,* they shall neither be *sold, bought or otherwise trafficked in.*

The general prohibition of Section 176 as to *sale* and other matters except *taking* applies only to fish protected by law.

Advance baiting of fish is forbidden by the Maine statute as is also *fishing for hire.*

The term *fish* is defined by Section 380, subdivision 6, as follows:

> "*Fish*" includes "*fish protected by law,*" "*fish protected by this article,*" and "*food-fish.*" Whenever the words "*fish protected*

by law" or *"fish protected by this article"* are used, reference is had only to *fish* for which a *closed season or size limit* is provided. Whenever the words *"food-fish"* are used, reference is had to *all species of edible fish.*

In connection with the question of size limit it is interesting to note that the statute of West Virginia requires the measurement to be made from the tip of the nose to the centre of the fork of the tail.

Rule 1a further provides:

Food fish, other than migratory food fish of the sea within the limits of the marine district, *shall not be taken* by any person *in any manner* other than by *angling* or in the manner *expressly permitted* by a *license or permit* duly issued by the Commission.

For a definition of the *marine district* see Section 300.

The above provisions constitute a blanket prohibition reinforced by other restrictive sections against the taking of any fish other than migratory food fish of the sea within the limits of the marine district except by angling unless specific authority as to other particular forms of taking can be pointed out in particular permissive sections.

Angling is defined by Section 380, subdivision 20:

"Angling" means taking fish by *hook and line in hand or rod in hand;* or if *from a boat* not *exceeding two lines with or without rod to one person.*

This definition has not been construed to prevent the use of more than *one hook* on a line or to prohibit the use of *gangs of hooks* upon artificial lures.

The Iowa act prohibits the use of more than *one hook* on a line except in case of artificial lures upon which *one gang* of not to exceed *three* hooks is used.

Only *one line or rod* may be used *on land* or other than from a boat and it must be *in hand.* Only *two lines or rods* or one of each to each person may be used *from a*

boat. Any other use of a line or rod or the *use of any additional line or rod* constitutes *the same a set line.*

The rule as to the *one line or rod in hand* other than from a boat has usually been liberally construed and no question has been raised where the same has been personally *attended* though not *actually in hand.*

The use of *landing nets* to land *angled fish* is permitted by Section 275, but there is no provision allowing the *gaffing* or *shooting* of angled fish no matter how large their size.

In contrast to the definition of *angling* is that of *hooking* contained in Section 380, subdivision 21:

> *"Hooking"* is defined to mean *taking or attempting to take fish not attracted by bait or artificial lure,* by *snatching with hooks,* whether *baited or unbaited, gangs or similar devices.*
>
> See sections 255 and 255a.

Fish which are to be taken by *angling only* cannot be taken *deliberately* by *hooking.*

The only angling license required up to the present is that exacted from certain non-residents in certain cases pursuant to Section 188 already referred to in Chapter V.

The only rule as to not fishing from *sunset* to *sunrise* is that applicable to *netting* and the hauling of similar devices.

> See section 273.

There are several important specific prohibitions as to fishing (reinforcing Section 176 and Section 177-2 and at this point it is important to note that the term *inhabited* whenever used means a *permanent occupancy* of a *species* as contrasted with a *temporary presence* of an *occasional fish,* and that the term *trout* means *brook-trout* as defined by Section 380–13.

> Section 380, subdivision 24.
> See People v. Tanner, 128 N. Y. 416.

One of the first auxiliary prohibitions is that contained in Section 242 against *stocking private waters* with certain fish taken from the waters of the State:

> *Trout* or *lake trout* shall not be taken from any of the *waters of the state* for the purposes of *stocking private ponds or streams.* Provided, however, that any person desirous of aiding the state in the *propagation and distribution of trout,* may on approval of the commission, take *trout eggs from trout in public waters for breeding purposes* and such *trout* shall be *returned to the waters* from which they were taken. Before *permission* is given, or *trout taken* as herein provided, the applicant shall show *conclusively* that he has *facilities for breeding trout,* and must execute a *satisfactory bond* to the people of the state, to be approved by the commission, conditioned that he will not *sell, give away, convert to his own use, or otherwise dispose of* any *trout,* or *eggs taken under said permit,* and will *return the young trout to public waters* at such times and places as the commission may *designate.*

This section is not to be interpreted as preventing the necessary removal of fish endangered in time of drought from one *stream* to *another* or the keeping for propagation purposes, in compliance with Section 159, of fish of *legal size* caught during the open season in a *legal manner.*

Another prohibition is that against *disturbing* certain fish while *spawning* contained in Section 243:

> *Bass, trout* and *lake trout* on *spawning beds in the close season* shall not be *disturbed,* nor shall their *spawn or milt* be taken from the *spawning beds* except as provided by the preceding section, and section *one hundred and fifty-five.*

Another restriction is that against the use of *explosives* contained in Section 245:

> *Fish* shall not be taken by means of *explosives.* Except for *mining or mechanical* purposes, *dynamite or other explosives* shall not be *used* in any of the waters of this state, or *possessed* upon the *waters, shores or islands thereof.* Possession thereof by any person on the waters, shores or islands thereof, of this state shall be *presumptive evidence* that the same is possessed for use in violation of the provision of this section.

The Commission *may allow* the use of dynamite in efforts to recover *bodies* under such restrictions as it sees fit to impose.

A further restriction is that against *obstructing* streams set forth in Section 246:

> Except as provided in section *two hundred and fifty-six* or as *directed by the commission,* no person shall by means of any *rack, screen, weir, or other obstruction* in any creek, *stream or river, prevent the passage of fish.* The commission may order such an obstruction to be *removed* by the *person erecting* the same or by the *owner of the land* on which the same is located. A *copy* of the order shall be served on such person or owner. *Failure* to comply with the terms of such order within *ten days* after service of the same shall be deemed a *violation* of this section.

See sections 22, 290 and 291.

The *pollution* of streams is prohibited by Section 247:

> No *dyestuffs, coal tar, refuse from a gas house, cheese factory, creamery, condensary or canning factory, sawdust, shavings, tan-bark, lime* or other *deleterious or poisonous substance* shall be thrown or allowed to run into any *waters,* either *private or public* in quantities *injurious to fish life* inhabiting the same, or *injurious to the propagation* of fish therein.

Under the statute as it formerly stood, pollution before it became punishable had to be rank enough to be destructive of fish.

People v. La Bell, 128 A. D. 709.

Injunctions may be had against pollution and damages recovered therefor.

New York v. Blum, 208 N. Y. 237.
Hodges v. Pine Products Co., 68 S. E. 1107 (Ga.).
Commonwealth v. Kennedy, 47 L. R. A. 673 (Pa.).
See sections 360–366.
See section 1425 of the Penal Law, subdivision 12.
See State v. Haskell, 34 L. R. A. 286.

Pollution of hatchery waters is prohibited by Section 248:

No person shall erect or maintain any *privy, watercloset, pigsty, hogpen, inclosure for poultry, barn or barnyard* in which animals or poultry are *kept,* or *drain* from any building or the cellar thereof, where drainage or refuse therefrom will flow into or find its way into *water* used by any *fish hatchery* operated by the state, or into any *pond, creek or stream* used in connection therewith. Every such privy, watercloset, pigsty, hogpen, enclosure, barn, barnyard and drain is hereby declared to be a *public nuisance,* and may be *summarily abated* by the commission. No person shall place *sewage or other matter injurious to fish* where the same can find its way into the water used by any *fish hatchery* operated by the state, or suffer the same to be done from, over or through *premises owned or occupied* by him.

Drawing or shutting off water to take fish is forbidden by section 249:

No person shall *take fish* by *shutting* or *drawing off water* for that purpose. No person shall *hold back* or *divert* the water in any stream which supplies a *state hatchery* so as to prevent the necessary flow of sufficient water for hatchery purposes.

No person except under authority of the commission shall take fish from the waters of any fish hatchery.

Restrictions are made by Section 250 as to the *placing of certain fish* in certain waters:

Fish or eggs thereof other than *trout, lake trout, frostfish, whitefish and smelt,* shall not be placed in any waters of the state *inhabited or stocked* with *trout.* No person shall put or place in any *public waters* of the state fish commonly known as *carp,* nor shall any person put or place in such waters the *spawn* of such fish or use such fish as *bait* in the water thereof. Whenever the conservation commission shall determine that any waters of the state heretofore *inhabited or stocked with trout* are no longer *inhabited by trout or are unsuitable* as trout waters, the commission may make an order permitting such waters to be *stocked* with any species of fish in addition to trout, lake trout, frostfish, whitefish or smelt, or the eggs thereof.

There is no restriction against the stocking of *private* non-trout waters with carp.

See section 1425, subdivision 12, of the Penal Law.

Fishing near *dams and fishways* erected by the State in public waters is prohibited by Section 251:

> The commission may maintain *fifty rods* from any *dam or fishway erected by the state in public waters,* on both sides of the stream above and below the fishway or dam (as the case may be) signboards containing substantially the following notice: "Fifty rods to the fishway or dam (as the case may be); all persons are prohibited by law from fishing in this stream between this point and the fishway or dam" (as the case may be). No person shall take fish within *fifty rods* of any fishway or dam posted with signboards as provided in this section.

The taking of fish *through the ice* in certain waters is prohibited by Section 252:

> No person shall *take fish through the ice* in waters *inhabited by trout* unless an *order specifying the waters and fixing the season* shall first be made by the commission.

If the waters are not *trout waters* any fish during the open season therefor may be taken by *angling.* Fishing in the *open water* surrounded by *ice* is not fishing *through the ice.*

Following the foregoing *prohibitive* provisions are certain *permissive* sections.

The use of *tip-ups* is regulated by Section 253:

> *Tip-ups* may be used, for fishing *through ice* except in waters *inhabited by trout,* to take *bullheads, catfish, eels, perch, sunfish,* and except during the months of *March* and *April, pikeperch, pike and pickerel.* No person shall operate or control at the same time more than *fifteen tip-ups.* All tip-ups must be *marked* with the *name* and *address* of the *owner* thereof.

See *Protective Orders.*

There is no restriction as to the use of *live bait* as in the case of *set lines* and no *license* is required. Only the *fish mentioned* may be so *taken.*

The use of *set lines* and *trap lines* is covered by Section 254:

> *Set lines* may be used except in waters *inhabited by trout* to take *whitefish, bullheads, catfish, eels, perch, sunfish, carp, mullet* and *dogfish,* provided an *order specifying the waters* and *fixing the season* shall first be made by the commission. Set and trap lines may be used to take *sturgeon* in any waters during the *open season therefor,* provided a *license* for so doing shall first be obtained from the commission.

Rules 17 and 18 on *set lines* read as follows:

17. Bait lines or trap lines to take sturgeon shall not exceed *1,200 feet* in length and the bait lines shall use Number *8–0 hooks* set not less than *two feet* apart and be anchored on the bottom; trap lines shall use Number *10–0 hooks,* set not less than *six inches* apart and be anchored not over *three feet* from the *bottom.* Each bait or trap line shall have attached to one end thereof a *buoy* which shall be *above water* and in plain sight at all times; each buoy shall have attached thereto a *tag,* issued by the Commission, upon which shall be stamped a *number* corresponding with the number on the *license.*

18. *Set lines* other than sturgeon lines shall not be more than *500 feet* in length nor contain more than 300 hooks; one end shall be *attached to the shore* and the other end thereof shall be *anchored to the bottom;* it shall not be lawful for one person to own or operate more than *one* such line; nothing but *dead bait* shall be used for bait; no fish other than the kind mentioned in *section 254* of the Conservation Law shall be taken with such lines.

The force of the limitation of Rule 18 and Sections 176 and 177, subdivision 2, was lost sight of in the case of People v. Keenan, 80 M. 539, where it was held that *blue pike* could be lawfully taken with a set line.

See People v. Tanner, 128 N. Y. 416.

The license fee for sturgeon lines is $1.00.

A license is required for other set lines and the fee is $1.00.

The use of worms, and any *dead bait* except *dead minnows, is allowed.*

Spearing, etc., are regulated by Section 255:

Spears, grappling hooks, naked hooks or snatch hooks may be used, except in waters *inhabited by trout,* for taking *whitefish, mullet, carp, catfish, dogfish, bullheads, suckers and eels at any time,* provided an *order specifying the waters* and *fixing the season* shall first be made by the commission.

No license is required.

See section 255a.

Section 255a further provides as to *snatch-hooks*

Suckers, mullet, carp, bullheads and eels may be taken by *snatch-hooks only* in any *stream* in the state at any point in such stream not *less than five miles* below the source thereof, between *November first* and *April thirtieth,* both inclusive. In taking such fish under the provisions of this section, *driving* shall be permitted. The requirements, prohibitions, conditions and exceptions prescribed by sections *two hundred and fifty-two* and *two hundred and fifty-five* of this chapter shall not apply to the taking of fish described in this section with *snatch-hooks* within the times herein prescribed.

Spearing in the Niagara river is governed by a second Section 255a:

1. Fish excepting *trout, black bass, pickerel and maskalonge* may be taken in the Niagara river between the lower steel arch bridge and the suspension bridge at Lewiston Heights with *spears,* at any time during the *open season* for such fish. No such fish, however, shall be taken of a size *less* than that prescribed by this chapter.

2. Every person, before taking fish with a spear as herein provided, shall obtain a *license* therefor from the town or city clerk of the town or city in which he resides. Such town clerk shall be entitled to receive a fee of one dollar for issuing such license to be disposed of in the manner provided by subdivision four of section one hundred and eighty-five of this chapter.

Compare section 188.

The use of *eel weirs and pots* is prescribed in Section 256:

Eel *weirs* and *eel pots* of such form as may be *prescribed* by the commission may be used at any time for taking eels, provided

a *license* for so doing shall first be obtained from the commission. Eel weirs shall not be used in waters *inhabited by trout*. This section shall not apply to waters of the *marine district*.

For a definition of the *marine district*, see section 300.

Rules 14, 15 and 16 as to *eel weirs and pots* provide as follows:

14. Eel *pots* must not be more than *6 feet long,* nor more than *12 inches square,* if in square form. The aperture or mouth of any eel pot shall be not more than *1 1/2 inches* in its greatest diameter. There shall be no fixtures or wings of any kind attached to or used in connection with eel pots.

15. For the purposes of these rules an eel *weir* shall consist of not to exceed *two wings or leaders* fastened to an *eel trap;* no eel *trap* shall have attached thereto more than *one weir;* the length of each weir shall be determined by the commission or person designated by it; and the use of weirs of a greater length than that specified in the license is *prohibited.*

16. Eel *weirs* and eel *pots* shall not be constructed, set or used in any manner so as to unduly *obstruct* the natural flow of water or interfere with the free passage of *boats.* The use of eel weirs, the laths of which are *less than 1 inch apart, is prohibited.*

Each eel weir or eel pot shall have attached thereto a tag, issued by the commission upon which shall be stamped a number corresponding with the number on the license. All fish, except eels, taken in an eel weir or an eel pot, must be immediately returned to the water.

The license fee for each eel pot is $3.00 and for each eel weir with trap attached, $20.00.

See Rule 13.

The taking of *frogs* is regulated by Section 257:

Bullfrogs, green frogs, and spring frogs may be taken in *any manner, possessed, bought and sold* from *June first* to *March thirty-first,* both inclusive. They shall not be taken, possessed, bought or sold at any other time.

Frogs are the only animals listed as *fish* which may be taken with a *gun.*

See section 185 as to hunting license.

It has been urged that frogs in springs should be protected during the winter months.

The taking of *minnows* is governed by Section 230:

> No person shall take *minnows for bait* with a *net, trap or seine* or *sell minnows so taken* without having first obtained a *license* so to do from the commission. Provided, however, that *no license* shall be required from a person to take minnows for *his own use and not for sale.* Minnows shall not be taken within *one hundred feet* of any dock, pier or boat landing structure along the Saint Lawrence river without the *consent of the owner* thereof, nor shall they be taken with a net, trap or seine in waters *inhabited* by trout.

Rules 19 and 20 apply to the taking of *minnows* for sale or for personal use:

19. Each application for a license to take minnows for bait for sale shall be accompanied by a satisfactory *bond* in the penal sum of *two hundred dollars,* signed by the applicant and two sufficient sureties.

20. *Black bass, maskalonge, white fish, pickerel, pike, pikeperch, lake trout, striped bass, yellow perch, shad and bullheads,* taken in a net used to take minnows for bait shall be *immediately returned* to the water uninjured.

No net more than *twenty-five feet long* shall be used for taking minnows for the *owner's personal use.*

Minnows cannot be taken in waters *inhabited by trout* either with a *licensed* or *unlicensed* net.

Report of Attorney-General, 1903, page 371.

Minnows can be taken in trout waters by *angling* only.

Persons interested in taking minnows should ascertain what streams are *stocked with and inhabited by trout.* Waters *suitable* therefor and *stocked with* trout are presumptively *inhabited* by them.

There appears to be no restriction against the *sale of minnows* taken *other than* with nets, trap or seines.

See section 176.

See Rule 13 as to license fee for minnow nets, and see Netting Rules generally.

It seems such a license may be operated under by the *licensee*, a person in his *employ* or a person, under his *immediate supervision.*

See Rule 6.

It is important to note as to the fish referred to in the sections to follow that no provision is made for their possession after the *close* of the *season.*

See section 181.

BASS

Game Fish

§ 231. 1. Open season

Black bass not less than *ten inches* in length may be taken and possessed from *June sixteenth* to *November thirtieth,* both inclusive.

2. Size of catch

A person may take not to exceed *fifteen* such black bass in one day, but whenever two or more persons are angling from the same boat they may take not to exceed *twenty-five* in one day.

Black bass are defined by Section 380, subdivision 15:

"Black bass" includes *Oswego bass.*

See sections 241a and *Protective Orders* under section 152, chapter IV.

TROUT

Game Fish

§ 232. 1. Open season

Trout not less than *six inches* in length may be taken and possessed from the first *Saturday of April* to *August thirty-first,* both inclusive.

2. Size of catch

A person may take not to exceed *ten pounds* of trout in one day.

See *Protective Orders.*

Trout are defined by Section 380, subdivision 13:

"Trout" includes *speckled trout, brown trout, rainbow trout, red-throat trout* and *brook trout.*

See section 371, on trout raised in *private hatcheries.*

The New Jersey act fixes the limit on trout by number at *twenty-five* to each person and it has been recommended in the interests of the smaller trout that the limit in this State be based upon *number* rather than *weight*. This obviates any question as to the last fish caught and kept. Suggestions have also been made to the effect that all *native trout* under seven inches and all *rainbow trout* under *nine* inches be protected.

It is perhaps of interest to note that the socalled speckled or *native* trout is not strictly speaking a trout, but a *char*, a *salmo*, the *salvelinus fontinalis*.

Section 233 making special provision as to trout on Long Island was repealed by Chapter 508 of the Laws of 1913.

It has been urged that the taking of trout after pronounced *dark* and before *daylight* should be prohibited as it was temporarily in 1908. This would not interfere with *dusk and dawn* fly-fishing and would have a tendency to block illegal night practices. It has also been urged that in waters *inhabited by trout* no fishing during the *close season* on trout, be permitted.

Bass and *wild trout* are above all others properly entitled *game fish* for the reason that they can be taken only by *angling* and can neither be *bought nor sold*.

LAKE TROUT AND WHITEFISH

§ 234. 1. Open season and size limit

Lake trout not less than *fifteen inches* in length *and whitefish* not less than *one and three-quarters pounds in the round* may be taken and possessed from *April first* to *September thirtieth*, both inclusive.

2. Otsego whitefish, commonly called *Otsego bass*, not less than *nine inches* in length may be taken and possessed from *January first* to *October thirty-first*, both inclusive.

The so-called *silver bass* is neither a *bass* nor a *whitefish*.

3. Size of catch

A person may take by *angling* not to exceed *ten lake trout* in one day, but whenever two or more persons are angling from the same boat they may take not to exceed *fifteen* in one day. *Whitefish* may be taken in *any number or quantity.*

4. Sale of

Such *lake trout and whitefish* may be bought and sold during the open season therefor.

See sections 235 and 241a.

As to netting *lake trout* and *whitefish,* see Section 271. *Lake trout* are defined by Section 380, subdivision 14:

"Lake trout" for the purposes of this article includes *landlocked salmon and ouananische.*

Section 235. *Lake trout* and *whitefish* may be taken in *Lakes Erie and Ontario* in any *number or quantity at any time,* and when so taken may be possessed, bought and sold, provided that every person to whom a *license* is issued to take such *fish* with a *net or nets* operated from power boats shall, when required by the commission, furnish without charge to the commission *eggs and milt* from such fish taken by him during the spawning season. Such *eggs and milt* shall be taken by the commission for *propagation* only and shall be taken from the fish by the *agents* of the commission. The person to whom such license is issued may be required by the commission to give a *bond* with sufficient sureties approved by the commission conditioned that he will furnish such *eggs and milt* as aforesaid and permit the *agents* of the commission to be present in any such boat at the time of the taking of such fish for the purpose of taking such *eggs and milt* and conditioned that he will not hinder or delay such *agent* in the performance of such duty nor in the landing of such *eggs and milt* from said boat in good order.

Lake trout not less than *fifteen inches* in length and *white fish* not less than *one and three-quarters pounds in the round* taken *without the state* may be *imported* into this state at *any time* and when so *imported* may be *possessed, bought and sold.*

PIKE PERCH

§ 236. 1. Open season, size limit and sale of

Pike perch not less than *twelve inches* in length may be taken, possessed, *bought and sold* in any *number or quantity* from *May thirtieth* to *March first,* both inclusive.

2. *Blue pike perch* and *saugers*, of any size may be taken at *any time* and in *any number or quantity* in *Lakes Erie and Ontario* and in the lower *Niagara river*, and when so taken may be possessed, *bought and sold.*

See section 241a and *Protective Orders.*

Pike perch are defined by Section 380, subdivision 17:

"*Pike perch*" includes *walleyed pike*, commonly called pike, and *yellow pike.*

As to netting *pike perch*, see section 271.

YELLOW PERCH

§ 236a. 1. *Yellow perch* may be taken and possessed, in *any number or quantity*, from the waters of *Cazenovia* lake, *Otisco* lake, *Skaneateles* lake, *Cross* lake, *Onondaga* lake and *Jamesville* reservoir, *only* between the *first day of May* and the *first day of March*, both inclusive.

2. Such *yellow perch* may be *bought and sold* during the *open season* therefor.

Subdivision 1 is a restriction as to the *waters named only* and does not constitute perch *protected by law.* Perch generally may be *bought* and *sold.*

As to netting *perch*, see section 271.

PICKEREL AND PIKE

§ 237. 1. Open season

Pickerel and *pike* in any *number* or *quantity* may be taken and possessed from *May first to March first*, both inclusive, except as herein provided.

2. Limit

In the *Saint Lawrence* river a person may take in one day not to exceed *twelve great northern pike*, locally known as "pickerel" not less than *twenty inches* in length.

3. Sale of

Such *pickerel and pike* may be *bought and sold* during the *open season* therefor.

See section 241a and *Protective Orders.*

Pickerel and pike are defined by Section 380, subdivision 16:

"*Pickerel*" and "*pike*" include the *great northern pike* commonly called *pickerel, pond pickerel, chain pickerel, grass pickerel* and *banded pickerel.*

As to netting *pickerel* and *pike,* see section 271.

STURGEON

§ 238. 1. Open season and size limit

Shortnosed sturgeon not less than *twenty inches* in length may be taken and possessed from *July first* to *April thirtieth,* both inclusive, in *any number or quantity. Lake sturgeon* not less than *thirty inches* in length, and *sea sturgeon* not less than *four feet* in length may be taken and possessed in any number or quantity at any time.

2. Sale of

Such *sturgeon* may be *bought and sold* during the *open season* therefor.

MASKALONGE

§ 239. 1. Open season and size limit

Maskalonge not less than *twenty-four inches* in length may be taken and possessed from *June sixteenth* to *December thirty-first,* both inclusive, in *any number or quantity.* No person shall take maskalonge *through the ice.*

2. Sale of

Such maskalonge may be bought and sold during the open season therefor.

Section 271 does not provide for netting *maskalonge.*

STRIPED BASS

§ 240. *Striped bass* not less than *twelve inches* in length may be taken by *angling* and with *nets* and possessed and *sold* in any *number or quantity* at any time.

See section 271, as to netting *striped bass.*

SMELT

§ 241. 1. Open season and size limit

Smelt or icefish not less than *six inches* in length may be taken from the *inland waters* of the state and in *Lake Champlain* in

any number or quantity at any time. Smelt or icefish of *any size* may be brought from *without the state* or taken within the *marine district.*

2. Possession and sale of

Such *smelt or icefish* may be possessed, *bought and sold* at any time.

Special open seasons as to Lake George are provided for by Section 241a:

The open seasons for taking fish in the waters of *Lake George,* in any part thereof, shall be as follows: *Lake trout* from *May first* to *October first,* both inclusive; *pike perch, pickerel, great northern pike,* from *June sixteenth* to *December thirty-first,* both inclusive; *bullheads* from *July first* to *December thirty-first,* both inclusive; *black bass* from *August first* to *December fifteenth,* both inclusive.

CHAPTER XII

NETTING

The differences between *anglers* and *net fishermen* will probably never be reconciled. No net, except the *trammel net* for catching *carp* only, would be permitted in the *inland* waters of the *State* if the average angler had his way.

On the contrary, net *fishermen* naturally favor the catching with nets and the sale of all kinds of fish.

Anglers who oppose the *angling license* are in a poor position to criticise the netting provisions and are not to be heard as against the tax-paying, non-fishing public which wants fresh water fish for food and insists that those who are disposed to catch and sell them be reasonably allowed to do so.

The application of the sections on netting is limited by Section 280:

> The provisions of part VIII of this article, except sections *two hundred and eighty-two and two hundred and eighty-three,* shall only apply to the taking of fish from *Lakes Erie and Ontario,* the *Hudson river north of Verplanck's Point* and the *inland waters* of the state.
>
> Compare section 300.

The most important prohibition against the use of nets is that contained in Section 275:

> In waters *inhabited by trout* the use of nets of any kind is *prohibited.* This prohibition shall not apply to *landing nets* used to land fish *duly hooked* by angling or to use of nets by the commission as provided in section *one hundred and fifty-five* of this chapter.

An important prohibitive provision as to netting is that contained in Section 244 on *thumping:*

> *Sailing, rowing, pushing or floating* in any boat or vessel in a waterway, river, run or channel, bay or sound, or patrolling the banks of such waterway, river, run or channel, bay or sound, and *stamping, jumping, shouting, pounding, beating or splashing the water, beating* the *banks, or boat* while a seine or net is *set, drawn, water, beating or pounding* the *banks, or boat* while a seine or net is *set, drawn, held, or used* in such waterway, river, run or channel, bay or sound, with intent to *drive* fish into such seine, or net, which acts are commonly known as *thumping,* are hereby forbidden.

Nets are defined by Section 380, subdivision 25:

> "*Nets*" includes *seines, gill nets, pound nets, trap nets, scap nets, fyke nets, dip nets, scoop nets* and *stake nets.*

The *trammel net* does not appear to be included. While it is essentially a *seine,* it was held in Rowe v. State, 83 Arkansas, 245 that a trammel net was not a seine.

In People v. McMasters, 74 Hun, 226, a person trolling and hooking into a net containing fish, by appropriating and taking the fish ashore was held liable for the penalty.

Nets are to be licensed as provided in Section 270:

> Unless otherwise provided by this article, seines, gills, fykes, pounds, traps, scaps and other nets or devices may be set or used in any of the waters of the state provided a *license* so to do shall be first obtained from the commission. *Rules* regulating the use of seines, gills, fykes, pounds, traps, scaps and other nets or devices in any of the waters of the state, and providing for the *licensing* of such nets together with a *license fee* therefor, may from time to time be prescribed by the commission when *not inconsistent* with law and such rules shall be *filed* in the office of the commission.
>
> See sections 230 and 275.
>
> See section 279 as to nets in the Hudson and Delaware rivers.

The general power of the Commission to revoke netting licenses was upheld by the Attorney-General's Report, 1900, page 251.

The establishment of properly certified and authenticated rules as to the use of nets was held in Josh v. Marshall, 33 A. D. 77 to be a condition precedent to the obligation of a net fisherman to procure a license.

Rules 1 to 13 on *nets* are as follows:

1. No nets of any kind shall be set or used for the taking of fish in Lake Erie or Lake Ontario or the inland waters of the State, or in the Hudson River south of Verplanck's Point, for the taking of fish *other than migratory food fish of the sea,* without a *license* so to do granted by the Conservation Commission.

1a. *Food fish,* other than migratory food fish of the sea within the limits of the marine district, *shall not be taken* by any person in any manner other than by *angling* or in the manner *expressly permitted* by a *license or permit* duly issued by the Commission.

2. No *license* shall be granted except upon *written application* made upon blanks to be furnished by the Commission and *signed and sworn* to by the applicant.

All applications for licenses must be *endorsed* by two responsible persons.

The application shall specify the *size* of the bar and the *kind and size of the net* to be used together with the length of the wings and leaders.

The Commission shall *determine and fix* the size of nets and the length of the wings or leaders to be used.

The Commission may *refuse* to grant a license to any person for any reason which to it may seem *sufficient.*

Each application shall be accompanied by a satisfactory *bond* signed by the applicant and *two* sufficient sureties in an aggregate penal sum equal to *one hundred dollars* for each net specified in the license but not exceeding *three hundred dollars;* each application for a *boat license* shall be accompanied by such a bond in the penal sum of *five hundred dollars.*

Failure to return to the Commission at the expiration of a license, *tags,* issued by it, or to make the *report required* by rule twelve hereof is sufficient cause for denying an application for a license.

3. All licenses for nets shall be granted pursuant and subject to these rules and regulations.

4. Only such nets, to the number and of the size of the bar, with leaders and wings, of the length mentioned, shall be used as are specified *in the license;* the license shall specify the kind of nets to be used and the duration of the license; licenses shall be granted for no longer than *one year;* all licenses granted during the year will expire on the

thirty-first day of December following unless an *earlier* date is specified; nets shall be used only during and at the times specified in the license.

5. The Commission may *revoke* any license granted hereunder at any time for any reason which to the Commission may seem *sufficient.*

6. A license issued pursuant to these rules is not *transferable* and if a licensed net be used by any person other than the *licensee* or a person in his *employ,* or under his immediate *supervision,* it shall be deemed forfeited, revoked and cancelled.

7. Nets shall be set or used only in the waters mentioned in the *license;* the setting and hauling of all nets in those waters shall at all times be under the direct *supervision and control* of the Conservation Commission or person designated by it, who shall have the power to *designate* the location of all nets; such location *once fixed* shall not be changed without the *written authority* of said Commission or person.

No net licensed under a seine license shall be staked, anchored or otherwise fastened while in the water unless *specifically permitted* in the license.

8. The Commission shall issue with each licensed net a *tag* upon which shall be stamped a number corresponding with the number or numbers on the *license.* Such tag must be *attached* to the net when *in use* in such manner that it will be on the top of or above the water and in *plain sight* at all times.

9. The owner of each *licensed boat* on Lake Erie or Lake Ontario shall at all times have his license in plain sight, aboard said boat. Each licensee must *exhibit* his license when requested by any *game protector* or by any *peace officer* of this State or by any person *designated* by the Commission.

10. The *bar* of all nets used under any license, except to take minnows for bait, shall be as follows:

Nets for taking *lake trout and whitefish,* not less than 2⅜-inch bar;

Nets for taking *Otsego whitefish* in Otsego Lake, not less than 1½-inch bar;

Nets for taking *fish,* other than lake trout and whitefish, not less than 1⅛-inch bar;

Nets for taking *short-nosed sturgeon,* not less than 2½-inch bar; Nets for taking *other sturgeon,* not less than 5-inch bar.

11. Fish not allowed to be taken under the license shall be *carefully handled* and *immediately returned* to the water; fish which may be taken, if under the size limit and taken in gill nets, must be disposed of as provided in section 177 of the Conservation Law.

12. Every person holding a license shall make an *annual report* to the Commission of the number, weight and species of fish caught and the value of the same, and *return* the *tags* issued to him with the license.

13. An applicant shall, at the time of filing his application for a license, pay to the Commission a *license fee* as provided in the following schedule:

NET SCHEDULE

For each minnow net, per lineal foot	$0 10
For each scoop, dip or scap net 10 by 10 feet square and under.	1 00
For each scoop, dip or scap net over 10 by 10 feet square	2 00
For each fyke net 3-foot hoop and under	2 00
For each fyke net 5-foot hoop and over 3 feet	3 00
For each fyke net over 5-foot hoop	5 00
For each 4-foot trap net and under	3 00
For each 6-foot trap net and over 4 feet	5 00
For each 8-foot trap net and over 6 feet	7 00
For each machine trap net larger than 8 feet	10 00
For each seine or gill net used only for taking fish not protected by law, per lineal foot	15
For each machine trap in the Niagara River	20 00
For each seine or gill net used only for taking fish not protected by law, 2 cents per lineal foot. No license issued for less than $5.00 and the maximum fee for such licenses will be	15 00
For each sturgeon line	1 00
For each set-line 500 feet in length, 300 hooks to each line	1 00
For each eel pot	3 00
For each eel weir and trap attached thereto	20 00
For each stake net per 100 lineal feet	3 00

In the waters of Lake Erie and Lake Ontario the following fees shall apply; outside of the mile and half limit as provided in section 276 of the Conservation Law:

For each fyke net	$10 00
For each trap net	15 00
For each row or sail boat used in fishing gill nets	10 00
For each boat of any other kind under 10 tons gross tonnage so used	20 00
For each boat of any other kind from 10 to 15 tons gross tonnage so used	25 00
For each boat of any other kind from 15 to 20 tons gross tonnage so used	30 00
For each boat of any other kind over 20 tons gross tonnage so used $1.50 per ton.	

There is no refund on the revocation of a netting license and the rules do not prevent the issuance of more than one license to any one person.

Net fishing is further regulated by Section 271:

> When permitted by the commission *lake trout, whitefish, pickerel, pike, pikeperch, shad, herring, striped bass, smelt or icefish and sturgeon of all kinds,* of the *size limit* and during the *open season* therefor as prescribed in part seven of this article, and all fish *not protected by law* may be taken by *nets* in waters of the state, in any *number or quantity.* For the purpose of supervising the taking of fish with nets the commission is empowered to designate from the protectors a *superintendent of inland fisheries* at a salary of not to exceed twenty-five hundred dollars per annum, and his actual and necessary expenses while in the performance of his official duties, not to exceed one thousand dollars.

Perch in the waters mentioned in Section 236a may be netted pursuant to this section.

Small brook fish, such as may be caught for use as minnows come within those not protected by law.

The *mesh* of nets is regulated by Section 272:

> When permitted the size of mesh of nets shall be as follows:
>
> 1. Gill or other movable nets used for taking lake trout or whitefish, not less than two and three-eighths inch bar. For taking Otsego whitefish, commonly called Otsego bass, not less than one and one-half inch bar.
> 2. Gill or other nets used for taking fish other than lake trout and whitefish, not less than one and one-eighth inch bar.

Compare rules on netting.

The time of hauling nets is regulated by Section 273:

> No nets or other devices for taking fish shall be hauled *after sunset* and *before sunrise.*

Nets are to be *buoyed* and *tagged* as provided in Section 274:

> All nets or other devices for taking fish permitted under this part shall be *buoyed* and *tagged* in such manner as may be *prescribed* by the commission.

The use of nets in Lakes Erie and Ontario is governed by Section 276:

Fish, except *black bass and maskalonge,* may be taken with nets during the *open season* therefor in the waters of *Lake Erie,* except within one-half mile of the shores or islands thereof and within five miles of the mouth of Cattaraugus creek and, with the exception of sturgeon nets, within five miles of the head of Niagara river during the open season; and in *Lake Ontario* opposite and between the east and west boundaries produced of Niagara county, except within one-half mile of the shores or islands of such lake and within one mile of the mouth of the Niagara river during the open season; and in Lake Ontario outside of such waters opposite Niagara county from *May sixteenth* to *September thirtieth,* both inclusive, except within one mile of the shores or islands thereof during the open season, and from *October first* to *May fifteenth,* both inclusive, except within one-half mile of the shores or islands thereof during the open season.

The use of nets in the *Niagara* river is regulated by Section 277:

Seines and squat nets may be used to take fish except *black bass, lake trout, whitefish and maskalonge* in the Niagara river in *November, December, January and March.* Fish except *black bass, pike perch, lake trout, whitefish, pickerel and maskalonge* may be taken by seine, machine or trap by *citizens* of the state in that part of the Niagara river in the town of Lewiston, Niagara county, during the time when *Canadians* may lawfully fish with such devices in said river on the Canada side opposite the town of Lewiston, provided a *license* therefor has been granted by the commission, and provided that *lake trout* and *whitefish* must not be taken during *November* and *December.*

The use of nets in *Chaumont* bay is governed by Section 278:

Fish, except *black bass,* and *maskalonge* may be taken with nets during the *open season* therefor in the waters and bays of Lake Ontario, in the county of Jefferson, between Horse Island, in the town of Hounsfield, and the town line between the towns of Lyme and Cape Vincent, except the waters within one-half mile of Stoney Island, Calf Island or of the Galloup Islands from *October first* to *June first,* both inclusive, and except the

waters around Fox Island within three-quarters of a mile of said island between a line running due north from the foot of said island, and a line running due east from the south head of said island from *October tenth* to *November twentieth* both inclusive. Such nets shall on order of the commission be removed from any place after the *black bass* begin to run there. Sturgeon may be taken with sturgeon nets of not less than five inch bar at any time.

The use of nets in the Hudson and Delaware rivers is regulated by Section 279:

Shad and herring may be taken with drifting nets operated by hand only from *March fifteenth* to *June fifteenth,* both inclusive, in the Delaware river and that part of the Hudson river below the dam at Troy and north of Verplanck's Point. No such net shall be set, placed or drawn, or fish taken therefrom between *sunset* on *Friday* and *sunrise on Monday.* Fish except salmon, black bass, trout, pike perch and except also during March and April, pickerel and pike may be taken with nets in the Hudson river below the dam at Troy, from *September first* to *May thirtieth,* both inclusive. Sturgeon may be taken in the Hudson river with sturgeon nets of not less than five and one-half inch bar, from *June first* to *September first,* both inclusive.

See section 1503 of the Penal Law.

As to fishing on *Sunday,* see Sickles v. Sharp, 13 Johnson, 497.

Fishing boats are subject to inspection as provided in Section 281:

Any person owning or operating a boat or vessel used for the *taking of fish* shall, at any time, permit game protectors or other employees of the commission to board such boats and inspect the cargo or contents, and shall at any time carry such persons for the purposes of inspecting nets or the hauling of the same, or the taking of fish eggs.

The seizure and confiscation of nets *illegally used,* are provided for in Section 282:

Seines, fykes, pounds, traps and other nets *not authorized by law, had, set or used* in or upon any of the *inland or tidal* waters of the state or on the *shores* thereof, or *islands* surrounded by said waters are hereby declared to be *public nuisances,* and shall be

summarily seized, abated and destroyed, by any game protector or may be sold by the commission at public auction to the highest bidder under rules and regulations established by it; provided, however, the commission may direct a game protector to retain certain nets or seines for the use of the state hatcheries. Possession of nets other than as provided for by part VIII at any time by any person in or on or within *five hundred feet of any waters* of the state shall be *presumptive evidence* that the same were *unlawfully used.*

See section 154 chapter IV.

Possession of nets whether in or outside of buildings within the five hundred foot mark is *presumptive evidence only* of their *unlawful use.* The *drying* of nets is, however, a part of their operation and use.

Section 283 further provides:

The reasonable expense of the *seizure, removal or destruction* of any net, pound or other illegal device shall be a *county charge* against the county in which the same shall be seized, and shall be audited and paid as a *county charge* on verified statement of the *game protector making the seizure,* stating the time and place of such destruction, the name of the person or persons *employed,* the *time spent and money paid,* if any, therein. The board of supervisors of any county may, by *resolution,* make such *further regulation* in the presentation of said statement and the destruction of said devices as it may deem proper.

Reasonable expense is not so narrow a term as *necessary expense* and should not be so construed in cases of seizure of nets by game protectors.

Report of Attorney-General, 1903, page 305.
Compare section 12 of the County Law.

CHAPTER XIII

MARINE FISHERIES

See sections 282–283.

The *marine district* is described in Section 300:

The *marine district* shall include all waters in and adjacent to *Long Island* and all *tidal waters* of the state, except the *Hudson* river *north of Verplanck's Point.*

See section 280.
See rules 1–13.

It is provided in Section 301:

There shall continue to be a *bureau of marine fisheries* under the supervision and control of the commission. The commission may appoint for the bureau of marine fisheries a *supervisor* of marine fisheries, who shall administer the affairs of such bureau relating to shell fish and shell fisheries.

The office and clerical force of the bureau are defined by Section 302 and the reports of the supervisor particularly as to shellfish cultivation and leases of lands under water for such purposes are governed by Section 303.

See article VI of the Public Lands Law.

Shellfish are defined by Section 380, subdivision 18:

"*Shell fish*" includes oysters, scallops and all kinds of clams.

Leases of *lands under water* for shellfish cultivation and all matters concerning the same are covered by Sections 304–309.

See section 333.

Sanitary inspection of shellfish grounds is provided for in Sections 310–313.

The taking of *oysters* from South Bay in Suffolk county is regulated by Section 314.

See section 334.

Blue Point oysters are those of at least three months growth taken from the waters of Great South Bay, Suffolk county.

See section 315.

Shellfish beds are protected by Section 316:

Shellfish shall not be taken from *sunset until sunrise.* No person shall take, carry away, interfere with or disturb oysters or clams of another *lawfully* planted or cultivated, or remove any stakes, buoys or boundary marks of a planted or cultivated bed. The possession of dredges, rakes or tongs overboard on any such beds shall be deemed prima facie evidence of a violation of this section.

