The Commonwealth of Massachusetts.

Commissioners on fisheries and game

A REPORT

UPON

THE MOLLUSK FISHERIES

OF

MASSACHUSETTS.

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The Oyster Laws.

In submitting a complete report upon the oyster industry, the oyster laws, which have played an important part in the development of the fishery, cannot be totally neglected. However, so important a subject demands separate investigation, and offers excellent opportunities for legal research. Therefore it is not the purpose of this report to give more than a brief account of the present oyster laws and their history.

The shellfish laws of Massachusetts constitute the foundation of the oyster industry, as they have taken a practically extinct native fishery and have built up the present extensive business. So closely are they connected with its welfare that the future of this growing industry depends upon the proper expansion of these laws to meet the new conditions.

A survey of these oyster laws, with an analysis of their merits and defects, is needed. Their defects have brought about the present unsatisfactory situation in certain localities, and should be remedied. Their merits should be strengthened and amplified, as the basis of future expansion. They have come into being from time to time, in response to the immediate need of the hour; consequently they have no unity, and are, indeed, but imperfectly understood. An insight into their perplexing details should bring out many inconsistencies. Again, no comprehensive knowledge of the history of the industry is possible without a study of the laws. The errors once committed need not be repeated to further embarrass the industry, and the lessons learned by experience would be well applied to its future development.

Protective and Constructive Laws. — The oyster laws can be divided into two classes: (1) protective; and (2) constructive. The early laws, which were passed to save the natural supply, were of the first class; while the laws establishing the present system of oyster culture come under the second heading. The beginnings of all legislative enactment arose in the treatment of the natural oyster beds. These beds were fast becoming exhausted, when laws were passed to protect their important natural resources. This measure was only partially successful. It did succeed in preserving the remnant of those old beds from destruction, but it was powerless to build up an industry of any extent. When it became clearly evident that no possible fostering of native resources could supply the growing demands of the market, legislation quite logically directed itself toward the artificial propagation of oysters. From this step arose a series of problems which long proved baffling, and still engross a great deal of public attention. The artificial propagation of oysters necessitated the leasing of grants in tidal waters. This giving up of public property to private individuals aroused the opposition of rival shellfish industries, who saw in this measure a curtailment of their resources. Numerous other difficulties of minor significance arose from time to time, all demanding attention at the hands of the Legislature.

Apart from the general supervision of the oyster industry, there have been two other sources of legislative enactment. First, special laws have been called for to regulate the fishery in certain waters under the oversight of the State Board of Health. Secondly, during the past few years the attention of the Legislature has been directed towards the development of the oyster fishery as an important asset of the Commonwealth, and laws authorizing various experiments, both scientific and practical, have been passed in order to devise methods of increasing and developing the industry.

I. *Protective Laws.* — The history of the oyster laws of Massachusetts is a history of the industry itself. The rise and decline of the fishery are distinctly traceable in the development of the legal machinery which regulates it. From the time of the Pilgrims the oyster

beds of the coast had been regarded as inexhaustible mines. The fallacy of this view gradually became apparent, as these beds began to be depleted through overfishing. As early as 1796 a general law, entitled "An act to prevent the destruction of oysters and other shellfish," was passed by the Legislature. Prior to 1869 the town of Harwich adopted this old law. Shortly after, Swansea followed suit, and restricted the exploitation of her native oyster beds in the Lee and Cole rivers. In 1870 Wellfleet inaugurated an innovation, in the nature of a permit to take oysters, which was required of all citizens of the town. The idea of this permit was to regulate the fishery, centralize control in the hands of the selectmen and add to the income of the town. In 1873 Sandwich passed a law enforcing a close season on all her native beds, to last for a period of one year. In 1875 Brewster followed the lead of Wellfleet, in demanding permits of all outsiders and also from all citizens taking more than 3 bushels at any one time, although an unlimited amount might be taken for food.