See section 1425 of the Penal Law.
See Colon v. Lisk, 153 N. Y. 188.
See People v. Warner, 116 A. D. 863.

There are many cases applying the principles of larceny to the unlawful taking of oysters.

Fleet v. Hegeman, 14 Wendell, 42.
Vroom v. Tilly, 99 A. D. 516, 184 N. Y. 168.
People v. Morrison, 194 N. Y. 175.

Section 317 further regulates the taking of shellfish:

Dredges for taking of shellfish from public or unleased lands shall not be operated from any boat propelled otherwise than by *sail or oars.*

Scallops are covered by Section 318:

Scallops shall not be taken or possessed, if less than *one year old,* except from legally planted or cultivated oyster lands. Nothing in this section shall be construed to permit the *sale* of scallops of less than one year of age for food.

By Section 319, it is provided:

No person who has not been an *actual resident* of this state for *six months* immediately prior to the time of engaging in the taking

of shellfish, shall take shellfish from the public lands in or under the waters of this state. Nothing in this section shall apply to a person who may be employed as a deck hand, engineer or fireman on a boat whose captain or owner may be a lawful resident.

Section 320 provides as to *starfish:*

Starfish and other *natural enemies* of shellfish shall be destroyed when taken, and shall not be returned alive to the waters of the state.

The taking of *lobsters* is regulated by Section 321:

Lobsters less than *four and one-eighth* inches measured on the *carapace* shall not be taken, possessed or sold. No person shall at any time take any *female lobsters in spawn or with eggs attached,* unless upon the *written order* of the state fish culturist or the supervisor.

Section 322 prescribes:

All *lobster traps* constructed or used after the *thirty-first day of December, nineteen hundred and fourteen,* shall have at the bottom of the trap on each side thereof an opening not less than *one and one-half* inches wide. Such openings must remain clear and undiminished.

The taking of *lobsters* is restricted to *residents* of the State except in certain cases as provided in Section 323.

The taking and use of *food fish* are regulated by Section 324.

Pollution of waters is governed by Sections 325–326.

The use of *nets* in certain waters is regulated by Sections 327–332.

By Section 334, it is provided:

The *board of supervisors* of the counties of *Nassau* and *Suffolk* may respectively pass *laws* not inconsistent with the provisions of this article regulating and controlling the *taking of fish, and shellfish* in arms of the sea and fish bait from public lands of such counties, and prescribe what violations thereof shall be punishable as misdemeanors and impose penalties, the same to be enforced under the provisions of article three of this chapter.

See County Law, section 12.

CHAPTER XIV

TRANSPORTATION

Assuming that quadrupeds, birds and fish *protected by law* have been *taken* in compliance with the foregoing provisions of the law, the State in the exercise of its police power and by virtue of its socalled ownership still regulates the matter of their *transportation.*

See section 176.

The general restrictions as to *transportation* contained in former statutes on the question have been interpreted by the courts and decisions based upon a strict construction of the law have been made as follows:

In Dietrich v. Fargo, 194 N. Y. 359, the restriction was held not to apply to *domesticated deer.*

See section 372.

Ignorance of the common carrier when he has not reason to know that packages contain game is a defense.

Maine v. Sweet, 29 L. R. A. 714.
People v. Montena, 139 A. D. 421.
See section 179, subdivision 1.

In People v. Montena, it was held that the prohibition applied to the person delivering the package to the carrier for shipment, but in People v. Suydam, 204 N. Y. 419, it was held that the prohibition applied only to a person or common carrier who receives the game for shipment and not to the person delivering the same for shipment.

See section 176.

In People v. Bisbee, 90 M. 601 the statute was held to apply to transportation *within the State only* and not to *importation* or *exportation.*

See section 381.

The former statutes have been held to be inapplicable to animals brought from without the State.

People v. Cone, 33 M. 393.
People v. Buffalo Fish Co., 164 N. Y. 93.
People v. Allen, 20 M. 120.
See section 381.

However, the general power of the State to regulate *transportation, importation* and *exportation* independent of the Lacey Act or other federal laws was upheld in People ex rel. Silz v. Hesterberg, 184 N. Y. 126, 211 U. S. 31.

See People v. Fargo, 137 A. D. 727.

The interstate commerce act prohibiting disclosures by common carriers without the consent of the shipper or consignee was not intended to shield carriers and their employees against disclosing information in regard to illegal shipments of game.

Report of Attorney-General, 1911, Vol. II, page 648.

In view of the interpretation of former statutes and the fact that there is no definition of the term *transport* which broadens the construction put upon it by People v. Bisbee, 90 M. 601 (which is on appeal), the present statute applies only to such transactions as possession and transportation occurring after the game reaches or before it leaves the territory of New York State. The carriage of such fish or game then amounts to transportation within the meaning of Sections 176 and 178 and the person who transports or who avails himself of the fish or game shipped from without the State at the destination in this State is in *possession* of it. Such possession during the *close season* in this State and such trans-

portation at any time would be in violation of Sections 176 and 381, unless otherwise permitted by law.

See People v. Fargo, 137 A. D. 727.

Section 178 which generally provides what transportation of quadrupeds, birds and fish *protected by law* may be indulged in without violating Section 176 and which presumptively clears away the complications raised by former statutes and their interpretation reads as follows:

Subd. 1. Common carriers

No *common carrier* or employee of such carrier shall, while engaged in such business, transport *as owner* of any fish or game or parts thereof of species which may not be *lawfully sold* at any time. Nor shall such carrier or person *knowingly receive or possess* the same for shipment for another whether contained in a package or unpacked if *no shipping permit is attached* as required in this section.

This restriction does not apply to *private* carriers.

Subd. 2. Transportation and exportation of fish and game lawfully salable

Any person may transport *in any manner* within this state or from a point *within* to a point *without* during the *open season therefor,* and in *any number,* wild quadrupeds, birds or fish of species which may be *lawfully sold.*

Game or fish raised in *private hatcheries or preserves* and carcasses of birds and mammals from *without the United States* and which may be lawfully imported and sold, when marked and tagged as provided in *part twelve* of this article, may be transported within and from a point within to a point without this state *in any number and by any means.*

See sections 370–375.

Subd. 3. The same; of fish and game not lawfully salable

Any person may transport *within this state* or from a point *within* to a point *without otherwise than by common carrier or parcel post* and during the *open season therefor* wild quadrupeds, birds or fish but *not more in any one day than the number thereof* which may be lawfully *taken in one day by one person* when of

species which *may not be lawfully sold* at any time except as otherwise provided in section *one hundred and ninety* hereof.

See section 190 on deer.

The *taker* may transport *within this state* or from a point *within* to a point *without* by common carrier *except by parcel post,* and during the *open season therefor,* wild quadrupeds, birds or fish but *not more in any one day than the number thereof which he may lawfully take in one day* when of species which *may not be lawfully sold* at any time provided the same or the package containing them shall have attached thereto before shipment, with the blanks properly filled in by him, a *shipping permit issued by the commission* except as otherwise provided in section *one hundred and ninety* hereof.

The form of such permit shall be determined by the commission.

See section 190 on deer.

Subd. 4. Importation of fish and game not lawfully salable

The *taker* may transport from a point *without* to a point *within* the state, during the *open season therefor within the state of New York,* game or fish of species which *may not be lawfully sold,* provided such game or fish was *lawfully taken* and may be *lawfully brought from the place where taken;* and further provided that the *taker accompanies the same;* or, the same may be *shipped* by him by common carrier *except parcel post,* but in that case the shipping requirements of *subdivision three* of this section shall apply.

The *taker* may transport from a point *without* to a point *within* the state, during the *closed season therefor within the state of New York,* game or fish of species which *may not be lawfully sold,* or for which there is *no open season,* provided such game or fish was *lawfully taken* and may be *lawfully brought from the place where taken,* and further provided that the *taker accompanies the same* and shall have with him a *license* issued by the commission permitting such transportation. *Quadrupeds* may be shipped by the taker by common carrier, *except by parcel post,* but in that case the shipping requirements of *subdivision three* of this section shall apply. Such game or fish when so transported may be *possessed at any time.*

Subd. 5. The same; of fish and game lawfully salable

Importation and transportation by any means and in any number during the *open season therefor* of wild game or fish the *sale*

of which is permitted by this article shall be lawful except as otherwise expressly provided therein.

Subd. 6. Shipping permits; prohibitions; limitation

Only *holders of hunting and trapping licenses* shall be entitled to *shipping permits* described in *subdivision three* of this section, for shipment of quadrupeds or birds taken in this state. No person shall be entitled to receive nor shall he apply for more than *six such permits* in any calendar year nor shall any person to whom such a permit has been issued *transfer* the same in any manner to any other person nor shall any other person *use* the same for shipping fish or game nor shall any person make any *false statement* in applying for such a permit nor shall one person use more than *six thereof* for shipping fish and game in any one calendar year.

Rule 32 provides:

"An importation license, pursuant to the provisions of section 178, subdivision 4, of the Conservation Law, may be issued upon application at any time. Such license shall expire on the thirty-first day of December following the date of issue. A fee of one dollar ($1.00) shall be charged for such license."

The restriction of Section 176 does not apply to the transportation of quadrupeds, birds or fish *not protected by law.*

Section 178 removes all restriction from the transportation during the *open season therefor* of quadrupeds, birds and fish *lawfully salable* even *though protected by law.*

As to the transportation of all quadrupeds, birds and fish *not salable* and the transportation during the *close season* of all those *salable but protected by law,* the provisions of the statute must be complied with.

No birds, *protected by law,* are salable except as provided in Sections 159, 372, 373 and 179 and these exceptions where applicable hold likewise as to quadrupeds and fish.

All fish *protected by law* are salable except *bass* and *trout.*

All quadrupeds *protected by law* for which there is an *open season,* are salable except *deer* and *squirrels.*

In the cases of quadrupeds, birds and fish which may not lawfully be sold only the limit per day per person can be transported and in the case of deer, but one carcass can be shipped.

As an exception to Sections 176 and 178, Section 179 provides:

> The provisions of section *one hundred and seventy-eight* hereof shall not apply to transportation of fish and game for *propagation purposes* nor to transportation of the *head, hide, feet or fur of quadrupeds* of the *plumage or skin of game birds legally taken and possessed* and the same may be transported at any time. The head, hide and feet of *quadrupeds* legally taken and possessed may be *bought and sold* at any time.

See also chapter XV on *Breeding, Importation and Sale.*
See section 159.

CHAPTER XV

BREEDING, IMPORTATION AND SALE OF FISH AND GAME

One of the principal qualifications of and exceptions to Sections 176 and 178 is Part XII of the law contained in Sections 370–375.

By Section 370 it is provided:

> Fish that may be *lawfully sold* under the provisions of this article, if *lawfully taken in another state or country,* may be transported *into this state* and possessed during the *open season* prescribed by this article. Provided, however, that no person shall transport into this state, or possess, any fish caught in that portion of *Lake Champlain* or its tributaries known as Missisquoi bay, lying and being in the province of Quebec, or the Richelieu river, which is the outlet of said lake, *at any time.* During the *close season* therefor any person may *buy, possess and sell lake trout, whitefish, pickerel, pike, pike perch, shortnosed sturgeon and striped bass* taken *without the state,* provided, however, such person shall keep a *book of record* in which he shall enter the *name, residence and post-office address* of every person from whom he shall *buy, sell to or ship* such fish and at all times shall *permit* the commission, or any *member or officer* thereof to make a full *examination* of his books and papers relating to the purchase and sale of fish, and when required by the commission, *furnish the original invoice or invoices, freight or express receipts* used in the transportation thereof.
>
> Compare section 375.
> See section 169 on the powers of game protectors.

In the case of People v. Wolf, 112 A. D. 449, it was held that it was not incumbent upon any person purchasing such fish during the close season to show that they were caught outside of the State. That case, however,

arose under the Forest, Fish and Game Law, Section 47, as amended to 1905 providing for licensed and bonded dealers.

It seems that under the present provision unless the person accused can and does furnish the proofs and tracers referred to in Section 370, the presumption raised by Section 181 will apply, the burden of proof on the whole case and the whole issue resting however upon the State.

See Procedure.

It also seems that where a person has purchased in good faith from another person, fish which the latter represents and warrants to be within the protection of this section, but which in fact are not, the purchaser would have a recovery over and cause of action against the seller for breach of implied and express warranties and in case of deceit, for fraud, in the event of any loss or penalty.

Section 371 provides as to trout:

> Any person desiring to engage in the business of propagating and selling *trout* raised in a private hatchery may make *application in writing* to the commission for a *permit* so to do. The commission when it appears that such application is made in *good faith,* shall issue to such applicant a hatchery *permit* to propagate, raise and sell trout during the *entire calendar year,* provided, however, that before any trout shall be transported, sold or offered for sale the same shall be duly *tagged* under regulations prescribed by the commission. Upon obtaining a like *permit,* trout raised in a private hatchery *without the state* may be possessed and sold *within the state,* provided the same shall be *tagged* as prescribed under rules and regulations of the commission.

With the above sections are to be read Rules 21–26:

21. The Commission will *lease* to each applicant to whom a *permit* is issued to engage in the business of propagating and selling *trout* raised in a private hatchery, a *device* to be used in *tagging* the trout. No device other than the one so furnished shall be used for this purpose. Each applicant shall pay to the Commission as and for rental

of said machine for the *first year* the sum of *sixty-five dollars, in advance,* and the sum of *one dollar* each year thereafter. At the *expiration* of said permit the applicant shall *return* said machine to the Conservation Commission, in as good condition as when taken, natural wear and tear excepted.

22. The Commission will furnish to each person to whom a permit is issued *metallic tags* inscribed with the letters "N. Y. S. C. C." Each applicant where hatchery is located *without the state* shall pay to the Commission for said tags the sum of *three cents* each. Each applicant shall pay to the Commission for said tags the sum of *one cent* each. Only tags so furnished shall be used; no tag shall be used *more than once.*

23. Artificially propagated *trout* not less than *six inches* long may be sold for *consumption,* at any season of the year, under said permit, provided one of said *metallic tags* is firmly *attached* to each *trout.* The sale of *wild trout* is prohibited at all times.

Any person holding a permit as aforesaid may sell, exchange or give away at any season of the year, for the purpose of *propagation or exhibition, any live trout* propagated by him.

Live trout for *propagation purposes only,* may be transported when accompanied by a *permit* issued by the Commission and *not otherwise.*

See section 159.

24. Before any *trout* are shipped or transported the package in which the same are contained must have affixed thereto a *tag* on which shall be plainly *marked* the *number of pounds* and *kind of trout* contained therein, together with the *name and address* of the *consignee and the consignor,* the *initial point of billing* and the *point of destination.*

25. Any person may *buy, sell or have in possession for sale* for use as food at any season of the year, a *trout artificially propagated and kept,* provided that such trout is *not less than six inches* long and provided also that the same is *tagged* as hereinbefore provided. The *tag* shall be removed only by the *consumer,* and when removed shall be *destroyed.*

26. Every person receiving a *permit* as aforesaid, to propagate and keep trout, shall make a *written report* to the Commission on or before *December thirty-first* of each year, stating the number and variety of *trout sold or exchanged, or given away* for use as food, or for propagation or exhibition *during the preceding year.*

There is no restriction as to the manner in which such *trout* may be taken.

Section 372 provides as to the breeding and sale of *elk, deer, pheasants* and *ducks* as follows:

1. License

Any person desiring to engage in the business of *raising and selling domesticated American elk, white-tailed deer, European red deer and fallow deer, roebuck, pheasants, mallard ducks and black ducks, or any of them,* in a wholly enclosed preserve, or entire island, of which he is the owner or lessee, may make application *in writing* to the commission for a *license* so to do. The commission, when it shall appear that such application is made in *good faith,* shall, upon the payment of a fee of *five dollars,* issue to such applicant a *breeder's license* permitting such applicant to breed and raise domesticated American elk, whitetailed deer, European red deer and fallow deer, roebuck, pheasants, mallard ducks and black ducks, or any of them, on such preserve or entire island, and to sell the same alive at any time for *breeding or stocking purposes* and to kill and transport the same and sell the carcasses thereof for *food as hereinafter provided.* Such license shall expire on the last day of *December* in each year at midnight.

2. Manner of killing

Any person to whom such a license shall have been issued may *kill* such elk, deer, pheasants, or ducks in the manner and at the time herein set forth, as follows: Elk, deer, pheasants, mallard ducks or black ducks may be killed *in any manner at any time,* but mallard ducks or black ducks, *killed by shooting,* shall not be bought, sold or trafficked in, except under such rules and regulations as the commission may prescribe. Any person may *possess or sell* such elk, deer, pheasants or ducks *for food* as hereinafter set forth.

3. Tagging

No elk, deer, pheasants or ducks, killed as aforesaid and intended *for sale,* shall be shipped, transported, sold or offered for sale, unless each quarter and each loin of each carcass of such elk or deer, and each pheasant or duck shall have been *tagged* under the supervision of the commission with an indestructible tag or seal, which shall be supplied by the commission. The quarters and loins of the carcass of such elk or deer, and the carcasses of such pheasants or ducks, when *tagged* as aforesaid, may be possessed, sold or offered for sale at any time. Every game protector or person designated by whom such elk, deer, pheasants or ducks shall have been *tagged,* shall within *five days* thereafter, make and file

with the commission a *written report* thereof, said tags or seals shall remain *affixed* as aforesaid until the quarters or loins of such elk or deer, or the carcasses of such pheasants or ducks shall have been *wholly consumed,* and the sale of a quarter, loin, or any larger portion of any such elk or deer, or the carcass of any such pheasant or duck, which shall not at the time have affixed thereto the tag or seal aforesaid, shall constitute a *violation* of this section, provided, however, that the keeper of a *hotel, a restaurant, a boarding house or a retail dealer in meat or a club* may sell *portions* of a quarter or loin of any such elk or deer, or of the carcass of any such pheasants or ducks so tagged or sealed as aforesaid, to a *patron or customer* for actual consumption, and *no license* shall be required of such person or club.

4. Transportation

Common carriers may receive and transport during the open season therefor carcasses, or parts thereof, of elk, deer, pheasants or ducks tagged as aforesaid, but to every package containing such carcasses, or parts thereof, shall be *affixed a tag or label,* upon which shall be plainly printed or written the name of the person to whom such *license* was issued and by whom such elk, deer, pheasants or ducks were killed, the name or names of the person or persons to whom such elk, deer, pheasants or ducks are to be *transported;* the name of the game protector or other person by whom such elk, deer, pheasants or ducks were *tagged;* the number of carcasses or portions thereof contained therein, and that the elk, deer, pheasants or ducks were *killed and tagged* in accordance with the provisions of this section.

5. Sale

No person shall sell or offer for sale any venison or birds *killed and tagged* as aforesaid without first obtaining a *license* so to do from the commission, upon such terms and conditions as the commission may prescribe, and any such license may be *revoked* at the pleasure of the commission. The said tags or seals shall remain *affixed* as aforesaid until the quarters or loins of such elk, or deer, or the carcasses of such pheasants or ducks shall have been *wholly consumed,* and the sale of a quarter, loin, or any larger portion of any such elk or deer, or the carcass of any such pheasant or duck, which shall not at the time have *affixed thereto* the tag or seal aforesaid, shall constitute a *violation* of this section, provided, however, that the keeper of a *hotel, a restaurant, a boarding house, or a retail dealer in meat or a club,* may sell portions of a quarter or loin of any such elk or deer, or of the

carcass of any such pheasants or ducks so tagged or sealed as aforesaid, to a patron or customer for actual consumption, and *no license* shall be required of such person or club.

6. Reports

On or before the *fifteenth day of April* of each year, every person, to whom a *license* shall have been issued as aforesaid, shall make a *report* to the commission covering the *calendar year* ending the thirty-first day of December in which said license was issued, which said report shall state the total number of elk, deer, pheasants, mallard and black ducks *killed, sold or transported,* as permitted by the provisions of this section, during the said period.

Such reports shall set forth the name of the person to whom such elk, deer, pheasants or ducks were *sold or transported;* the name of the game protector or person designated in whose presence such elk, deer, pheasants or ducks were *tagged,* and such reports shall be *verified* by the affidavit of the person to whom such *license* was issued, or if the license was issued to a corporation, then by an *officer* thereof.

7. Deer Preserves to be fenced

A *preserve* used for the breeding of elk or deer, pursuant to this section, shall be surrounded by a *fence of wire* or other material of a pattern to be approved by the commission of a height not less than *seven feet.*

8. Revocation of license

If any person to whom any such license shall have been issued shall be convicted of a *violation* of the conservation law in relation to fish and game, the commission may *revoke* the license of such person, and thereafter *no similar license* shall be issued to such person.

See section 380, subdivision 9, on domestic game.

Rule 33 provides:

"Black and mallard ducks raised under a breeders' license pursuant to the provisions of section 372 of the Conservation Law and killed by shooting during the open season for wild waterfowl may be sold at any time, provided permission in writing so to do shall first have been obtained from the Commission, and further provided:

"(1) That said black and mallard ducks shall have been marked or tagged by a representation of the Commission before being killed. The marks or tags used are to be furnished by the Commission at a charge of one cent each.

"(2) That said black and mallard ducks be also tagged pursuant to the provisions of said section 372, subdivision 3, thereof, during the said open season for wild waterfowl."

Section 373 provides as to *mammals* and *birds* imported from *without the United States* as follows:

The unplucked carcasses of *pheasants* of all species, *Scotch grouse, European black-game, European black plover, European gray-legged partridge, European red-legged partridge, Egyptian quail,* and the carcasses of *European red deer, fallow deer, roebuck* and *reindeer* may be imported into this state from *without the United States* and *sold* therein at any time, provided, nevertheless, that immediately upon their importation and before they shall have been sold by the importer, there shall be *affixed* to each bird and to each quarter and each loin of each deer a *tag or seal* in the manner provided by section three hundred and seventy-two. The said tags or seals shall *remain,* as aforesaid, until the quarters and loin of such deer, and each bird to which it shall be *affixed* shall have been consumed, and the sale of any quarter, loin or larger portion of such deer, and each bird to which it shall be *affixed* shall have been consumed and the sale of any quarter, loin or larger portion of such deer, or of any portion of such bird which shall not at the time have *affixed* to it the tag or seal aforesaid shall constitute a *violation* of this section. Provided, nevertheless, that the keeper of a *hotel, a restaurant, a boarding house or a retail dealer in meat or a club* may sell portions of any birds so tagged to a *guest, customer or member for consumption.* No dealer other than the keeper of a *hotel, a restaurant, a boarding house or a retail dealer in meat or a club* shall sell or offer for sale any such game *imported and tagged* as aforesaid without first obtaining a *license* so to do from the commission upon such terms and conditions as the commission may prescribe. Such license shall expire on the *last day of December* in each year at midnight unless *sooner revoked* by the commission.

Compare section 377.

See section 380, subdivision 10, on *imported game.*

Fees are provided for in Section 374:

The commission shall be entitled to receive and collect for each *tag or seal affixed* to the carcass of any animal or bird, as provided by sections *three hundred and seventy-two* and *three hundred and seventy-three,* the sum of *five cents;* and the sum of *one cent* for each tag or seal affixed to each *trout* as provided by section *three hundred and seventy-one* hereof.

The storage of *fish* is provided for in Section 375:

Any dealer in *fish or frogs,* duly *licensed* as herein provided, may hold during the *close season,* in a store house to be *designated* by the commission, such part of his stock of *fish or frogs* as he has on hand *undisposed of* at the beginning of the *close season.* Such dealer shall give a *bond* to the people of the state conditioned that he will not, during the *close season* ensuing, sell, use, give away, or otherwise dispose of any fish or frogs which he is *permitted to possess during the close season;* that he will not in any way, during the time when such bond is in force, *violate* any provision of this article; the bond may also contain such other provisions as to the *inspection* of the fish or frogs possessed, as the commission shall require, and shall be subject to the *approval* of the commission as to amount and form thereof, and the *sufficiency* of the sureties. But *no presumption* that any fish or frog is *lawfully possessed* under the provisions of this section shall arise until it *affirmatively appears* that the provisions thereof have been *complied with.*

Compare section 370.

Section 377 provides as to mammals and birds imported from without the *State:*

Any person engaged in the business of raising and selling domesticated American elk, whitetail deer, European red deer and fallow deer, roebuck, pheasants, mallard ducks and black ducks, or any of them, in a wholly enclosed preserve or entire island, of which he is the owner or lessee, *under a breeder's law* providing for the tagging of all preserve bred game and otherwise *similar in principle* to the law of the state of New York in such case made and provided, may make application in writing to the commission for a *permit* to import such *mammals* or *birds* into the state of New York and sell the same. In the event that the commission shall be satisfied that the said mammals and birds are

bred in captivity and are killed and tagged under a breeding law *similar in principle* to that of the state of New York, upon the payment of a fee of *five dollars,* together with such additional sum as the commissioner may determine to cover the necessary cost of inspection, the commission may *in its discretion* issue a *revocable permit* in writing to such applicant to import such *mammals* and *birds* raised as aforesaid into the state of New York and to sell the same, in which case the provisions of sections *three hundred and seventy-two, three hundred and seventy-three* and *three hundred and seventy-four* of the conservation law, in so far as the same are applicable, shall apply.

Compare section 373.

The foregoing provisions of the Conservation Law whereby certain game birds from foreign countries are excluded and others admitted are based upon ornithological rather than geographical lines. The scheme is to permit the importation of birds which do not resemble our native birds and at the same time treat fairly the legitimate commercial interests of this and other nations.

Attorney-General's Report, 1911, vol. II, page 667.

The same principle is true as to the *mammals* mentioned and as to the commercial interests of this and other states.

See People v. Stillman, 117 A. D. 170.
People v. Weinstock, 193 N. Y. 481.
People v. Waldorf Co., 118 A. D. 723.
People v. Booth & Co., 105 A. D. 184.
People v. Harrison Co., 138 A. D. 124.
Silz v. Hesterberg, 184 N. Y. 126.
Dieterich v. Fargo, 194 N. Y. 359.

CHAPTER XVI

THE PROTECTIVE FORCE

The Conservation Law as to *fish and game* is primarily enforced by the Commission through the activities of the *protective force* under the supervision of the *chief game protector* who is in main charge of the Department of *Fish and Game.*

Section 165 provides as to the *protective* force and its twelve divisions as follows:

> The commission shall appoint *one hundred and twenty-five* game protectors. The commission shall appoint a *chief game protector,* a *deputy chief game protector, twelve division chief protectors, five fisheries protectors,* and a *protector* for the *Saint Lawrence river.* The chief game protector shall have general supervision and control of *all protectors.* The positions of chief game protector, deputy chief game protector, division chief protectors, fisheries protectors, the protector for the Saint Lawrence river and the other game protectors provided for by this section shall hereafter be classified in the *competitive class* of the *classified civil service.*

Protectors are rated according to the provisions of Section 166:

> The commission shall have power to *remove,* to *suspend without pay,* to *reduce in rank,* to act as a *trial board* in hearing and passing upon *charges,* and to *rate* all game protectors and fisheries protectors on the basis of *merit and efficiency,* in accordance with the provisions of the state *civil service law.* It shall rate all protectors on the basis of merit and efficiency in *three grades,* to be known as the first, second and third grades. Protectors rated in the *first and second grades* shall not be removed unless furnished with *reasons* for removal and given a *hearing.* The commission is empowered to make such *rules and regulations* as in its judgment are required, to secure a proper rating of the protectors, or to carry out the provisions of this section.

Bonds are required by Section 167:

The *chief game protector* shall give a bond to the people of the state in the sum of *one thousand* dollars conditioned for the faithful discharge of his duties, with sureties to be approved by the commission. Every game protector shall give a like bond in the sum of *five hundred* dollars.

Their compensation is fixed by Section 168:

The *chief game protector* shall receive an annual salary of *four thousand* dollars. The *deputy chief game protector* shall receive an annual salary of *twenty-four hundred dollars.* Each *division chief* protector shall receive an annual salary of *sixteen hundred dollars* and his actual and necessary *traveling expenses,* not exceeding *seven hundred and fifty dollars* a year. Each *fisheries protector* shall receive an annual salary of *thirteen hundred dollars,* and his actual and necessary *traveling expenses,* not exceeding *seven hundred and fifty dollars.* Each *game protector* shall receive an annual salary of *nine hundred dollars* and his actual and necessary *traveling expenses,* not exceeding *six hundred dollars;* provided, however, that each game protector who shall have been rated in the *first grade* for a *full year* shall receive increased salary at the rate of *fifty dollars per annum,* and for *each year thereafter* in which he shall *so qualify* he shall receive a *like increase* until he receives the sum of *thirteen hundred dollars per annum,* but the commission shall have the power in its discretion, for cause shown, to *cancel such increase* or any part thereof on the failure of any protector receiving such increase to qualify for the *first grade in any year.* Game protectors rated in the *first grade only* shall be eligible for promotion.

The first grade for the year 1916 includes the first *thirty* on the merit list.

Their powers are enumerated in Section 169:

Game protectors, forest rangers, and *fisheries protectors* shall enforce all laws relating to *fish, birds and quadrupeds;* all laws of *boards of supervisors* relating to the same; and shall have power to *execute* all *warrants and search warrants* issued for a violation of this article; to serve *subpoenas* issued for the examination and investigation or trial of offenses against any of the provisions of said law; to make *search* where they have *cause to believe* that fish, birds or quadrupeds, or any parts thereof, are *possessed in*

violation of law, and *without search warrant* to examine the contents *of any boat, car, automobile or other vehicle, box, locker, basket, creel, crate, game bag or other package,* and the *contents of any building other than a dwelling house,* to ascertain whether any of the provisions of this article or of any law for the protection of fish, shell-fish, birds or quadrupeds have been or are being violated, and to use *such force* as may be necessary for the purpose of such examination and inspection; and *with a search warrant* to search and examine the contents of any *building or dwelling house; seize all quadrupeds, birds or fish or any parts thereof possessed in violation of law or showing evidences of illegal taking and seize and confiscate* all devices *used* in taking fish, game or wild animals *illegally,* and hold the same subject to the order of the commission; to *arrest without warrant* any person committing a misdemeanor under the provisions of this article in their presence, and take such person immediately before a magistrate having jurisdiction for trial, and to exercise such *other powers of peace officers,* in the enforcement of the provisions of this chapter, or of judgments obtained for violation thereof, as are not herein specifically provided. Any regular or special game protector, fisheries protector, fire superintendent, forest ranger or inspector who shall *compromise or settle* any violation of the fish and game law *out of court* or except as provided by section *thirty-six* of this chapter, *without the order of the commission,* shall be guilty of a *misdemeanor.*

A game protector to be entitled to hunt must comply with Section 185.

A game protector is not required to secure a license under the Sullivan Law to carry concealed weapons.

Report of Attorney General, 1913, vol. II, page 636.

A game protector has no authority to receive pay in compromise of a penalty.

People v. Klock, 55 M. 46.

The compromise of civil causes of action for the penalty made through protectors are to be made *in court* subject to the *approval* of the Commission unless made *out of court* by stipulation on the *order* of the Commission.

See Procedure and sections 9, 26, 29, 36, 50 and 51.

Game protectors are entitled to be taken on any *boat or vessel* used for the taking of fish at any time.

See section 281.

Where a game protector enters upon lands whether posted or parked or not for the *bona fide* enforcement of the law or to ascertain whether the law is being violated he commits no actionable trespass; but he has no right to hunt or fish without the consent of the owner of the land or the consent of the owner of the exclusive rights thereon.

To accomplish an arrest a game protector may commit what would otherwise be a trespass.

People v. Morehouse, 6 N. Y. Supp. 763.

By the Connecticut statute any game protector may *deputize* another person to assist him in detecting any violations or making arrests.

By Section 169 of the Criminal Code, it is provided:

Every person must aid an officer in the execution of a *warrant* if the officer require his aid and be *present and acting* in its execution.

Assistants to game protectors should wherever possible be other protectors, special protectors or peace officers in order to avoid any technical questions of trespass.

Sections 1824 and 1825 of the Penal Law make it a misdemeanor *knowingly* to resist or obstruct a game protector in the discharge of his duty.

Compare section 1851 of the Penal Law.

Section 1846 of the Penal Law makes it a misdemeanor to impersonate a game protector.

See Procedure as to arrests.

The matter of reasonable searches and seizures are within the control of the State and are not affected by Amendment IV to the U. S. Constitution.

Matter of Spies, 123 U. S. 181.
Eilenbecker v. District, etc., 134 U. S. 31.
Kansas v. Bradley, 26 Fed. Rep. 289.

Section 169 gives to a protector acting in good faith in the matter of search, almost as "wide a charter as the wind."

A protector may search *without warrant* any building except a *dwelling house* or building *used* as a *dwelling* and as to buildings other than *dwelling houses* he has the same powers and rights of search *without warrant* as he has *with warrant*.

See Procedure as to search warrants.

A building any part of which is usually occupied by a person or person lodging therein at night is ordinarily deemed a dwelling house.

See section 400 of the Penal Law.

The power of search given to protectors, it seems, includes what amounts substantially to a reasonable search of the person and embraces the power without warrant to search any receptacle of any kind not inside a dwelling where he has any reason to suspect that it contains fish or game.

Compare sections 154, 221 and 282 on *seizures*.

See Chapter IV, Section 152, on laws enacted by boards of supervisors.

No action can be maintained against a protector for releasing wild animals unlawfully taken or possessed.

James v. Wood, 8 L. R. A. 448.

Protectors are required by Section 170 to make *reports* as follows:

> The chief game protector and division chief protectors shall make such reports as are required by the commission. Each *game protector* shall keep a *daily record* of his official acts, and report the same at the close of each *week* to the *division chief* of his division, and similarly report at the close of each *month* to the *chief game protector*. The salary and traveling expenses of a game protector shall not be payable except upon the *certificate* of the chief game protector that such protector has made the required report and properly performed his duty.

Special game protectors are provided for by Section 171 as follows:

> The commission may in its *discretion* appoint *special game protectors*. Such special game protectors shall hold office *during the pleasure* of the commission, and shall have the *same powers as game protectors*, and receive *one-half* of the fines and penalties *less expenses*. They shall make reports *as required by the commission*. No person shall be eligible for such appointment until he shall have passed a non-competitive examination conducted under authority of the commission.
>
> See section 185, subdivision 11.

A moiety is one-half the fine or penalty after the deduction of the expenses of collection.

> Roberts v. Hatch, 40 Hun 53.

Contracts entered into by special protectors to share moieties with each other or third persons have been upheld.

> Overton v. Williams, 139 A. D. 177.

This would not apply to regular protectors.

> See section 29, and Carpenter v. Taylor, 164 N. Y. 171.

The Yukon act gives the moiety to the informer and Oregon statute offers a reward for information resulting in conviction.

The powers of peace officers are covered by Section 172:

> *Peace officers* shall have the same powers as game protectors under this article, except the right to search without warrant.
>
> See section 185.

Peace officers are sheriffs, under sheriffs and deputy sheriffs, and constables, marshals, police constables or policemen of a city, town or village.

> Section 154 of the Criminal Code.

Provision is made by Section 173 for the defense of protectors against suits:

> It shall be the *duty* of the attorney-general on request of any *regular game protector,* accompanied with the approval of the commission, to appear in and defend as attorney any action or proceeding *prosecuted against* the protector for or on account of any act of his done while *holding such office* and when such act was, in the *opinion* of the attorney-general done in *discharge* of the protector's *official duty* or in *reasonable exercise of his authority.*

In broad terms a protector is liable for acts done in *excess* of his authority and for any damage or injury to person or property *negligently, unnecessarily* or *maliciously* inflicted in the *discharge* of his *duty.*

Every association for the protection of fish and game should make it one of its foremost objects to furnish *assistants* and *assistance* to game protectors.

The members of such associations should themselves first of all obey the *law* and next furnish *proof and prosecution* in the case of every violation *seen.*

No protector should be obliged to cut into his expense account for *extraordinary* traveling expenses and every association could readily place at his reasonable disposal the use when needed of automobiles and of motor boats.

It is conceded on all sides that even with proper co-operation from such associations, from peace officers in general and the sheriff in each county in particular, from special protectors and in all probability, in the future, from U. S. marshals and their deputies and from federal wardens, the protective force is numerically inadequate and should be increased. In addition the movement to establish a State constabulary or rural police force corresponding to that in vogue in Pennsylvania should succeed as it would not only protect remote districts against lawlessness in all its forms, but would subject violators of the Conservation Law to an incessant and effective cross-fire.

The members of all protective associations, individually and collectively, can help to furnish funds for these increases of policing forces by insisting on the requirement of a proper combination, angling, hunting and trapping license.

It has been urged and it seems proper that the Workmen's Compensation Law should be so amended as to expressly include within the benefits of its provisions all game protectors and their assistants.

It has not been deemed a primary *duty* of protectors to arrest for trespasses on posted lands or private parks.

CHAPTER XVII

PROCEDURE

With but few exceptions, all provisions as to penalties, fines and punishment for violations of Article V are grouped under Section 182:

1. Unless a *different or other penalty* or *punishment* is herein specially prescribed, a person who buys, sells, offers for sale, takes, possesses, transports or has in possession for sale or transportation any fish, bird or quadruped, shell-fish or crustacean in *violation* of any of the provisions of the conservation law in relation to fish and game, or who *violates* or who *fails to perform* any duty *imposed* by any of the provisions of said law, or any *lawful order, rule or regulation* adopted by the commission, is guilty of a *misdemeanor;* and in addition thereto is liable as follows: to a penalty of *sixty dollars* and an additional penalty of *twenty-five dollars* for each *fish, bird, quadrupeds, shell-fish or crustacean, or part* of fish, bird, quadruped, shell-fish or crustacean, bought, sold, offered for sale, taken, possessed, transported or had in possession for sale or transportation in *violation thereof.*

2. A person who buys, sells, offers for sale, takes, possesses, transports or has in possession for sale or transportation any *deer, elk, moose, caribou, antelope, beaver or part of* any such animal in violation of any of the provisions of said law or of any lawful rule or regulation of the commission, is guilty of a *misdemeanor,* and in addition thereto is liable as follows: to a penalty of *one hundred dollars* and an additional penalty of *one hundred dollars* for each deer, elk, moose, caribou, antelope, beaver or part of any such animal bought, sold, offered for sale, taken, possessed, transported or had in possession for sale or transported contrary to law.

3. A person who violates any of the provisions of sections *two hundred and forty-five, two hundred and forty-seven* or *two hundred and forty-eight* thereof, shall be guilty of a *misdemeanor,* and in addition thereto is liable as follows: to a penalty of *five hundred dollars,* and an additional penalty of *ten dollars* for each fish taken, killed or possessed in violation thereof.

4. Any *public officer* who fails to perform any duty imposed by any of the provisions of said law or any lawful rule or regulation of the commission is guilty of a *misdemeanor,* unless otherwise specifically prescribed herein, and in addition thereto is liable to a penalty of *one hundred dollars.*

5. A person who violates any provision of *part eleven* shall be guilty of a *misdemeanor,* and shall be liable to *exemplary damages* in the sum of *twenty-five dollars* for each offense or trespass to be recovered by the *owner of the lands, or hunting or fishing rights thereon,* with *costs of suit,* in addition to the *actual damages,* all of which may be recovered in the *same action.* The *consent in writing* of such owner to hunt or fish on said lands during the open season shall be a defense to a prosecution under this section.

See section 230.
See sections 153, 154, 169, 185, 246, 291.
See sections 300–334.
As to section 182, subdivision 5, see chapter XIX.

The *penalties* provided by the law are recoverable in *civil actions* brought by the Commission.

Fines or *imprisonment* or both are imposed by way of *judgment* in *criminal actions* upon either *plea* or *verdict* of guilty.

The civil action to recover the penalty, whatever its result, is no bar to the criminal action and the criminal action whether resulting in acquittal or conviction, is no bar to the civil action.

See section 36.
People v. Snyder, 90 A. D. 422.

Either one may precede the other or they may be simultaneously commenced and prosecuted.

The duties of the *Deputy Attorney-General* and assistants in respect to litigation in which the Commission is involved are defined by Section 9:

It shall be the duty of the attorney-general, when requested by the commission, to appoint a deputy attorney-general, and such assistants as may be necessary, and assign them to the commission. The deputy attorney-general shall receive an annual salary of five thousand dollars. The salaries of the assistants shall be

fixed by the commission. It shall be the duty of such deputy, in the name of the attorney-general, to conduct all prosecutions for *penalties* imposed by the forest, fish and game law or by this chapter, and to bring all actions, suits and proceedings, which the commission shall be authorized to institute and maintain, and to defend all actions, suits and proceedings brought against the commission. Such deputy shall also act as *counsel* to the commission. No action, suit or proceeding in which the *title to lands* of the state in forest preserve counties shall be involved shall be *withdrawn or discontinued,* nor shall judgment therein *against the state* be entered on consent except on *special permission* of the court and after application made in open court on which application all the terms and conditions of the settlement shall be fully stated in writing and the reasons therefor set forth at length.

Compare sections 50, 51, 26, 29, 36, 169.

In 1895 it was held that litigation involving title to State lands could not be compromised by allowing judgment to be entered therein adverse to the State.

Report of Attorney-General, 1895, page 345.

On the contrary, in 1910 the power of the old commission to settle on a *compromise basis,* out of court, without action instituted, claims in favor of or against the State was generally upheld.

Report of Attorney-General, 1910, page 772.
See discussion under section 50, and People v. Santa Clara Lumber Co., 213 N. Y. 61.

From Sections 9 and 26 it is manifest that the Commission determines when civil actions shall be brought to recover *penalties* and takes exclusive charge of them through the Deputy Attorney-General. For this reason, game protectors have no immediate concern with civil actions as such except upon compromise thereof as provided in Section 36.

Section 26 provides:

Actions for *penalties* for violations of any provision of this chapter shall be in the name of the "People of the State of New

York;" and must be brought on the *order* of the commission, and may be *compromised, settled and discontinued* as provided in section *nine* of this chapter. Such actions, if in *justices' courts,* may be brought in *any town of the county* in which the penalty is *incurred,* or, if the defendant resides in *another county,* in any town of the county in which the *defendant resides.*

See section 36, and see People v. Robbins, 39 Hun 137.
Compare section 2863 of the Code of Civil Procedure.
See Leonard v. Ehrich, 40 Hun 460; and
People v. Haskell, 62 Supp. 654.

There is small occasion for the commencement of civil actions in justices' courts due to the provisions of Section 27 as to *costs:*

In case of *recovery of any amount* in an action brought for a *penalty* under this chapter or in any action *authorized* by this chapter, in any *court of record* the people shall be entitled to recover *full costs, of course,* and at the rates as provided for by section *thirty-two hundred and fifty-one* of the code of civil procedure, together with witnesses' fees and other disbursements.

Section 27 overrides section 3228 of the Code of Civil Procedure, as to civil actions brought under the Conservation Law.

Compare People v. Strauss, 48 A. D. 198.

The jurisdiction of a Justice's Court is limited to a grant of judgment not to exceed $200, but a justice of the peace has power to allow an amendment of the complaint reducing the amount demanded to one within his jurisdiction.

People v. Wait, 114 A. D. 334.

As to confession of judgment before magistrates holding Justices' Courts or Courts of Special Sessions, see Section 36.

The jurisdiction of the Supreme Court is governed by Sections 217–218; 982–991 of the Code of Civil Procedure.

The jurisdiction of County Courts in cases where the defendant is a resident of the county in which the action is brought is governed by Section 340 of the Code of Civil Procedure.

In cases where civil actions are brought before Justices' Courts and where appeals are taken to County Court demanding a new trial as a matter of right, intricate questions of costs may arise where there is any offer in the field.

See sections 3044–3067, 3068–3073, of the Code of Civil Procedure.
See McKuskie v. Hendrickson, 128 N. Y. 555.
See Pierano v. Merritt, 148 N. Y. 289.

It has been held that no presumption can be entertained that the action is brought by the proper party.

People v. Belknap, 58 Hun 241.
See section 185, subdivisions 10–12.

As to civil actions for the recovery of exemplary damages brought by the owner of posted or parked lands against trespassers, see Chapter XIX.

The civil action for a penalty must be brought within two years except that under Section 185, subdivision 10, where brought by an individual on the order of the Commission, it seems it must be brought within one year.

Sections 383 and 387 of the Code of Civil Procedure.
See People v. Robbins, 39 Hun 137.

Actions for penalties may be joined in the same complaint.

See sections 484–10; 2863 and 2937 of the Code of Civil Procedure.

It seems to be unnecessary to prove intent in the civil action for the penalty.

People v. Snyder, 90 A. D. 422.
People v. Redwood, 140 A. D. 814.

Every person whether actually engaged in a violation or only counseling, aiding or assisting in any way is separately and severally liable for the penalty. It is no defense that others concerned are not joined or that others involved have paid the penalty.

People v. White, 124 A. D. 79.
See definitions of *hunting* and *taking,* sections 380–26, 27.

The statute being highly penal is ordinarily to be strictly construed in favor of the defendant and against the State.

In actions to recover the penalty the case must be proved by a fair preponderance of evidence as distinguished from the criminal action in which the guilt of the accused must be established beyond a reasonable but not a captious doubt.

Wherever by the express terms of any section, certain circumstances raise a presumption of violation or where a proviso or exception is made, the burden of rebutting the presumption or bringing the acts in question within the proviso or exception rests with the defendant, but the burden of proof upon the whole case rests with the State.

See sections 181, 282, 196, 199, etc.
See People v. Chamberlain, 92 M. 720.
Richardson v. State, 77 Arkansas 323.

The law consistently provides that each violation carries with it the prescribed penalty and an additional penalty for each fish, bird or quadruped taken in the unlawful manner or as a result of the unlawful act. There can therefore be no nice distinctions drawn on the question of cumulative penalties.

See People v. Spencer, 201 N. Y. 105.

Assuming that a person on properly posted lands, in the close season, takes by angling five five-inch trout;

then draws off water by diverting the stream; then nets ten trout, catches ten with his hands and dynamites the rest taking in all fifty fish, half of which are under size and the total catch weighing fifteen pounds; for how many penalties can he be held and to which of the distinct violations are the additional penalties to be superadded?

The civil action to recover exemplary damages for the trespass may be brought by the owner of the lands or of the exclusive fishing rights.

He can be held by the State under separate counts for at least five distinct penalties and to each penalty can be superadded the additional penalty for each fish taken in that particular unlawful manner.

The violations as to the pound and length limit, it has been claimed, should properly be eliminated due to the fact that the catch was made in close season.

Assuming that no proof could be made by the State as to the exact number of fish taken by each unlawful method, it seems, additional penalties could be claimed for all of the fish under each distinct violation and a jury would have to determine on the evidence that intricate question of how many *fish* were taken in each particular manner, best solved perhaps by concentrating the additional penalties under the violation which carries the heaviest penalty for each individual fish unless the defendant could satisfactorily apportion them.

Many illustrations along this line might be made.

The general provisions of the Code of Civil Procedure governing the satisfaction of judgments in civil actions are embraced within Sections 1487–1495; 3032–3035.

A judgment in an action for a penalty must first be satisfied by an execution against property and if not so satisfied it may be satisfied by an execution against the person.

It was held in the case of People v. Monaco, 54 Misc. 25, that to deprive a person taken on a body execution of

the right to the liberties of the jail the statute should expressly so state.

Accordingly Section 28 governing the enforcement of judgments in civil actions for the penalty now reads as follows:

> Judgments recovered under this chapter may be enforced by *execution against the person* as provided by the code of civil procedure. A person taken into custody upon such an execution shall *not be admitted to the liberties of the jail* and shall be confined for not less than *one day,* and at the rate of *one day* for each *dollar* of the amount of the judgment recovered. No person shall be imprisoned *more than once,* or for more than *six months* on the same judgment. Imprisonment shall not operate to *satisfy a judgment.*
>
> See section 36.

Civil actions if brought against infants through the appointment of guardians ad litem, are governed by Sections 471 and 2888 of the Code of Civil Procedure.

> See section 554 of the Code of Civil Procedure.

A parent or guardian of an infant is as a rule not liable for the wrongful acts of the infant unless the infant's acts are committed at the instigation or through the coercion of the parent or guardian.

> Compare sections 176, 380–26 and 27.

What is of paramount importance is the consideration of matters of jurisdiction and procedure in criminal actions. From this wide field only, a choice of the more salient propositions can be presented.

Violations of the Conservation Law as such, with few exceptions, constitute crimes of the class of misdemeanor.

> Compare section 54, subdivision 3.

In misdemeanors, all participants are principals.

> See section 27 of the Penal Law.

A child under the age of seven years is not capable of committing crime (doli incapax). A child of the age of seven years and under the age of twelve years is presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him and to know its wrongfulness. A child of the age of twelve years or more is presumed to be capable of the commission of crime.

See sections 816–817 of the Penal Law.

The circumstances under which arrests may be made by private persons are set forth in Sections 183–185 of the Criminal Code:

§ **183**. A private person may arrest another:

1. For a crime committed or attempted in his presence;
2. When a person arrested has committed a felony, although not in his presence.

§ **184**. A private person, before making an arrest, must inform the person to be arrested of the cause thereof, and require him to submit, except when he is in the actual commission of the crime, or when he is arrested on pursuit immediately after its commission.

§ **185**. A private person, who has arrested another for the commission of a crime, must, without unnecessary delay, take him before a magistrate, or deliver him to a peace officer.

For offenses other than those defined by the Conservation Law, game protectors who are not peace officers as well, may make arrests pursuant to the above provisions only.

See Section 169 as to the powers of game protectors in the matter of the enforcement of the Conservation Law.

Sections 177–182 of the Criminal Code prescribe the conditions under which arrests may be made by an officer without a warrant:

§ **177**. A peace officer may, without a warrant, arrest a person:

1. For a crime, committed or attempted in his presence;
2. When the person arrested has committed a felony, although not in his presence.

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.

§ **178**. To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.

§ **179**. He may also, at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and is justified in making the arrest, though it afterward appear that a felony has been committed, but that the person arrested did not commit it.

§ **180**. When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape.

§ **181**. A peace officer may take before a magistrate a person who, being engaged in a breach of the peace, is arrested by a bystander and delivered to him.

§ **182**. When a crime is committed in the presence of a magistrate, he may, by a verbal or written order, command any person to arrest the offender, and may thereupon proceed as if the offender had been brought before him on a warrant of arrest.

In cases of arrest without warrant or where instead of arrest, an offender is accorded an opportunity to appear before a certain magistrate at a designated time in default of which appearance a warrant will be asked for, before any further proceedings are had, an information should be laid and a deposition made before the magistrate before whom the offender is *taken* or *appears,* not only for purposes of record, but in all cases to save any question of jurisdiction itself; and this is a proper practice even where there is a plea of guilty interposed or an immediate trial had, coupled with a waiver of such formalities.

See People ex rel. Farley v. Crane, 94 A. D. 397.
People v. Zabor, 103 A. D. 594.
People v. Burns, 19 M. 680.

Unlawful and malicious arrests constitute oppression and are made misdemeanors by Section 854 of the Penal Law.

Magistrates are those officers who have power to issue warrants for the arrest of persons charged with crime and among those enumerated are justices of the peace, police justices, and recorders of cities.

See sections 146–147 of the Criminal Code.

The preliminaries to the issuance by magistrates of warrants based on information and deposition are prescribed by Sections 145–166 of the Criminal Code and the more important of those provisions are as follows:

§ **145**. The information is the allegation made to a magistrate that a person has been guilty of some designated crime.

The information should designate by name or identify by description the person accused of the crime charged and cannot either as to the fact of the crime or the identity of the offender, be based solely on information and belief. The sources of information and grounds of belief must be stated and sufficient facts to show that the complainant is acting in good faith must be set forth.

People ex rel. Livingston v. Wyatt, 186 N. Y. 383.
Tanzer v. Breen, 139 A. D. 10.
People ex rel. Laird v. Hannan, 37 Supp. 702.

Further provisions are viz.:

§ **148**. When an information is laid before a magistrate, of the commission of a crime, he must examine on oath the informant and prosecutor, and any witnesses he may produce, and take their depositions in writing and cause them to be subscribed by the parties making them.

§ **149**. The depositions must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the crime and the guilt of the defendant.

§ **150**. If the magistrate be satisfied therefrom, that the crime complained of has been committed, and that there is reasonable ground

to believe that the defendant has committed it, he must issue a warrant of arrest.

§ **152**. The warrant must specify the name of the defendant, or if it be unknown to the magistrate, the defendant may be designated therein by any name. It must also state an offense in respect to which the magistrate has authority to issue the warrant, and the time of issuing it, and the city, town or village where it is issued, and be signed by the magistrate with his name of office.

This provision together with or apart from others does not seem to authorize what are popularly and ordinarily termed "John Doe" proceedings or inquiries. On this question there is considerable confusion of authority.

Compare sections 20–25.

Where a crime has actually been committed and the name of the offender is unknown, it *seems* that the information and warrant or the papers in the proceeding must so describe and identify him as to enable a witness subpoenaed on the proceeding, trial or examination to determine that he *himself* is not the person *accused.*

Magistrates, except in certain quasi criminal proceedings can apparently lawfully hold only trials of or examinations to hold for the action of the grand jury, named, identified or described persons charged with the actual commission of crime.

In cases where there is uncertainty as to whether a crime has been committed or where the offender's identity is unknown, the inquiry or investigation can, it appears, lawfully be conducted only before a grand jury.

People ex rel. Livingston v. Wyatt, 186 N. Y. 383.
People ex rel. Willett v. Quinn, 150 A. D. 813.
People ex rel. Sampson v. Dunning, 113 A. D. 35.
People ex rel. Brown v. Tighe, 146 A. D. 491.
People ex rel. Friedman v. Cornell, 37 M. 676.
Scheer v. Keown, 29 Wis. 586.
People ex rel. Lewisohn, 176 N. Y. 253.

In cases of violations of the Conservation Law magistrates holding courts of Special Sessions have jurisdic-

tion, it *seems,* only to try and to determine the guilt of named, described or identified persons definitely charged with the actual commission of the offense.

See section 31.

But it was intimated by Judge Chase, however, in Livingston v. Wyatt that a so-called "John Doe" proceeding should be allowed where a crime had *actually been committed* but the offender's *identity* had to be *ascertained,* and upon the strength of that statement such proceedings are resorted to in extraordinary cases as a claimed matter of right.

The Code goes on to say:

§ **153**. The warrant must be directed to, and executed by, a peace officer.

§ **154**. A peace officer is a sheriff of a county, or his undersheriff or deputy, or a constable, marshal, police constable or policeman of a city, town or village.

See section 169 as to powers of game protectors.

Where a recorder of a city issues a warrant it may be directed to and executed by any peace officer in the State.

See section 155 of the Criminal Code.

Other provisions are:

§ **156**. If it be issued by any other magistrate, it may be directed generally to any peace officer in the county in which it is issued, and may be executed in that county; or if the defendant be in another county, it may be executed therein, upon the written direction of a magistrate of such other county indorsed upon the warrant, signed by him with his name of office, and dated at the city, town or village where it is made, to the following effect: "This warrant may be executed in the county of Monroe" (or as the case may be).

§ **157**. The endorsement mentioned in the last section cannot, however, be made, unless upon the oath of a credible witness, in writing, indorsed on or annexed to the warrant, proving the handwriting of the magistrate by whom it was issued. Upon this proof, the magistrate indorsing the warrant is exempted from liability to a civil or

criminal action, though it afterward appear that the warrant was illegally or improperly issued.

§ **159.** If the crime charged in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, for his appearance before the magistrate named in the warrant, and take bail from him accordingly.

Where the defendant is required to be taken before the magistrate who issued the warrant, the officer may, if that magistrate be absent or unable to act, take the defendant before the nearest or most accessible magistrate in the same town in which the magistrate before whom the warrant was returnable resides, if there be any such magistrate accessible and qualified to act; otherwise before the nearest or most accessible magistrate in the same county.

See section 164 of the Criminal Code.

An important provision along this line is:

§ **166.** If the defendant be taken before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, or if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew.

Arrests made by an officer under a warrant are governed by Sections 167–176 of the Criminal Code:

§ **167.** Arrest is the taking of a person into custody that he may be held to answer for a crime.

§ **168.** An arrest may be:

1. By a peace officer, under a warrant;
2. By a peace officer without warrant; or
3. By a private person.

§ **169.** Every person must aid an officer in the execution of a *warrant,* if the officer require his aid and be *present and acting* in its execution.

§ **170.** If the crime charged be a felony, the arrest may be made on any day, and at any time of the day or during any night. If it

be a misdemeanor, the arrest cannot be made on Sunday, or at night, unless by direction of the magistrate indorsed upon the warrant.

See section 5 of the Judiciary Law.

§ **171**. An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer.

§ **172**. The defendant is not to be subjected to any more restraint than is necessary for his arrest and detention.

§ **173**. The defendant must be informed by the officer that he acts under the authority of the warrant, and he must also show the warrant if required.

§ **174**. If, after notice of intention to arrest the defendant, he either flee or forcibly resist the officer may use all necessary means to effect the arrest.

§ **175**. The officer may break open an outer or inner door or window of any building, to execute the warrant, if, after notice of his authority and purposes, he be refused admittance.

§ **176**. An officer may break open an outer or inner door or window of any building, for the purpose of liberating a person, who, having entered for the purpose of making an arrest, is detained therein, or when necessary for his own liberation.

Sections 186 and 187 of the Criminal Code provide:

If a person arrested escape or be rescued the person, from whose custody he escaped or was rescued, may immediately pursue and retake him, at any time, and in any place in the state.

To retake the person escaping or rescued, the person pursuing may, after notice of his intention and refusal of admittance, break open an outer or inner door or window of a building.

Such force as may be necessary to require an offender to submit to an arrest is justifiable.

Penal Law, section 246

Section 165 of the Criminal Code provides:

The defendant must in all cases be taken before the magistrate without necessary delay, and he may give bail at any hour of the day or night.

Section 5 of the Judiciary Law provides that a court shall not be opened or transact any business on Sunday, except to receive a verdict or discharge a jury. But the

prohibition does not apply to prevent the exercise of the jurisdiction of a magistrate where it is necessary to preserve the peace, or, in a criminal case, to *arrest, commit* or *discharge* a person charged with an offense.

See People ex rel. Burke v. Fox, 205 N. Y. 490.

Section 382 provides:

> This article is intended to be a restatement of existing law with such changes as clearly appear. (The term of office of the present employees of the commission in the division of fish and game shall not be affected, except as herein specifically provided.) Nothing in this article shall be construed as *amending* or *repealing* any of the provisions of the *code of criminal procedure* nor of *the penal law.* Any of the provisions of this article *inconsistent* with the provisions of the *code of criminal procedure* or of *the penal law* shall be held to be *effective* for the *purposes of this article only.*

This amended section disposes of many troublesome questions formerly arising on the interpretation of different sections of the Penal Law, particularly Section 1937 of the Penal Law, and the Criminal Code, especially Sections 56, 39–1, 211, 254 and 717.

Section 31 provides:

> Subject to the *power of removal* provided in the code of criminal procedure, *courts of special sessions* and *police courts* shall have, *in the first instance,* jurisdiction of offenses committed under this chapter within their *respective counties.* A warrant shall be returnable before the magistrate *issuing the same.* And, for the purpose of *this chapter only,* the jurisdiction of the courts mentioned in this section is *extended* as to misdemeanors to permit the *imposition of the fines and sentences* authorized by this chapter.

Courts of special sessions are courts held by *qualified* justices of the peace and police justices for the trial of such criminal offenses as come within their jurisdiction.

Compare sections 62 and 74 of the Criminal Code.

This provision as to jurisdiction appears to apply to prosecutions for trespass on posted lands.

Where an offender is brought before one of the Courts designated by Section 31, he should be informed of his right to ask and he may ask for an adjournment of not less than five nor more than ten days during which to make an effort to secure a certificate from the county judge or a justice of the Supreme Court to the effect that reason exists for the presentation of his case to a grand jury.

See sections 57–58 of the Criminal Code.
People v. Barry, 16 A. D. 462.

Failure to notify the defendant is no ground for reversal where a plea of *guilty* is made.

People v. Loomis, 65 M. 156.

If he does not ask for such adjournment or fails to secure the certificate, the magistrate holding the court shall proceed with the case.

Such an application for the presentation of the case to a grand jury should be made where for any reason the magistrate may be needed as a material witness for either side.

Compare section 3151 of the Civil Code.

Sections 211 and 56 of the Criminal Code, under which it was claimed that a defendant could be tried by Special Sessions for game law violations only when he elected to be so tried, have been held to be inapplicable to cases under the Conservation Law.

People v. McKenzie, 69 M. 540.
Compare People v. Austin, 49 Hun, 396.
People v. Knatt, 156 N. Y. 302.
People v. Vert, 134 A. D. 790.

The offender may be taken before any magistrate in the county within which the offense was committed. The limitation of Section 151 of the Criminal Code requiring trials to be had in the town where the offense was committed have been held inapplicable to cases under the

Conservation Law and a justice of the peace or any magistrate holding a Court of Special Sessions may issue a warrant for and try a person accused of a violation of the Conservation Law, committed anywhere within the county where the magistrate resides.

People v. McKenzie, 69 M. 540.
People v. Keenan, 80 M. 539.

Exclusive jurisdiction is not given to courts of special sessions as was the case under Section 24 of the Forest, Fish and Game Law. "Jurisdiction in the first instance" together with the other language in Section 31 can hardly be held to mean "exclusive jurisdiction."

Compare People v. McCarthy, 168 N. Y. 549.
Austin v. Vrooman, 128 N. Y. 229.
People v. Austin, 49 Hun 396.
People v. Dillon, 197 N. Y. 254.

See section 56–27 of the Criminal Code and section 2186 of the Penal Law.

For this reason Section 39, subdivision 1 of the Criminal Code does not appear to apply to cases arising under the Conservation Law and they may, it seems, if the State so elects, be tried by indictment in the first instance under Section 254, etc., of the Criminal Code instead of before a Court of Special Sessions in the first instance.

Compare People v. Snyder, 90 A. D. 422.

Sections 134–137 of the Criminal Code as to crimes committed within five hundred yards of a county boundary being triable in either county, and jurisdiction as to crimes committed on trains or vessels seem to apply only to criminal actions prosecuted by indictment.

People v. Bates, 38 Hun 180.
People v. Kyser, 78 Misc. 68.

Under the old law, particularly the law of 1888, civil actions for the enforcement of the Game Law could be tried in the county where committed or in an adjoining county.

See People v. Rouse, 15 Supp. 414.
Compare sections 982–991 of the Civil Code as to place of trial and change of venue.

Misdemeanors must be prosecuted within two years from the time of the commission of the offense; otherwise they are barred by the statute.

See section 142 of the Criminal Code.

Cases involving children under the age of sixteen years are to be disposed of separately in Juvenile Court Sessions.

See sections 487 and 2186, Penal Law, and 56–27 of the Criminal Code.

The general procedure in Courts of Special Sessions after the defendant has been brought before the magistrate is governed by Sections 699–740b of the Criminal Code.

Section 188 of the Criminal Code provides:

When the defendant is brought before a magistrate upon an arrest *either with or without warrant* on a charge of having committed a crime, the magistrate must immediately inform him, of the charge against him, and of his right to the aid of counsel in every stage of the proceedings and before any further proceedings are had.

The general principle embodied in the above provision is applicable to proceedings in Courts of Special Sessions.

Compare section 8 of the Criminal Code on the matters of trial, counsel, witnesses, etc.

§ 699. In cases in which the courts of special sessions or police courts have jurisdiction, when the defendant is brought before the magistrate, the charge against him must be distinctly read to him and he must be required to plead thereto.

It would seem that in cases of arrest without warrant jurisdiction attaches upon arraignment and plea and no change of magistrate is permissible and this would apply where prosecutions have been commenced at the instance of other persons than the game protectors.

See People ex rel. Lotz v. Norton, 76 Hun, 7.
See sections 57, 164, 750 Criminal Code and section 3151 Civil Code.

It is further provided:

§ **701**. Upon a plea other than a plea of guilty, if the defendant does not demand a trial by jury, the court must proceed to try the issue.

§ **702**. Before the court hears any testimony upon the trial, the defendant may demand a trial by jury.

§ **706**. The court must then draw out six of the ballots, successively; and if any of the persons whose names are drawn do not appear, or are challenged and set aside, such further number must be drawn as will make a jury of six, after all legal challenges have been allowed.

§ **707**. The same challenges may be taken by either party, to the panel of jurors or to an individual juror, as on the trial of an indictment for a misdemeanor, so far as applicable; and the challenge must, in all cases, be tried by the court.

Five peremptory challenges in addition to those for cause are allowed by section 373 Criminal Code.

§ **708**. If six of the jurors summoned do not attend, or be not obtained, the court may direct the officer to summon any of the bystanders, or others who may be competent, and against whom there is no sufficient cause of challenge, to act as jurors.

§ **710**. When six jurors appear and are accepted, they constitute the jury.

§ **712**. After the jury are sworn, they must sit together and hear the proofs and allegations of the parties, which must be delivered in public, and in the presence of the defendant.

By Section 356 of the Criminal Code where the trial is upon indictment, the case if it be one of misdemeanor may be tried in the absence of the defendant.

The Code proceeds to prescribe as follows:

§ **714**. When the jury have agreed on their verdict, they must deliver it publicly to the court, which must enter it in its minutes.

§ **715**. The jury cannot be discharged, after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for some cause within the meaning of sections four hundred and twenty-eight and four hundred and twenty-nine, the court sooner discharge them.

See those sections as to disagreement of the jury, injury to one of the jurors or the defendant, etc., and discharge by consent.

§ **716**. If the jury be discharged, as provided in the last section, the court may proceed again to the trial, in the same manner as upon the first trial; and so on until a verdict is rendered.

In case of conviction the certificate thereof must be made during the session of the court and cannot be made by the justice after the court organized to try the cause has ceased to exist.

People ex rel. Cook v. Smith, 9 N. Y. Supp. 181.

§ **723**. Within twenty days after the conviction, the court must cause the certificate to be filed in the office of the clerk of the county.

§ **724**. The certificate, made and filed as prescribed in the last two sections, or a certified copy thereof, is conclusive evidence of the facts stated therein.

§ **729**. The court may issue subpoenas for witnesses, as provided in section six hundred and eight, and punish disobedience thereof, as provided in section six hundred and nineteen.

Section 608 of the Criminal Code provides:

A magistrate, before whom an information is laid, may issue subpoenas, subscribed by him, for witnesses within the state either on behalf of the people or of the defendant.

Section 731 of the Criminal Code provides:

No fees are payable to a juror or witness, for his service or attendance in a court of special sessions.

The fees of justices of the peace and constables in criminal cases are governed by Sections 740 and 740b.

Some of the main propositions as to evidence and proof in criminal cases as contained in sections of the Criminal Code are as follows:

§ **389**. A defendant in a criminal action is presumed to be innocent until the contrary be proved; and in case of reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

It is now well settled that evidence of good character may in and of itself raise a reasonable doubt which would warrant a jury in acquitting a defendant no matter how strong the evidence against him may be.

See authorities cited under the above section in Criminal Code.

Further provisions are made, viz:

§ 393. The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify does not create any presumption against him.

§ 395. A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction without additional proof that the crime charged has been committed.

A prior plea of guilty in the same case may be proved.

See People v. Jacobs, 165 A. D. 721.
Compare section 36.

Section 399 of the Criminal Code provides:

A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.

Game protectors engaged in detective work and participating in a violation merely for purposes of procuring evidence are not accomplices.

Compare People v. Noelke, 94 N. Y. 137.
People v. Levoy, 72 A. D. 55.

Penal statutes are to be strictly construed.

Compare section 21 of the Penal Law.
People v. Keenan, 80 M. 539.

Prior *convictions* of any crime may be proved against a defendant to discredit him, but the mere fact of arrest or indictment cannot.

People v. Cascone, 185 N. Y. 317.

It would seem that the *commission* of other violations of the Conservation Law could be proved under the rule laid down in People v. Molineux, 168 N. Y. 264.

A party cannot impeach his own witness. Hearsay evidence is excluded and while ignorance of law is no defense or excuse, ignorance of *fact* under certain circumstances might be.

An important provision as to witnesses in both civil and criminal actions is contained in Section 35:

> No person shall be *excused from testifying or producing any books, papers or other documents* in any civil or criminal action, or proceeding taken or had under this chapter, upon the ground that his testimony might *tend to convict* him of a crime, or to subject him to a *penalty or forfeiture.* But no person shall be *prosecuted, punished or subjected* to any *penalty or forfeiture* for or on account of any act, transaction, matter or thing *concerning which* he shall under oath, have *testified or produced documentary evidence,* and *no testimony* so given or produced shall be *received against him* upon any criminal investigation or proceeding; provided, however, that no person so testifying shall be exempt from prosecution or punishment for any *perjury* committed by him in his testimony. Nothing herein contained is intended to give, or shall be construed as in any manner giving, unto any corporation, immunity of any kind.

The immunity and protection afforded by the above section appear to be broad enough to answer the requirements.

Chappell v. Chappell, 116 A. D. 573.
People ex rel. Lewisohn, 176 N. Y. 253.
People v. Cahill, 193 N. Y. 232.
People ex rel. Ferguson v. Reardon, 197 N. Y. 236.
Counselman v. Hitchcock, 142 U. S. 564.
People v. Anhut, 162 A. D. 517.
Compare section 25, chapter 1.

Communications between attorneys and third persons not their clients are not privileged under Section 835 of the Code of Civil Procedure.

See Report of Attorney-General, 1910, page 399.

One of the most troublesome questions in connection with criminal actions, as distinguished from civil actions to recover penalties, is that of *jeopardy.*

The State Constitution provides that no person shall be *twice* put in jeopardy for the *same offense.*

New York State Constitution, article I, section 6.
See section 32 of the Penal Law.
See U. S. Constitution, amendment V.

By what appears to be the *weight* of the leading authorities, jeopardy has been said to attach or occur when by a court of competent jurisdiction, a person has in a legal manner been once finally convicted or acquitted of a certain crime.

Am. & Eng. Encyc., Vol. 17, pages 584–585.

A second jeopardy arises where the two offenses in question are identical both in law and in fact.

Am. & Eng. Encyc., Vol. 17, pages 596–597.
12 Cyc. page 280.

Assume that a person on Sunday on properly posted lands, shoots several English snipe or several waterfowl prior to September 16th.

Under those circumstances, he can be prosecuted for a violation of the Penal Law as to *Sunday shooting,* for a violation of the Conservation Law as to trespasses on *posted* lands, for a violation of the Conservation Law as to taking birds in *close season* and also for a violation of the Federal Regulations as to *closed season.*

The offenses are committed against different statutes and different jurisdictions and are not *identical in law regardless* of whether they are so in fact or not.

The same principle would hold true it seems of city or village ordinances and valid laws passed by boards of supervisors.

Am. & Eng. Encyc., Vol. 17, pages 604–605.
12 Cyc. 288, 289.

Where the same act constitutes a violation of several sections of the Conservation Law the test of *identity in fact* is one difficult to apply.

The true test stated in general terms is that if the evidence required to support one charge would of itself also support the other, there is an *identity in fact.*

Am. & Eng. Encyc., vol. 17, pages 597–598.
12 Cyc. 280.

In view of the fact that any one *may* institute a prosecution of a person for a *misdemeanor,* in cases where such prosecutions are started on complaint by *individuals,* the game protector should be *called in* and given charge of the case. A conviction otherwise obtained would, however, unless *collusive* or in *fraud,* constitute *jeopardy,* but the Commission could if dissatisfied with the result commence the civil action for the penalty.

See Bishop on Criminal Law, section 1010.
See Wharton on Criminal Law and Procedure, page 451.
State v. Little, 1 N. H. 257.
Am. & Eng. Encyc., vol. 17, page 593.

Assume that a person during the close season without a license takes five partridges with a gun and six partridges by means of nets and sells them all.

Under the above rule he can be prosecuted for four separate offenses: 1st, the taking; 2d, the use of nets; 3d, the sale, 4th, the hunting without a license; the excess of the limit is to be disregarded inasmuch as the taking is in close season.

Assume that a person on a trout stream in open season draws off water and takes with nets fifteen pounds of brook trout and sells them.

Under the above rule, it seems he can be prosecuted for four separate offenses: 1st, the drawing off of the water; 2d, the netting; 3d, the excess of the limit; 4th, the sale.

Such separate offenses could, it appears, be included in one indictment under separate counts, but an information is not supposed to contain different counts.

See sections 145, 278, 279 of the Criminal Code.

Many complicated illustrations along these lines can readily be presented.

Under these rules, it would seem that if the person were prosecuted on a *picked* charge and acquitted, he could still be prosecuted on another charge provided the evidence required to support the one was not *identical* with the evidence required to support the other.

Section 32 provides:

> A person convicted of a *misdemeanor* under this chapter, except as otherwise provided herein, shall be punished by a fine of not less than *ten dollars* nor more than *one hundred dollars;* and if such fine is *not paid,* he shall be imprisoned in a *county jail or penitentiary* until such fine is *satisfied;* which imprisonment shall be at the rate of one *day* for *every dollar* of such fine; if any person be convicted a *second* time of a misdemeanor under this chapter, except as otherwise provided herein, he shall be punished either by a fine of not less *than twenty-five dollars* nor more than *one hundred and fifty dollars;* or by imprisonment in a county jail or penitentiary for not more than *one hundred days,* or by *both such fine and imprisonment;* if a fine imposed be *not paid,* he shall be imprisoned in a county jail or penitentiary until such fine is *satisfied,* which imprisonment shall be at the rate of *one day* for *every dollar* of such fine; if a person shall be convicted a *third time* of a misdemeanor under this chapter, unless otherwise provided herein, he shall be punished by imprisonment in a county jail or penitentiary for not less than *ten days* nor more than *six* months; and by a fine of not less than *ten dollars* nor more than *one hundred dollars;* and if the fine imposed be *not paid,* he shall be imprisoned in a county jail or penitentiary until such fine is *satisfied;* which imprisonment shall be at the rate of *one day* for *every dollar* of such fine and shall be *in addition* to the prison sentence.

Cases where sentence is suspended constitute prior *convictions.*

See section 470b Cr. Code.

In some of the States upon the conviction the offender not only forfeits his license, but is prohibited from securing another license during that and the ensuing year.

The above section controls Section 1937 of the Penal Law.

See section 36.

Where a person prior to May 12, 1916, has been *convicted* of a violation of the old Forest, Fish and Game Law, or of the Conservation Law, as distinguished from having made a settlement of the civil action for a penalty; or where a person is convicted after May 12, 1916, of a violation committed prior to that date such conviction in either case may, it seems, be charged and proved against him as a basis for the increased punishment provided by Section 32 for second and third convictions, in case of trial for and conviction of a violation committed after the amendment took effect.

The punishment for violations committed prior to May 12, 1916, is governed by Section 32 as it read prior to the amendment.

People v. Raymond, 96 N. Y. 38.
People v. Sickles, 156 N. Y. 541.
Shepard v. People, 25 N. Y. 406.
Compare section 1941 of the Penal Law.

A child of more than seven and less than sixteen years of age who shall commit any act or omission which if committed by an adult would be a crime not punishable by death or life imprisonment shall *not be deemed guilty of any crime,* but of juvenile delinquency only.

See section 2186 of the Penal Law.
Compare section 1897–3 of the Penal Law.

It seems that neither *fine* nor ordinary *imprisonment* can be imposed in cases of juvenile delinquency.

Compare section 2194 of the Penal Law.

In other cases where a sentence to imprisonment for not less than sixty days is imposed, the confinement must be in the penitentiary and not in the county jail.

See section 2196 of the Penal Law.

Section 510 of the Criminal Code provides:

"When a person is hereafter convicted of a felony, who has been before that conviction, convicted in this state of any other crime, he may be adjudged by the court, in addition to other punishment inflicted upon him, to be an habitual criminal. A person convicted of a misdemeanor, who has been already five times convicted in this state of a misdemeanor may be adjudged by the court in addition to, or instead of, other punishment, to be an habitual criminal."

See sections 512–514 which put such persons under a ban as to character, search and arrest.

Section 470a of the Criminal Code provides:

"If the judgment be suspended, after a plea or verdict of guilty or after a verdict against the defendant upon a plea of former conviction or acquittal, the court may pronounce judgment at any time thereafter within the longest period for which the defendant might have been sentenced; but not after the expiration of such period, unless the defendant shall have been convicted of another crime committed during such period."

See sections 470b and 484.

Appeals to County Court from courts of Special Sessions are governed by Sections 749–772 of the Criminal Code. The following sections are quoted:

§ 750. "An appeal may be allowed for an erroneous decision or determination of law or fact upon the trial and for the purpose of an appeal in all cases now pending or hereafter brought, a conviction for a criminal offense shall be deemed a final judgment although sentence shall have been suspended by the court in which the trial was had or otherwise suspended or stayed."

See chapter 125 of the Laws of 1913.

§ **751**. "For the purpose of appealing, the defendant or some one on his behalf, must within sixty days after the judgment, or within sixty days after the commitment where the appeal is from the latter, make an affidavit showing the alleged errors in the proceedings or conviction or commitment complained of, and must within that time present it to the county judge or justice of the supreme court, or in the city and county of New York, to the recorder or a judge authorized to hold a court of general sessions in that city, or in the city of Albany to the recorder, and apply thereon for the allowance of the appeal.

§ **752**. "If, in the opinion of the judge, it is proper that the question arising on the appeal should be decided by the county court, he must indorse on the affidavit an allowance of the appeal to that court; and the defendant, or his attorney, must within five days thereafter, serve a copy of the affidavit upon which the appeal is granted, together with a notice that the same has been allowed, upon the district attorney of the county in which the appeal is to be heard."

Section 764 of the Criminal Code provides:

"After hearing the appeal if the court must give judgment without regard to technical errors or defects which have not prejudiced the substantial rights of the defendants, and may render the judgment which the court below should have rendered, or may, according to the justice of the case, affirm or reverse the judgment in whole or in part, as to all or any of the defendants, if there be more than one, or may order a new trial, or may modify the sentence."

An appeal may be allowed on the ground that the sentence was excessive.

People v. Dinehart, 155 A. D. 687.

§ **768**. "If a new trial be ordered, it may be had in the county court in the same manner as upon an issue of fact on an indictment; and that court may proceed to judgment and execution, as in an action prosecuted by indictment, except that in the city of New York, such new trial may be had, in the discretion of the court reversing the judgment of conviction, in the magistrates' court wherein the defendant was convicted, or in the court reversing the judgment, with or without a jury. Where the appeal was from a judgment of commitment made under section four hundred and eighty-six of the penal law, the new trial shall be had before the county court without a jury."

Section 36 provides:

Any regular or special game protector, fisheries protector, fire superintendent, forest ranger or inspector, who shall charge a

person with any violation under this chapter, may take such person before any magistrate in the *county where the violation occurred,* and thereupon such person may, upon the *consent* of the representative of the conservation commission making the charge, *compromise and settle* his liability for *civil penalties* under this chapter, for an amount agreed upon between said magistrate, the representative of the commission and the person charged with such violation, which amount shall not be less than *ten dollars* nor more than the amount for which such person would be liable in a civil action for penalties. If such compromise be made such person shall forthwith *subscribe his name* to a statement setting forth the *facts* constituting such violation, the *amount* agreed upon, and that a *judgment* may be entered against him for that sum. Upon said statement being sworn to before and filed with said magistrate he shall forthwith *enter* in his civil docket a record of the proceedings and the amount of the judgment.

Said justice shall upon the entry of such judgment be entitled to a fee of *one dollar* to be paid by the person charged with such violation.

A judgment entered as provided herein may be enforced by an execution against the *property* of the defendant; but *no body execution* shall issue thereon. Such judgment shall be a *bar* to a criminal action for the same violation, *if satisfied within thirty days* from the date of the entry thereof.

See section 395 of the Criminal Code.

It was held in the case of Pollock v. Aldrich, 17 Howard's Practice 109 that a justice of the peace could take judgment by confession anywhere in the county in which he resided.

Under Section 2864 of the Code of Civil Procedure, a justice of the peace may take judgment by confession for and in a sum not to exceed five hundred dollars, with costs.

See sections 3010–3012.

A settlement made pursuant to Section 36 does not constitute a *conviction* to be availed of as a first offense under Section 32.

Section 29 provides:

Moneys received in an action for a penalty brought under *article five* of this chapter, or upon the settlement or compromise

thereof, and fines for violations of any of the provisions of said article shall be paid within *thirty days* after the receipt thereof to the commission. The commission shall apply so much thereof as may be necessary to the payment of the *expenses of collection* and shall pay one-half of the balance, in cases brought by special game protectors, to the special game protector upon whose information the action was brought. Regular protectors shall not receive moieties. The commission in its discretion may settle or compromise any action to recover any penalty provided for in said article or a cause of action therefor, at such sum as it may deem advantageous to the state. The commission may, out of moneys arising from such fines or penalties, pay the fees of magistrates and constables for services performed in criminal actions brought upon information of a game protector, district forest ranger, forest ranger or fire warden.

See section 171.
See section 185–10.
See sections 9, 26, 36 and 169.

Prior to the enactment of Chapter 130 of the Laws of 1908 game protectors were compensated on the basis of moieties.

The above section seems to apply to fines collected for trespasses on posted lands.

Compare Rockefeller v. Lamora, 106 A. D. 348.

In cases where prosecutions result in no fine, fees are to be charged against the town in which the offense was committed.

Attorney-General's Report, 1896, page 234.
See sections 171 and 240 of the Town Law.

For this reason it seems desirable where practicable to prosecute offenders before magistrates in the town where the violation was committed.

Section 30 provides:

Moneys received in actions for penalties brought under *article four* of this chapter shall be paid to the commission, who shall apply so much thereof as may be necessary to the payment of the expenses of collections. The balance of such receipts shall be avail-

able for enforcing the various provisions of law for the protection of forests against fire.

This section does not appear to apply to fines. Section 34 provides as to search warrants:

> Any justice of the peace, police justice, county judge, judge of a city court or magistrate having criminal jurisdiction shall, if it *appear probable* that fish, birds or game *taken or possessed* contrary to the provisions of article five of this chapter are *concealed*, issue a *search warrant* for the discovery thereof, in accordance with the practice provided in title two of part six of the code of criminal procedure, so far as the same are applicable thereto.

Sections 793–812 of the Criminal Code on search warrants are in part as follows:

§ **793**. "A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched.

§ **794**. "The magistrate must, before issuing the warrant, examine on oath, the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

§ **795**. "The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

§ **796**. "If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the magistrate.

§ **798**. "A search warrant may, in all cases, be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer, on his requiring it, he being present and acting in its execution.

§ **799**. "The officer may break open an outer or inner door or window of a building, or any part of the building, or anything therein to execute the warrant, if, after notice of his authority and purpose, he be refused admittance.

§ **800**. "He may break open any outer or inner door or window of a building for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

§ **801**. "The magistrate must insert a direction in the warrant that it be served in the day-time, unless the affidavits be positive that the property is on the person or in the place to be searched; in which case he may insert a direction that it be served at any time of the day or night.

§ **802**. "A search warrant must be executed, and returned to the magistrate by whom it was issued, if issued in the city and county of New York, within five days after its date, and if in any other county, within ten days. After the expiration of those times, respectively, the warrant, unless executed, is void.

§ **803**. "When the officer takes property under the warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found, or, in the absence of any person, he must leave it in the place where he found the property.