The aim of all this legislation was not to develop the industry directly, but indirectly by preserving and fostering the native beds. This theory, while excellent in motive, did not work out well, as the native beds could not by any possible protection be brought to produce an annual yield at all adequate to the growing demands of the market.

The utilization of purely natural resources proving unequal to the demands of the occasion, the creation of other resources became necessary, and an entirely new epoch in the history of the oyster fishery was inaugurated. This epoch marked the beginning of the production of oysters by artificial means, and the establishment of this new industry and the perplexing complications which grew out of it have been the source of legislative strife for many years.

II. *Constructive Laws.* — The first legislation authorizing the present system of oyster culture was instituted at Swansea, in 1869. This was the beginning and the foundation of a broad movement of oyster culture which spread rapidly along the southern coast of the State. This curious law allowed the selectmen to sell, by public or private sale, the oyster privilege of Swansea outright to any person or persons who were citizens of the town. The measure, although apparently designed to restrict the exhaustion of the native resources, did not tend to develop the industry. It possessed one element of value, *i.e.,* it increased the revenue of the town. Apart from its interest as the forerunner of artificial propagation of oysters, this old law is noteworthy, as it forms the basis of the system which to-day regulates the industry in that section of the country. The custom of selling an extensive oyster privilege, as apart from the system of leasing grants, first clearly outlined in the law of 1869, still holds throughout this section. It remains the usual custom to sell either the whole of a township's available oyster territory, or else an extensive part of it, to one man for a lump sum per year.

In 1874 an important step occurred in the evolution of the oyster industry. Swansea and Somerset were given the privilege of granting any of their bays, shores, banks and creeks for the propagation of oysters. This act was far more sweeping and advanced than any of its predecessors, but it was in one respect too sweeping. It interfered with the rights of the property owners along the shore, and was therefore contrary to the general underlying principle of the State law, which allows the cultivation of oysters only in so far as such cultivation does not interfere with the vested rights of all citizens alike. The measure proved untenable, and was promptly repealed. Its repeal was on general principles a thing to be desired, but nevertheless a blow to the industry. The tidal waters along the coast have always been the most valuable part of the oyster territory, as they have proved to be the best adapted for obtaining "oyster set." This measure was therefore designed to aid the oyster growers, and give them valuable privileges which belonged originally to the adjoining property owners. Even to the present day the dividing line between the rights of property owners and oystermen has remained an unsettled question.

It was about this time that the close season proved a failure in Buzzards Bay, and the towns of Wareham, Bourne and Marion turned their attention toward the establishment of an oyster industry. This attempt became a settled policy of these towns about 1875.

In 1878 a peculiar act was passed, making it unlawful for any person to remove oysters from any grant, even his own, between the hours of sunset and sunrise. This act was necessary for the protection of the oyster planters, by preventing the stealing of oysters from the grant at night. Various efforts had been made to protect grants from such attacks, but the extreme difficulty of detection was always an insuperable obstacle to proper enforcement, and it was deemed expedient to prohibit all fishing at night. That this problem had become an important one is shown by the title of the law, which was styled "An act for the better protection of the oyster fisheries in this commonwealth.

In 1884 an important act was passed, enlarging the limits of that territory which might lawfully be used for the cultivation of oysters. Practically all communal waters outside the jurisdiction of adjacent land owners was thrown open for oyster grants.

In 1885 the institution of a public hearing was inaugurated. This was a concession to the hostile quahaug element, and allowed the public the opportunity of protesting against the granting of territory for oyster culture; nevertheless, the final power really remained in the hands of the selectmen. A further concession to this element was the law which called for the revoking of grants within two years if unimproved. The interests of the oystermen were also kept in sight, and legislation passed which was designed to protect grants still more from the depredations of outsiders. Provision was likewise made for the proper enforcement of these laws, and the penalties attached were increased.