§ **809**. "If it appear that the property taken is not the same as that prescribed in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

§ **811**. "A person who maliciously and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

§ **812**. "A peace officer who, in executing a search warrant, wilfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor."

See section 1847 of the Penal Law.

Section 93 of the General Construction Law provides:

"The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, *enforced, prosecuted or inflicted,* as fully and to the same extent as if such repeal had not been effected."

See section 32.

CHAPTER XVIII

PRIVATE PROPERTY RIGHTS IN WILD ANIMALS

This chapter deals with the ownership of wild animals (*ferae naturae*) as among or between *individuals* in contradiction to that so-called title to them asserted by the State against *all claimants,* discussed in connection with Chapter *III* devoted to an analysis of Section 175 of the Conservation Law.

As has been there intimated, the declaration of that section based upon what was the Civil Law of Rome, the Common Law of England, and the *adopted law* of this State does not extend or apply to animals falling within the following Classes:

A. Animals domestic (*domitae naturae*).

B. Animals once wild, but legally reclaimed and tamed (*Mansuetae naturae*).

C. Animals wild (*ferae naturae*) so far reclaimed as to be kept in captivity provided their possession was *legally* acquired and *lawfully* maintained.

See sections 190, 200, 159, 371–372.

D. Animals wild which are neither *quadrupeds, birds* nor *fish.*

See section 185 on *hunting license* where a *gun* is used.

CLASS A.

In order to solve many of the interesting questions which arise under this particular chapter, it will undoubtedly prove profitable to devote some discussion to animals in Class A. These common domestic animals such as horses, cattle, sheep, fowls, dogs, cats, etc., are like other chattels the subjects of what are termed absolute

property rights for the invasion of which the usual civil remedies of conversion and replevin will lie. These property rights in domestic animals may be protected by the use of such force as may be necessary to accomplish the purpose and prevent interference therewith.

Penal Law, section 246.

It has also been held that the owner of such animals may retake them from any person wrongfully withholding or appropriating them provided it is done peaceably. This privilege is spoken of as the right of *recaption,* but is not encouraged as against resort to legal processes as the exercise of the right tends to the commission of breaches of the peace.

Cooley on Torts, pages 52–58.
Addison on Torts, vol. 1, page 442.

At a time when under the English common law larceny was among the *capital crimes,* the courts refused to consider as the subjects of larceny even domestic animals which were of no value for *food purposes.* Such animals regardless of any claim to value for any other reason were entitled *noxious animals of a base nature* and this was true of *dogs* and *cats* although a civil action was admitted to lie for any injury done them.

People v. Campbell, 4 Parker's Criminal Reports, 386.
2 Cyc. 309.
2 Blackstone, 292–293.

It was however held that the stealing of the *skin* of a dog was larceny for the reason that *labor* had been expended on it.

Rex v. Halloway, 1 C. & D. 127.

This principle of law has been generally *discarded* and all domestic animals including dogs and cats are subjects

of larceny in this State if for any reason they have a commercial market or marketable *value.*

Mullaly v. People, 86 N. Y. 365.
Ingham on Animals, page 8.

The title to the *increase* of these animals, their young and their eggs, according to both the Civil Law and the Common Law follows that of the parent animals on the maxim *partus sequitur ventrem.*

Am. & Eng. Ency. of Law, vol. 2, page 348.
Schouler on Personal Property, vol. 1, page 83.

The only exception to this rule seems to be that of cygnets or young swans which belong equally to the owner of the male and female birds due to their claimed lifelong mating.

2 Cyc. 30.
7 Coke, 18a.
2 Blackstone, 390.

It would prove a difficult problem to adopt any precise general principle upon which one could determine just what animals fall within this domestic class and what do not. According to eminent philosophers the reason why many animals are wild is not because of their own nature so much as the treatment they receive from mankind and any one with any experience among unmolested wild animals can vouch for this. Prominent naturalists also assert what must needs be true that those animals which are commonly called tame were originally wild and have only by virtue of years or heredity and environment became otherwise.

Ingham on Animals, 1–2.
Schouler on Personal Property, vol. 1, pages 76–83.
2 Kent's Commentaries, page 348.

One of the favored tests is the possession or lack on the part of the particular animal of what is known as the *animus revertendi* (the disposition if unconfined or strayed, to remain at or return home). The instinct for natural liberty has been abandoned by the tame animals, and has not been abandoned by the wild ones forcibly held in subjection.

Domestic animals are presumed to possess this *animus revertendi.*

People v. Kaatz, 3 Parker's Crim. Reports, 129.

Such domestic animals are personal property and title to them passes accordingly.

CLASS B

Experience abounds with instances where animals concededly *wild* have been caught, kept, and so adapted to captivity through the art industry and patience of man that they have lost the *spark of liberty,* the inclination to be wild and have developed subject perhaps to occasional lapses, "*pet nature*" or a pronounced *animus revertendi.* These reclaimed animals may perhaps properly be called those *mansuetae naturae* (of a tamed nature) in order by a technical and rather artificial distinction to differentiate them from those (*domitate naturae*); they would without doubt not be presumed to possess the *animus revertendi* and the possession of that characteristic if material would have to be proved.

Compare Cooley on Torts, page 435.
Ulery v. Jones, 81 Ill. 403.

The *animus revertendi* is only to be known by the usual *custom or habit* of the animal to return. Its intention to return if strayed is manifested by its habitual return unless interfered with.

4 Blackstone's Commentaries, 588–589.

These animals in Class B are like those in Class A, the subjects of absolute property rights for the invasion of which the usual civil remedies will lie and their wrongful appropriation is *larceny* if they for food, fur or other reason have a commercial market or marketable value.

Ingham on Animals, pages 8–10, 20–23, 37–40.
Abbott's Trial Evidence, 378–380.

Accordingly:

Pigeons and doves have been held to be the subjects of larceny.

Reg. v. Cheafor, 8 Eng. L. & Eq. 598.
Rex. v. Brooks, 4 C. & D. 131.
See 23 Albany Law Journal, 482.

Pheasants reared by a hen have been so treated.

Rex v. Garnham, 7 Cox C. C. 451.

Ferrets under the old idea have been held not to be the subjects of larceny on account of their *base nature.*

Rex v. Seabring, 3 R. & B. C. C. 351.

The proposition would not now hold true in view of the *value* of ferrets for other than food purposes.

In Warren v. State, 1 Green (Iowa) 106 a *raccoon* was held not to be the subject of larceny, but this case was severely criticised in Haywood v. The State, 41 Arkansas, 479, on the ground that raccoons are in some localities prized for food aside from their fur value.

Bees in the possession of their owner have been held to be the subject of larceny.

Manning v. Mitcherson, 69 Ga. 447.
Haywood v. State, 41 Arkansas, 479.

The early law extended the property right in these animals beyond their actual possession and attached it to them when unconfined or strayed provided of course

they possessed the *animus revertendi* and were capable of identification.

In the days of falconing this was particularly applicable to the *hawk or falcon* on the wing in pursuit of game.

Ingham on Animals, pages 6–7.
4 Blackstone, 588–589.

These principles would apply to any such animal of Class B though of a type ordinarily found *wild,* where there was anything to indicate its *reclaimed nature* and it was capable of *identification* in the hands of a taker.

Title to animals in Class B and their increase is governed by the same principles as those applicable to animals in Class A.

CLASS C

The above principles including that of larceny apply with equal force to wild animals legally acquired and possessed which have not developed any *animus revertendi,* so long as they are kept *captive,* even though if escaped they would lose their nature as property. This would include fish in inclosed ponds or trunks from which they can be taken at will, but the rules does not appear to apply to fish in ponds having inlets and outlets through which the fish may pass at will.

2 Blackstone, 392.
Ohio v. Shaw, 60 L. R. A. 481.
Fleet v. Hegeman, 14 Wendell, 42.
Earl v. Van Alstyne, 8 Barbour, 630.
Compare section 246, 290, 291.
See section 1425, subdivision 12, of the Penal Law.

As a general rule if an animal not possessed of the *animus revertendi* escapes or should be restored to its natural element or habitat all property in it is lost; but a

person *unlawfully* releasing such animals *lawfully* possessed is *liable* for the loss sustained.

2 Blackstone, 393.
James v. Wood, 82 Me. 173.
2 Kent, 394.

There seems to be an *exception* to this rule where the owner on observing or hearing of the escape *follows, finds and identifies* the animal.

Mullett v. Bradley, 24 M. 695.

A mere temporary escape of a wild animal does not divest its owner of title *per industriam.* It remains his property and no stranger can acquire title thereto provided it has *animus revertendi* or the owner *pursues and identifies it.*

Amory v. Flynn, 10 Johnson, 102.
Goff v. Kilts, 15 Wendell, 550.

This is true although it may flee to and make its abode on the lands of another where he cannot pursue it without committing a trespass.

In the case of Goff v. Kilts, a swarm of *bees* owned by Goff left the hive and settled on a tree standing on the lands of Kilts. Goff observing the swarm kept it in sight, followed it and marked the tree into which the bees had gone. Two months later the tree was cut down, the bees killed and the honey taken by Kilts and others. The claim of Goff to the bees and the honey was upheld by virtue of the principle set forth in the above exception to the rule.

In the case of Mullett v. Bradley a *sea lion* had escaped from the plaintiff who had it in captivity near New York City and two weeks later was caught in a fish pound off the Jersey coast, seventy miles from the point of its escape. The owner had not observed its escape and upon

learning of the fact had not followed its possible course in search of it, but on learning of its recapture had demanded its return. It was held that the animal had regained its natural liberty, had shown no intention to return and that the property in it was lost.

This case has been criticized on the ground that the principle held to, is not applicable to animals which are not ordinarily found wild in the locality of the capture.

Ingham on Animals, 3–4.

There would without doubt also be an exception in case of an animal so *marked, tagged* or *branded,* as to disclose the identity of its owner if the animal were taken alive or even if killed, though in all probability no action would lie for the otherwise *innocent* act of killing it, if it had lost its *animus revertendi.*

Ingham on Animals, 7.
2 Blackstone, 392.

In Amory v. Flynn, 10 Johnson, 102, wild geese which had become tamed, but which had twice before strayed and not returned, were held nevertheless to be the subject of trover.

Where the animal which has been kept in captivity escapes and regains its natural element and liberty without inclination to return and is not promptly pursued and re-possessed by the *claimed owner* or cannot, it seems, be *identified* if taken by *another* while the claimed owner is also *prosecuting the search,* the owner's right therein *ceases* and it becomes the property of the person thereafter capturing it.

Kellogg v. King, 114 Cal. 378.
James v. Wood, 82 Maine, 173.
Matter of Deposit, 131 A. D. 403.
Brinkerhoff v. Starkins, 11 Barb. 248.
Goff v. Kilts, 15 Wendell, 550.
4 Blackstone, 588.
People v. Doxtater, 75 Hun, 472.

This rule is more applicable to birds and quadrupeds than fish.

The latter class of animals (C), is perhaps of most importance as including in a qualified sense wild quadrupeds, birds or fish possessed *alive* during *close season* in accordance with law.

It would particularly apply to animals possessed by virtue of Sections 159, 190, 196, 200, 371, and 372. Wild animals protected by law possessed prior to 1912 except under a collector's license would not be property except as the State might not care to disturb the claims to such animals possessed prior to the time when the doctrine of State ownership was formally declared.

For instance, a bird, quadruped or fish protected by law taken prior to 1912, could lawfully be possessed during the close season only by one holding a collector's license now provided for in Section 159–1.

From 1912 on, it could also be so possessed by one holding a license to propagate under what is now Section 159–2; otherwise it would not be property and the State could if it saw fit confiscate it. No fish, quadrupeds or birds propagated and distributed by the State could, it seems, thus be possessed nor could any taken in close season be possessed except by a collector under Section 159–1.

Wild animals captured and held during close season in violation of law do not become the property of the captor and he cannot maintain an action against a game warden who releases them.

James v. Wood, 82 Me. 173.

This would also hold true of a release made by any other person acting in good faith.

It seems that fish in an *enclosed* pond have been deemed to pass with the title to the land, but the better rule now appears to be that wild animals including fish in Class C are except as to such restrictions as the State places

on those held under license, for all purposes, personal property.

See Ingham on Animals, 40–41.
See Schouler on Personal Property, 120.
See Robens v. Barrett, 66 Hun, 189.

CLASS D

It may be said in passing that this category would include *worms, grubs and insects.*

It would embrace *reptiles* except such as might be listed as quadrupeds, such as the turtle.

It would cover *mammals* which are not *quadrupeds,* such as whales and seals, walruses, etc.

Perhaps the most important of the above enumerated animals from the standpoint of this work is the *bee.* As to him, his hive and honey there is a wealth of law and has been no little litigation. In view of the fact that a majority of the principles generally applicable to all wild animals have been laid down in the case of bees, a reference to these authorities and their holdings is indispensable as well as interesting.

Bees are animals *ferae naturae,* but when hived, they become reclaimed and the property of the person who first hives them. If they afterward fly away this right of ownership continues so long as the swarm is *kept in sight* and the owner can under such circumstances pursue and recapture them even though they should settle upon a tree on another person's lands.

Schouler on Personal Property, vol. I, page 83.
2 Kent, 394.
Goff v. Kilts, 15 Wendell, 550.
Merrills v. Goodwin, 1 Root, 209.

Bees in the possession of the owner are the subject of *larceny.*

State v. Murphy, 8 Blackford, 898.
Harvey v. Commonwealth, 23 Gratt. 941.

It was held in the case of Wallis v. Mease, 3 Binn, 546, that wild bees remaining in a tree where they have been hived, notwithstanding the fact that the tree is upon the land of an individual and the owner confined them in it, were not the subject of a *felony.*

This proposition may well be doubted in view of the commercial *value* of bees.

Bees have a local habitation, more often in a tree than elsewhere, and while there they may be said to be within control, because the *tree* may at any time be *felled.* But the right to cut it is in the *owner of the soil,* and, therefore, such property as wild bees are susceptible of is in him also. A hunter's custom may recognize a right to the tree in the *first finder,* but the law of the land knows nothing of this, and he will be a *trespasser* if, without permission, he enters upon the land to cut it. Even a *license* given by the owner of the soil to cut the tree may be *revoked* at any time before it has been acted on. But if the bees have once been *domesticated* and have then escaped, the loser retains his property therein, and may reclaim them if he pursues after them with reasonable promptness.

Cooley on Torts, 509.

Bees are *ferae naturae;* and until hived and reclaimed, no property can be acquired in them. *Finding* a tree on the land of another, containing a swarm of bees, and *marking* the trees with the *initials* of the finder's name, is not reclaiming the bees, nor does it vest in the finder any exclusive right of property in them; nor can the finder maintain trespass against a person for cutting down the tree and carrying away the bees.

Gillet v. Mason, 7 Johnson, 15.

A licensee may, however, maintain an action against a subsequent licensee who interferes while he is *actually engaged* in cutting down the tree.

Adams v. Burton, 43 Vt. 36.

Wild bees, in a bee-tree, belong to the *owner of the soil* where the tree stands.

Though another discover the bees, and obtain license from the owner to take them and mark the tree with the initials of his name, this does not confer the ownership upon him, until he has taken *actual possession* of the bees.

If he omit to take such possession, the owner of the soil may give the *same license to another,* who may take the bees, without being liable to the first finder.

The two parties, both having license, the one who takes possession *first,* acquires the title.

There is some question as to whether the license to the second person would operate as a *revocation* of the first license, but ordinarily it would not.

Ferguson v. Miller, 1 Cowen, 243.

Finding bees in a tree on another's land gives the finder no right to the bees or honey.

Merrils v. Goodwin, 1 Root, 209.

The owner of the bees, which have been *reclaimed,* may bring an action of trespass against a person who cuts down a tree into which the bees have entered on the soil of another, destroys the bees and takes the honey.

Where bees take up their abode in a tree, they belong to the owner of the soil, if they are unreclaimed; but if they have been reclaimed, and their owner is able to *identify* his property, they do not belong to the owner of the soil, but to him who had the former possession, although he cannot enter upon the lands of the other to

retake them without subjecting himself to an action of *trespass.*

Goff v. Kilts, 15 Wendell, 550.

Such a large number of the principles of property rights in and to wild animals which will be discussed farther on are referred to in Goff v. Kilts, that the interesting opinion in the case is printed here in full:

"Animals *ferae naturae,* when reclaimed by the art and power of man, are the subject of a qualified property; if they return to their natural liberty and wildness, without the *animus revertendi,* it ceases. During the existence of the qualified property, it is under the protection of the law the same as any property, and every invasion of it is redressed in the same manner. *Bees* are *ferae naturae,* but when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is, hiving or enclosing them, gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature by experience and practice has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant — in other words, to the person who first hives them; but if a swarm fly over the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them. Under these circumstances, no one else is entitled to take them. 2 Black. Comm. 393; 2 Kent's Comm. 394.

"The question here is not between the owner of the soil upon which the tree stood that included the swarm, and the owner of the bees; as to him, the owner of the bees would not be able to regain his property, or the fruits of it without being guilty of trespass. But it by no means follows, from this predicament, that the right to the enjoyment of the property is lost; that the bees therefore become again *ferae naturae,* and belong to the first occupant. If a domestic or tame animal of one person should stray to the enclosure of another, the owner could not follow and retake it, without being liable for a trespass. The absolute right of property, notwithstanding, would still continue in him. Of this there would be no doubt. So in respect to the qualified property in the bees. If it continued in the hollow tree, as this qualified interest is under the same protection of the law as if absolute, the like remedy existed in case of an invasion of it. It cannot, I think, be doubted, that if the property in the swarm continues while within sight of the owner — in other words, while he can

distinguish and identify it in the air — that it equally belongs to him if it settles upon a branch or in the trunk of a tree, and remains there under his observation and charge. If a stranger has no right to take the swarm, in the former case, and of which there seems no question, he ought not to be permitted to take it in the latter, when it is more confined and within the control of the occupant.

"It is said the *owner of the soil* is entitled to the tree and all within it. This may be true, so far as respects an unreclaimed swarm. While it remains there, in that condition, it may, like birds and other game, (game laws out of the question) belong to the owner or occupant of the forest, *ratione soli.* According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it, but since the institution of civil society, and the regulation of the right of property in its positive laws, the forest as well as the cultivated field, belong exclusively to the owner, who had acquired a title to it under those laws. The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *ferae naturae* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the enclosure of another for this purpose. He would be a trespasser, and as such liable for the game taken. An exception may exist in the case of noxious animals, destructive in their nature. Mr. Justice Blackstone says, if a man starts game in another's private grounds, and kills it there the property belongs to him in whose ground it is killed, because it was started there, the property arising *ratione soli,* 2 Black. Com. 219. But if animals *ferae naturae* that have been *reclaimed,* and a qualified property obtained in them escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues, and though he cannot pursue and take them without being liable for a trespass, still this difficulty should not operate as an abandonment of the animals to their former liberty. The rights of both parties should be regarded and reconciled as far as is consistent with a reasonable protection of each. The cases of Heermance v. Vernay, 6 Johns. R. 5, and Blake v. Jerome, 14 id. 406, are authorities for saying, if they were wanted, that the inability of the owner of a personal chattel to retake it while on the premises of another without committing a trespass, does not impair his legal interest in the property. It only embarrasses the use or enjoyment of it. The owner of the soil therefore, acquiring no right to the property in the bees, the defendant below cannot protect himself by showing it out of the plaintiff in that way. It still continues in him, and draws after it the possession sufficient to maintain this action against a third person,

who invades it by virtue of no other claim than that derived from the law of nature. This case is distinguishable from the cases of Gillet v. Mason, 7 John. R. 16, and Ferguson v. Miller, 1 Cowen, 243. The first presented a question between the finder and a person interested in the soil; the other between two persons, each claiming as the first finder. The plaintiff in the last case, though the first finder had not acquired a qualified property in the swarm according to the law of prior occupancy. The defendant had. Besides the swarm being unreclaimed from their natural liberty while in the tree, belonged to the owner of the soil *ratione soli.*"

The provisions which apply to bees, apply with even greater force likewise to the *honey* and the *honeycomb.*

So where a trespasser placed a box in a tree on another's land for bees to hive in, it was held that he could not maintain trover against a third person for taking bees and honey from the box.

Rexroth v. Coon, 15 R. I. 35.

While it has been claimed that the law applicable to chattels *embedded in the soil* making them the property of the landowner should apply to grubs, worms and bees hived in a tree, the principle seems strictly true only of *inanimate* property.

Other important principles equally applicable to fish have been laid down in the case of whales in Addison on Torts, Vol. 1, pages 413–414:

"If a whale has been struck by a harpooner, the whale, so long as the harpoon remains in the fish, and the line continues attached to it, and also continues in the power of management of the striker, is a *fast fish,* though during that time it is struck by a harpooner of another ship; and if the whale afterwards breaks from the *first* harpoon, but continues fast to the *second,* the second harpoon is a *friendly* harpoon, and the fish of the *first* striker, and of him alone. But if the first harpoon or line *breaks,* or the line attached to the harpoon is not in the power of the striker, the fish is a *loose* fish, and will become the property of any other person who strikes and obtains it. But although the harpoon comes out of the fish, or is detached from the line, yet if the whale is so *entangled* in the rope as to give the first strikers the same power over it as if the harpoon were *fixed,* the

fish will still continue a *fast fish,* and be the property of the *first* strikers; and if the fish is unlawfully *liberated* by the wrongful *interference* of a third party, who afterwards harpoons it and secures it, it will nevertheless, be the property of the *first* strikers. If a whale is killed, anchored and left with *marks* of appropriation, it is by law and *custom* the property of the captor even if it drifts away from the place of anchorage."

Compare Ingham on Animals, 23–28.

Property in a whale is in those who first iron or lance it with implements by which it can be identified.

Swift v. Gifford, 2 Lowell, 110.
Ghen v. Rich, 8 Fed. Rep. 159.

Where it is *customary* to kill whales with bomb lances and they sink to the bottom and after two or three days float to the surface, a *usage,* that they shall belong to the person who killed them, no matter by whom found is *enforceable.*

CLASS E

The class of animals and the property rights in them upon which all of the foregoing discussion has an important bearing and in which sportsmen are immediately interested consists of quadrupeds, birds and fish in their natural element or state of nature whether protected by law or otherwise. It may not be amiss at this point to reiterate that only those *quadrupeds* for which a *close season* is provided and those *fish* for which a *close season* or *size limit* or *both* are specified are *protected by law.* All *birds* are *protected by law* except those specifically *outlawed* by Section 219.

See section 176 and the discussion thereunder.

As to these animals except for regulations as to transportation, possession after close season, sale, etc., the State during the open season provided by law waives and abandons its claims of ownership and title in favor of the

person who *legally* takes them and in favor of the otherwise absolute or qualified property rights acquired and held in such fish and game by virtue of the common law preserved by Article I, Sections 16, 17, of Constitution of the State and applied by the courts which common law, in the absence of statute, prevails.

As to the common law generally preserved by the Constitution;

Fulton Light & Power Co. v. State, 200 N. Y. 400.
Matter of Carnegie Trust Co., 151 A. D. 606.
Smith v. Rochester, 92 N. Y. 463.

If these animals in Class E are taken or possessed contrary to law, alive or dead, they not only may be *confiscated* by the State, but *no property* as against third persons is it appears acquired in them.

Third persons not acting in good faith who availed themselves of the fruit of the violation would be liable to the State.

See sections 176 and 154.

As was stated in James v. Wood, 82 Me. 173:

"Suppose a hunter has his rifle levelled at game in close time and some one shoves it aside so that the game is missed. Shall the hunter have damages? He has only been prevented from continuing a criminal act. Suppose lobsters illegally taken are thrown overboard alive. Is he who does it a trespasser? Shall the taker of them have damages for his illegal catch? Or suppose one lands a salmon in violation of law and a bystander, while it is yet alive, throws it back into the water. Shall the fisherman have the value of the salmon that the law forbids his having at all? When game is killed, it absolutely becomes property, but when taken alive only conditionally so; for when released property in it is gone. So long, then, as the possession of live game is illegal, qualified property in it is illegal also, and the releasing of such game interferes with no legal right or title of the person illegally holding it captive."

This brings us to the consideration of what is known as the Law of the Chase as to animals in the *state of*

nature which obtains as between individuals hunting in *compliance with law* where the rights of the *owner of the land* or of the *exclusive hunting and fishing rights thereon* are *waived* and not asserted. This exception will be discussed later.

The Law of the Chase presents two principles or rules:

First — That of the Civil Law of Rome.

Second — That of the Common Law of England.

Under both rules the property right in the animal so reduced to *actual possession* is protected by law and for invasion of it, the usual *civil remedies* and also *larceny* if it is of any *value* will lie. This would apply to the *killed animal;* the *wounded* animal reduced to actual possession and kept captive and to animals in trap, dead or alive.

Wild game being the subject of ownership and property, its possession is *prima facie* title as with all other chattels and is sufficient to support any action concerning it against the wrongdoer.

James v. Wood, 82 Me. 173.

It was held in State v. Krider, 78 N. C. 481, that *fish* unless reclaimed, confined or dead and valuable for food, were not to be considered subjects of *larceny.*

In Norton v. Ladd, 5 N. H. 203, it was held that where a *sable* was caught in a trap and stolen therefrom the theft *could not be larceny,* harking back to the old English cases involving *noxious animals,* although it was admitted that the *skin* alone might be.

On the contrary, it was held in State v. House, 65 N. C. 315, that the taking of an *otter* from a trap was larceny for the reason of the value of its fur; to quote from the opinion in the case:

"All of the distinctions as to animals *ferae naturae* and as to their generous or base natures which we find in the English books will not hold good in this country. The English system of game laws seems to have been established more for princely diversion than for use or profit

and is not at all suited to the wants of our enterprising trappers. We take the true criterion to be *the value* of the animal whether for the food of man, for its fur or otherwise. We know that the otter is an animal very valuable for its fur and we know also that the fur trade is an important one in America and even in some parts of North Carolina. If we are to be bound absolutely by the English authorities without regard to their adaption to this country, we should be obliged to hold that most of the animals so valuable for their fur are not the subjects of larceny on account of the baseness of their nature while at the same time we should be bound to hold that hawks and falcons when reclaimed are the subjects of larceny in respect to their generous nature and courage."

So it was said in the case of Haywood against the State, 41 Arkansas, 479, involving the theft of a tamed mocking bird:

"The English Courts made exceptions to the rule that reclaimed animals to be the subjects of larceny must be *fit for food*. Thus the tamed hawk was held to be the subject of larceny though unfit for food, because it served to amuse the English gentlemen in their fowling sports. So reclaimed honey bees were made an exception because, though not fit for food themselves, their honey is. Under decisions of English and American courts made upon the common-law definition of larceny, Mr. Bishop classes the following animals when reclaimed as the subjects of the offense: Pigeons, doves, hares, conies, deer, swans, wild boars, cranes, pheasants, partridges and fish suitable for food, including oysters. To which might be safely added wild turkeys, geese, ducks, etc., when reclaimed. Of those animals of which there can be no larceny, though reclaimed, he puts down the following: Dogs, cats, bears, foxes, apes, monkeys, polecats, ferrets, squirrels, parrots, singing-birds and coons. In the South, squirrels are in common use as food animals, and the hunters of all climates regard bears as good food. Iowa is credited with the decision that coons are unfit for food and therefore by the common law not the subject of larceny, when reclaimed. Among the colored people of the South the coon when fat in the fall and winter is regarded as a luxury, and the Iowa decision would not be regarded by them as sound law or good taste. Every species of personal property was not the subject of larceny at common law. The provisions of the larceny statute of this state are very broad and comprehensive. The first section defines the crime thus: 'Larceny is the felonious stealing, taking and carrying, riding or driving away the

person or property of another.' This, perhaps, is not more comprehensive than the common-law idea. The reclaimed mockingbird in question was no doubt personal property. To hold that larceny might be committed of the cage but not of the bird would be neither good law nor common sense."

It may be stated that the Civil Law and the Common Law agree that in animals in a *state of nature* there is no absolute property right or no property right properly speaking in the *individual.* Such peculiar rights as exist in them under the above exception due to the ownership of the land are subject to the control of the State and governed by it. But when killed or reclaimed they become property, absolutely when killed and qualifiedly when reclaimed.

State v. Mallory, 67 L. R. A. 773.
James v. Wood, 82 Me. 173.
Blades v. Higgs, 11 H. L. Cases, 621.
Kellogg v. King, 114 Cal. 378.
Geer v. Connecticut, 161 U. S. 519.
Long Point v. Anderson, 19 Ont. 487.

Property rights in such animals, however, may be acquired provided it is done in compliance with law and not in hostility to the claim of the State before and after capture. And when within the provisions of the statute the individual is as much protected in the enjoyment of his rights in this species of property as in any other under the law.

Kellogg v. King, 114 Cal. 378.

These rights may be acquired as it is said per *industriam hominis* that is by the art and agency of man directed toward their capture, dead or alive. The natural right to pursue or take any wild animal, exists in every individual except so far as restrained by express provision of law and a person who has once seized such

an animal becomes the owner thereof while he remains in control of it.

2 Blackstone, 403.

The Rule of the Chase under the Civil Law was that *actual and continued* occupancy or possession of wild animals was absolutely necessary to the successful assertion of title thereto; one must both catch and keep. If the animal though in hand and wounded, escaped, the property in it was lost.

2 Justinian, book 1, section 13.
2 Kent's Commentaries, 349.
4 Blackstone Commentaries, 588.

But under the Common Law while it is true that actual occupancy or possession creates title, the principles of property rights in and to wild animals are greatly and interestingly *extended*. A *constructive* possession or occupancy is recognized.

Under the Common Law Rule recognizing the *constructive* occupancy or possession, the rule is different. This constructive possession arises when an animal has been so *wounded* as to *deprive* it of its natural liberty and the *chase* of it reasonably certain to reduce it to actual possession is *uninterrupted* and unabandoned. It also occurs when an animal has been trapped or snared and in escaping has so injured itself as to be *deprived* of its natural liberty provided it is tracked or hunted down *without interrupted chase*. It also arises when *fish* have been *hooked, netted or enclosed* so as to bring them within the *practical control* of the fisherman.

Addison on Torts, vol. 1, page 415.
Pierson v. Post, 3 Caines, 175.
Buster v. Newkirk, 20 Johnson, 75.
Charlebois v. Raymond, 12 L. C. J. 55.
Liesner v. Wanie, 50 L. R. A. 703 (145 N. W. 374).

While *pursuit alone* gives no property in animals, *ferae naturae,* the possession necessary to acquire such right does not mean *actual bodily seizure,* but *wounding* or *ensnaring* the animal so as to *prevent* its escape is sufficient provided the hunter does not *abandon* the chase.

State v. House, 65 N. C. 315.
Fleta B., 3 Ch. 2, p. 175.
Bracton B., 2 Ch. 1, p. 8.

Speaking of the application of the principle of constructive occupancy to fish, it is said in Addison on Torts, page 414:

"If the interference of such third party takes place before the fisherman has got the fish in his *power,* or under his *dominion and control,* there can be no right of property in or title to, the fish. Thus, where the plaintiff, whilst fishing for pilchards, had *nearly encompassed* a vast quantity of fish with a net, and would have captured the whole of them, but for the interference of the defendant, who came with boats and sailors, and drove the fish into his own nets and captured them, it was held that the plaintiff could set up no title to the fish, as he never had them under his *dominion and control,* but ought to have sued the defendant for *interfering with his nets,* and unjustifiably preventing the plaintiff from exercising his occupation and calling of a fisherman, and catching the fish."

Citing: Young v. Hitchens, 5 Q. B. 606.
Stevens v. Jeacocke, 11 Q. B. 731.

Where a person while fishing cast a seine around a shoal of mackerel with the exception of an opening which the seine did not close up, but through which in the opinion of witnesses, the fish could not easily escape, it was held that his possession was nevertheless not so complete as to enable him to maintain an action of trespass against one who entered and took the fish.

Young v. Hichens, 6 Q. B. 606.

The leading New York case on the Rule of the Chase is Pierson v. Post, decided in 1805:

"Post with certain dogs and hounds had found and started a fox and was pursuing the fox when Pierson prevented his catching it, killed it and carried it off.

"The Court after considering the civil law and the common law, the works of Blackstone, Justinian, Fleta, Bracton, Puffendorf, and Barbeyrac, laid down the law in the following opinion:

"The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in, the fox as will sustain an action against Pierson for killing and taking him away?

"The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *ferae naturae,* and that property in such animals is acquired by *occupancy only.* These admissions narrow the discussion to the simple question of what acts amount to *occupancy,* applied to acquiring right to wild animals.

"If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes, lib. 2, tit. 1, c. 13, and Fleta, lib. 3, c. 2, p. 175, adopt the principle, that *pursuit alone* vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be *actually taken.* The same principle is recognized by Bracton, lib. 2, c. 1, p. 8.

"Puffendorf, lib. 4, c. 6, s. 2, and 10 defines *occupancy* of beasts *ferae naturae,* to be the actual corporal *possession* of them, and Bynkershock is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast *mortally wounded,* or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson who intercepted and killed him.

"It therefore only remains to inquire whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute relations, or have arisen between the *huntsman* and the *owner of the land* upon which beasts *ferae naturae* have been apprehended; the former claiming them by title of *occupancy,* and the latter *rationed soli.* Little satisfactory aid can, therefore, be derived from the English reporters.

"Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but on the contrary, affirms, that actual *bodily seizure* is not, in all cases, necessary to constitute *possession* of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not *indispensable* to acquire right to, or possession of, wild beasts; but that, on the contrary, the *mortal wounding* of such beasts, by one *not abandoning* his pursuit, may, with the utmost propriety, be deemed possession of him; since thereby, the pursuer manifests an unequivocal intention of *appropriating* the animal to his individual use, has *deprived* him of his natural liberty, and brought him within his *certain control.* So also, encompassing and securing such animals with *nets and toils,* or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape *impossible,* may justly be deemed to give possession of them to those persons who, by their industry and labor, have used means of apprehending them. The case now under consideration is one of mere *pursuit,* and presents no circumstances or acts which can bring it within the definition of occupancy by Puffendorf, or Grotius, or the ideas of Barbeyrac upon that subject.

"The cases cited from 11 Mod. 74–130, I think clearly distinguishable from the present; inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise; and in the report of the same case (3 Salk. 9), Holt, Ch. J., states, that the ducks were in the plaintiff's decoy pond, and so in his possession, from which it is obvious the court laid much stress in their opinion upon the plaintiff's possession of the ducks, *ratione soli.*

"We are the more readily inclined to confine possession or occupancy of beasts *ferae naturae,* within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting, or pursuing such animals, without having so *wounded, circumvented* or *ensnared* them, so as to *deprive them of their natural liberty,* and subject them to the *control* of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

"However *uncourteous* or *unkind* the conduct of Pierson towards Post, in this instance may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied."

A dissenting opinion was rendered by one of the judges and because of its rich and racy character, it is presented here:

"Whether a person who, with his own hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away?

"This is a knotty point, and should have been submitted to the arbitration of *sportsmen,* without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor reynard would have been properly disposed of and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned, and which must be so well known to every votary of Diana. But the parties have referred the question to our judgment and we must dispose of it as well as we can, from the partial lights we possess, leaving to a higher tribunal, the correction of any mistake which we may be so unfortunate as to make. By the pleadings it is admitted that a fox is a 'wild and noxious beast.' Both parties have regarded him, as the law of nations does a pirate, '*hostem humani generis,*' and although '*de mortuis nil, nisi bonum,*' be a maxim of our profession, the memory of the deceased has not been spared. His depredations on farmers and on barn yards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds; or what gentleman, at the sound of the horn, and at peep of day, would mount his steed, and for hours together, '*sub jove frigido,*' or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labors of the chase, were permitted to come in at the death and bear away in triumph the object of pursuit? Whatever Justinian may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance

of so many centuries, not to have a right to establish a rule for ourselves. In his day, we read of no order of men who made it a business in the language of the declaration in this case, 'with hounds and dogs to find, start, pursue, hunt and chase,' these animals, and that too, without any other motive than the preservation of Roman poultry; if this diversion had been then in fashion, the lawyers who composed his institutes, would have taken care not to pass it by, without suitable encouragement. If anything, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the fox-hunter, we have only to say *tempora mutantur;* and if men themselves change with the times, why should not laws also undergo an alteration.

"It may be expected, however, by the learned counsel, that more particular notice be taken of their authorities. I have examined them all, and feel great difficulty in determining, whether to acquire dominion over a thing, before in common, it be sufficient that we barely see it, or know where it is, or wish for it, or make a declaration of our will respecting it; or whether, in the case of wild beasts, setting a trap, or lying in wait, or starting, or pursuing, be enough; or if an actual wounding, or killing, or bodily tact and occupation be necessary. Writers on general law who have favored us with their speculations on these points, differ on them all; but, great as is the diversity of sentiment along them, some conclusion must be adopted on the question immediately before us. After mature deliberation, I embrace that of Barbeyrac, as the most rational, and least liable to objection. If at liberty, we might imitate the courtesy of a certain emperor, who, to avoid giving offence to the advocates of any of these different doctrines, adopted a middle course, and by ingenious distinctions, rendered it difficult to say (as often happens after a fierce and angry contest) to whom the palm of victory belonged. He ordained, that if a beast be followed with large dogs and hounds, he shall belong to the hunter, not to the chance occupant; and in like manner, if he be killed or wounded with a lance or sword; but if chased with beagles only, then he passed to the captor not to the first pursuer. If slain with a dart, a sling, or a bow, he fell to the hunter, if still in chase, and not to him who might afterwards find and seize him.

"Now, as we are without any municipal regulations of our own, and the pursuit here, for aught that appears on the case, being with dogs and hounds of imperial stature, we are at liberty to adopt one of the provisions just cited, which comports also with the learned conclusion of Barbeyrac, that property in animals *ferae naturae* may be acquired without bodily touch or manucaption, provided the pursuer be within reach, or have a reasonable prospect (which certainly existed here) of taking, what he has thus discovered an intention of converting to his own use.

"When we reflect also that the interests of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err, in saying, that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporal possession, or bodily seisin, confers such a right to the object of it, as to make any one a wrongdoer, who shall interfere and shoulder the spoil."

The *first opinion* controlled the case and is the *law*. In 1844 a statute was passed, ch. 109, which provided that any person who had started and pursued in the counties of Suffolk or Queens with a dog or otherwise, any deer during the open season should be deemed to be in possession of it so long as he or they should continue in fresh pursuit thereof, but this was repealed by chap. 194, Laws of 1849.

In Buster v. Newkirk, decided in 1822, it appeared that the Newkirk was hunting deer and had *wounded* one about six miles from Buster's house and was *pursuing* it with his dogs. He followed the track occasionally discovering blood until night; *on the next morning he resumed the pursuit* until he came to Buster's house where he found the deer had been killed the evening before. The deer had been fired at by another person just before he was killed by Buster and had fallen, but rose again and ran on, the dogs being in pursuit and Newkirk's dog laid hold of the deer about the same time when the plaintiff cut the deer's throat. Newkirk demanded the venison and skin and Buster gave up the venison, but refused to deliver the skin.

The Court said:

"The principles decided in the case of Pierson v. Post (3 Caines Rep. 175), are applicable here. The authorities cited in that case establish the position, that property can be acquired in animals *ferae naturae*, by *occupancy only;* and that, in order to constitute such an occupancy, it is sufficient if the animal is deprived of his natural liberty, by *wounding*, or otherwise, so that he is brought within the *power and*

control of the pursuer. In the present case, the deer, though wounded, ran six miles; and the defendant in error had *abandoned* the pursuit that day, and the deer was *not deprived* of his natural liberty, so as to be in the power or under the control of Newkirk. He, therefore, cannot be said to have had a property in the animal, so as to maintain the action?"

In Liesner v. Wanie, a Wisconsin case (1914), the pursuit of a wounded wolf was vigorously continued and *actual possession* of the wounded animal was *inevitable* and it was held that while under the Civil Law the property right was postponed to the actual taking, yet under the Common Law one who had wounded a wild animal and pursued it so that escape was impossible had a property right therein which he might protect against one who killed and took possession of it, and his title would not be divested by the capture or killing of the animal by another, if at the time its *capture* by the huntsman was *reasonably probable* on account of *wounds inflicted* by him.

Citing: 2 Bracton, chapter 1, page 8.
2 Justinian Inst., title 1, section 13.
2 Fleta, 2, 175.
Pierson v. Post.
Buster v. Newkirk.
Charlebois v. Raymond.

It also held that larceny would lie in case the animal was of value for food, fur or otherwise. If of absolutely base nature, it would not lie.

In Charlebois v. Raymond, it was held that a person who has *chased* a wild animal and *wounded* it, is the first occupant so long as he *remains in pursuit* and is the owner of it, should it be caught or killed *by another.*

It must be borne in mind that the above rule and cases presuppose a reasonably certain *identification* of the animal in question.

It may also be gathered from these cases and those on whales that established *customs and usages* among

sportsmen might on proof thereof play an important part in deciding any such issue and that a special or struck jury might be impanelled to dispose of them.

It would seem that *involuntary* cessation of pursuit caused by nightfall ought not to divest the title; and that he who *finds* the animal dead after the search has been *given up* by the hunter should be treated only as the finder of *lost property* and bound to deliver it to the one who brought about its reduction to possession, but *this is apparently not the law.*

The hooking into a net *lawfully set* and the taking of fish therefrom would without doubt constitute larceny.

It was held in People v. McMasters, 74 Hun 226, that the taking of such fish from a net unlawfully set and not immediately releasing them, rendered the taker liable to the penalty.

It would seem that this *constructive possession* property right could be acquired through *agents* and would also be *assignable,* but such points up to date like many others have not been passed on.

This rule of the chase would of course also apply to all animals not fish, birds or quadrupeds.

It appears to be comparatively simple on the above principles to determine the *right* to take and the *title* to game taken on *public lands,* assuming they are *public* and the *right* to take and the *title* to fish taken in *public waters* assuming they are *public* as distinguished from *private* lands and waters.