In 1886 an act was passed which was designed to do away with all possible outside monopoly. The danger of organized capital acquiring control of a large tract and excluding small individual planters had become apparent, and this means was taken to guard against it. The act prohibited the transfer of grants in any township to any person not a citizen of that township; thus, if any monopoly did exist it would be restricted to only one township. The limits during which fishing on grants might be carried on was lengthened two hours, so that it read from "one hour before sunrise to one hour after sunset."

In 1892 the town of Yarmouth obtained a law requiring a permit for citizens to take oysters from native beds, not exceeding 2 bushels per week, from September 1 to June 1. This is now the only town in the Commonwealth to require such a permit from citizens.

In 1895 legislation was passed relative to the proper definition of the boundaries of grants. This was rendered necessary because of the haphazard methods hitherto pursued in giving grants with very indefinite boundaries. Mean low-water mark was fixed as the shoreward boundary of grants, while mean high-water mark was defined as the limit to which shells might be placed to catch the set. This, however, was dependent upon the owners of the adjacent property, and their consent was held necessary before this territory between high and low water could thus be utilized.

In 1901 special legislation was passed, restricting the catching of oysters in contaminated waters except for bait.

In 1904 authority was granted to proper officials to develop the oyster industry by planting shellfish, or by close season.

In 1905 the Fish and Game Commission was authorized to expend a sum not exceeding $500 per annum for the investigation of the oyster, by experiment or otherwise, with a view to developing the industry.

The development of the oyster laws has been by a process of evolution. They have kept pace with the growth of the industry, and have been in fact the logical outcome of that expansion. The various acts which go to make up the bulk of this legislation have been passed from time to time to fill the immediate demands of the hour, and consequently lack that unity and consistency which might otherwise characterize them. Changing conditions have called for alterations in the legal machinery, as the industry has expanded, to meet new requirements. These additions have frequently been dictated by shortsighted policy, and the Commonwealth as a whole has often been lost sight of in the welfare of the community.

Of all the shellfisheries, the oyster industry is most hampered by unwise legislation. It is the most difficult to handle, because it presents many perplexing phases from which the others are free. Clams, quahaugs and scallops flourish in their respective territories, and legislation merely tends to regulate their exploitation or marketing. With the oyster, however, other problems have arisen. The areas in the State

where oysters grow naturally are few in number and relatively of small importance. The clam, quahaug and scallop grounds are to be compared with wild pastures and meadows, which yield their harvests without cultivation; while the oyster grants are gardens, which must be planted and carefully tended.

With this distinction arises another question, of far-reaching significance, — the question of private ownership. The quahaug, clam and scallop fisheries demand that the tidal flats and waters be held in common as communal interests, and freely open to all citizens of the town; the oyster fishery requires that certain portions of these flats and waters be set aside for private ownership. With the economic questions involved in this discussion it is not the purpose of this report to deal. There is one fact, in any case, which cannot be argued away. The oyster industry is dependent solely upon private ownership of grants. If, therefore, the oyster industry is to be encouraged at all, — and it certainly has very great possibilities, — this fact of private ownership must be accepted at once. If, as some assert, it is an evil, it is a necessary evil, and it has come to stay. The questions remaining for legislation on this subject are the proper regulation of this private ownership, so as to give the maximum of encouragement to the oyster fishery, and the minimum of danger to the rival shellfish industries.

The oyster and quahaug industries openly clash. This is an unfortunate occurrence, but it cannot be avoided, since the ground suitable for the culture of oysters is almost always the natural home of the quahaug. Therefore, when portions of this ground are given out to private individuals for the production of oysters, the available quahaug territory is necessarily reduced. Over this question endless disputes have arisen. The problem is undoubtedly one requiring delicate adjustment; but there is no reason why these two industries should not flourish side by side, as there would be plenty of room for both if all the available territory were properly utilized.

There is one important feature of this problem, however, which the present laws have wholly failed to recognize. Wherever practicable, the best of the quahaug territory should not be granted; and as far as possible, the oystermen should utilize only those tracts of territory which are not naturally very productive of quahaugs.