See article IV, as to the Forest Preserve.
See Public Lands Law.
See Barge Canal Lands.
See section 366.

The wound which would deprive a *bird* of its liberty and bring it within the control of the hunter would be one proposition. The wound which would bring about the

same *result* as to a *quadruped,* however, especially a large one, would present a quite different question.

In the case of fish *duly hooked,* netted or otherwise deprived of liberty, but lost through the *conceded* interference of a third person and *no other cause,* assuming that the *species* was known and the question of weight determinable by other means than the " scales on his back " a definite basis for a respectable cause of action would appear to be made.

As intimated earlier in this discussion of animals in Class E, the above Rule of the Chase does not appear necessarily to apply where the rights of the *owner of the land* or the holder of the *exclusive hunting and fishing rights* thereon are *asserted.*

It therefore becomes of *paramount importance* to determine the *title to lands* and particularly the title to lands *along and constituting the bed of waters,* inasmuch as will be seen later, the *control of the waters* as far as the *exclusive hunting and fishing rights* thereover or therein are concerned *prima facie* follow the ownership of the *bed of the waters* just as does the title to the ice formed upon the *surface.*

See Rossmiller v. State, 58 L. R. A. 93.

The proposition of determining the ownership of lands which involve no waters except those of *negligible volume* is comparatively simple and can readily be solved by a reference to the chain or abstract of title and an examination of the descriptions, courses, metes and bounds in the consecutive conveyances.

Presumptively the land within the bounds of the *highway* is owned by the abutting owner to the *centre* of the road; if he owns on both sides, he owns the land subject to the public easement which does not, however, include the right of the public to fish or hunt (regardless of the provision of law prohibiting hunting on the highway), any more than it includes the right to cut the grass or

pluck the nuts or apples from the trees which grow within the four rod strip.

No hunting or fishing rights along the highway through a man's land exist in favor of the public even when there has been a dedication of the land for highway purposes.

See section 222.
Realty Co. v. Johnson, 66 L. R. A. 439.

The towpaths have been held not to be public highways.

Attorney-General's Report, 1912, Vol. 2, page 514.

When the question of the title to lands *along waters* and *under waters* arises, especially as to whether the title is in *State* or *individuals,* the difficulties begin and in this respect reference is had to *natural waters* only. The title to bed of the Erie and other canals like the strip along the sides is of course in the State.

Green Island Ice Co. v. Norton, 105 A. D. 331.

As to the natural waters of the State, there is encountered again the conflict between the *civil* and the *common* law. While on many propositions involving such waters there is a sharp clash of principle, the authorities, ancient and modern, whether applying the civil law or the common law substantially agree that *prima facie* the title to lands under *tidal* waters whether *navigable in fact or not* is in the sovereign or State from *highwater mark* to *highwater mark.*

5 Cyc. 893–902.
Matter of New York, 168 N. Y. 134.
Hume v. Packing Co., 92 Pac. 1065.
Trustees of Brookhaven v. Strong, 60 N. Y. 56.
Murphy v. Brooklyn, 98 N. Y. 642.
Coxe v. State, 144 N. Y. 396.
Sage v. Mayor, 154 N. Y. 61.
Girard on Title to Real Estate, 933–944.
Fulton Light, Heat & Power Co. v. State, 200 N. Y. 400.

The overwhelming weight of authority in the various state and federal courts is to this effect.

See People v. Steeplechase Park Co., 218 N. Y. 459.

This *presumption* may of course be overcome and is not absolute. Under certain circumstances, grants may include the lands under tidal waters.

Pacific M. & E. Co. v. Portland, 46 L. R. A. 363.
See Public Lands Law.
See Smith v. Bartlett, 180 N. Y. 360.

The authorities also practically agree that *prima facie* the title to lands under the waters of *brooks, small streams, ponds, small lakes,* and *non-tidal, non-navigable in fact, lakes and rivers,* is in the riparian or littoral owner — the owner of the banks, shores and adjacent upland. The owner of the upland on *both sides* of the waters or surrounding it has title to the *whole bed.* He who owns only on *one side* owns the bed to the *center or thread* of the stream or body of water (*ad filium aquae*). These proprietary rights in the bed carry the *control* of the waters subject to the obligation to respect the rights of upper and lower riparian owners; and this proposition is true where the waters cross the highway.

Robinson v. Davis, 47 A. D. 405.
Girard on Titles to Real Estate, 545, 922–933.
Gouverneur v. Nat. Ice Co., 134 N. Y. 355.
Tripp v. Richter, 158 A. D. 136.
Rockefeller v. Lamora, 85 A. D. 254.
Fuller Light, Heat & Power Co. v. State, 200 N. Y. 400.
Calkins v. Hart, 64 M. 149.

This *presumption* also may be overcome and the descriptions and bounds in the conveyances constituting the chain of title will *govern.* They may limit one upland owner to the *bank* or some other point and the opposite

owner's title may extend clear *across* the stream or body of water including the *entire bed.*

Nichols v. Howland, 52 Hun, 287.
Matter of City of New York, 212 N. Y. 325.
Mott v. Mott, 68 N. Y. 246.

This principle is built upon the theory that he who conveys the *upland* will not ordinarily care to reserve the *bed* of the waters, but the grant may be expressly limited and the shore and bed reserved.

All navigable waters in the states are for purposes of *commerce* under the control of Congress.

29 Cyc. 294.
U. S. Statutes, 3540–3541.

Where the authorities strike sparks in an incessant clash is on the question of the title to the lands along and the beds of *non-tidal navigable* waters. The cause of this conflict and chaos is the failure of the Common Law of England in the course of its development to adopt and apply the rule and test of the Civil Law as to navigability in its application of the general principle of law that the title to the beds of *navigable* waters was presumptively in the *crown* or *state.*

See Willow River Club v. Wade, 42 L. R. A. 305.

The test under the Civil Law was and is navigability or non-navigability *in fact* regardless of the *tidal nature* of the waters and the presumption that the title to the bed is in the *sovereign* is applied accordingly.

By the civil law a *littoral* right of way for purposes of navigation, anchorage, rowing, etc., existed on the banks, or shores of public streams over private lands. Such right, however, has been held not to exist under the common law as prevailing in England and this country. A special custom however might be shown as conferring

the right. But it probably would not be held to include the right of fishing and hunting as a part of the easement.

See Girard on Title to Real Estate, page 941.
Ball v. Herbert, 3 Term. Rep. 253.

The test under the Common Law applying the presumption as to the title to the beds of *navigable* waters, is the *presence* or absence of the ebb and flow of the *tide.* Its presence renders the waters navigable *in law* regardless of whether they are so *in fact* and if non-tidal the *prima facie* title to the *bed* is in the upland owner *subject* to the public easement of *passage and navigation.*

At common law, a conveyance of land bounded on a river or stream in which the tide does not ebb and flow, although navigable in fact, is presumed to carry title to the thread of the stream.

5 Cyc. 895.

This presumption may of course be overcome just as in the case of the rule as to waters non-navigable in fact and non-tidal.

This sharp conflict was carried over from the mother countries into the various territories now comprising our various states. Wherever Spanish, French or Dutch conquest or dominion originally obtained, there is a leaning, though not a consistent one toward the rule of the *civil law.* Where English Conquest and dominion occurred, the tendency of course was to apply the *common law* rule, but it has led to constant trouble owing to the palpably different conditions existing in the British Isles and those found in our vast territory.

Both rules have been applied to the largest rivers in the country, the Missouri and the Mississippi. The Federal Courts incline to the *civil law* and have applied it in some of the territories before they became states.

Wilson v. Watson, 35 L. R. A. 227.

However out of the confusion of authorities is found a substantial agreement among them to the effect that the *common law* rule cannot apply to the *great inland lakes and rivers* of the country nor to the fresh waters constituting State and National boundaries.

Miller v. Mendenhall, 8 L. R. A. 89.
People ex rel. Burnham v. Jones, 112 N. Y. 597.

This would beyond question place the title to the *beds* of Lakes *Erie, Ontario* and part of Lake *Champlain,* the *Niagara* river and the *Delaware* river where it constitutes a boundary between New York and Pennsylvania, presumptively in the *State* from *highwater mark,* giving along the shore at ordinary times a stronger right to the public than the *littoral* right of way conferred on the public by the *civil law.*

Compare Lenoir Co. v. Crabtree, 39 L. R. A. 1213.
Border Island Co. v. Cowles Co., 94 M. 340.

New York State is peculiarly unfortunate in respect to this conflict between these two rules in that to the *same* sets of *facts* and circumstances, our courts have applied *both rules* and have reversed themselves.

The situation of the Hudson and Mohawk rivers is unique in comparison with other waters of the State. Prior to 1644 the Dutch were exercising dominion over the greater portion of these rivers and their valleys. The Dutch in that year capitulated to the English and all the inhabitants were confirmed in their rights of property. Sovereignty again passed to the Dutch by conquest in 1673, but by the treaty of Westminster in 1674, New Netherland was again restored to King Charles II of England and it remained under English rule until the revolution.

See Appleby v. City of New York, 163 A. D. 680.

For these reasons the title granted to the original settlers in the valleys of these rivers and all grants under

Dutch dominion as construed by the *civil law* prevailing in the Netherlands, did not include to the riparian owners the *banks* or beds of the rivers. Upon the surrender of this territory the guaranty assured by the English authorities to its inhabitants of the peaceable enjoyment of their possession simply confirmed the right already possessed and the *beds* of these navigable streams never having been *conveyed* became by virtue of the right of sovereignty vested in the English Crown as *ungranted, unappropriated* lands and the State of New York as a consequence of the revolution *succeeded* to all the rights of the English Crown.

This proposition is aside from the *tidal* character of the waters from the standpoint of the *common law.*

See section 300 on Marine District.
Canal Appraisers v. People, 17 Wendell, 571.
Commissioners v. Kempshall, 26 Wendell, 404.
Smith v. Rochester, 92 N. Y. 463.
Mott v. Clayton, 9 A. D. 181.
Fuller Light, Heat & Power Co., 200 N. Y. 400.

On the contrary whenever a grant was made under English dominion the *common law* rule crept in and the the presumption arose that the *beds* were conveyed by the *patent* to the grantees subject to the *public easement* of navigation unless expressly excepted and reserved, in spite of any *tidal* character of the waters.

See section 300 on Marine District.
Williams v. Utica, 217 N. Y. 162.
Danes v. State, 169 A. D. 443.
Hinckel v. Stevens, 165 N. Y. 171.

While this disposes of the Hudson and the Mohawk, there is still a discord and confusion as to the beds of the balance of the *inland waters* of the State as to which there are two sharply defined, conflicting lines of authorities.

By virtue of the principle that the *common law* in so far as applicable to our conditions became absorbed by and a part of the law of this State as declared by the Constitution, we are confronted by the application of that rule. For as a general proposition in the absence of statute, the *common law will prevail.*

The case of Hooker v. Cummings, 20 Johnson, 90, involving the bed of the Salmon river in what was then Oswego county, decided in 1822, following the lead of People v. Platt, 17 Johnson, 195, involving the Saranac river in Clinton county, decided in 1819, applied the common law rule to all fresh, *navigable waters* of the State except the Hudson and Mohawk, holding that *presumptively* the title to the *beds* of all these waters was in the riparian owner.

In the case of Commissioners v. Kempshall, 26 Wendell, 404, involving the Genesee river, decided in 1841, the same proposition was held to, deeming the *common law rule* adopted and applicable to the fresh navigable waters of the State.

On the contrary the case of People v. Canal Appraisers, 33 N. Y. 461, involving the Mohawk, decided in 1865, following the lead of People v. Tibbitts, 17 Wendell, 570, involving the Mohawk, decided in 1836 and Starr v. Child, 20 Wendell, 149, involving the Genesee, decided in 1838, explicitly repudiated Hooker v. Cummings and flatly held that the *common law rule* was wholly *inapplicable* to this country and the waters of this State, contrasting the conditions in England and in our territory.

The case of Smith v. Rochester, 92 N. Y. 463, decided in 1883, involving Hemlock lake, repudiated People v. Canal Appraisers as applicable *only* to the Hudson and Mohawk under the *civil law* rule and reaffirmed the application of the *common law rule* as declared in Hooker v. Cummings, to all other fresh, navigable waters of the State.

In the case of Geneva v. Henson, 140 A. D. 49, involving the title to the bed of Seneca lake, decided in 1910, in which case two referees reported *opposite ways* on the facts and the law, Smith v. Rochester was apparently limited to the *smaller* lakes and rivers.

Compare Geneva v. Henson, 195 N. Y. 447.

It seems that under the *civil law* that in the case of navigable waters what are known to the *common law* as the *jus publicum* (the *public easement* over the waters) and the *jus privatum* (the proprietary *title to the bed* and all not involved in the public easement of navigation and passage) were practically *one*. Under the *common law* the *jus publicum* was in the *crown or sovereign* in trust for the public and was *inalienable;* the *jus privatum* was in the crown as a *proprietor* and could be *granted and conveyed.* The rule seems to be that in this State the *jus privatum* was abandoned to the owners of the *upland* unless expressly reserved or unless the grant was limited.

Lewis v. Utica, 159 A. D. 160, 217 N. Y. 162.
Town of Brookhaven v. Smith, 188 N. Y. 74.

The solution of all this confusion seems to be to examine the title of the *lands under water* just as *ordinary lands* bearing in mind the *presumptions.* To do this the search must begin with what is known as the *Treaty of Hartford.* In 1628 the King of Great Britain *granted in fee* to the colony of Massachusetts Bay, certain described lands on the Atlantic coast and then by a general grant included the lands within the lines of latitude across the entire continent which in sweep took in practically all of the present State of New York.

In 1664 Charles II conveyed by grant to the Duke of York a large tract of land which embraced much of the territory *included* in the grant already referred to, particularly what are now the *central* and *southwestern* parts of the State. This raised a dispute which con-

tinued down to the creation of the states and the State of New York and the commonwealth of Massachusetts as *successors* to the title and the contention, after the matter had been brought to the attention of Congress, entered into the treaty of Hartford in 1786, through Commissioners appointed for the purpose and the treaty was ratified by the respective states.

By this treaty, Massachusetts *ceded to New York,* all claim which she had as a *sovereign* to the *government* and *jurisdiction* of the territory in question and *ceded* to New York all lands east of what was known as the *pre-emption line* running from the northern boundary of Pennsylvania through the center of Seneca Lake and on into Lake Ontario. New York *ceded* to Massachusetts as an *individual proprietor* all *lands west* of the pre-emption line.

Seneca Indians v. Appleby, 127 A. D. 770.

This treaty has been referred to and discussed in many cases, some of the most important of which are:

Commissioners v. Kempshall, 26 Wendell, 404.
Smith v. Rochester, 92 N. Y. 463.
Geneva v. Henson, 140 A. D. 49.
Seneca Nation v. Christie, 126 N. Y. 122.

It was generally held that as to lands under water *west* of the pre-emption line, Massachusetts held the *jus privatum* including the title to the *bed* and that New York held the *jus publicum.* As to the territory to the *east* of the line except in so far as the *jus privatum* had been by *prior patent* under the *English Crown* granted to *individuals,* both the *jus publicum* and *jus privatum* were vested in the State of New York.

Seneca Nation v. Christie, 126 N. Y. 122.

In Geneva v. Henson, (195 N. Y. 447), 140 A. D. 51, 202 N. Y. 545, it was finally intimated that the State could not be deemed to have *reserved* the *waters* of Seneca lake

and *parted* with title to the west half of the *bed* and the decision repudiated Smith v. Rochester as to the *larger bodies of water* in the western part of the State covered by the treaty. The Court of Appeals held that regardless of the treaty the question of title should be determined by the deeds in the chain of title. It seems that Henson's deed ran to the lake and thence along the shore thereof, and it appears to have been held, apart from the effect of the treaty, that the *bed of the lake was not conveyed.*

Compare Geneva v. Henson, 202 N. Y. 545.

The Attorneys-General of the State have locked horns on this proposition.

In the reports of 1905, page 324, the doctrine of Smith v. Rochester is adhered to and the beds of the navigable non-tidal waters are held to be owned by the upland proprietor subject to the public easements.

In 1908 the Attorney-General rendered the following opinion in connection with *barge canal lands* (page 248):

"The deeds between riparian owners are not *conclusive* upon the state as to their rights in streams and should not govern in the preparation of appropriation maps and descriptions of upland to be taken. Where the state owns the bed and waters of a stream, its title extends to the *highwater mark, on both banks,* if the banks are owned by private proprietors.

Generally speaking, the state should be treated as the proprietor of the bed and waters of the Hudson, Mohawk, Oswego, Seneca, Genesee and Niagara rivers and Tonawanda and Northern Wood creeks. That statement, however, probably needs qualification in respect to the *headwaters* of those streams, where they are so small as never to have been actually *navigable.* At the present time it of course requires some research to determine where that point would be in rivers which were formerly navigated by much *smaller craft* than are now used.

In respect to the branches of these rivers named unless such branches are navigable within the above definition, they should be treated as *wholly private.*"

See section 21.

In 1913, the Commissioners of the Land Office were advised that they had no power to make *irrevocable* grants of land under the waters of navigable streams and that all grants should contain a clause expressing a power of revocation and reserving the right explicitly.

Attorney-General's Report, Vol. II, page 405.

It has been stated that the rights of the State in the bed of navigable streams was *sovereign* and not *proprietary* and that it would only grant the *use* as the *title* was in the people of the State.

Attorney-General's Report, 1912, Vol. II, page 576.
See Public Lands Law, article 12.

The cases cited, People v. N. Y. S. F. Co., 68 N. Y. 71, and Coxe v. State, 144 N. Y. 396 deal, however, with *tidal* waters.

It would seem, therefore, out of all this conflict of opinion and authority that if any *presumption* obtained to the *west* of the line it would be in favor of *Massachusetts* and her *successors* as to the lands under the *smaller bodies of water,* and in favor of *New York* as to the lands under the *larger bodies of water;* either one of the presumptions to be overcome by the respective deeds and their descriptions and limitations.

To the *east* of the line, the *presumption* would appear to be in favor of the State as to any beds of waters, *navigable in fact* leaving it for him who claims to the contrary to show that the State has parted with the title.

As to any of these beds of waters on either side of the line, the State may of course have parted with the title through patent or grant particularly where grants of immense tracts of land have been made and the question must be determined in the end like any other question of title to real estate, the description, metes, bounds, exceptions and reservations contained in the consecutive conveyances, governing.

Burnham v. Jones, 112 N. Y. 597.

See Section 1957 of the Code of Civil Procedure as to actions to vacate letters patent.

As to patents including the bed of the waters,

See Lewis v. Utica, 217 N. Y. 162.

Where the lines run to the lake, or river and then along it, the bed seems to be included; when they run to highwater mark, lowwater mark, the bank, etc., and then along it, the bed seems to be *excluded.*

Fulton L., H. & P. Co. v. State, 200 N. Y. 400.
See Wheeler v. Spinola, 54 N. Y. 377.
See 5 Cyc. 893–903.

There are other questions affecting the title to lands under water, one of which involves what is called *avulsion.* This occurs where there is a *sudden violent shift* in the course of a stream or the formation of its bed and such a change does not alter the former situation as to the title to the land.

5 Cyc. 904.
Whiteside v. Norton, 45 L. R. A. 112.
State v. Bowen, 39 L. R. A. 200.
Fowler v. Wood, 6 L. R. A. 162.
Mulry v. Norton, 100 N. Y. 424.

Where, however, by the natural process of *accretion* by slow and imperceptible degrees *alluvium* is deposited on the bed or against the shore and land is thus formed the title to the *deposits* is in the owner of the bed. *Islands* formed in the stream or a body of water follow the same rule and belong to the person owning the bed on which they are formed. *Accretion* is the process and *alluvium* the deposit.

29 Cyc. 370–372.
Fowler v. Wood, 6 L. R. A. 162.
Kinkead v. Turgeon, 7 L. R. A. 316.
Mulry v. Norton, 100 N. Y. 424.
Wilson v. Watson, 35 L. R. A. 227.

Carson v. Turk, 42 L. R. A. 384.
Cook v. McClure, 58 N. Y. 437.
Matter of Commissioners, 37 Hun, 537.
Steers v. Brooklyn, 101 N. Y. 51.

In cases where by *reliction* or *recession* there has been a *permanent* subsidence of the waters leaving what was formerly the *bed* of the waters, dry *exposed land* two lines of authorities are to be found. One line of decisions holds that such land should go to the *upland owner* as compensation for lands flooded in the past, but the better and more approved rule seems to be that whose it was as the *bed of the waters,* it still is as the *bed exposed.*

Powell et al. v. Rochester, —— M. —— (1916).
Holman v. Hedges, 112 Iowa 714.
Colley v. Golden, 21 L. R. A. 300.
Fuller v. Shedd, 33 L. R. A. 146.
Hodges v. Williams, 95 N. C. 331.
Kinkead v. Turgeon, 74 Neb. 580.
Mulry v. Norton, 100 N. Y. 424.
Ruling Case Law, Vol. I, pages 227–248.

As against the above principle of *reliction,* it must be conceded that the State or any individual proprietor might have lost title to the exposed lands or the *enclosed* bed of waters through *adverse possession* or *tax sales.*

See Gouverneur v. National Ice Co., 57 Hun, 474 (134 N. Y. 355).

As to adverse possession against the *State* generally, see Hamlin v. People, 155 A. D. 680.

According to the principle already stated that *presumptively* hunting and fishing rights upon and in waters belong to the owner of the *bed* of the waters, it has been held that the right of fishing and fowling in and on *tidal* waters is a *public* one.

19 Cyc. 993.
Butler v. Attorney-General, 8 L. R. A. 1047.
Girard on Titles to Real Estate, 945.

The exclusive right to fish and hunt in and over *non-navigable non-tidal* waters is vested in the *riparian* owners.

Rockefeller v. Lamora, 85 A. D. 254.

With the exception of the *great lakes* and the *boundary* waters, the overwhelming weight of authority is to the effect that *presumptively* the *riparian* owners along *navigable non-tidal* waters have the exclusive right to hunt and fish thereon and therein. The ownership of the *bed* carries with it the *exclusive hunting and fishing rights.* The public *easement* of passage and navigation does *not include* the right to fish and to hunt.

Hooker v. Cummings, 20 Johnson, 90.
Girard on Titles to Real Estate, 945.
Rockefeller v. Lamora, 85 A. D. 254.
19 Cyc. 993.
Slingerland v. Int. Cons. Co., 43 A. D. 215.
Matter of Deposit, 131 A. D. 403.
People v. Doxtater, 75 Hun 472.
Hartman v. Tresise, 4 L. R. A. 873.
Sterling v. Jackson, 37 N. W. Rep. 45.
Ne-pee-Nauk Club v. Wilson, 96 Wis. 290.
State v. Shannon, 36 Ohio St. 423.
Beatty v. Davis, 20 Ont. 373.
Chenango Bridge Co. v. Paige, 83 N. Y. 178.
Schulte v. Warren, 13 L. R. A. 745.
People v. Truckee Co., 116 Cal. 397.

If the title to the bed of the waters is in the State the rights of hunting and fishing are in the public. If the *title* to the *bed* of the waters is the *riparian owners,* the *control* of hunting and fishing over and in the waters is *theirs.*

As was said in Sterling v. Jackson:

"The defendant claims that he had a right to shoot the wild fowl from his boat, because, as the waters were navigable where he was, he had the right to be there; that, there being no property in wild fowl until captured, if he committed no trespass in being where he was, no action will lie against him for being there and shooting the wild duck.

There is a plausibility in the position, which, considered in the abstract, is quite forcible, and if applied to waters where there is no private ownership of the soil thereunder would be unanswerable. But, so far as the plaintiff is concerned, defendant had no right to be where he was, except for the purpose of pursuing the implied license held out to the public of navigating the waters over his land. So long as that license continued, he could navigate the water with his vessel, and do all things incident to such navigation. He could seek the shelter of a bay in a storm, and cast his anchor therein, but he had no right to construct a 'hide' nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun."

And it was stated in State v. Shannon:

"True, navigable streams in this state are declared to be public highways, but the right to use a public highway is not abridged by protecting the owner of the fee in the exclusive right of killing game therein."

Most of the legislative acts declaring streams *navigable* which were not *so in fact* have been invalidated as *unconstitutional.*

Girard on Titles to Real Estate, 923.
Hartman v. Tresise, 4 L. R. A. 873.
DeCamp v. Dix, 159 N. Y. 436.

In Turner v. Hebron, 14 L. R. A. 386, it was held that fishing rights belonged with the ownership of the waters apart from the bed, but this case does not seem to have been followed. Water seems generally to be treated as something incapable of absolute ownership. And the legislative acts as to the *waters* of the rivers and lakes in the State appear to be confined to the regulation of *navigation* and aid of the *canal* system.

Sweet v. Syracuse, 129 N. Y. 316.
Selby Co. v. State, 104 N. Y. 562.

The above *common law* rule as to the *ownership* of the *bed* of the waters *carrying with it* the exclusive *rights* so settled by the decisions does not appear to have been abrogated by *statute.*

There is also no right of way across private property to navigable waters.

State v. Gunn, 170 Mass. 509.

In view of the decision in Geneva v. Henson, 140 A. D. 49, it seems that as to the *inland, non-tidal* waters of the State which are *navigable in fact,* the *presumption* might be that the title to the bed is still in the *State* and the fishing and hunting rights on and in such waters, *public.* The courts, however, have apparently never held so, as can be readily seen by the authorities quoted. Each case must evidently be determined on its *own facts and circumstances* in the light of the *presumptions* referred to and the *decisions* cited.

Where the title to the lands in question is in the State, the restrictions as to the taking of the fish or game found thereon except for such prohibitions as are presented by sections of the Penal Law, are contained in the provisions of the Conservation Law.

See sections 54, 176, 366.

Where, however, the title to the lands is in a private individual, as has been already intimated, there is apparently *vested* in the *owner of the soil subject to* the *state regulations* for the protection of fish and game, a *special, quasi* or *qualified* property right in and to the *game* and *fish* found upon it. As to this property right, there are encountered the same two conflicting rules of the *civil law* and the *common law.*

See State v. Mallory, 67 L. R. A. 773.

This peculiar property right has never been held to be of such a nature as to make the owner of the land liable for the acts of any such animals while on it.

The right to pursue and take wild animals *anywhere* without let or hindrance originally obtained and con-

tinued until the community ownership of land was abandoned when a recognition of land title rather than a property in animals *ferae naturae* prevented the pursuit of game on the land of another; barring all questions of *trespass,* individual property in them became vested in the person reducing them to possession prior to which time no individual could claim *exclusive* right to them.

James v. Wood, 82 Maine 173. (8 L. R. A. 448.)

The above was the rule of the *civil law.* As between the *owner* of the land and the *trespasser,* the latter acquired title to the game taken although it was conceded that the owner could *forbid and prevent* the trespass before or after the killing of any game.

Justinian, Book 2.
Geer v. Connecticut, 161 U. S. 519.
State v. Mallory, 67 L. R. A. 773.

The rule of the *common law* is different. As to animals in their state of nature there properly speaking is no exclusive property right in them except the right to have such animals as *voluntarily* come upon the land, remain there *undisturbed* and it has been claimed it is this *special right* in defense of which *in the main,* the *parking* and *posting* law has been enacted.

For driving the game off the land an action at common law has been said to lie.

Am. & Eng. Encyc., Vol. XIV, page 657.
Ingham on Animals, 572–575.

The *common law* recognized three distinct forms of this *quasi* property.

1st: That arising from the ownership of the land (*ratione soli*); the right of any *owner of land* at common law to kill and take such animals *ferae naturae* as were from time to time found upon this land, for while

living they partake of the *quality of the soil* and they feed on his lands and crops.

See Ferguson v. Miller, 1 Cowen, 243.
See State v. Mallory, 67 L. R. A. 773.

2d: That arising from a *privilege* granted on lands (*propter privilegium*) under early English law when the title to game was deemed in the crown as a *proprietor* and was granted in the nature of an exclusive privilege or franchise.

2 Blackstone, 394, 413, 419.

3d: That arising from the comparative *helplessness* of nesting birds and breeding animals especially those in burrows and their young (*ratione impotentiae*) by reason of their inability to make use of their liberty and forsake him.

2 Blackstone, 394.

This first right was lost by the animals *quitting* the land or even being *hunted off* and no action seems to lie for intercepting their course or flight or preventing their coming.

Hannam v. Mockett, 2 B. & C. 934.
Meredith v. Triple Island Club, 38 L. R. A. 286.
Sutton v. Moody, 1 Ld. Raymond, 250.
Graham v. Ewart, 11 Exchequer, 326.
Wickham v. Hawker, 7 M. W. 63.

In Hannam v. Mockett, it was said property *ratione soli* in wild animals exists only while they are *voluntarily* on the land of the claimant; the fact that they voluntarily and habitually *resort* to his land to breed gives him no right of action against one who *prevents* their coming. But it was intimated that an exception should be made in favor of a person who by expenditure of money and labor decoyed wild animals of intrinsic value, to his premises and conducts a business of raising and selling them for profit.

The second was likewise lost by their quitting the liberty.

2 Blackstone, 394.
Sutton v. Moody, 1 Ld. Raymond, 250.

The third was lost by their attaining strength and growth and *leaving* the premises.

2 Blackstone, 394.

Except for these mentioned rights there was no private property in wild animals as long as they remained in the *state of nature.*

2 Blackstone, 391.
State v. Mallory, 67 L. R. A. 773.
Schulte v. Warren, 13 L. R. A. 745.
James v. Wood, 82 Me. 173.
State v. Sumner, 2 Ind. 377.
State v. Niles, 78 Vt. 266.

The above *qualified rights* were *absolute* against a *trespasser* and in violation thereof he acquired no *title* to the game *taken.*

The act of reducing an animal *ferae naturae* into possession where title is thereby created, must not be *wrongful* and if such an act is effected by one who is at the moment a *trespasser,* no title to the property is created in him, but vests in the *owner of the soil* and the wrongdoer is liable for trespass and conversion; and the mere finding of wild animals on the lands of another does not vest in the *finder* any title to or property in them.

Blades v. Higgs, 11 H. L. Cases, 621.
Haifer v. Salloway, 58 Fla. 255.
State v. Repp, 104 Iowa, 305.
Commonwealth v. Chace, 9 Pick. 15.
Rexroth v. Coon, 15 R. I. 35.
Merrils v. Goodwin, 1 Root, 20.

As it is stated in Am. & Eng. Ency. and in Cyc.:

Every owner of land has a common law right to kill and take all such game *ferae naturae* as may be found on his land and as soon as this

right is exercised, the animals so killed or caught become the *absolute property* of the owner of the soil.

The act of reducing an animal *ferae naturae* into possession must not be *wrongful* and if such an act is effected by one who is at the moment a *trespasser* no title to the property can be created.

Am. & Eng. Encyc., vol. II, page 344.
2 Cyc. 307–309.

Substantially the same propositions are asserted in Am. & Eng. Encyc., vol. 14, pages 655–656 where the rationale of the "*English rule*" applicable to lands and estates upon which the exclusive hunting and fishing rights of owners are protected against *poachers,* is set forth.

(Citing the English Cases and Authorities.)

This property right may be *restricted and taken away* by statutory regulation of the right to hunt during close season and then the owner loses *temporarily* his qualified property in animals.

State v. Theriault, 70 Vt. 617.
Zanella v. Bolles, 80 Vt. 345.
State v. Mallory, 67 L. R. A. 773.

The property right seems to be *absolute* as to the animals *killed* or rendered *incapable of escape.*

It is *qualified* as to those *taken* but still *capable of escape* and is lost by their *escape.*

It is *special or quasi* as to animals in a *state of nature* on the land.

These rights may be said to be *defeasible* by the *animals only.*

2 Cyc. 309.

For the invasion of these *common law* qualified property rights, trespass, conversion, replevin and recaption apply as well as the right to use such force as is necessary to prevent interference therewith.

The most important *English* cases on this property right *ratione soli* are perhaps Sutton v. Moody, 1 Ld. Raymond, 250, and Blades v. Higgs, 11 H. L. Cases, 621.

In the first case a distinction was made between an animal *started* on the lands of *one person* and *killed* on those of *another;* and a case where the animal was both *started and killed* on the *same person's land.* In the former instance the hunter became the owner of the animal though liable in *trespass* to both of the land owners; in the latter instance, he was both a *trespasser* and the *title* to the animal was in the *owner of the land.*

So it was held that where A stood on his own or B's land and shot an animal started on the land of C, the title to the animal was in A; but where A stood on the highway and shot an animal on the land of B, no title to the animal was acquired.

Osbond v. Meadows, 12 C. B. 10.
Mayhew v. Wardley, 14 C. B. 550.

Under the rule laid down in Sutton v. Moody, many complications and perplexities might arise.

For instance:

If a quadruped or bird was started and wounded on the lands of B and escaped to the lands of C and was killed by A, then the property would be in A.

If a bird was flushed on the lands of B and though wounded flew or after falling, escaped to the lands of C, the hunter would own it.

If a bird or quadruped wounded or unwounded was reduced to actual possession on the land of B and without design on the part of the hunter, of its own volition escaped to the lands of C and was killed there, the property would be in the hunter.

If a bird was killed in the air over B's land, but in falling dropped on the land of C, another problem would arise, and in this connection, it was held in the case of Kenyon v. Hart, 11 L. T. N. S. 733, that where A upon

his own land shot at a pheasant which rose from his land, but the act of shooting took place while the pheasant was in the air over B's land and the pheasant fell dead on B's land, the bird belonged to A.

If a bird or quadruped was started on the land of B and whether wounded or not, escaped to the lands of C, but returned to the lands of B, where originally found and was there killed or reduced to actual possession, then the property in it would be in B.

To avoid these unnecessary perplexities, the case of Blades v. Higgs seems to have put the property in him on whose land the animal is *reduced to actual possession* regardless of where it was *started.* This case decided in 1865 so fully sets forth the common law principle of private property rights in wild animals as between the owner of the land and others that the following extensive quotations are made from it:

(Lord Westbury.)—" When it is said by writers on the Common Law of England that there is a *qualified or special* right of property in game, that is in animals *ferae naturae* which are fit for the food of man, whilst they continue in their *wild state,* I apprehend that the word 'property' can mean no more than the *exclusive right* to catch, kill, and appropriate such animals which is sometimes called by the law a reduction of them into *possession.*

" This right is said in law to exist *ratione soli,* or *ratione privilegii,* for I omit the two other heads of property in game which are stated by Lord Coke, namely *propter industriam* and *ratione impotentiae,* for these grounds apply to animals which are not in the proper sense *ferae naturae.* Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *fera naturae* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the *absolute property* of the owner of the soil.

" Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the Crown in virtue of its prerogative, one man had of killing and taking animals *ferae naturae* on the land of *another;* and in like manner the game, when killed or taken by virtue of the *privilege,* became the *absolute property* of the owner of the *franchise,* just as in the other case, it becomes the absolute property of the owner of the soil.

"The question in the present case is whether game found, killed, and taken upon my land by a *trespasser* becomes *my property* as much as if it had been killed and taken by myself, or my servant by my authority.

"Upon principle, there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction to actual possession such reduction must not be a *wrongful act,* for it would be unreasonable to hold that the act of the *trespasser,* that is of a wrong doer, shall divest the owner of the soil of his qualified property in the game, and give the wrong doer an absolute right of property to the exclusion of the rightful owner.

"But in game, when *killed and taken,* there is absolute property in *some one,* and therefore the property in game found and taken by a *trespasser* on the land of A., must vest either in A. or the trespasser, and if it be unreasonable to hold that the property vests in the trespasser or wrong doer, it must of necessity be vested in A., the owner of the soil.

"This view of the case is supported by a series of decisions. In the case of Sutton v. Moody, 1 Ld. Raym. 250, Lord Chief Justice Holt deduced several conclusions from the Year Books on the subject of property in game. Among these are the following propositions: 'If A. starts a hare in the grounds of B., and hunts it and kills it there, the property continues all the while in B.'

"In the case thus put it must of course be taken that A. has hunted and killed the hare without the leave or license of B., and therefore that it is a wrongful act by A. which enures for the benefit of the true owner, viz B. the owner of the soil.

"Another proposition is, that if A. starts game in the forest or warren of B. and hunts it into the grounds of C. and there kills it, the property is in B. the proprietor of the chase or warren, because the privilege continues, and consequently B. is entitled to the absolute property in the dead game so chased and killed by A., who from the statement of the case must be taken to have acted without the license of B., and therefore to have been a trespasser.

"A third proposition is, that if A. starts a hare in the grounds of B. (who is entitled *ratione soli* only, for that is plainly implied), and hunts it into the ground of C., and there kills it, the property is in the hunter; for it cannot be in B., who is entitled *ratione soli* only, and not *ratione privilegii,* for the hare is not killed upon his land; and it cannot be in C., for the game was not originally found in his possession, but was only driven upon his ground by the chase and pursuit of the hunter.

"These propositions appear to me to prove clearly that game found and killed by a *trespasser* under such circumstances as that it would

be the absolute property of the owner of the soil, or of the owner of the right of free warren, if it had been found and killed by such *owner,* instead of by the trespasser, does in law become the absolute property of the *proprietor of the soil* or *privilege,* immediately on its being so caught and killed by the *trespasser.*

"The law, so laid down in Sutton v. Moody, is consistent with several earlier cases decided subsequently to the Year Books of which I will mention one, Coney's Case, Godf. 122, which has been recognized and acted upon in several subsequent decisions. Of these I may mention Churchward v. Studdy, 14 East, 249, Graham v. Ewart, 11 Exch. 326, 1 H. & N. 550. See 7 H. L. Cas. 331, and lastly, the Earl of Lonsdale v. Rigg, 11 Exch. 654, 1 H. & N. 923, in the Courts of Exchequer and Exchequer Chamber, on which so much reliance was placed by the Courts of Common Pleas and Exchequer Chamber, 12 C. B. N. S. 501, 13 C. B. N. S. 844, in their decision of the present case.

"With respect to this case of Lonsdale v. Rigg, I entirely concur in the observations of Mr. Justice Blackburn, and consider that case as a conclusive authority upon the point before us, which it is not desirable to question or disturb.

"The case, when properly considered, amounts to this: grouse were shot and taken away by a trespasser upon and from the land of the plaintiff, who brought trover for the dead grouse, and it was clearly held by the Judges of the Court of Exchequer and afterward by all the judges in the Court of Error, that the grouse as soon as they were killed and fell upon the land of the plaintiff, became and were his absolute property in respect of his ownership of the soil.

"This conclusion would not be affected even though it might be true that an indictment at common law would not lie against the trespasser for killing and carrying away of game, if it be one continuous act, inasmuch as the ownership of the game is considered as incident to the property in the land. But this consequence is the result of a peculiarity in the law of larceny, which holds that the act of serving and taking away things attached to the freehold is not a felonious taking, a result which does not affect the existence of the right of property."

(Lord Cranforth.)—"It was argued before the House that if game killed by a poacher is the property of the owner of the soil, then every poacher is guilty of larceny. But that is a fallacy. Wild animals whilst living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels, so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, as growing fruit was, considered as a part of the realty. If a man entered my orchard and filled a wheelbarrow with apples, which he gathered from my trees he was not

guilty of larceny (see now the Statute 24 and 25 Vict., c. 96, No. 36), though he had certainly possessed himself of my property; and the same principle is applicable to wild animals.

"It was further said that the late Game Act which authorizes the stopping of a poacher having game in his possession, and the selling of the game for the benefit of the parish, shows that the Legislature could not have understood the game to be the property of the person on whose land it was killed, for in that case it was said it would have been an unjust appropriation of the property of another; but this provision in the statute was probably made because it might often be impossible to know on whose land every particular head of game had been killed, and was considered to be on the whole an arrangement beneficial to the land owner."

(Lord Chelmsford.)—"The question to be determined on this appeal is, whether animals *ferae naturae,* killed or reduced into possession by a trespasser on the land of another, become the property of the owner of the land.

"The case was very learnedly argued on both sides, and all the authorities with respect to property in wild animals, either in a state of nature and reclaimed, were fully examined, and both the civil and the common law were referred to for doctrine on the subject.

"By the civil law, the person who took or reduced into possession any animal *ferae naturae,* although he might be a trespasser in so doing, acquired his property in it. This appears clearly from the passage in the Institutes cited in the argument. If the same rule prevails in our law, then the rabbits in question were not the property of Lord Exeter, but of the poacher who took and killed them upon his Lordship's land.

"This doctrine, however, as to the right of property in wild animals captured, seems never to have prevailed in our law to its full extent. With respect only to live animals in a wild and unreclaimed state, there seems to be no difference between the Roman and the common law.

"With respect to wild and unreclaimed animals therefore, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed, or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, absolutely when they are killed, and in a qualified manner when they are reclaimed.

"So far everything is clear, and the only difficulty which arises upon the subject of property in wild animals, is that which the present case presents.

"As animals *ferae naturae* when killed or reduced into possession by the owner of land where they are found, or by his authority, become instantly his property, does the unauthorized act of a trespasser, by

the very fact of killing them, convert them at once to the use of the owner of the land.

"To this question Lord Holt, according to the case which he puts in Sutton v. Moody, would have given a distinct answer, that provided the game was both started and killed on the ground of the same owner, the property would be in him.

"I think Lord Holt must have been of opinion that as long as the game continued upon the land there was a species of property or rather perhaps a right to take it, existing in the owner of the land, which was sufficient to make it his the instant, by being killed or taken, it became the subject of property. But I cannot so easily discover the principle upon which he proceeds when he said that 'If A. starts a hare on the ground of B., and hunts it into the ground of C., and kills it there, the property is in A., the hunter, but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C.'

"I have some difficulty in understanding why the wrong doer is to acquire a property in the game under the circumstances here supposed. If the animal had left the land of B. and passed into the land of C., of its own will, and had been immediately it crossed the boundary, killed by C., it would unquestionably have been his property. Why then should not the act of a trespasser to which C. was no party, have the same effect as to his right to the animal as if it had voluntarily quitted the neighbouring land? And why, not only should B. lose his right to the game, and C. acquire none, but the property, by this accident of the place where it happened to be killed, be transferred to the trespasser? It would appear to me to be more in accordance with principle, to hold that if the trespasser deprived the owner of the land where the game started, of his right to claim the property by unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that other owner and not for himself.

"But the first proposition stated by Lord Holt, with respect to game started and killed on the land of the same owner, is free from all difficulty, and is sufficient to dispose of the present question. The case of Sutton v. Moody has always been regarded as an authority upon this point, and as far as I can ascertain, has never been questioned.

"It certainly would not be right to disturb a principle of law so long established, unless it could be clearly shown to be erroneous. And it appears to me not only to be well founded, but that very strange consequences would follow from adopting the view contended for by the appellant. If he is right in saying that the owner of the lands has no property in game unless it is killed by him or by his authority, it will necessarily follow that a poacher reducing the game into possession, and thereby, as possessor, though a wrong doer, having a right to it against all the world, there being no one entitled as owner to challenge

his possession, might maintain an action against the owner of the land for taking the game from him even upon the land itself where it was killed. It is much more reasonable to hold that the trespasser having no right at all to kill the game, he can give himself no property in it by his wrongful act; and that as game killed or reduced into possession is the subject of property, and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken or killed.

"This view of the case will render the distinction suggested in the course of the argument between killing and carrying away the rabbits as parts of one and the same continuous act, and killing them and leaving them upon the land and coming back for them, wholly immaterial. For the act of killing being at once that which made the rabbits the subject of property, and reduced them into possession, whether they were for an instant or for hours upon the land, they equally belonged to the owner of the land."

All of the usual *civil* remedies appear to have been available against a trespasser.

The common law seems to have held, however, that as to the animals taken in the *state of nature* larceny did not lie.

25 Cyc., page 17.
Ingham on Animals, 12–15.
Reg. v. Townley, L. R. I. C. C. 315.
Reg. v. Petch, 14 Cox C. C. 17.
State v. Repp, 104 Iowa, 305.
Reg. v. Read, 28 Eng. Rep. (Moak, 12) 123.

In the English case of Reg. v. Petch decided in 1878, it was said:

"The case is really governed by that of Reg. v. Townley where the law on the subject is fully stated in the judgment of Blackburn, J. At common law to constitute larceny it was necessary that there should be a taking and carrying away of the chattel. And among the instances put in the old books are those of growing trees and lead fixed to a building which constitute part of the freehold where a severance was necessary to turn them into chattels and unless there was an interval between the one act of turning them into chattels and the other act of taking them away during which there was a change in the possession from the person who severed them to that of the owner, the final act of carrying them away by the person who severed them did not form the subject matter of larceny. So in the present case although

property in wild animals as decided in Blades v. Higgs (11 H. of L. cases, 621), becomes that of the owner by being killed on his land but it does not follow that when a man without right goes upon the land and kills wild animals they become so reduced into the possession of the owner of the land as to render the man liable to a charge of larceny for carrying them away. In Reg. v. Read, the principle was the same as that which governs this case. It is true that in that case the prisoner was employed to trap rabbits and had authority to kill rabbits and that availing himself of that authority, he trapped and killed rabbits, but that was not in fulfillment of his duty, but with the intention of taking the rabbits for his own purposes and not for his master. He reduced them into his own possession and not that of his master. In no sense did he reduce them into the possession of his master for he took them direct from the trap to where the bag was concealed and put them into his bag. The only circumstance that appears to distinguish this case is the fact that the keeper Howlett marked some of the rabbits, but that was done not with the intention of altering the possession of them, but for the purpose of identifying them. That fact does not make any difference in the case."

The English or *common law* can then be summed up from the above authorities as follows:

When game regardless of where it is *started* is killed on the land of A, or is there *reduced to actual possession,* it becomes at once *his property.* This is true it seems, whether A has killed the game himself or whether it has been killed by others, trespassers or otherwise. This is so whether the fact that the game is dead and lying upon his land is or is not within A's *knowledge.* Under such circumstances, the game is at once *reduced into the possession* of A and he may bring an action against any one who *converts* it. Under such circumstances any person who picks up and dishonestly *appropriates* the game is guilty of *larceny* except in cases where the killing and carrying away are one continuous act.

The 1916 statute of the province of Ontario provides:

"A person who commits an offense against this Act shall not have or acquire any right of property in game or fish caught or taken by him while committing such offense or in respect of which such offense was committed, but the same shall be forfeited and shall become the property of the owner, lessee or licensee, if any, in breach of whose rights

the offense was committed; or if there is no such owner, lessee or licensee, shall become the property of His Majesty."

The question of main importance is does the common law rule obtain in this State?

It is said in Am. & Eng. Encyc., vol. 14, page 658, that the English game laws are founded on the idea of restricting the right to take game to certain *privileged classes* generally *land holders,* though in 1831 the law was so modified as to allow any one to obtain a *license* to kill game provided he was no *trespasser.*

In State v. House, 65 N. C. 315, it is intimated that the English system of game laws seems to have been established more for *princely diversion* than profit.

In State v. Horton, 139 N. C. 588, it was held that game in the *state of nature* was not the property of the owner of the land to the extent that one accidentally committing a homicide while trespassing in pursuit of game should be held liable for manslaughter, particularly for the reason that no one could be said to be in *possession* of animals in a *state of nature.*

In Cooley on Torts, page 510, there is the following statement: "As regards beasts of the chase the *English rule* is that if the hunter starts and captures a beast on the land of another, the property in it is in the owner of the land. Under the *civil law* the property passed to the *captor* and such is *believed* to be the recognized rule in America, even when the capture has been effected by means of *trespass* on another's land.

These are the main comments in criticism of the *English* or *common law rule* and its *application* to American and New York State wild animals taken by a *trespasser.*

The statements that an owner of land is not the owner of the fish and game found thereon, made in such cases as Matter of Deposit, 131 A. D. 403; People v. Doxtater, 75 Hun, 472, and Rockefeller v. Lamora, 85 A. D. 254, are really limited to the situation as between the State and the owner and subject his rights to State regulation;

for the issue in the Deposit and Doxtater cases was between the *State* and the *owner of the land.* In the Lamora case the statement " No man owns wild game or fish even though they be on his land unless he has reduced them to his possession by capture. If they wander from his premises to those of the public or another he may not complain of their taking " does not *necessarily* conflict with the common law rule as set forth in Blades v. Higgs.

As was held in Rockefeller v. Lamora:

" It is probable that section 18 of article 3 of the Constitution would prohibit the Legislature from granting to any individual or association the exclusive right of fishery in any of the *navigable waters* of the State, for such a grant would be in the nature of an exclusive privilege or franchise. And if the state had any title to the fish, birds and game on private lands, the Legislature could not give away that title to an individual or association seeking to park a particular territory. Doubtless the Legislature had something of this in mind when by section 277 of chapter 488 of the Laws of 1892 it repealed chapter 623 of the Laws of 1887, which provided that when any territory should be dedicated and designated as a private park all fish, birds and game should become the property of the owner or the person or corporation having the exclusive right to shoot, hunt or fish thereon. But such a grant was not a necessity, for the proprietors of the soil through which *non-navigable* streams flow have the exclusive right of fishing."

To support his *dictum* Cooley cites three cases, Taber v. Jenny, 1 Sprague, 315, holding that a whale belongs to its captors; Matthews v. Treat, 75 Maine, 594, holding that there is no property in fish in *tide* water; and State v. Roberts, 59 N. H. 484, which holds that there is no property in fish in a fresh water pond unless so *enclosed* as to be entirely within the *control* of the owner of the *surrounding land.* The first two cases involve *tidal* waters and the third seems to ignore the qualified right of the owner of the soil or the exclusive privilege in its assertion of the right of the State to *regulate* fishing upon *private* waters.

It may be that the rule of the *civil law* and not that of the *common law* obtains in New York State, and the application of the *civil law* rule would clear up many tangles. Yet under the *civil law* rule the right of the owner to forbid *trespass* and hunting was recognized and the owner could stop the hunter before or after he had killed the animals and could put him off under any circumstances.

But on apparently no other proposition is it claimed that the rules of the *civil law* obtain in this State; they do not hold as to the Rule of the Chase proper and they do not apply as to Navigable Waters except as to the Hudson and Mohawk.

The *common law* rule has been applied as to *navigable waters* and the *rule of the chase.*

The constitution of the State preserved the applicable *common law* and the English rule is not as *repugnant* to our conditions as is the common law rule on navigable waters.

See art. 1, Const., sections 16–17.

In fact with the *posting law* the conditions here are potentially exactly like those in England and every *trespasser* is a *poacher.*

The *English rule* is recognized in Pierson v. Post, the leading New York case on property in wild animals.

It is recognized and referred to without disapproval in Goff v. Kilts, 15 Wendell, 550.

More than that the leading English case of Blades v. Higgs and the doctrine laid down by it are adopted by Cyc. and Am. & Eng. Encyc. and are *cited* and *approved* in the case of Vroom v. Tilly, 99 A. D. 516 (1904), affirmed, 184 N. Y. 169; and while this is a case on oysters, no distinction seems to be made between such animals and those possessed of greater powers of *locomotion.*

The Penal Law long ago *abolished* the technical common law distinction between larceny and embezzlement

and *did away with* the doctrine of severance, possession and asportation referred to in the English cases.

By Section 1291 of the Penal Law it is provided as to larceny:

> All the provisions of this article apply to cases where the thing taken is a fixture or part of the realty or any growing tree plant or produce and is severed at the time of the taking in the same manner as if the thing had been severed by another person at a previous time.

The fact that game may not lawfully be sold would be no defense just as the fact that trees in the forest preserve could not be sold was held to be no defense.

See People v. Gaylord, 139 A. D. 814.

It is well established that of oysters not only *conversion* but also *larceny* may be committed.

Fleet v. Hegeman, 14 Wendell 42.
Vroom v. Tilly, 184 N. Y. 168.
People v. Morrison, 194 N. Y. 175.

The common law rule will prevail unless abolished by valid statute or repudiated by the courts.

The exclusive right to hunt and fish on land, upon which the English law is built as set forth in Blades v. Higgs and other cases, is consistently recognized in the Conservation Law and the authorities. The hunting license law (Section 185, subdivision 8), recognizes it and at present makes qualified concessions in its favor. It is recognized in Section 50 and Sections 360–366, which govern private park sand posted lands and the obligation of the State in the matter of purchase of the exclusive rights.

It cannot be claimed that the provisions as to posted lands are in compensation for these rights impliedly abolished by the law. This qualified property right in game is the equivalent of this same exclusive right to take by fishing and hunting.

See Rockefeller v. Lamora, 85 A. D. 254.

There is perhaps no greater part of the scheme of fish and game propagation and protection than that carried out by the recognition in the law as to private parks and posted lands of these exclusive rights and the enforcement of them through the creation of criminal and civil exemplary liability for the trespass in addition to other existing remedies.

Section 382 declares the law to be a restatement of existing law with such changes as clearly appear and Section 175 has never yet been held to have abrogated the *common law* rule.

For these reasons it would seem that though the courts if called upon to decide the question might *repudiate* the common law rule just as it might the rule as to fishing and hunting rights on *nontidal navigable* waters, nevertheless the *weight of authority* is in favor of the rule as consistent with our conditions.

It would appear wise therefore until this question is settled to adopt the principles of the *common law* in favor of the owners of the land or the exclusive rights and secure their *waiver* and *consent* as provided for in the Conservation Law.

This property right (*ratione soli*) primarily is with the *land* but absolute title to the land is not necessary to support the claim. It obtains in favor of the one holding the exclusive right to fish, hunt or trap upon the land.

State v. Mallory, 67 L. R. A. 773.
Payne v. Sheets, 75 Vt. 335.
Seymour v. Courtney, 5 Burr, 814.
Fitzgerald v. Firbank, 2 Ch. 96.

Occupation of a spot for five or six consecutive weeks annually as a fishing place is not sufficient to establish a prescriptive right of exclusive fishing; either as against an individual proprietor or the public.

Jackson v. Lewis, Cheves (S. C.) 259.

The exclusive rights being an interest in the lands in the nature of a *profit a prendre* are within the *statute of*

frauds and subject to the requirements of that statute as to written instruments are assignable and the subject of lease or sale.

Bingham v. Salene, 15 Oregon, 208.
Wickham v. Hawker, 7 M. & W. 63.
Graham v. Ewart, 11 Exchequer Reports, 326.
Am. & Eng. Encyc., vol. XXIII, page 185.
Wood on Statute of Frauds, section 3.
Am. & Eng. Encyc., vol. X, page 401.
State v. Mallory, 67 L. R. A. 773.

Article 1, Section 13, of the State Constitution, prohibiting leases for a term longer than twelve years applies only to leases of agricultural lands for agricultural purposes.

A lease of an island includes the game.

Garcia v. Gunn, 119 Cal. 315.

The rights in and to waters may be granted *separate* from the bed and the bed may be reserved from the grant.

Taggart v. Jaffrey, 28 L. R. A. 1050.
Jackson v. Halstead, 5 Cowen, 216.

The *socalled* owner of water in a stream or pond not navigable or of all the rights and privileges therein has the exclusive right of fishing in the same although the land lying under the water belongs to *another.*

Lee v. Mallard, 116 Ga. 18.

The right of fishing in private waters is a *profit a prendre* and a person who enjoys the right may bring an action of trespass at common law for its infringement.

Fitzgerald v. Firbank, 2 Ch. 96.

This *profit a prendre* passes with the land or water unless *reserved.* Exclusive rights of fishing and hunting on another's land or waters may also be acquired by *prescription* but being a *profit in lands* as distinguished

from an *easement,* it cannot be claimed by *custom* but must be acquired by *prescriptive use* as belonging to *some estate* and not by a person as merely one of the *public.*

19 Cyc. 990.
Tuscarora Club v. Brown, 154 A. D. 366.

If the land is owned by more than one person, the rights of *all the owners* should be leased or sold for the *profit a prendre* being in the *nature* of, but *stronger* than an easement in gross cannot, it seems, be granted by one tenant in common without the *consent* of the others.

Crippen v. Morse, 49 N. Y. 63.
City Club of Auburn v. McGheer, 198 N. Y. 160.
Palmer v. Palmer, 150 N. Y. 139.
Girard on Titles to Real Estate, 762.
Am. & Eng. Encyc., vol. XXIII, page 188.
Compare section 360.

One working a farm *on shares* instead of being technically a *tenant* may be but a cropper vested with but a sub-possession and in the absence of an express grant to him of these exclusive rights cannot assert them.

Am. & Eng. Encyc., vol. VIII, pages 318–324.

In the case of a *tenant* these exclusive rights may be *reserved* from the operation of the lease and *remain* in the owner of the land.

On the *highway* the title being generally in the owner of the abutting lands subject to the *public easement,* the same principles apply to hunting and fishing within the four rod strip, as hunting and fishing rights are not such *servitudes* as go with the public easement.

Girard on Titles to Real Estate, 841.
Realty Co. v. Johnson, 92 Minn 363.
19 Cyc. 989.
Compare Rockefeller v. Lamora, 106 A. D. 345.
See section 222 as to hunting on highways except those in the forest preserve.

The owners of these exclusive rights whether by virtue of *title* to the land, unrestricted possession by *lease* or *grant* or otherwise may of course *waive* them in favor of any persons whom they desire to allow to hunt or fish. This waiver or *consent* until *revoked* would vest in such person the title to such fish and game as he might *take*. Such person however unless he is vested with *greater* authority or rights has it seems no rights which will prevail against a *trespasser*.

See Ferguson v. Miller, 1 Cowen, 243.

But under the *common law* rule a person acting *on behalf* of the owner of the land could deprive the trespasser of the game and restore it to the land owner. If he acted in *bad faith* he, as well as the trespasser, might possibly be held for *larceny* for it is larceny to take property from a *thief* with intent to deprive the true owner thereof.

See People v. Livingstone, 47 A. D. 283.

As between two persons, both of whom are on the land with the consent of the owner or owners, the *rule of the chase* would apply.

Assuming that the *common law* rule as to the qualified property rights in and to game on the land being vested in the owner of the land, *holds,* in this State, there must be some *adjustment* between *that rule* and the *rule of the chase.*

Has the person who by so wounding or ensnaring the animal as to deprive it of natural liberty, the right to *continue* his pursuit of the animal upon *another's land?*

Under the *common law* rule if the person in question has acquired what would otherwise be the constructive possession of the animal while a *trespasser* on the lands, his constructive possession would appear to be *void* and of no avail.

On the contrary where the person in question acquired the constructive possession of the animal on his *own*

lands or lands upon which he had a *legal right* to be it would seem that he should have a right to *follow* the animal and *take* it upon another's land without violating the provisions as to trespass.

See Goff v. Kilts, 15 Wendell, 550.

For instance if a person standing upon lands where he has a right to be, fishes in the stream *over the fence* upon lands of another where he has no right to be, he is a *trespasser.*

But if while standing on the lands of the consenting owner, he *hooks* a fish and the fish carries his line up stream *under the fence* or takes pole and all, or if the fish in being "snailed out" leaves the hook and *falls* on the other person's land, it seems that he should have a right to follow up and *rescue* his property without violating Part XI.

See Goff v. Kilts, 15 Wendell, 550.

If a person under the same circumstances *shoots* a bird or quadruped and wounds it but it escapes to the adjoining lands it would likewise seem that he should be entitled to follow and take it without violating Part XI.

In the English case of Kenyon v. Hart, 11 L. T. N. S., 733, it was held that where A upon his *own land* shot at a pheasant which rose from his land, but the act of shooting took place while the pheasant was in the *air* over B's land, the act of A in going on B's land and picking up the bird was *not* a trespass in pursuit of game.

But where a pheasant was on the ground of an adjoining owner and A shot it and went over to pick up the bird it was held to be a *trespass* in pursuit of game.

Osborn v. Meadows, 6 L. T. N. S. 290.

Firing at game from a *highway* has been held to be a *trespass* in pursuit of game.

Mayhew v. Wardley, 14 C. B. N. S. 550.
See Ingham on Animals, 574.

The same principles would apply along the boundaries of *closes, refuges* and territories covered by *additional protective orders* and the sending of a *dog* into the closed territory by one standing outside would constitute a *violation* of the law.

Most of the puzzling, technical situations which may arise under the *common law* rule as to the rights of the owner of the land would be dispensed with if it were *definitely* held that the *civil law* rule *applied* in New York State and that the *trespasser* acquired *title* to the game at the risk *only* of the violation of Part XI.

See the discussion in the next chapter.

CHAPTER XIX

PRIVATE PARKS AND POSTED LANDS.

At the outset in considering questions as to parks and posted lands provided for in Part XI of the Conservation Law the restrictions of the statute as to *dams* on the *inland waters* of the State are all important.

Section 290 provides:

> Before the construction of a dam is *commenced* on any of the *inland waters* of the state, the plan thereof, and a statement of the name, length and location of the waters on which the same is to be built shall be given to the commission by the person, or if by public authority, by the official directing or permitting the work.
>
> Compare sections 22, 246.

Section 291 provides:

> The commission may on *notice* to the owner of the land or the official directing or permitting the work, make an *order* to be entered in its minutes and to be served by copy on such person or official directing the construction of *fishways* in any dam *heretofore* or *hereafter* built, or if there be fishways, the making of *changes* therein in accordance with specifications to be embodied in said order and it shall be the duty of the person or official so served to *comply* with such order within the time to be specified in said order, and every person or officer who fails or refuses to comply with or violates such order shall be guilty of a *misdemeanor* and be liable to a penalty of *five dollars* for every *day* such violation, failure or refusal continues.
>
> Compare sections 32, 182.

By Section 161 of Chapter 24 of the Laws of 1909, the effect of a somewhat similar provision was limited to *dams* in streams more than *six miles* in length inhabited

by fish *protected by law*. The statute now applies to all streams or bodies of water no matter what their size or length.

The philosophy of these provisions and the authority of the Commission to enforce them are fully set forth in:

Matter of Fishway, 131 A. D. 403.
Compare State v. Haskell, 23 L. R. A. 227.
See Hall v. Conklin, 138 A. D. 450.
See Cookinham v. State, 171 A. D. 80.

There is no prescriptive right *based* upon long continued use to maintain a dam or an obstruction to the passage of fish.

19 Cyc. 992.
Matter of Deposit, 131 A. D. 403.

Subject to such *restrictions* a landowner may convert the old channel of a stream into fish ponds, hatcheries, etc., and cut a new channel for the water, if he returns it to the old channel before it leaves his lands.

State v. Parker, 27 L. R. A. 1138.

Speaking of the *public right* and the rights of upper and lower riparian *owners* to have fish pass up and down the stream, the court in Matter of Deposit said:

"While *private* interests should not be allowed to infringe upon *public* rights, *public* rights should not be allowed to unnecessarily abridge vested *private* interests."

See article 6 of the Navigation Law.

Section 1423 of the Penal Law provides:

"A person who wilfully or maliciously displaces, removes, injures or destroys a dam *lawfully* erected or maintained upon any water within the state or hoists any *gate* in or about such dam is punishable by *imprisonment* for not more than *two years*."

The above provisions are of immediate concern in cases where dams in the aid of *fowling* and *fishing* are contemplated.

Probably the most romantic case on the question of trespass in pursuit of game is the English case of Baker v. Berkeley, 3 C. & P. 32, where the hunted stag took refuge in the barn and the owner refused to allow the hunting party to come upon his premises to effect the kill. This case which has been the subject of picture and story arose apart from any such aids for the enforcement of one's rights against trespassers as the posting law.

As indicated in the preceding chapter only those persons *owning* the *exclusive* hunting and fishing rights upon lands can effectively post them under Part XI.

At the threshold of this subject there must be fixed in mind the fact that *two* distinctly *different* situations are contemplated by the law:

First: The establishment of *private parks,* accomplished by the setting apart of lands and waters devoted to the *bona fide propagation and protection* of fish and game as provided in Sections 360–361.

Second: The *protection* of the *exclusive* hunting and fishing *rights* on *enclosed* or *cultivated* lands as provided in Section 362.

The portion of the law devoted to these propositions has been repeatedly *amended* to meet different conditions and the objections raised and pointed out in litigated cases.

Legislation along this line apparently dates back to Chapter 384 of the Laws of 1860.

The first important reported case involving trespasses in pursuit of fish and game was that of Hill v. Bishop, 17 N. Y. Supp. 297, construing the law of 1887. It was there held that only those who had the *entire* and *exclusive control* of a pond could legally post it against trespass.

The law of 1892 did not make a trespass a criminal offense and that feature was added by Chapter 573 of the

Laws of 1893, Section 217. The law of 1892 contained no *proviso* as to waters *stocked* with State fish. It was not until the enactment of Chapter 319 of the Laws of 1896 which took effect April 17, 1896, that any such proviso was made.

The law as it stood down to and including 1893 was construed and interpreted in People v. Hall, 8 A. D. 15, decided in 1896, and that case seems to have settled the law down to the enactment of chapter 319 of the Laws of 1896.

That case involved the shooting of water fowl on "Black Lake" in Seneca county and was a criminal prosecution.

The following are quotations from the opinion in the case:

"The defendant was convicted of the crime of shooting wild ducks upon certain lands and water claimed to have been devoted to, and used as, a private park, for the purpose of propagating and protecting fish, birds and game, without 'the consent of the owner or person having the exclusive right to shoot, hunt or fish thereon.'

"The prosecution and conviction seem to have been based exclusively upon sections 212 to 215 and 217 of chapter 488, Laws of 1892, as amended by chapter 573, Laws of 1893. It is so stated in the respondent's brief, and so it would appear from the printed case; and it is not contended that the appellant was guilty of violating sections 210 and 211, relating to trespassing upon 'inclosed or cultivated land for the purpose of shooting or hunting any game.' The affidavit of Edward Lay, upon which the warrant was issued, stated that the lands were 'partially inclosed,' and he testified that his lands consisted of 106 acres of marsh, swamp and water and 85 acres of upland; 'we pasture the marsh land in the summer time, and we have inclosed the marsh and water for hunting purposes; the marsh part is fenced down to the water.' Hiram Lay testified that the lands were fenced on the north, south and west, but not on the east; that the fence was for keeping cattle off the hard land, and was there before the passage of this statute. The contention upon this appeal is that the lands were regularly devoted and used as a private park for the purpose of propagating and protecting fish, birds and game; but this is controverted by the appellant, and is the main question to be considered and determined. Is the respondent's contention supported by adequate proof of user for the purposes of propagating and protecting birds and game?

"The 'private park or territory' claimed by the complainants consists of about 250 acres, about 106 or 125 acres being of marsh, swamp or water, the body of water being designated as Black lake or pond, and connected by an outlet with Seneca river. At times the low lands would be covered by overflow of water from Seneca river, and at other times the water would be so low that the pond would be greatly reduced from its normal size, by reason of low water. Evidence was given *tending to show title in the prosecutors of the land surrounding and under the said pond,* except a part of a small cove on the extreme southern edge of the pond, which was said to contain one-half or three-quarters of an acre of land.

"Edward Lay testified that, before he put up the signboards, every body hunted and fished upon that lake or pond, and had done so as long as he could remember without hindrance from him, and that there are about fifty acres of marsh land between the hard land and the pond; that in time of high water the marsh and swamp lands are covered with water, also the lands belonging to Carey, Hammond and Charles Lay; that 'the identity of the lake is lost in time of high water; I don't know just where the lines are; I do not know the exact location of the north line of lot No. 63; the lake and marsh is all one body of water in time of high water; the waters in the lake rise as the water in the river rises; the lake connects with an inlet and outlet; the water rises in the river first and sets back in the lake; there are springs in the lake; in low water runs from the lake to the river.'

"A witness (Carey) called by the defendant testified that he owned lands north of the complainants; that a 'shank' of the lake runs up into his land at time of medium water fifty or sixty rods; that he shot and fished on the waters covering his land in the spring of the year to the knowledge of the complainants; that he had known fifty acres of his land to be covered with water four feet deep in the spring of the year; that there are times when the lake is fed by the waters from the river and times when it is not; that a south wind raises the water in the lake and marshes; that the inlet is not a very large body of water and is not fed by the spring; that this 'shank' is a low piece of land and in low places the water cannot get out, and the low places are sometimes connected with the lake and sometimes not.

"Hall testified that the lake is fed from the river in high water, but at times it gets so dry that there is but little water in it.

"This is about all the material evidence that is necessary to be presented in the determination of the matters on controversy.

"The defendant was shooting on a small island in about the center of the bay.

"Respondent says that the complainants do not claim the exclusive right to the whole of Black lake, but only to exclude people from the

lands described by them in their published notice, and no more; that they make no claim to hunt or fish in the cove referred to, situated at the extreme southerly point of the lake; that it is no part of the lake proper.

"It is not disputed but that the complainants fully complied with the statutory requirements as to publication in the newspaper, and also placed signboards warning trespassers.

"The purpose of this statute is to make it a criminal offense, and thereupon an offense against the people at large, for one to enter upon the lands of another, who has complied with the conditions prescribed, for the purpose of shooting wild birds or animals, or of fishing in the pond, lake or streams thereon. Evidently the provisions referred to are of a highly penal character, and by all canons of construction they must be strictly construed and not be extended by implication. The leading rule of construction of statutes is, of course, to ascertain fairly the intention of the Legislature; but in statutes giving a penalty, if there be a reasonable doubt of the case made upon the trial or in the pleadings, coming within the statute, the party of whom the penalty is claimed is to have the benefit of such doubt.

"A preliminary question arises, as to whether the signboards placed upon the private park or territory should contain a notification of the fact that the lands, or lands and water, are devoted to the purpose of propagating and protecting fish, birds and game, or whether a simple notice warning all persons from trespassing upon the lands or water is a sufficient compliance with the statute. It will be observed that the notice required to be published in the newspaper (of which one publication is sufficient) must expressly declare that such lands, or lands and water, will be used as a private park for the purpose of propagating and protecting fish, birds, etc. In addition to that, the statute requires the placing of notices or signboards 'warning all persons against trespassing thereon;' that is to say, upon such park or territory.

"It would seem to be a fair and reasonable interpretation of the statute that the signboards should give notice that it is a private park, as well as warn all persons against trespassing thereon. If the lands are 'inclosed or cultivated,' and signboards are posted warning against trespassing, that is sufficient to make the trespasser a criminal by virtue of sections 210, 211 of the statute. But if they are not so inclosed or cultivated, the notice should substantially state that it is a private park, etc., for the propagation of fish, etc., or, in other equivalent words, the 'warning' must be that it is a private park, etc., and that trespassing is forbidden.

"Another matter for determination is whether such lands, or lands and water, were actually 'used as a private park for the purpose of

propagating and protecting fish, birds and game,' as required by the statute.

"The evidence is insufficient to show that the lands or waters were used or devoted for any such purpose, within the true intent and meaning of the statute. The notice published in the newspaper is dated October 13, 1893. The witness Edward Lay, who is one of the prosecutors, testified that 'we put a rack in the pond after putting in carp, and it was taken down, and I could never find out who took it down.' Also, that 'we have inclosed the marsh and water for hunting purposes.' Hiram Lay testified that the rack was put in the channel about five years ago, before the notices were published. On cross-examination he said that 'the lake has been stocked with carp.' 'I have sold leases to parties to hunt on this land. There is a party that has leased the land and has the privilege to shoot and hunt there for three years. We have let it to about ten persons and ourselves. We only reserved the right to shoot in the lake, so that if we wished we could take a party in there to shoot. We, or they, could permit any reasonable number to go in there and shoot. The company made their own rules as to whom they should permit to go hunt in the lake.'

"It is to be inferred from this that the owners leased their lands to a hunting or hunting and fishing club, and thus devoted their lands for the purpose of hunting and fishing. This is hardly consistent with the idea of propagating and protecting wild birds or game. Indeed, there is no evidence of any act done for the purpose of such propagation and protection. And the only evidence of any act done towards propagating fish is that the lake or pond was stocked with carp about five years ago, but no quantity specified. This will not do; that is not a sufficient compliance with the requirements of the statute, and the owners or lessees are not entitled to its protection against interference with their hunting and fishing.

Citing Benscoter v. Long, 157 Penn. St. 209.

"It is true that the defendant here is not charged with fishing in a private pond or lake devoted and used for the propagation and protection of fish; still the decision quoted is not without application to the case brought up for review. The principle of that adjudication is, that where a statute requires that the lands, or lands and water, shall be used for a specified purpose, whether for the propagation and protection of fish or of wild birds or game, the evidence of user for propagating purposes must be ample and sufficient to warrant a conviction. Here there is but very slight evidence tending to show that the lake or pond was used or intended to be used for propagating fish, whilst there is no evidence whatever of any act done for the propagation of wild birds or game, or for their protection and preservation. The pub-

lic declaration and notice of the owners that they devoted the lands and waters for both these purposes is false as to both.

"Appellant also contends that even though the proprietors of this pond had actually devoted and used the waters for the primary purpose of propagating and protecting fish, they could not claim protection for it as a private pond under the provisions of the statute; that to bring the case within the statute, the whole of the pond must be so far private property as to confine therein the fish with which it is stocked; that the ownership of a part only of the land covered by the water is not sufficient to give to the whole water the distinctive character of private; that the question is not whether the complainants have rights which may be trespassed upon, but is the whole body of water private within the meaning of the statute. It is argued that the complainants must show exclusive right to fish in these waters, and this they did not have, because it appears that in time of high water there are several persons owning land in the vicinity who have the right to fish therein. Then again, a portion of the waters of this pond enter into the cove owned by one Hammond. That the nature of this body of water is such that the idea of propagating and protecting fish is entirely out of the question, because at time of high water the identity of the lake is lost and it becomes a part of the river."

It is to be first noted that the statute was held to be highly *penal* and to be *strictly* construed.

See Rockefeller v. Lamora, 85 A. D. 257.
See Stahl v. Roof, 164 N. Y. 162.

The evidence in the Hall case as to *stocking* was offered as bearing upon the proposition of *propagation* to prove the establishment of a *private park*. The statute then read propagation *or* protection.

In the Attorney-General's Report of 1895 at page 161, it was held that a stocking with the consent of the owner did not change the character of the waters; if private they remained so.

By chapter 319 of the Laws of 1896, the original *proviso* as to *stocking* was added:

"Provided however that all waters *heretofore* stocked by the state or which may *hereafter* be *stocked* by the state from any of the fish hatcheries, hatching stations or by fish furnished at the expense of the states shall be and remain *open to the public* to fish therein the same as

though the private park law had never existed. But nothing herein contained shall be construed as affecting any rights now existing of persons owning lands or holding leases of private grounds, waters or parks *prior* to the passage of the act."

The law as changed by this amendment was construed in Rockefeller v. Lamora, 85 A. D. 254, decided in 1903. This stubbornly contested case was tried three times, was three times before the Appellate Division and finally on a point of practice only went to the Court of Appeals.

See 96 A. D. 91, 106 A. D. 345, 186 N. Y. 567.

The following quotations are taken from the opinion in 85 A. D. 254:

"The plaintiff is the owner of about 50,000 acres of Adirondack forest lands, being the greater portion of townships 16 and 17 in great tract No. 1 of Macomb's purchase in the southern part of Franklin county.

"The St. Regis river, which flows northwesterly into the St. Lawrence, has its source, in three branches, in this vicinity. What is termed the Middle branch rises in the St. Regis lakes, situate in township 18, which joins township 17 on the east, and flows for several miles through the plaintiff's lands. On the easterly side of township 17 is a considerable body of water known as Fallensby Junior pond. Its inlet is from Slush pond situate in the westerly borders of township 18, and its outlet empties into the Middle branch of the St. Regis river on plaintiff's land. In the southwest part of the township is a pond known as Bay pond, the outlet of which flows into the West branch of the St. Regis river, which does not join the Middle branch for many miles after leaving the territory owned by the plaintiff. In the northeast part is located Quebec pond, the outlet being Quebec brook, which flows northerly off the lands of plaintiff, and eventually joins the Middle branch a considerable distance beyond the borders of his tract. A small tributary known as McCollom's brook, rising on another township, empties into Quebec brook just south of the north line of township 17.

"The plaintiff completed the acquisition of his lands in the spring of 1899, and immediately began the establishment of them as a *private park* for the protection *or* propagation of fish, birds and game, by the publishing and posting of the notices provided by article 9 of the Fisheries, Game and Forest Law (Laws of 1892, chap. 488, as amd.

by Laws of 1895, chaps. 395 and 974, and Laws of 1896, chap. 319). Since that time, the entire tract, except about twenty-five acres cleared for a camp near Bay pond, has been devoted to the uses of a fish and game preserve. The plaintiff engaged, and has kept employed, men to look after his lands and to preserve them from trespass. English deer were imported and turned loose amongst the native deer, both of which have been fed during the winter when occasion required. Fish, birds and deer have largely increased since the establishment of the park.

"In April and May, 1902, the defendant, on three several occasions, entered upon the plaintiff's lands and fished in the Middle branch of the St. Regis river. He knew of the published and posted notices, and, in addition, had been warned by the plaintiff's keepers not to fish upon the plaintiff's lands, because it was a private park. He caught and carried away a number of trout on each occasion.

"The plaintiff thereupon brought action in Justice's Court against him to recover the penalty, in the form of exemplary damages, prescribed in section 203 of the Forest, Fish and Game Law. The defendant justified his trespass on the ground that the waters on and running through the plaintiff's lands and pretended park had been *stocked* with fish by the State, and that, hence, the plaintiff had no right of action for the penalty in the form of exemplary damages against a citizen fishing in such waters.

"That action resulted in a judgment for the defendant, and the plaintiff appealed to the County Court of Franklin county for a new trial, which resulted in a direction of a verdict for the defendant at the close of the evidence, and it is from that judgment that the plaintiff appeals. On that trial the plaintiff established the facts hereinbefore stated, and the defendant sought to prove the *stocking* of the waters by the State in justification of his acts.

"Errors were committed on the trial in the admission of unproved documents and letters, but this court puts its decision on broader grounds. The vast sums of money expended by individuals and clubs in establishing and preserving private parks in the Adirondacks, and the great interest which the citizens of the State have in their rights to the pursuit of pleasure and health in that region, demand from the court a *broad interpretation* of the law.

"For the purposes of the discussion of the case it will be *assumed* that the defendant proved that the witness Dwight, between the years 1891 and 1894, not being the *owner* of the lands or having any *fishing rights* in the streams, and *without the consent* of the owners, *stocked* the inlet of Fallensby Junior pond with speckled trout fry procured by him from the State hatchery and hatched at the State's expense; and that he also *stocked,* in the same manner, with lake trout and speckled trout fry, the inlet of Bay pond, and that such fish were furnished by

the State Fish and Game Commission, on his request, they knowing where they were to be placed. Also that the witness McNeil *stocked,* before 1899, McCollom's brook with speckled trout fry, under the same circumstances and under the same conditions.

"This state of facts did not, we think, justify the defendant in his trespass, nor authorize the court to direct a verdict in his favor.

"As early as the case of Hooker v. Cummings, it was held that in all rivers of the State not navigable in the sense that tide ebbs and flows (except the Hudson and Mohawk rivers, to which a different rule has been applied by reason of the terms of the grants), the proprietors of the soil through which a stream flows have the exclusive right of fishing therein, applying the rules of the common law of England to their full extent in that regard. This case has been often cited with approval, and has become one of the leading cases illustrating the rights of riparian owners.

"In Chenango Bridge Co. v. Paige (83 N. Y. 178) the doctrine is reiterated that the bed and banks of a fresh water river where the tide does not ebb and flow are the property of the riparian proprietor, who may use the land or water of the river in any way not inconsistent with the easements of the public for passage as on a public highway.

"In Smith v. City of Rochester (92 N. Y. 485) it is said that the Legislature has no more power over fresh water streams of this character than over other private property, except for the purpose of regulating, preserving and protecting the public easements.

"In the present case there is no claim that the Middle branch of the St. Regis river is navigable for any purpose or in any sense. The plaintiff is the owner of the soil on both sides of the stream, and of its bed, as well as of the various ponds and streams which are claimed to have been stocked with fish from the State hatcheries.

"Further citation of authority and illustration that when the plaintiff became the purchaser of the land and the beds of the streams and ponds, he prima facie had the exclusive right of fishery therein, is futile and unnecessary.

"What, then, was the intent of the Legislature in enacting the parking law? Clearly, we think, only to give one complying with its terms protection to his private rights and the right to recover a penalty in the form of exemplary damages in addition to the actual damage sustained by trespass.

"The act did not purport to *give* the owners of the lands and streams the right to fish and hunt on their own premises. They had that *already,* and they had the common-law action for trespass against any intruder. It is not questioned by what the Legislature could give the right to *increased* damages for the doing of certain acts, if it saw

fit. The provision for treble damages for cutting and despoiling trees upon the lands of another, and for forcible entry and detainer, was a part of the Revised Statutes before the enactment of the Code, and the power of the Legislature in that regard has never been doubted.

"It may be said, too, that the Legislature had in mind some *public benefit* to be derived from the establishment and preservation of private parks. The law was passed at the beginning of the agitation for a forest preserve, the primary object of which was to protect the wild lands of the State from devastation and thereby preserve the waterways of the State. Game preserves could be established only in mountainous regions, and the protection of timber is a necessity to their continuance.

"There was saved to the State, to remain *open to the public,* waters heretofore *stocked* by the State or by fish furnished at the expense of the State, or which might thereafter be *stocked* and it is under this provision that the defendant attempts to justify the trespass. *But how stocked?* The Legislature could not authorize the State Fish Commissioners to enter upon a man's private fishery, *without his knowledge and consent,* and deposit therein fish hatched by the State, and thus convert his property to public use and destroy his private rights. This would be the taking of private property for public use without just compensation. One might own a tract of thousands of acres, practically valueless as timber land or for agricultural purposes, and yet of very great value for the establishment of a private park. The defendant contends that the Legislature intended to provide that the act of a *stranger,* in conjunction with the determination to stock of the Fish and Game Commission, in depositing a few fish hatched at the State's expense in one of the streams on lands of an individual or corporation, should have the effect of dedicating to the public an entire territory, the waters stocked as well as all other waters on the lands, and that the owner and his grantees would be thereafter debarred from converting it into a valuable private park. This would be a more complete destruction of riparian rights than the declaring of a stream a public highway for the floating of logs, without adequate compensation, which the courts have uniformly condemned. The owner of a stream could doubtless *dedicate* it to the public use, as he could his lands to a public highway, but this imports *consent* on his part and a *bargain* entered into between him and the public authorities.

"Nor do we think that if *one* pond or stream on a tract of land should be so dedicated to the public by the owner consenting that it be *stocked* by the State, that the owner would thereby dedicate to the public *all the other* separate streams and ponds which might be on all the land that he owned. It is true that fish, at certain seasons of the year, pass from one portion of the stream to another. Trout fry placed

in a small tributary, as they obtain greater size work to the main stream, and so up that stream, and may never go back to the original water in which they were placed. But this does not constitute a *stocking of the main stream.* The language of the statute is, 'all waters heretofore stocked.' In common parlance the use of the term 'waters,' as applied to various lakes, streams and ponds on a tract of land, imports a designation of them in *severalty,* and in such sense we think the term is used in the statute. Our interpretation of the statute is that the stocking of streams and waters, the beds and adjacent lands of which are owned by an individual or corporation, in order to give the right to the public to fish therein, must be with the *consent* of the owner or one having a *right* of fishery therein, and that only the *particular* stream, lake or pond thus *stocked* is so made public, and that such stocking does not open to the public streams to which they may be tributary, and that this stocking of such a stream by the State and the owners above or below, does not have the effect of opening to the public that part of the stream situated on lands of an owner who has *not consented* to such dedication, and that the public is not permitted to follow the migrations of the fish and take them in that part of the stream on private lands without the owner's *consent.*

"It is urged that the various laws enacted by the Legislature, with respect to the time and manner of taking various kinds of fish and game, are inconsistent with this interpretation of the law.

"There is nothing *inconsistent* between this public regulation and the rights of individual owners. The power resides in the several States to regulate and control the right of fishing in the public waters within their respective jurisdictions. Fish and game are migratory, and those which may now be on *private* lands may quickly change their location to *public* lands and public waters. No man *owns* wild game or fish, even though they be on *his land,* unless he has reduced them to his possession by capture. If they *wander* from his premises to those of the public or another, he may not *complain* of their taking. In public waters and on public lands, this right is open to all alike, and no individual right is trespassed upon by so doing.

"We have not overlooked the case of People v. Hall (8 App. Div. 15), urged upon our consideration by the defendant's counsel. There were many reasons in that case which called for a reversal of the judgment convicting the defendant of a misdemeanor provided by the Game Law, and the determination of the court could have well been put on those grounds alone. We are forced to disagree with that portion of the opinion which intimates that a private park cannot be maintained under the statute, unless proof is given that animals and fish were *actually* bred and propagated thereon. The language of the statute is, 'devote such lands or lands and water, to the propagation *or* protection

of fish, birds or game.' It is well known that when fish and game are *protected* they *propagate* rapidly. In the present case the proof is that both have very largely increased since the establishment of the park. A protection which allows natural propagation, we think, meets the requirement of the statute.

"We are mindful that this interpretation deprives the public at large, by the infliction of severe penalties for infraction of the law, of the pleasure and profit of fishing and hunting in a very large portion of the Adirondack forest, and gives to men of great wealth, who can buy vast tracts of land, great protection in the enjoyment of their privileges. The wisdom of the Legislature in prescribing exemplary damages, and making fishing and hunting upon private parks a misdemeanor is not for the court to review. It was within its province to do so if it saw fit. Exemplary damages are no new thing for willful conduct, and the Legislature is constantly enacting that certain willful injuries shall be deemed misdemeanors.

"The burden was on the defendant to show that the stream in which he fished has been *dedicated* to the public. The plaintiff being the *owner* of the land through which it flowed, it was prima facie private property; and upon the plaintiff showing compliance with the statute he was *presumptively* entitled to recover.

"There was no proof that the stream in which the defendant was fishing had been, in contemplation of law, *stocked* by the State. He failed, therefore, to justify his acts, and by them incurred liability for the penalty in the form of exemplary damages provided by the statute."

Stocking without the *consent* of the owner has always been held to give the public no rights.

19 Cyc. 991.

It was from the reading of the statute as it then stood that the idea of *wading the stream* arose.

Nothing was held as to the *form* of the consent whether it should be written or oral, or whether it should be given in advance or could be given by ratification. The statute however *contemplates* a *written* consent so *acknowledged* as to entitle it to *record*, such as those contained in the blanks furnished to applicants for fish.

To quote from the opinion in 96 A. D. 91:

"On an appeal from a former judgment in favor of the defendant the judgment was reversed and this court granted a new trial in the

County Court. On the new trial the case was submitted to a jury and a verdict was rendered in favor of the defendant, upon which judgment was entered, and from which judgment this appeal is taken.

"The defendant's contention is that the plaintiff is not entitled to the benefit of said *statute* authorizing the laying out of his lands and waters as a private park and the devotion of the same to the propagation or protection of fish, birds or game by reason of the fact that waters included in said private park had been theretofore *stocked* with fish by the State of New York.

"It is not claimed that the lands and waters included in said private park have been stocked with fish by the State at the *request or with the consent* of the *plaintiff*. The lands and waters so included in said private park were purchased by the plaintiff in three separate tracts, each tract including a large number of acres. When waters are stocked with fish by the State it takes away from the owner thereof certain property rights provided by said statute and results in a *charge,* to run with the land, which materially affects the owner's interest therein and the value of said lands and waters. The consent to such charge is bounded by the extent of the *ownership* of the person giving the consent. Within the bounds of the lands and waters owned by the person giving the consent there may be a question as to the extent of the waters included within the consent and as to one stream or portion of the stream being reasonably near to the waters so stocked with fish by the State. A question cannot arise as to whether another stream or distinct portion of the same stream is beyond the boundaries of the lands and waters owned by the person giving his consent to such stocking by the State. The charge runs with the *land* and not with the *person* and it is fixed at the time the consent is given and the waters are stocked in pursuance thereof. It cannot be extended to other lands and waters simply by reason of the fact that the grantee of the waters stocked with fish by the State and of adjoining or other lands and waters is one and the same person. The lands and waters upon which the defendant trespassed were wholly lands and waters purchased by the plaintiff of the Ducey Lumber Company. It follows, therefore, that all of the evidence included in the record relating to lands purchased by the plaintiff or other person is immaterial for the purpose of showing that they are reasonably near to the lands purchased of the Ducey Lumber Company.

"It is claimed by the defendant that the Ducey Lumber Company consented to persons who were *strangers* to their title stocking the waters upon lands so owned by it with fish furnished at the expense of the State. The evidence shows that one Ducey, who it is alleged was president of the Ducey Lumber Company, assented orally to certain

persons stocking the St. Regis waters with trout. Assuming that the waters included in said private park at the place where the defendant fished were so stocked pursuant to said consent it becomes important to determine whether the corporation was bound by such assent so as to create a charge on its lands even in the hands of a bona fide purchaser from it.

"The stocking of waters with fish furnished at the expense of the State was not one of the *purposes* for which said corporation was organized; the consent not being within the purposes of the corporation or in the usual course of its business or incidental thereto, the president had no power to make it without express authority."

To quote from the opinion in 106 A. D. 345:

"This case has been twice before us on appeals by the plaintiff and the questions then raised fully considered, first in 85 Appellate Division, 254, and again in 96 Appellate Division, 91. The facts and claims of the parties were there fully stated, and it is unnecessary to repeat them.

"The defendant now appeals from a verdict rendered against him by direction of the court.

"The plaintiff moved for a direction of a verdict and the defendant moved for a nonsuit. Without the defendant asking to go to the jury upon any question, the court directed a verdict in favor of the plaintiff, leaving to the jury the question only as to whether the plaintiff should recover exemplary damages of twenty-five dollars for each of three trespasses or for only one trespass. The jury rendered a verdict against the defendant for *eighteen cents* damages. The plaintiff rested content with this verdict, but the defendant moved to set it aside, and an order was subsequently entered denying that motion.

"This appeal presents two questions not heretofore specially considered, the one being that the defendant was on a *public highway* running through plaintiff's park at the time of the alleged fishing and trespass, and the other that plaintiff cannot maintain an action for exemplary damages for trespass under the Forest, Fish and Game Law, but that such right, if any exists, is in the People of the State and not in the owner of the land.

"With respect to the first claim it is sufficient to say that the pretended highway was a mere path or trail leading to the fishing grounds, and was in no sense a public thoroughfare so as to be or ever become a public highway. Besides, there was no request that the jury pass upon the question as to whether or not the path was a public highway upon which the defendant was justified in traveling or stopping.

"Section 203, which provides for the recovery of exemplary damages

not exceeding twenty-five dollars for each trespass committed in addition to the actual damages sustained, is found in article 11 of the law, which provides for the laying out of private parks, and defines the rights of the owner therein.

"The word 'penalty' is not used in connection with the giving of exemplary damages in section 203. But the plaintiff indorsed his summons in the Justice's Court 'action for a penalty,' and in his complaint, after stating all the facts which, if true, would entitle him to the exemplary damages provided by the statute, alleges that the defendant became liable for said penalty and exemplary and actual damages in the sum and amount of fifty-five dollars. It is plain that the plaintiff intended to sue for the damages given by the statute and not to bring his action for a common-law trespass simply.

"We think that the provisions of section 188 have no application to the bringing of an action for exemplary damages by the owner of a private park established and maintained according to law, and that he can bring an action for the exemplary damages provided in section 203 in his own name and without permission of the chief game protector or the Forest, Fish and Game Commissioner. The provisions of article 10, in which sections 185 and 188 are found, manifestly relate to the penalties incurred in the unlawful taking or killing or possession of the fish, birds and animals protected by law. *The people can have no interest in trespasses upon a private park.* The exemplary damages given by the statute and fixed at twenty-five dollars are for the trespass, and not for the fish or game taken. It would be a strange construction of the statute to say that a person might establish and maintain a private park for the propagation and protection of fish and game and that he was powerless to use the weapons given for its defense.

"The jury gave the plaintiff but eighteen cents, whereas they could have given him not exceeding twenty-five dollars for each trespass or offense. If the plaintiff is content with this, as he is, the defendant cannot complain that the verdict is too small. Where one party submits to a verdict the other cannot be heard to insist that it shall be set aside because it is unjust to the one recovering."

It cannot be imagined that any landowner would consent to the stocking of a stream if he knew that thereby he would create a *lien* upon his lands.

Such an interpretation of the statute would involve the right of *any number* of people to come upon his lands and *trample* across crops to reach the stream, for the adja-

cent owners might not have consented. Knowledge on the part of the owner apart from full consent could hardly be deemed a test, for some one, before the *land owner* could prevent it, might introduce fish into the stream against his *protest* or after it was done, *inform* him of the fact. Such a *consent,* if given, could hardly be binding on a *bona fide* purchaser *without actual notice* or the *constructive notice* given by the *recorded,* acknowledged consent now provided.

The question as to fishing or hunting from the *highway* has been decided against the public as has already been stated.

See Realty Co. v. Johnson, 66 L. R. A. 439.

All of the above considerations doubtless lead to the *amendment* of the law. The *stocking* upon which the case of Rockefeller v. Lamora seems to have been decided was done at a time covered, if at all, by chapter 319 of the Laws of 1896, and before the a*mendment* made by Chapter 20 of the Laws of 1900, which *radically changed* the statute:

"But waters stocked with fish by the state at any time after April seventeenth, eighteen hundred and ninety-six, shall not be laid out in such park. If waters in any such park are hereafter stocked by the state with the consent of the owner, the provisions of this article shall no longer apply thereto."

There is no provision here about any *waters* lying *open to the public.*

In 1905 the Attorney-General in his report at page 352 distinguished between the stocking of streams in *private parks* and those on lands *not private parks* and held that the statute was applicable only to waters in private parks *surrounded* by land. It was also held that the character of the waters so stocked remained *unchanged* and were still *private.* To the question as to whether the *wading* of the stream made any difference on the question of *trespass* there appears to have been no *definite* answer made.

In 1911, Vol. 2, page 251, the Attorney-General stated:

"If after the enactment of section 28, the state with the owner's *consent,* stocks the waters of a *private park,* it seems the owner may not *invoke* the *provisions* of this *article* against one fishing in such waters *without permission,* but I do not think the character of the waters has been changed from *private* to *public* by the state having stocked such waters. Under section 31 of the said law where a person had the exclusive right to fish upon *enclosed land and water* and complies with the statute, as to giving and posting notices, though the State had *stocked* such waters a person fishing therein *without permission* is *liable* under the penalty provided by section 32 of said law.

"The owners could *dedicate* such land and water or they could be *appropriated* under the statute, but the mere *stocking* by the state cannot be said to be *dedication* or *appropriation* to public use."

See sections 50, 152, 153, 366.

To make the effect of *stocking* with consent cover both *private parks* and *private lands not parks* and both *fish* and *game* the amendment of 1912, Ch. 318, Section 360, was enacted:

"But waters *stocked* with fish by the state at any time *after* April seventeenth, eighteen hundred and ninety-six, shall not be laid out in any such *park.* If *waters or lands* are hereafter *stocked* by the state with *fish* or *game* with the *consent* or *knowledge* of the owner, the provisions of this part shall no longer *apply* thereto."

Section 360 now reads:

A *private park* for the *propagation and protection* of fish, birds or quadrupeds may be established by the owner or person having the *exclusive right* to hunt or fish on private land and water, by publishing once a week for not less than four weeks in a newspaper printed in the county where such land or land and water are situated, a notice substantially describing the same and stating that it will be used as a *private park to propagate and protect* fish, birds or quadrupeds. *Part* of a private lake or pond may be laid out in a *private park,* if *all riparian owners,* including *owners of the bed* thereof, *consent* thereto in *writing.* If the *state* of New York be such owner such consent may be given by the *commission.* But waters *stocked* with fish by the state at any time after April *seventeenth, eighteen hundred and ninety-six,* shall not be laid out in any *such park.* If waters or lands are hereafter *stocked* by

the state with *fish* or *game* with the *consent* of the owner, the provisions of part XI shall *no longer apply thereto.*

The provisions of Section 360 apply to lands devoted to the propagation *and* protection of fish and game and particularly concern *unenclosed and uncultivated* lands. *Enclosed* or *cultivated* lands can be *parked,* but *unenclosed* and *uncultivated* lands cannot be *posted* for the mere purpose of *protecting* the exclusive right to hunt or fish thereon.

Compare section 362.
Compare People v. Hall, 8 A. D. 15.
See sections 371, 373, 200, 196.

It has been claimed that lands stocked by the State with *game* with the consent of the owner may be either parked or posted against *fishing* and that lands, the waters on which have been stocked by the State with *fish* with the consent of the owner may be parked or posted against *hunting* and that appears to have been the legislative intent.

While the lands and waters may be *parked and posted* by those having the *exclusive rights,* the *consent* to the stocking must be that of the *owner* or *owners* of the lands and the consent of lessees or owners of the exclusive rights or other persons is of no effect as far as the rights of the owner of the lands are concerned. The word "*knowledge*" was eliminated by the amendment of 1913. The consent of the owner of the lands could not affect prior rights of owners of the exclusive privileges properly protected through record and notice where necessary.

While the consent may it seems be *oral,* it should be for purposes both of *proof* and *record,* written, executed and acknowledged and these consents are supplied with the blanks furnished to applicants for fish and game.

The Vermont statute provides:

"A person making *application* for or receiving from the fish and game commissioner, *fish fry or fingerlings for distribution* in the waters

of this state, who *wilfully* or *intentionally* deceives said commissioner in regard to the *use* to be made of such fish fry or fingerlings or makes *other use* of the same than is *represented* in the *application* therefor, or prescribed by said commissioner, shall be guilty of a *misdemeanor* and fined not more than *fifty dollars.*"

The Connecticut statute provides:

"No fish shall be furnished by the state for stocking any stream, river, pond, or lake from which the taking of fish is *prohibited* by the owner or lessee."

Compare the *applications* for fish and *affidavits* of stocking.

The Massachusetts statute provides:

"No person, corporation or association shall be *provided* by the commonwealth with trout or trout spawn to stock waters owned or leased by him or them or under his or their control *unless* he or they first agree in writing with the commissioners on fisheries and game that such waters so stocked shall be *free for the public* to fish in during the season in which the taking of trout is permitted by law."

Where the fact that lands or waters have been stocked by the State with the consent of the owner can be *established* the parking or posting of such property is ineffectual as far as holding a trespasser *criminally* liable and liable for *exemplary* damages is concerned. It by no means follows that his lands lie *open to the public.*

Any person hunting or fishing on the premises without the *permission* or *consent* of the owner is still a *trespasser* and may be *put off, sued* for such damages as at common law he is liable for and may be *enjoined* from further trespasses, and no exception to this proposition appears to have been made as to lands and waters *stocked* with the consent of the owner *after* 1896 and *prior* to 1900.

Where one *wades* the stream he is *no less* a trespasser than when he *treads* the banks.

In the case of *private parks* the *published notice* must state that the premises will be used as a *private park to propagate and protect fish, birds or quadrupeds* or

words to that effect, but such requirement does not appear to be made as to the *posted notice.*

The *publication* of the notice is *required* only as to lands *parked,* but publication *may* be made as to *posted* lands as well.

Section 361 provides:

> *Notices or signboards not less than one foot square* warning all persons against *hunting or fishing* or trespassing thereon *for that purpose,* shall be *conspicuously posted and maintained* on a private park not more than *forty rods* apart close to and along the *entire boundary* thereof, and there shall be so placed at least *one* notice or signboard on *each side* and *one* at *each corner* of such park and where an *outer* boundary runs along or under any *waters,* the nearest *shore or banks* within the park shall be deemed the *boundary* for the purpose of posting such notices or signboards. It shall also be considered *due service* of notice for trespass upon any person or persons, by serving them *personally* in the name of the owner or owners of such private park with a *written notice* containing a brief description of the premises, warning all persons against hunting or fishing or trespassing thereon.

There is no requirement as to where or how the signs are to be put up as long as they are conspicuously placed nor as to the *size, color* or *character* of the *lettering* used provided it is legible. As to all persons not *personally served* with notice, the signs must be both *posted* and *maintained.* The *name* of the owner does not necessarily have to *appear* upon the sign, but it should be there in order to inform persons of the *identity* of the owner and the lands and to prevent *fraud* or *mistake.* Where notices are *worn off, torn down,* etc., they should be *replaced* as against all persons not *personally* served with notice.

Section 362 provides:

> An *owner* or person having the *exclusive right* to hunt or fish upon *inclosed or cultivated lands,* or to take *fish* in a *private pond or stream* and desiring to *protect* the same, shall *maintain* notices or signboards, of the *size* and posted and maintained in the manner described in the preceding section.

Enclosed lands are defined by Section 380, subdivision 23:

> Where lands are referred to as "*enclosed*" or "*wholly enclosed*" the *boundary* may be indicated by *wire, ditch, hedge, fence, road, highway, water* or by any *visible or distinctive* manner which indicates a *separation* from the *surrounding* contiguous territory, except as otherwise provided.

See section 372, subdivision 7.

Section 362 does not apply to *unenclosed, uncultivated* lands.

See section 360.

No *published* notice is necessary in order to protect the exclusive rights upon such lands.

"Boundary" and "enclosure" are not necessarily identical.

In the instance of *cultivated* lands the *posted notices* themselves seem to constitute or indicate a *boundary.* In the instance of *uncultivated* lands the signs must be posted along the *boundary* of the *enclosure* and *water* or *roads* among other things appear to constitute *enclosures.* In the case of *waters,* they may, it appears, be posted against *fishing* without *enclosure,* but to successfully *post* them against *hunting,* it seems they should be *enclosed* by something more than *land* or *shore.*

The notices it seems may *bound* the territory set apart as a *private park,* but the notices alone do not constitute the lands *enclosed.*

As to persons *personally served* with notice after the lands are once *posted,* the signs do not need to be *maintained,* but as to all others the signs must be *kept posted.*

Printed notices were formerly furnished by the Commission but Section 363, covering that proposition, was repealed in 1913.

Section 364 provides:

> No person shall *injure, deface, or remove,* a notice or signboard, placed or maintained pursuant to the provisions of this article.

Section 365 provides:

> No person shall *take or disturb fish, birds or quadrupeds* on any *private park* or *private lands* or *trespass thereon for that purpose,* after notices are *posted* as prescribed herein; or, if the notices have been *once posted* or the land *established as a private park,* after *personal service* upon him in the *name* of the *owner or owners* of a *written or printed notice* containing a *description* of the premises and *warning* all persons against *hunting or fishing or trespassing thereon.*

The trespass contemplated is one for the purpose of fishing, trapping or hunting *only.* Trespasses for *other purposes* would not render the intruder liable *except* at common law.

The law of 1892 provided that "being on the land with gun or fishing tackle or apparatus or allowing hunting dogs thereon shall be deemed a violation," but as the statute now stands the *purpose* of the trespass would be a question of fact.

The posting of lands *unenclosed* or *uncultivated* will not it appears render a trespasser liable under Part XI unless the premises are properly set apart as a *private park* for the *bona fide* propagation *and* protection of fish and game.

> See People v. Hall, and compare Rockefeller v. Lamora, 85 A. D. 254.

Section 366 provides:

> Any land *owned by the state,* enclosed as defined by subdivision twenty-three of section three hundred and eighty of this chapter, *except* lands in the Adirondack and Catskill parks, may be set aside by the conservation commission as a *game refuge* upon publishing the notice mentioned in section three hundred and sixty of this chapter and upon posting and maintaining the notices or signboards in the manner described in section three hundred and sixty-one of this chapter. The commission may *purchase* in the

name of and for the use of the state in any town of the state *outside* the limits of the Adirondack and Catskill parks, lands containing not less than *one hundred acres,* or may *purchase* the shooting and fishing *rights* in connection with such lands, and may establish thereon a *game refuge* upon publishing and posting the notices as above provided. No person shall take or disturb fish, birds or quadrupeds on such state game refuges or *trespass thereon for that purpose,* after the notices are published and posted as above prescribed. Such lands shall remain a *game refuge* and *private park* for the *propagation and protection* of fish, birds or quadrupeds as long as such lands remain the property of the state, or until the commission shall by an order to be published in the manner prescribed by section three hundred and sixty, *permit* the taking of fish, birds or quadrupeds upon such premises.

See sections 50, 152, 153.

In respect to such game *refuges* the State is treated as an individual proprietor and the same penal and exemplary damage provisions apply as in the case of private lands.

There is no provision exacting a penalty for the fish, birds or quadrupeds taken as though taken in close season as is made in the case of *closes,* Section 153, or territory covered by *additional protective orders,* Section 152.

Section 366a provides:

The conservation commission is also authorized to set aside the following tract of land as a game refuge surrounding the game farm at Sherburne, Chenango county, New York, bounded and described as follows: Commencing at a point in the village of Sherburne at the intersection of Main and State streets, and running thence northerly in the highway leading from Sherburne village to Earlville village and crossing the Lackawanna railroad track at Baldwin station; thence westerly from said Baldwin station about eighty-eight rods to a bridge across the east branch of the Chenango river where the said Sherburne-Earlville highway is intersected by the Earlville and Sherburne west-hill highway; thence southerly on the Sherburne west-hill highway two miles to Sherburne west-hill, and crossing at Sherburne west-hill highway leading from Sherburne village to Smyrna village; and running thence south from Sherburne west-hill along the Merril's ridge road to Sherburne Four Corners; being two miles and three hundred

and sixteen rods; and running thence northeasterly from Sherburne Four Corners past the schoolhouse on the road leading from Sherburne Four Corners to Sherburne village; and thence easterly across the Chenango river and along the Pratt road, being about three miles and one hundred and sixty rods, to the place of beginning.

Section 182, subdivision 5, provides as to the punishment for violations of Part XI as follows:

A person who violates any provision of *part eleven* shall be guilty of a *misdemeanor,* and shall be liable to *exemplary damages* in the sum of *twenty-five dollars* for each offense or trespass to be recovered by the *owner of the lands, or hunting or fishing rights thereon,* with *costs of suit,* in addition to the *actual damages,* all of which may be recovered in the *same action.* The *consent in writing* of such owner to hunt or fish on said lands during the open season shall be a defense to a prosecution under this section.

See sections 26, 31 and 32.
See Procedure.

The *exemplary* damages are now fixed at the *flat sum* of *twenty-five* dollars.

The civil action to recover the exemplary damages may be brought in a court of record instead of in justice's court and the recovery carries with it the *costs* regardless of Section 3228 of the Code of Civil Procedure.

See Furman v. Cunningham, 34 Hun, 606.
See section 3250 of the Code.

It is stated in Rockefeller v. Lamora, 106 A. D. 345, "The people can have no interest in trespasses on a private park." This being so the *exemplary damages* of course are recoverable by the *owner* of the exclusive rights but the *fine,* it seems, goes to the *Commission* and not to the *town* where the offense was committed under Sections 171 and 240 of the Town Law. Sections 26 and 31, however, govern civil and criminal actions as to the locality of jurisdiction and Section 32 controls as to the punishment for the misdemeanor.

The civil action for the recovery of the exemplary damages must be brought by the owner of the exclusive right whether owner of the land or otherwise. The criminal prosecution may be *started* on the complaint of any person but the co-operation of the owner would be indispensable in the matter of proof. While the *written* consent of the owner unrevoked is the only defense available according to the statute a prosecution should and doubtless would fail on proof of the unrevoked, oral consent or waiver of the owner.

See Procedure and Arrests by Private Persons.

If a license is given *orally* when it should be in *written* form, the person giving it cannot object to acts done under it prior to revocation.

See Pierrepont v. Barnard, 6 N. Y. 279.
See Byron v. Blakeman, 22 Barbour, 336.
See Gerard on Titles to Real Estate, 847.

The termination of the license or permit makes the person a trespasser thereafter.

29 Cyc. 445.

A *temporary* permit or license to fish or hunt on lands whether written or oral is not like a lease for a definite term or a sale of the *exclusive rights* discussed earlier in this chapter. There is a great conflict of authority as to whether a written or oral license or permit for any purpose for a definite *time* and for which a valuable consideration is *paid* can be revoked prior to its expiration and there is no decision to be found which holds that such a permit to hunt during the open season would be irrevocable.

In Bingham v. Salene, 15 Oregon, 208, the *grant* of the *exclusive* hunting rights on lands and waters was held not to be a revocable license. That case, however, involved the absolute sale of a *profit a prendre,* a trans-

fer of which it being in the nature of an interest in lands must be in writing within the statute of frauds.

See Isherwood v. Salene, 40 L. R. A. 299.

For these reasons reliance should be placed only upon a *lease* or a *grant* of the *exclusive rights.* In all other cases the *waiver* of the *trespass,* no matter what *form* it takes, is best considered a favor to be *sought* and a *privilege* not to be *abused.*

The Iowa statute goes so far as to provide for the revocation of the hunting license of a person who hunts on enclosed or cultivated lands without the permission of the owner.

As a means of protection against persons not inclined to such a view and non-observers of the golden rule, it is beyond dispute advisable for land owners and owners of exclusive rights to post hunting and fishing grounds "hog tight, horse high and bull strong."

Chapter 145 of the Laws of 1912 provides for the record of any instrument registering "farm names" and it would seem that a reference in any notice to such record would constitute a valuable part of any description of the premises.

It has been urged that the distinctions, both technical and substantial between *private parks* and posted lands *not parks* be abolished and exactly the same provisions as to posting, publishing, boundaries and enclosures be made where practicable as to all lands. It has also been contended that the law should definitely constitute the *notices* themselves the *boundary* or *enclosure.*

In order, however, to avoid these present distinctions, the approved manner of protecting the exclusive rights to hunt and fish on lands would evidently be as follows:

First. The lands should be *enclosed* within the meaning of the statute whether they are cultivated or not.

Second. The *notice* stating that they are established

as a *private park* for the propagation *and* protection of game should be published.

See Rockefeller v. Lamora, 85 A. D. 254.

Third. The lands should be *posted* as provided in Section 361. The *whole* premises should be posted as *one tract;* and streams or ponds or timber tracts should be posted *separately* and as separate tracts where practicable.

Fourth. Written notices should be served *personally* upon particularly obnoxious individuals.

Fifth. The notices should be *renewed* and *kept posted.*

The language and text of the posted notice is immaterial as long as in words it warns all persons against hunting, fishing, trapping or trespassing for such purposes. "Hunting" would, however, include "trapping." The notice may be confined to any one or more of such acts or it may embrace them all. The notices may be *conspicuously* nailed to fences, trees, posts or otherwise *displayed.*

The Oklahoma statute even provides that the owners or lessees of private parks shall have authority to make and enforce additional rules not inconsistent with law, for the protection of fish and game. In this connection if permission is given to a person to hunt or fish on posted lands upon stated conditions, a violation of the conditions might *avoid* the consent and render him *liable* under the statute as for trespass.

The owner may demand for inspection the production of a trespasser's hunting license (and should be able to do so in the case of anglers) in order to *identify* him and if refusal is made, he may arrest him for either the trespass where the lands are properly posted or the refusal to exhibit the license and turn him over to a peace officer or take him before a magistrate, and prosecute criminally; or he may bring the civil action for exemplary damages or he may do both.

He can put the trespasser off his premises using only such force as is necessary to accomplish the purpose and it is the duty of the trespasser when ordered off to leave by the most direct course which will occasion the least damage.

Even a trespasser may defend himself against wanton and malicious violence.

People v. Gillick, Hill & Den. Supp. 229.

He may also have recourse to the injunction.

Bosta Land Co. v. Burdick, 90 Pac. 532.

There are a few other important legal propositions of concern to landowners and sportsmen which properly have a place here.

The *exclusive right* to hunt or fish upon lands and waters must be *reasonably* exercised at *seasonable* times and in *legitimate* ways and all *unnecessary* injury to crops or other property must be avoided.

Bingham v. Salene, 15 Oregon, 208.
19 Cyc. 989.
Ingham on Animals, 573.

The owner of the land who has granted to others the exclusive rights thereon may operate, drain and clear the land provided he acts in *good faith,* but may be liable for acts of *bad faith.*

Isherwood v. Salene, 40 L. R. A. 299.

It was held in the case of Bingham v. Salene that the *grantee* of the sole and exclusive hunting rights on lands had no authority under the particular written instrument involved in that case, to authorize or issue permits to *other persons,* to exercise *like rights* against the objection of the grantor although it was held that the rights themselves might be *assigned.*

See Salene v. Isherwood, 55 Oregon, 263.
See Authorities cited in footnote to Isherwood v. Salene.

Damages may be recovered by the owner of the exclusive fishing rights against one who runs chemicals into the stream thereby injuring the fishing privilege.

Hodges v. Pine Products Co., 33 L. R. A. 74.
See Smith v. Cranford, 84 Hun, 318.

As against licenses or persons on the premises by *permit* or *invitation* the owner can enforce liability for any *actual damages* done.

The owner ordinarily cannot be said to be liable in *negligence* to persons on the land by mere *permission* or to *trespassers* except for *affirmative* acts such as the infliction of *wanton* or *malicious* injury. Where persons are on the land by *invitation,* it seems that the owner may be liable for the absence of such care as the circumstances of the case require.

Fox v. Warner-Quinlan Co., 204 N. Y. 240.
Weitzman v. Barber Co., 190 N. Y. 452.

The owner would be liable to *trespassers* for injuries received by coming in contact with dangerous *devices* set and *designed* to injure, or hidden pitfalls.

Forbrick v. Electric Co., 45 M. 452.
People v. Most, 35 M. 145.

The owner would be liable for injuries received from a wild animal kept by him.

Van Leuven v. Lyke, 1 N. Y. 516.
Hays v. Miller, 11 L. R. A. 748.
Leonard v. Donoghue, 87 A. D. 104.

The owner would be liable for injuries caused by domestic animals including horses, bulls, rams, dogs, etc., where he has *knowledge* of their *vicious nature.*

Muller v. McKesson, 73 N. Y. 195.
Lynch v. McNally, 73 N. Y. 347.
Benoit v. Troy R. R. Co., 154 N. Y. 223.

Moynahan v. Wheeler, 117 N. Y. 285.
Lettis v. Horning, 67 Hun, 627.
People v. Shields, 142 A. D. 194.

It has been held that the keeper of *bees* must so locate the hives as to avoid unnecessary danger to persons on the highway or upon the premises.

Parsons v. Manser, 62 L. R. A. 132.

Trespass *alone* is no defense to an action brought to enforce such liability, but where the trespasser with *knowledge* of the dangers *voluntarily* places himself within their reach, he assumes the risks and cannot recover.

Molloy v. Starin, 113 A. D. 852.

This rule as to assumed risk and contributory negligence does not appear to apply to vicious *dogs* and their owner with knowledge or notice is liable for their acts, if unconfined, under all ordinary circumstances.

Woodridge v. Marks, 17 A. D. 139.
Loomis v. Terry, 17 Wendell, 497.

To show how far this principle of assumed risk, etc., has been carried, where a caretaker had been *instructed* to shoot with a rifle in the direction of *trespassers* in order to drive them off and a *trespasser* who had *knowledge* of the practice was wounded by one of the *bullets* it was held that he was guilty of *contributory negligence,* had *assumed the risks* and could have no cause of action.

Magar v. Hammond, 171 N. Y. 377.

A trespasser with knowledge that there are *spring guns* located in woods, though ignorant of the particular spots where they are placed cannot maintain an action for an injury received from the discharge in consequence of his accidentally treading on the latent wire communi-

cating with the gun. The same rule applies as to other dangerous *devices, pitfalls,* etc.

Illott v. Wilkes, 2 Barn. & Ald. 304.

What is perhaps of most concern to the average hunter is the *dangers* which his *dog* may encounter.

See Graham v. Smith, 40 L. R. A. 503.

It is well understood that dogs which wrongfully chase, worry or wound *sheep* or angora *goats* may be killed by any person with impunity.

See sections 117 and 123 of the County Law.

Such a dog may it seems be killed *on sight* at any time.

Smith v. Wetherill, 78 A. D. 49.

The statute however does *not* apply to dogs worrying *horses, cattle* or *animals* other than sheep or goats.

Van Etten v. Noyes, 128 A. D. 406.

In cases where other domestic animals are threatened by dogs the right to kill them depends upon the *necessity* of so doing in order to *prevent* injury to the domestic animal.

Ingham on Animals, 127–129.
2 Cyc. 416–417.
Collinson v. Wier, 91 M. 501.

It has been held that the right to kill dogs in order to protect *inanimate* property is based upon the same considerations as the right to kill in protection of *animate* property.

2 Cyc. 417.

A dog cannot be killed simply because he is a *trespasser.*

Rimbaud v. Beiermeister, 168 A. D. 596.

But the right to kill a dog found trespassing and *endangering* property is not affected by the *relative value* of the *dog* and the *property* being injured.

Simmonds v. Holmes, 61 Conn. 1.
Collinson v. Wier, 91 M. 501.

In Reis v. Stratton, 23 Ill. App. 314, it was held that a person would not be justified in killing a *valuable* animal found destroying property of *little value.*

In Lipe v. Blackwelder, 25 Ill. App. 119, it was held lawful to kill a dog which was running through *grain* and *injuring* the crop. The exact *contrary* was held in Tyner v. Cory, 5 Ind. 216.

Poisoning dogs is prohibited by section 190 of the Penal Law.

There is a *clash* of decisions on the right of a landowner to kill dogs which are pursuing *game.* The main authorities on this question appear to be *English* cases.

In the case of Townsend v. Wathen, 9 East. 277, it was declared to be unlawful to set baited *traps* in the woods for the purpose of catching hunting dogs.

In the case of Deane v. Clayton, 7 Taunt. 489, the defendant had set *dog spikes* in the trees in his woods so placed as to let hares and rabbits run *under* them but calculated to injure any dog which might be in pursuit. The plaintiff's dog ran into the woods in chase of a rabbit and was killed on one of the spikes. The four judges before whom the case was argued conceded the *qualified property right* of the owner of the land in and to the game found thereon, but were evenly and hopelessly divided as to the right of the owner to protect such a property in that or any other manner.

In Jordin v. Crump, 8 M. & W. 782, a *later case,* it was held that dog *spears* set for the purpose of protecting *game* and disabling hunting dogs were lawful.

The general principle laid down by these English cases appears to have been disapproved of in North Carolina and Connecticut.

Parratt v. Hartsfield, 4 Dev. & B. L. 110.
Johnson v. Patterson, 14 Conn. 1.

From these authorities it seems that under the *English* or *common law* rule the owner of land is entitled to protect his *qualified property* in the wild animals in a *state of nature* upon the lands, against injury from dogs. The application of the *civil law* rule would render any such proposition untenable.

In any event the prudent person will see that there is cause to complain neither of his dog nor himself.

All rules ride out to sea when it comes to the question of fighting dogs.

It was held in Boecher v. Lutz, 20 Weekly Digest 484, that when two dogs were fighting and could not otherwise be separated, the dog which had been the aggressor might be killed.

But the ethics of a dog fight is admirably set forth in the case of Wiley v. Slater, 22 Barbour, 506:

"This is the first time I have been called upon to administer the law in the case of a pure dog fight, or a fight in which the dogs, instead of the owners, were the principal actors. I have had occasion to preside upon the trial of actions for assaults and batteries originating in affrays in which the masters of dogs have borne a conspicuous part, and acquitted themselves in a manner which might well have aroused the envy of their canine dependents. The branch of the law, therefore, applicable to direct conflicts and collisions between dog and dog is entirely new to me, and this case opens up to me an entirely new field of investigation. I am constrained to admit total ignorance of the code duello among dogs, or what constitutes a just cause of offense and justifies a resort to *ultima ratio regem,* a resort to arms, or rather to teeth, for redress; whether jealousy is a just cause of war, or what different degrees and kinds of insult or slight, or what violation of the rules of etiquette entitle the injured or offended beast to insist upon prompt and appropriate satisfaction, I know not, and am glad to know that no nice question upon the conduct of the conflict on the part of

the principal actors arises in this case. It is not claimed, upon either side, that the struggle was not in all respects dog-like and fair. Indeed I was not before aware that it was claimed that any law, human or divine, moral or ceremonial, common or statute, undertook to regulate and control these matters, but supposed that this was one of the few privileges which this class of animals still retained in the domesticated state; that it was one of their reserved rights, not surrendered when they entered into and became a part of the domestic institution, to settle and avenge, in their own way, all individual wrongs and insults, without regard to what Blackstone or any other jurist might write, speak or think of the 'rights of persons' or 'rights of things.' I have been a firm believer with the poet in the instinctive if not semi-divine right of dogs to fight; and with him would say,

'Let dogs delight to bark and bite,
For God hath made them so;
Let bears and lions growl and fight,
For 'tis their nature to.'

"It is possible, that had the owners of both dogs been present the belligerents would have been changed, and the familiar questions growing out of *son assault desmene* and *molliter manus imposuit* would have been presented, but no such questions are made here.

"The defense is not rested upon the principle of self-defense or defense of the possession of the master of the victorious dog. Had this defense been interposed, a serious and novel question would have arisen, as to the liability of the offending dog for excess of force, and whether he would be held to the same rules which are applied to human beings in like cases offending; whether he would be held strictly to the proof of the necessity and reasonableness of all the force exerted, under the plea that in defense of his carcass or the premises committed to his watch and care, 'he did necessarily a little bite, scratch, wound, tear, devour and kill the plaintiff's dog, doing no unnecessary damage to the body or hide of the said dog.'

"Addressing myself to the question really made in the case, then, the first difficulty I meet with is the want of proof of ownership by the defendant of the offending dog. The plaintiff made a *prima facie* case, by proving an apparent possession of the dog, but the appearances were entirely explained by the witness Nowell, who testifies that the dog was not owned by the defendant, nor kept nor harboured by him, but was really a trespasser on the premises, being kept at the shop adjoining. Upon the question of ownership there is really no conflict of testimony.

"2. Whatever may have been the character and habits of the dog, there is no evidence that he was the aggressor, or in the wrong, in this

particular fight. The plaintiff's dog may have provoked the quarrel and have caused the fight; and if so, the owner of the victor dog whoever he may be, cannot be made responsible for the consequences.

"3. There is no evidence that the dog alleged to belong to the defendant was a dangerous animal, or one unfit to be kept. The cases cited, in which dogs have attacked human beings, although trespassers, and the owners have been held liable, are not applicable. It is one thing for a dog to be dangerous to human life, and quite another to be unwilling to have strange dogs upon the master's premises. To attack or drive off dogs thus suffered to go at large, to the annoyance if not to the detriment and danger of the public, would be a virtue, and that is all that can be claimed, upon the evidence, was done in this case. Owners of valuable dogs should take care of them proportioned to their value, and keep them within their own precincts or under their own eye. It is very proper to invest dogs with some discretion while upon their master's premises, in regard to other dogs, while it is palpably wrong to allow a man to keep a dog, who may or will, under any circumstances, of his own volition, attack a human being. If owners of dogs, whether valuable or not, suffer them to visit others of their species, particularly if they go uninvited, they must be content to have them put up with dog fare, and that their reception and treatment shall be hospitable or inhospitable, according to the nature or the particular mood and temper at the time, of the dog visited. The courtesies and hospitalities of dog life cannot well be regulated by the judicial tribunals of the land.

"4. Evidence is slight that the dog died in consequence of this fight. I should infer, from the evidence, that he continued his annoying visitations until some one who did not own a white dog with black spots on his head, made use of a shot gun or 'Sharpe's rifle,' or some other substitute, to abate the nuisance. But as this question is left in doubt by the evidence, the judgment of the justice is conclusive as to the cause of death. I can, however, see no just grounds for the judgment. It can only be supported upon the broad ground that when two dogs fight and one is killed, the owner can have satisfaction for his loss from the owner of the victorious dog; and I know of no such rule. The owner of the dead dog would, I think, be very clearly entitled to the skin, although some, less liberal, would be disposed to award it as a trophy to the victor, and this rule would ordinarily be a full equivalent for the loss; and with that, unless the evidence differ materially from that in this case, he should be content."

As an almost invariable rule socalled *shooting accidents* are the consequence of the negligence of the operator

of the gun and create a liability against the shooter in favor of the person injured not only on the theory of negligence, but also on that of assault and trespass.

Bullock v. Babcock, 3 Wendell, 391.
See American Digest, vol. 48, page 2826.

Where a person is hunting and while hunting negligently shoots another he is ordinarily liable, as was stated in Hankins v. Watkins, 77 Hun, 360:

" This action was for negligence. The plaintiff claimed, and the evidence given in his behalf disclosed, that on the 14th day of October, 1889, he and his brother went to the head of Cayuga lake, duck hunting; that they took with them two tame ducks to be used as decoys; that while they were preparing to anchor them as such decoys one of them escaped from the boat in which they were, and the plaintiff and his brother pursued it; that while doing so the defendant shot at them and seriously injured the plaintiff; that the accident occurred a few minutes before six o'clock in the morning; that it was clear and broad daylight, being about fifteen or twenty minutes before sunrise; that between the place where the defendant stood when he fired and the boat in which the plaintiff and his brother were, there was nothing to obstruct the defendant's vision, so that if he looked before firing he would have seen the plaintiff, his brother and the boat in which they were at the time. The evidence of the defendant was somewhat in conflict with that of the plaintiff, and tended to show that it was not sufficiently light at the time to enable him to see the plaintiff, and that his vision was obstructed by the limbs of trees and shrubs that stood between him and the plaintiff.

" The question whether the transaction was as claimed by the plaintiff, or as claimed by the defendant, was submitted to the jury and it found in favor of the plaintiff. Therefore, in examining the questions of the defendant's negligence and the plaintiff's freedom from contributory negligence, we must regard the facts proved by the plaintiff as the established facts in this case. Assuming the transaction to have occurred in the manner testified to by the plaintiff and his witnesses, it is quite obvious that both the question of the defendant's negligence and the question of the plaintiff's freedom from contributory negligence were questions of fact that were properly submitted to the jury, and that its findings thereon should be regarded as final.

" The appellant, however, insists that the rule of law applicable to this case is, that ' One who is hunting in a " wilderness " is not bound

to anticipate the presence, within range of his shot, of another man, and is not liable for any injury caused unintentionally by him to a person of whose presence he was not aware,' and cites 2 Wait's Actions and Defenses, 702, and Bizzell v. Booker (16 Ark. 308), to uphold his insistence. When we examine the Bizzell case we not only find that the facts in that case were wholly unlike those in the case at bar, but that all that was held in that case was, that where a person doing a lawful act, or an act not mischievous, rash, reckless or foolish, and naturally liable to result in injury to others, he was not responsible for damages resulting therefrom by accident or casualty, while he was in the exercise of such care and caution to avoid injury to others as a prudent man would observe under the circumstances surrounding him. We also find that in that case it was expressly held that such a person would be answerable for damages which resulted from his negligence or want of such care and caution on his part. Referring to Wait's Actions and Defenses, we find the statement above quoted, and that the Bizzell case is the only authority cited to sustain it. We fail to see how the doctrine of the Bizzell case in any way aids the defendant, but, on the contrary, it seems to be an authority in favor of the plaintiff, as the court in that case expressly indorsed the doctrine laid down by Bronson, Ch. J., in Vandenburgh v. Truax (4 Den. 464), as follows: 'It may be laid down as a general rule, that when one does an illegal or mischievous act which is likely to prove injurious to others, and when he does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable in some form of action for all the consequences which may directly and naturally result from his conduct. It is not necessary that he should intend to do the particular injury which follows, nor, indeed, any injury at all.' In Shearman & Redfield on Negligence (686), it is said: 'A very high degree of care is required from all persons using firearms in the immediate vicinity of other people, no matter how lawful or even necessary such use may be,' and the cases of Weaver v. Ward (Hob. 134); Castle v. Duryee (1 Abb. Ct. App. Dec. 327); Moody v. Ward (13 Mass. 299); McClenaghan v. Brock (5 Rich. Law [So. Car.] 17); Haack v. Fearing (5 Rob. 528); Moebus v. Becker (46 N. J. Law, 41), are cited to sustain that proposition. Cooley, in his work on Torts, page 705, says: 'When one makes use of loaded weapons he is responsible only as he might be for any negligent handling of dangerous machinery, that is to say, for the care proportioned to the danger of injury from it.' Under the circumstances disclosed by the evidence in this case, and upon the authorities bearing upon the question of the defendant's liability, we think there is no doubt of the plaintiff's right to recover in this action.

"On the trial the defendant was asked: 'Did you intend to shoot this plaintiff?' This question was objected to by the plaintiff, the objection was sustained and the defendant duly excepted. While it has been held that when the question of the party's intent is one of the issues in an action, he may testify that he had or did not have the intent charged, still, where the issue is not one of intent, such evidence is inadmissible, as his intent is wholly immaterial. In this case, while the complaint charges the defendant with having wrongfully and negligently caused the plaintiff's injury, there was no claim on the trial that his act was intentional, but, on the contrary, the plaintiff sought to recover only upon the ground of the defendant's negligence. This is shown very plainly by that portion of the charge of the learned trial judge, in which he said to the jury: 'It is not claimed that he (defendant) wilfully shot the plaintiff. The plaintiff's counsel repudiates the idea that he deliberately and wilfully, intending to hit these men, shot at them, for they claim that the act was a lawless act, and that the act was careless and negligent, and not deliberate or wilful.' Again, the judge says: 'But this is not a charge of wilful shooting.' Thus the question at issue between the parties on the trial was whether the plaintiff's injury was caused by the defendant's negligence, and no question of his intent was involved in the case. We find no error in this ruling.

"The defendant was also asked: 'Did you handle your gun that morning in a careful, prudent and cautious manner?' This was objected to, the objection sustained and the defendant excepted. We think this exception was not well taken. If by this question the defendant sought to show that in his opinion he was not negligent in shooting the plaintiff, it was inadmissible, as that was a question not for the witness, but for the jury to decide. (Carpenter v. Eastern Transportation Co., 71 N. Y. 574; 16 Am. & Eng. Ency. of Law, 463, and cases cited.) If the defendant's purpose was to show that he handled his gun with care, it was immaterial, as the negligence charged did not relate to the manner in which he used his gun, but consisted in his shooting towards the plaintiff without previously looking to see what was within the range of his gun when he fired. The defendant was also asked: 'Have you had considerable experience in handling a gun and were you careful in handling your gun upon the morning in question?' which was objected to and excluded. This was in substance the same as the previous question, and the evidence was properly rejected. We are also of the opinion that the court properly refused to admit the evidence called for by the question put to the witness Brown, whether the defendant was 'a capable and careful hand to handle a gun.'

"It appears that photographs had been taken of the place where this injury occurred. The plaintiff was interrogated as to the relative condition, at the time when they were taken and when the injury occurred, of the trees, water and other things, as to what was done, and as to whether there was anything to obstruct the defendant's view. This evidence was objected to by the defendant, and admitted under this exception. As the photographs were not admitted in evidence or shown to the jury, we are unable to see how the defendant could possibly have been injured by the admission of this evidence. It is quite manifest that even if the evidence was inadmissible its admission was harmless, and, hence, we find in the ruling no reason to disturb the judgment."

Gross negligence in the matter of handling a gun resulting in the death of the person injured may amount to manslaughter.

McDaniel v. State, 21 L. R. A. 678.
Osborn v. State, 31 L. R. A. 966.
State v. Stilt, 17 L. R. A. 308.
State v. Horton, 1 L. R. A. 991.

Penal Law, Section 1052, provides:

"Such homicide is manslaughter in the *second degree,* when committed without a design to effect death:

"1. By a person committing or attempting to commit a *trespass,* or other invasion of a private right, either of the person killed or of another, not amounting to a *crime;* or,

"3. By any act, procurement or *culpable negligence* of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree."

The game laws of many of the States and of the provinces of Canada create heavy civil and criminal liabilities against persons hunting who regardless of intent injure other persons by the discharge of firearms. Some of the enactments are particularly severe in cases of such shooting near cities or incorporated villages.

There are a few provisions of the Penal Law covering what are known as *malicious mischiefs:*

Section 1425, subdivisions 1, 2, 3, 5, 6 and 12, provides

that a person shall be guilty of a misdemeanor who wilfully:

"1. Cuts down, destroys or injures any wood or *timber* standing or growing, or which has been cut down and is lying on lands of another, or of the people of the state; or,

"2. Cuts down, girdles or otherwise injures a fruit, shade or ornamental *tree* standing on the lands of another, or of the people of the state; or,

"3. *Severs* from the *freehold* of another, or of the people of the state, any *produce* thereof, or any thing attached thereto; or

"5. Enters without the consent of the owner or occupant any orchard, fruit garden, vineyard or ground whereon is cultivated any fruit, with intent to take, injure or destroy any thing there *growing or grown;* or,

"6. Cuts down, destroys or in any way injures any *shrub, tree* or *vine* being or growing within any such orchard or upon any such ground, or any building, frame work or erection thereon; or

"12. Takes or attempts to take, without the consent of the owner of any *lake* or *pond,* any *fish* from the waters thereof, provided such lake or pond is so situated that fish can not *pass* thereinto from the waters of any other lake, pond or stream, either public or owned by other persons; or, without the consent of the owner of any such lake or pond, places therein any piscivorous fish or any poison or other substance injurious to the health of fish, of lets the waters out of any such lake or pond, with the intent to take fish therefrom or to harm fish therein."

Section 1426 provides:

"A person, who *maliciously* injures or destroys any standing crops, grain, cultivated fruits, or vegetables, the property of another, in any case for which punishment is not otherwise prescribed by this chapter or by some other statute, is guilty of a misdemeanor."

POSITION	Name	Residence	Date of entrance into present position	Compensation
UNCLASSIFIED SERVICE				
Commissioner	George D. Pratt	Glen Cove, L. I.	April 19, 1915	$8,000 00
EXEMPT CLASS *				
Deputy	Alexander Macdonald	St. Regis Falls	April 27, 1915	6,000 00
Secretary	Augustus S. Houghton	7 West 44th St., N. Y. C.	May 1, 1915	3,000 00
Confidential secretary to commissioner	Warwick S. Carpenter	Bennington, Vt.	June 17, 1915	2,000 00
Confidential stenographer to commissioner	Vacancy.			
Assistant secretary and cashier	John J. Farrell	3283 Sixth Ave., Troy	Dec. 1, 1911	2,400 00
Auditor of fire accounts	Sherman D. Fuller	Gouverneur	April 3, 1914	1,800 00
Supervisor of marine fisheries	Emmet B. Hawkins	Huntington, L. I.	May 13, 1915	3,000 00
Cashier, bureau of marine fisheries	Riley P. Squires	Babylon	June 1, 1915	2,000 00
Confidential agent	Delmar C. Speenburgh	Hunter	May 14, 1915	1,800 00
Confidential agent	Ernest Pratt	218 East 20th St., N. Y. C.	Sept. 6, 1911	1,800 00
Confidential agent	2 vacancies.			
Confidential agent	John H. La Pan	Saratoga Springs	Jan. 1, 1914	1,800 00
District forest ranger	William O'Brien	Old Forge	Oct. 1, 1912	1,500 00
District forest ranger	Stratton D. Todd	Saeger	May 1, 1915	1,500 00
District forest ranger	Allen T. Vosburgh	Lake Clear Junction	Nov. 1, 1915	1,500 00
District forest ranger	Emilius C. Roberts	Northville	May 15, 1915	1,500 00
District forest ranger	P. J. Cunningham	North Creek	Oct. 1, 1912	1,500 00
Deputy attorney-general	A. Frank Jenks	411 East 5th St., Jamestown	Jan. 1, 1915	5,500 00
Special deputy attorney-general	Marshall McLean	101 W. 72d St., N. Y. C.	May 6, 1915	6,000 00
Assistant deputy attorney-general	William T. Moore	Mechanicville	Jan. 1, 1915	4,000 00

* Amended to January 16, 1916.

DIRECTORY OF THE CONSERVATION COMMISSION — Continued

POSITION	Name	Residence	Date of entrance into present position	Compensation
		EXEMPT CLASS — *Continued*		
Assistant deputy attorney-general	T. Paul McGannon	149 Walnut St., Corning	Jan. 1, 1915	$3,000 00
Assistant deputy attorney-general	Blaine F. Sturgis	501 S. Academy St., Medina	Jan. 1, 1915	3,000 00
Assistant deputy attorney-general	E. Clarence Aiken	141 Genesee St., Auburn	Feb. 1, 1915	5,000 00
Assistant deputy attorney-general	Glen A. Frank	Jamestown	Jan. 16, 1916	3,500 00
		COMPETITIVE CLASS		
Examiner of titles	Burton H. Loucks	Lowville	Nov. 1, 1911	4,000 00
Attorney	John O. Bates	233 Park Ave., Albany	April 26, 1909	2,400 00
Auditor and pay clerk	A. J. Mulligan	249 Quail St., Albany	June 7, 1895	2,800 00
Assistant to chief of publications	Edward M. Coughlin	Troy	May 1, 1912	1,500 00
State fish culturist	Tarleton H. Bean	Smithtown	Jan. 10, 1906	4,000 00
Superintendent game bird farm	Harry T. Rogers	Sherburne	May 14, 1909	2,000 00
Assistant superintendent game bird farm	A. R. Miller	Rensselaer	Dec. 1, 1914	1,200 00
Chief land surveyor	Wilbur F. Smith	Malone	Aug. 15, 1915	2,400 00
Special agent	A. B. Strough	231 Ontario St., Albany	May 29, 1895	2,000 00
Stereoptican operator	Rodney E. Gooding	Geneseo	Aug. 9, 1909	1,600 00
Secretary to supervisor of marine fisheries	Harry Silverman	32 Henry St., Brooklyn	July 6, 1911	1,800 00
Inspector of docks and dams	Alexander R. McKim	17 Gramercy Park, N. Y. C.	Oct. 10, 1911	3,500 00
Record and penalty clerk	Emil F. Prantner	1377 Prospect Ave., N. Y. C.	June 22, 1915	1,500 00
Stenographer	Clara E. Bailey	21 Jeanette St., Albany	May 11, 1909	1,500 00
Stenographer	John H. Cleary	434 First St., Troy	Jan. 5, 1910	1,650 00
Stenographer	Florence E. Daly	2271 Fifth Ave., Troy	Aug. 1, 1912	1,400 00
Stenographer	Archie K. Rider	169 Lancaster St., Albany	Jan. 20, 1908	1,300 00
Stenographer	Mary E. Fitzgerald	217 Livingston Ave., Albany	Oct. 16, 1911	1,200 00
Stenographer	Herman Blume	563 Howard Ave., Brooklyn	Dec. 3, 1913	1,300 00

Stenographer	Justin T. Mahoney	Troy	Dec. 1, 1912	1,200 00
Stenographer	Lillian M. Clarke	Watervliet	July 18, 1910	1,100 00
Stenographer	Martha L. Foland	Philmont	Feb. 27, 1911	1,100 00
Stenographer	Marguerite M. Higgins	61 Clinton Ave., Albany	Nov. 21, 1912	900 00
Stenographer	Mary Bishop	Troy	June 1, 1912	900 00
Stenographer	Helen A. Noonan	Watervliet	Dec. 28, 1912	900 00
Stenographer	Jane K. Cushing	476 20th St., Troy	Aug. 1, 1915	300 00
Stenographer	Rosine Mullarkey	48 Eagle St., Albany	Dec. 1, 1915	600 00
Stenographer	Agnes C. O'Keefe	162 2d St., Albany	Feb. 1, 1915	800 00
Chief clerk	John S. Casey	134 Third Ave., Utica	Jan. 5, 1911	1,800 00
Clerk	Frank W. Traver	40 Delaware Ave., Albany	May 26, 1909	1,800 00
Clerk	Grace Munsell	Albany	Sept. 15, 1908	1,400 00
Clerk	Lucy Anderson	8 Spring St., Albany	Jan. 1, 1912	1,000 00
Clerk	Franklin D. Thomas	Rensselaer	June 1, 1915	900 00
Junior clerk	Thomas C. Maxwell	129 Orange St., Albany	Feb. 1, 1915	600 00
Typewriter copyist	Frances Callahan	110 Oakwood Ave., Troy	May 11, 1912	900 00
Typewriter copyist	Margaret A. Farrell	272 Livingston Ave., Albany	June 16, 1914	720 00
Messenger	Thomas E. O'Connor	122 Clinton Ave., Albany	Oct. 1, 1911	1,100 00
Page	Henry A. Fleig	80 Second Ave., Albany	Feb. 19, 1915	480 00
Telephone operator	Margaret Smith	127 Dove St., Albany	Oct. 1, 1914	900 00
Special importation agent	Francis S. Coyle	2172A Fulton St., Brooklyn	June 1, 1912	1,500 00
Special importation agent	Charles J. Ward	201 W. 104th St., N. Y. C.	Jan. 5, 1912	1,500 00
Superintendent of state forests	C. R. Pettis	916 Myrtle Ave., Albany	June 1, 1910	4,000 00
Assistant superintendent of forests	William G. Howard	1108 Madison Ave., Albany	May 17, 1911	2,500 00
Forestry field supervisor	Ernest W. Blue	New Hampton	July 1, 1915	1,400 00
Examiner of state lands	Lawrence McGrath	Livingston Manor	Nov. 1, 1915	900 00
Forester	Albert H. King	101 North Pine Ave., Albany	Nov. 22, 1911	1,800 00
Forester	Arthur S. Hopkins	208 Westminster Rd., Roch'ter	May 7, 1914	1,800 00
Forester	Benson H. Paul	300 Highland Ave, Ithaca	Feb. 15, 1915	1,400 00
Forester	Karl Schmitt	Gorham	Sept. 1, 1915	1,200 00
Chief fire inspector	Charles J. Gibson	Saranac Lake	June 1, 1912	1,400 00
Chief fire inspector	Claude H. Heath	Catskill	June 1, 1912	1,400 00
Superintendent of inland fisheries	M. C. Worts	84 West Seneca St., Oswego	July 16, 1912	2,800 00
Marine fisheries protector	Edgar Hicks	West New Brighton	Oct. 1, 1915	1,300 00
Marine fisheries protector	Henry P. Haff	Islip	Mar. 18, 1909	1,300 00

DIRECTORY OF THE CONSERVATION COMMISSION — Continued

POSITION	Name	Residence	Date of entrance into present position	Compensation
		COMPETITIVE CLASS — *Continued*		
Marine fisheries protector	Herbert A. Horton	New Suffolk	May 17, 1913	$1,300 00
Marine fisheries protector	Everett R. Overton	East Quogue	June 15, 1913	1,300 00
Marine fisheries protector	D. H. W. Benson	Far Rockaway	May 12, 1915	1,300 00
Protector for the St. Lawrence river	George S. Wagoner	Alexandria Bay	Aug. 27, 1914	900 00
Foreman of hatchery	William H. Burke	Old Forge	July 10, 1909	1,080 00
Foreman of hatchery	Herbert E. Annin	Margaretville	Jan. 1, 1895	1,080 00
Foreman of hatchery	Charles H. Walters	Cold Spring Harbor	Jan. 1, 1895	1,080 00
Foreman of hatchery	Frank Redband	Mumford	Jan. 1, 1895	1,080 00
Foreman of hatchery	Grant E. Winchester	Bemus Point	Feb. 1, 1901	1,080 00
Foreman of hatchery	Henry Davidson	Bath	Dec. 1, 1905	1,080 00
Foreman of hatchery	William D. Rhines	Linlithgo	June 15, 1910	1,080 00
Foreman of hatchery	Daniel E. Miller	Constantia	May 1, 1912	1,080 00
Foreman of hatchery	A. F. Risley	Old Forge	Mar. 4, 1915	1,080 00
Foreman of hatchery	Milo Otis	Upper Saranac	Aug. 1, 1915	1,080 00
Foreman of hatchery	Sumner Cowden	Bemus Point	June 4, 1915	1,080 00
Chief game protector	Llewellyn Legge	168 Water St., Binghamton	Nov. 1, 1910	4,000 00
De uty chief game protector	John T. McCormack	1119 Prospect Pl., Brooklyn	June 1, 1915	2,400 00
Division chief game protector	Byron A. Cameron	Saranac Lake	May 1, 1912	1,600 00
Division chief game protector	James A. Colloton	6 Manning Sq., Albany	Nov. 12, 1912	1,600 00
Division chief game protector	Joseph M. De Silva	Griffin Corners	Mar. 4, 1915	1,600 00
Division chief game protector	Edmund Gallagher	177 Atkins Ave., Brooklyn	June 15, 1915	1,600 00
Division chief game protector	Frederick W. Hamilton	Syracuse	July 9, 1912	1,600 00
Division chief game protector	C. A. Johnson	Hoosick Falls	July 9, 1912	1,600 00
Division chief game protector	Charles E. Lee	Islip	July 9, 1912	1,600 00
Division chief game protector	F. C. Mullin	Dexter	July 9, 1912	1,600 00
Division chief game protector	R. B. Nichols	Indian Lake	April 15, 1912	1,600 00

Division chief game protector	Charles R. Stapley	Geneseo	July 9, 1912	1,600 00
Division chief game protector	C. E. Underhill	Fonda	Oct. 1, 1914	1,600 00
Division chief game protector	William H. Weston	731 Montgomery St., Syracuse.	May 12, 1911	1,600 00
Game protector (Albany county)	W. L. Delaney	55 Eagle St., Albany	May 1, 1912	900 00
Game protector (Allegany county)	Sherman S. Scott	Filmore	Dec. 1, 1908	900 00
Game protector (Allegany county)	John Pike	Cuba	May 21, 1914	900 00
Game protector (Broome county), 1st grade	Harry Curry	Binghamton	May 2, 1913	1,000 00
Game protector (Broome county)	Adelbert M. Seeley	Binghamton	May 20, 1915	900 00
Game protector (Broome county)	S. B. Slatler	Binghamton	Aug. 6, 1915	900 00
Game protector (Cattaraugus county)	Joseph F. Hirsch	Allegany	July 19, 1912	900 00
Game protector (Cattaraugus county)	Robert L. Witherill	Olean	Oct. 5, 1915	900 00
Game protector (Cayuga county), 1st grade	Willard A. Hoagland	Auburn	June 4, 1912	950 00
Game protector (Chautauqua county)	Elloy R. Ganey	Jamestown	Dec. 18, 1914	900 00
Game protector (Chautauqua county)	Ray L. Burmaster	Irving	Oct. 19, 1915	900 00
Game protector (Chemung county), 1st grade	Michael C. Murphy	Horseheads	May 1, 1912	950 00
Game protector (Chemung county)	E. J. O'Connor	Elmira	July 14, 1913	900 00
Game protector (Chenango county)	Lewis H. Burnside	Norwich	July 1, 1908	900 00
Game protector (Clinton county)	Charles Riley	Plattsburg	Aug. 25, 1908	900 00
Game protector (Clinton county)	John H. North	Plattsburg	Dec. 27, 1910	900 00
Game protector (Columbia county)	C. A. Merrifield	Martindale	Oct. 5, 1915	900 00
Game protector (Cortland county)	Willis D. Cloyes	Cortland	May 1, 1908	900 00
Game protector (Delaware county), 1st grade	Andrew B. Allison	Bloomville	July 14, 1913	1,000 00
Game protector (Delaware county)	Frank C. Bowen	Hancock	Aug. 9, 1915	900 00
Game protector (Dutchess county)	Asa H. Arnold	Amenia	Aug. 18, 1915	900 00
Game protector (Dutchess county)	Irving S. Lindley	Poughkeepsie	Aug. 18, 1915	900 00
Game protector (Erie county), 1st grade	Leon W. Paxon	Akron	Mar. 6, 1913	950 00
Game protector (Erie county), 1st grade	Albert Stadlmeir	Blaisdell	April 15, 1914	1,000 00
Game protector (Erie county), 1st grade	Fred Hoffman	Buffalo	April 15, 1914	950 00
Game protector (Essex county)	William M. Stearns	Saranac Lake	Dec. 7, 1914	900 00
Game protector (Essex county)	Frederick G. Thomas	Ticonderoga	Jan. 4, 1911	900 00
Game protector (Essex county)	Ernest A. Wood	Schroon Lake	Dec. 24, 1914	900 00
Game protector (Essex county), 1st grade	Daniel Seckington	Elizabethtown	Feb. 1, 1907	1,000 00
Game protector (Essex county)	Clark Hayes	Bloomingdale	July 1, 1915	900 00
Game protector (Franklin county), 1st grade	Charles J. Kirby	Brainardsville	Dec. 21, 1910	950 00
Game protector (Franklin county)	Edward St. Clair	Franklin Falls	May 3, 1912	900 00

DIRECTORY OF THE CONSERVATION COMMISSION — Continued

POSITION	Name	Residence	Date of entrance into present position	Compensation
		COMPETITIVE CLASS — *Continued*		
Game protector (Franklin county)	Harlow S. Wheeler	Gile	Mar. 10, 1915	$900 00
Game protector (Fulton county), 1st grade	C. H. Masten	Gloversville	May 1, 1912	950 00
Game protector (Greene county)	H. T. Ashton	Catskill	Oct. 1, 1915	900 00
Game protector (Hamilton county)	W. J. Butler	Long Lake	May 1, 1911	900 00
Game protector (Hamilton county)	George Howland	Lake Pleasant	Sept. 27, 1912	900 00
Game protector (Hamilton county)	Frank Stanyon	Wells	Oct. 5, 1915	900 00
Game protector (Herkimer county), 1st grade	Joseph Jenkins	Poland	Aug. 8, 1911	950 00
Game protector (Herkimer county)	J. H. Kane	Little Falls	Mar. 27, 1911	900 00
Game protector (Herkimer county)	Ray C. Wallace	Herkimer	Oct. 5, 1915	900 00
Game protector (Jefferson county)	John Dollinger	Redwood	Aug. 5, 1912	900 00
Game protector (Jefferson county), 1st grade	C. M. Stearns	Sackett Harbor	Nov. 8, 1912	1,050 00
Game protector (Kings county), 1st grade	J. H. Wackerman	Brooklyn	May 24, 1912	1,000 00
Game protector (Kings county), 1st grade	John J. Ward	Brooklyn	Aug. 5, 1912	950 00
Game protector (Lewis county)	William Andre	Croghan	May 24, 1912	900 00
Game protector (Lewis county)	Austin G. Harris	Harrisville	Sept. 27, 1912	950 00
Game protector (Lewis county)	William Waterhouse	Croghan	Aug. 6, 1915	900 00
Game protector (Livingston county), 1st grade	Lewis S. Morris	Scottsburg	May 1, 1912	1,000 00
Game protector (Madison county)	William C. Wood	Munnsville	May 12, 1914	900 00
Game protector (Madison county)	Laurence J. Carlon	Munnsville	Feb. 8, 1915	900 00
Game protector (Monroe county), 1st grade	E. H. Gannon	Irondequoit	Sept. 11, 1911	1,000 00
Game protector (Monroe county), 1st grade	C. H. O'Donnell	Mumford	May 24, 1912	1,000 00
Game protector (Montgomery county)	Henry F. Towle	Amsterdam	Aug. 17, 1915	900 00
Game protector (Nassau county)	Thomas H. Allen	Port Washington	Mar. 16, 1911	900 00
Game protector (Niagara county)	H. W. Billings	Niagara Falls	Sept. 24, 1913	900 00
Game protector (Niagara county), 1st grade	M. S. B. Knight	Gasport	Dec. 16, 1913	950 00

Game protector (Oneida county)	Frederick H. Bellinger	Forestport	May 9, 1911	900 00
Game protector (Oneida county), 1st grade	Merton Westcott	Waterville	Aug. 8, 1911	950 00
Game protector (Oneida county), 1st grade	Charles G. Worden	Oriskany	July 1, 1908	1,050 00
Game protector (Onondaga county)	Elton B. Downing	Lafayette	May 1, 1912	900 00
Game protector (Ontario county)	D. B. Oughterson	Geneva	Oct. 5, 1915	900 00
Game protector (Orange county), 1st grade	Valentine J. Kohl	Middle Hope	Jan. 20, 1914	950 00
Game protector (Oswego county)	C. J. Quick	Pulaski	Aug. 31, 1914	900 00
Game protector (Oswego county), 1st grade	George H. Travis	Cleveland	Nov. 1, 1910	1,100 00
Game protector (Otsego county)	William F. Newell	Mount Vision	Nov. 21, 1910	900 00
Game protector (Putnam county), 1st grade	Joseph Barry	Carmel	May 1, 1912	950 00
Game protector (Rensselaer county)	Patrick F. Butler	Troy	May 1, 1912	900 00
Game protector (Rockland county), 1st grade	E. J. Knapp	Stony Point	May 9, 1912	1,000 00
Game protector (St. Lawrence county)	Jay Hand	Cranberry Lake	Nov. 28, 1906	900 00
Game protector (St. Lawrence county)	W. M. Welch	Fine	Nov. 22, 1915	900 00
Game protector (St. Lawrence county)	Harold F. Gale	Gale	Oct. 27, 1915	900 00
Game protector (St. Lawrence county)	Winfield S. Rutherford	Waddington	Oct. 27, 1915	900 00
Game protector (Saratoga county)	Newton A. Scott	Greenfield Centre	June 6, 1898	900 00
Game protector (Saratoga county), 1st grade	Thomas J. Sheridan	Saratoga Springs	Oct. 10, 1911	950 00
Game protector (Schoharie county), 1st grade	Miles Hazelton	Middleburg	Aug. 9, 1909	1,000 00
Game protector (Schenectady county)	Claude Hanlon	Schenectady	Aug. 6, 1915	900 00
Game protector (Schuyler county)	Edward C. Gleason	Wayne	May 20, 1911	900 00
Game protector (Schuyler county)	William J. Weed	Montour Falls	Oct. 5, 1915	900 00
Game protector (Schuyler county)	M. L. Callahan	Montour Falls	Mar. 23, 1911	1,000 00
Game protector (Seneca county)	Lloyd B. Anderson	Seneca Falls	Nov. 24, 1915	900 00
Game protector (Steuben county)	Carl A. Beebe	Painted Post	Aug. 14, 1909	900 00
Game protector (Steuben county), 1st grade	Henry Heffernan	Hammondsport	May 1, 1912	1,050 00
Game protector (Suffolk county)	James H. Hildrith	Amagansett	Sept. 5, 1912	900 00
Game protector (Suffolk county)	Richard B. Hamel	Bellport	Aug. 17, 1915	900 00
Game protector (Sullivan county), 1st grade	Eugene C. Cross	Liberty	Sept. 11, 1911	1,050 00
Game protector (Sullivan county)	Edward Bisland	Glen Spey	Oct. 5, 1915	900 00
Game protector (Tioga county)	Charles H. Yaple	Owego	Nov. 8, 1911	900 00
Game protector (Tompkins county)	John B. Vann	Ithaca	May 4, 1903	900 00
Game protector (Ulster county), 1st grade	Fred De Witt	Kingston	May 1, 1912	1,050 00
Game protector (Ulster county), 1st grade	Edward P. Nolan	Milton-on-Hudson	Aug. 27, 1914	950 00
Game protector (Warren county)	Dennis Bump	Lake George	April 25, 1913	900 00

DIRECTORY OF THE CONSERVATION COMMISSION — Concluded

POSITION	Name	Residence	Date of entrance into present position	Compensation
		COMPETITIVE CLASS — *Concluded*		
Game protector (Warren county)	Morgan B. Leland	Glens Falls	Dec. 16, 1910	$900 00
Game protector (Warren county)	Robert Somerville	Sodom	Oct. 1, 1902	900 00
Game protector (Washington county)	Harvey B. Cruickshank	Salem	Oct. 10, 1910	900 00
Game protector (Washington county)	Charles B. Kendall	Greenwich	Mar. 9, 1915	900 00
Game protector (Wayne county), 1st grade	Claude T. De Ville	Sodus Point	Jan. 1, 1913	950 00
Game protector (Wayne county), 1st grade	Peter Knobloch	Lyons	Dec. 23, 1910	950 00
Game protector (Wayne county)	George Davis	Lyons	May 1, 1912	900 00
Game protector (Westchester county) 1st grade	Benjamin M. Bailey	White Plains	May 1, 1912	1,050 00
Game protector (Westchester county)	Edward T. Townsend	White Plains	Dec. 30, 1915	900 00
Game protector (Wyoming county), 1st grade	Thomas E. Marsh	Castile	June 10, 1907	950 00
Game protector (Yates county), 1st grade	Chester C. Culver	Penn Yan	July 11, 1908	1,000 00
Division engineer	Albert H. Perkins	Selkirk	Jan. 1. 1910	4,000 00
Asst. eng., water power, storage and drainage	Edward H. Sargent	25 Delaware Ter., Albany	Oct. 19, 1915	3,000 00
Assistant civil engineer	Russell Suter	New York City	July 1, 1910	3,000 00
Assistant civil engineer	Frank H. Macy	Dansville	May 15, 1912	2,000 00
Assistant civil engineer	E. S. Cullings	62 Magnolia Terrace, Albany.	Dec. 15, 1911	2,000 00
Assistant civil engineer	Frank D. Porter	271 Hudson Ave., Albany	July 28, 1910	1,900 00
Map draftsman	E. T. Hughes	Clinton	Nov. 1, 1915	1,500 00
Junior engineer	Hollister Johnson	Dansville	Nov. 15, 1915	1,500 00
Junior engineer	John W. Henry	Canandaigua	Dec. 7, 1915	1,305 00
Junior engineer	Albert J. Mantica	Albany	Nov. 15, 1915	$5 00 per day
Leveler	Charles L. Wood	Herkimer	Feb. 28, 1914	4 50 per day
Junior assistant	Henry Schottin	Buffalo	April 1, 1915	900 00
Junior assistant	James J. Lennon	21 So. Ferry St., Albany	Oct. 1, 1915	900 00
Junior assistant	Clarence B. Carver	Carmel	Aug. 15, 1915	$3 50 per day

Junior assistant	Joseph E. Roohan	Dansville	June 4, 1915	3 50 per day
Rodman	Ivan C. Hall	Hinckley	June 7, 1915	4 00 per day
Rodman	Carl C. Cooman	Ithaca	July 16, 1914	3 50 per day
Chainman	Robert Micnas	New York City	Feb. 1, 1915	900 00
Engineer on motor boat	Lawrence Newton	Halesite	July 1, 1915	900 00
Foreman	James D. Kennedy	Dansville	July 1, 1915	$4 00 per day

TREATY

(Ratified and Made Public Aug. 29, 1916)

PROTECTION OF MIGRATORY BIRDS

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN FOR THE PROTECTION OF MIGRATORY BIRDS IN THE UNITED STATES AND CANADA.

AUGUST 22, 1916.—Message read; convention read the first time and referred to the Committee on Foreign Relations, and, together with the message, ordered to be printed in confidence for the use of the Senate.

To the Senate:

In pursuance of the resolution adopted by the Senate on July 7, 1913, requesting the President to propose to the Governments of other countries the negotiation of a convention for the protection and preservation of birds, negotiations were by my direction initiated with the Government of Great Britain through the British ambassador for the conclusion of a convention that would insure protection to migratory and insectivorous birds in the United States and Canada.

These negotiations have resulted in the signature, on August 16, 1916, of a convention for this purpose between the United States and Great Britain, which I transmit herewith to receive the advice and consent of the Senate to its ratification.

The attention of the Senate is invited to the accompanying report of the Secretary of State and to the views of the Department of Agriculture therein presented.

WOODROW WILSON.

THE WHITE HOUSE,
Washington, August 21, 1916.

REPORT OF THE SECRETARY OF STATE.

DEPARTMENT OF STATE,
Washington, August 17, 1916.

The PRESIDENT:

The undersigned, the Secretary of State, has the honor to lay before the President, with a view to its transmission to the Senate, if his judgment approve thereof, to receive the advice and consent of that body to its ratification, a convention between the United States and Great Britain for the protection of migratory birds in the United States and Canada, signed at Washington on August 16, 1916.

This convention is the result of negotiations initiated with the British ambassador at Washington in pursuance of the resolution adopted by the Senate on July 7, 1913, "That the President be requested to propose to the Governments of other countries the negotiation of a convention for the protection and preservation of birds."

The Department of Agriculture has taken keen interest in the negotiations, and has been of great help in their final conclusion. The views of that department regarding the negotiation of this treaty were expressed in a communication recently addressed to this department, as follows:

Not very many years ago vast numbers of waterfowl and shorebirds nested within the limits of the United States, especially in the far West, but the extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen, have so altered conditions that comparatively

few migratory game birds nest within our limits. The greater part of the supply still remaining, the value of which must be estimated at many millions of dollars, breed largely in the Canadian provinces and consist of birds that winter within or to the south of the United States and journey back and forth in autumn and spring across our territory.

That a very great number of people in the United States are personally interested in the protection of our migratory wild birds is evidenced by the fact that there are about 5,000,000 sportsmen in this country and their number is steadily increasing. These men are all dependent upon the continuance of our supply of wild fowl for their sport, and a very large number of them are in consequence taking an active interest in the present treaty. In addition the value of the proper protection of our migratory insectivorous birds is of the deepest interest to farmers for the practical assistance they give in destroying insects injurious to crops. Furthermore, millions of people in the United States are deeply interested in the conservation and increase of our bird life from an esthetic viewpoint, as well as on account of their practical utility. As a result the number of persons who approve and are deeply interested in the conclusion and enforcement of the present treaty includes many millions. There is no question but that the Federal migratory bird law and the present treaty for the protection of migratory wild fowl now being negotiated between the United States and Canada are conservation measures of prime importance.

Respectfully submitted.

ROBERT LANSING.

CONVENTION.

Whereas many species of birds in the course of their annual migrations traverse certain parts of the United States and the Dominion of Canada; and

Whereas many of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops, in both the United States and Canada, but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds;

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas, Emperor of India, being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects, and to the end of concluding a convention for this purpose have appointed as their respective plenipotentiaries:

The President of the United States of America, Robert Lansing, Secretary of State of the United States; and

His Britannic Majesty, the Right Honorable Sir Cecil Arthur Spring Rice, G. C. V. O., K. C. M. G., etc., His Majesty's ambassador extraordinary and plenipotentiary at Washington;

Who, after having communicated to each other their respective full powers which were found to be in due and proper form, have agreed to and adopted the following articles:

ARTICLE I.

The High Contracting Powers declare that the migratory birds included in the terms of this Convention shall be as follows:

1. Migratory Game Birds:

(*a*) Anatidæ or waterfowl, including brant, wild ducks, geese, and swans.

(*b*) Gruidæ or cranes, including little brown, sandhill, and whooping cranes.

(*c*) Rallidæ or rails, including coots, gallinules and sora and other rails.

(*d*) Limicolæ or shorebirds, including avocets, curlew, dowitchers, godwits, knots, oyster catchers, phalaropes, plovers, sandpipers, snipe, stilts, surf birds, turnstones, willet, woodcock, and yellowlegs.

(*e*) Columbidæ or pigeons, including doves and wild pigeons.

2. Migratory Insectivorous Birds: Bobolinks, catbirds, chickadees, cuckoos, flickers, flycatchers, grosbeaks, humming birds, kinglets, martins, meadowlarks, nighthawks or bull bats, nut-hatches, orioles, robins, shrikes, swallows, swifts, tanagers, titmice, thrushes, vireos, warblers, wax-wings, whippoorwills, woodpeckers, and wrens, and all other perching birds which feed entirely or chiefly on insects.

3. Other Migratory Nongame Birds: Auks, auklets, bitterns, fulmars, gannets, grebes, guillemots, gulls, herons, jaegers, loons, murres, petrels, puffins, shearwaters, and terns.

ARTICLE II.

The High Contracting Powers agree that, as an effective means of preserving migratory birds there shall be established the following close seasons during which no hunting shall be done except for scientific or propagating purposes under permits issued by proper authorities.

1. The close season on migratory game birds shall be between March 10 and September 1, except that the close season on the Limicolæ or shorebirds in the maritime Provinces of Canada and in those States of the United States bordering on the Atlantic Ocean which are situated wholly or in part north of Chesapeake Bay shall be between February 1 and August 15, and that Indians may take at any time scoters for food but not for sale. The season for hunting shall be further restricted to such period not exceeding three and one-half months as the High Contracting Powers may severally deem appropriate and define by law or regulation.

2. The close season on migratory insectivorous birds shall continue throughout the year.

3. The close season on other migratory nongame birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres and puffins, and their eggs, for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

ARTICLE III.

The High Contracting Powers agree that during the period of ten years next following the going into effect of this Convention, there shall be a continuous close season on the following migratory game birds, to-wit:

Band-tailed pigeons, little brown, sandhill and whooping cranes, swans, curlew and all shorebirds (except the black-breasted and golden plover, Wilson or jack snipe, woodcock, and the greater and lesser yellowlegs); provided that during such ten years the close seasons on cranes, swans and curlew in the Province of British Columbia shall be made by the proper authorities of that Province within the general dates and limitations elsewhere prescribed in this Convention for the respective groups to which these birds belong.

ARTICLE IV.

The High Contracting Powers agree that special protection shall be given the wood duck and the eider duck either (1) by a close season

extending over a period of at least five years, or (2) by the establishment of refuges, or (3) by such other regulations as may be deemed appropriate.

ARTICLE V.

The taking of nests or eggs of migratory game or insectivorous or non-game birds shall be prohibited, except for scientific or propagating purposes under such laws or regulations as the High Contracting Powers may severally deem appropriate.

ARTICLE VI.

The High Contracting Powers agree that the shipment or export of migratory birds or their eggs from any State or Province, during the continuance of the close season in such State or Province, shall be prohibited except for scientific or propagating purposes, and the international traffic in any birds or eggs at such time captured, killed, taken, or shipped at any time contrary to the laws of the State or Province in which the same were captured, killed, taken, or shipped shall be likewise prohibited. Every package containing migratory birds or any parts thereof or any eggs of migratory birds transported, or offered for transportation from the Dominion of Canada into the United States or from the United States into the Dominion of Canada, shall have the name and address of the shipper and an accurate statement of the contents clearly marked on the outside of such package.

ARTICLE VII.

Permits to kill any of the above-named birds which, under extraordinary conditions, may become seriously injurious to the agricultural or other interests in any particular community, may be issued by the proper authorities of the High Contracting Powers under suitable regulations prescribed therefor by them respectively, but such permits shall lapse, or may be cancelled, at any time when, in the opinion of said authorities, the particular exigency has passed, and no birds killed under this article shall be shipped, sold, or offered for sale.

ARTICLE VIII.

The High Contracting Powers agree themselves to take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention.

ARTICLE IX.

The present Convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible and the Convention shall take effect on the date of the exchange of the ratifications. It shall remain in force for fifteen years, and in the event of neither of the High Contracting Powers having given notification, twelve months before the expiration of said period of fifteen years, of its intention of terminating its operation, the Convention shall continue to remain in force for one year and so on from year to year.

In faith whereof, the respective Plenipotentiaries have signed the present Convention in duplicate and have hereunto affixed their seals.

Done at Washington this sixteenth day of August, one thousand nine hundred and sixteen.

[SEAL.] ROBERT LANSING.

[SEAL.] CECIL SPRING RICE.

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