

Circuit Court, E.D. Pennsylvania.

CORFIELD
v.
CORYELL.

April Term, 1823.

WASHINGTON, Circuit Justice. The points reserved present for the consideration of the court, many interesting and difficult questions, which will be examined in the shape of objections made by the plaintiff's counsel to the seizure of the Hiram, and the proceedings of the magistrates of Cumberland county, upon whose sentence the defendant rests his justification of the alleged trespass. These objections are,----

First. That the act of the legislature of New Jersey of the 9th of June 1820, under which this vessel, found engaged in taking oysters in Maurice river cove by means of dredges, was seized, condemned, and sold, is repugnant to the constitution of the United States in the following particulars: 1. To the eighth section of the first article, which grants to congress the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. 2. To the second section of the fourth article, which declares, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. 3. To the second section of the third article, which declares, that the judicial power of the United States should extend to all cases of admiralty and maritime jurisdiction.

In case the act should be considered as not being exposed to these constitutional objections, it is then insisted,

Secondly. That the locus in quo was not within the territorial limits of New Jersey. But if it was, then.

Thirdly. It was not within the jurisdiction of the magistrates of Cumberland county.

Fourthly. We have to consider the objection made by the defendant's counsel to the form of this action.

The first section of the act of New Jersey declares, that, from and after the 1st of May, till the 1st of September in every year, no person shall rake on any oyster bed in this state, or gather any oysters on any banks or beds within the same, under a penalty of \$10. Second

section: No person residing in, or out of this state, shall, at any time, dredge for oysters in any of the rivers, bays, or waters of the state, under the penalty of \$50. The third section prescribes the manner of proceeding, in cases of violations of the preceding sections. The two next sections have nothing to do with the present case. The sixth section enacts, that it shall not be lawful for any person, who is not, at the time, an actual inhabitant and resident of this state, to gather oysters in any of the rivers, bays, or waters in this state, on board of any vessel, not wholly owned by some person, inhabitant of, or actually residing in this state; and every person so offending, shall forfeit \$10, and shall also forfeit the vessel employed in the commission on such offence, with all the oysters, rakes, &c. belonging to the same. The seventh section provides, that it shall be lawful for any person to seize and secure such vessel, and to give information to two justices of the county where such seizure shall be made, who are required to meet for the trial of the said case, and to determine the same; and in case of condemnation, to order the said vessel, &c. to be sold.

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2. The next question is, whether this act infringes that section of the constitution which declares that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?' The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, *552 and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of

the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.' But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens. A several fishery, either as the right to it respects running fish, or such as are stationary, such as oysters, clams, and the like, is as much the property of the individual to whom it belongs, as dry land, or land covered by water; and is equally protected by the laws of the state against the aggressions of others, whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state. It is the property of all; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.

This power in the legislature of New Jersey to exclude the citizens of the other states from a participation in the right of taking oysters within the waters of that state, was denied by the plaintiff's counsel, upon principles of public law, independent of the provision of the constitution which we are considering upon the ground, that they are incapable of being appropriated until they are caught. This argument is unsupported, we think, by authority. Rutherford, bk. 1, c. 5, §§ 4, 5, who quotes Grotius as his authority, lays it down, that, although wild beasts, birds, and fishes, which have not been caught, have never in fact been appropriated, so as to separate them from the common stock to which all men are equally entitled, yet where the exclusive right in the water and soil which a person has occasion to use in

taking them is vested in others, no other persons can claim the liberty of hunting, fishing, or fowling, on lands, or waters, which are so appropriated. 'The sovereign,' says Grotius (book 2, c. 2, § 5), 'who has dominion over the land, or waters, in which the fish are, may prohibit foreigners (by which expression we understand him to mean others than subjects or citizens of the state) from taking them.' That this exclusive right of taking oysters in the waters of New Jersey has never been ceded by that state, in express terms, to the United States, is admitted by the counsel for the plaintiff; and having shown, as we think we have, that this right is a right of property, vested either in certain individuals, or in the state, for the use of the citizens thereof, it would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other states. Such a construction would, in many instances, be productive of the most serious public inconvenience and injury, particularly, in regard to those kinds of fish, which, by being exposed to too general use, may be exhausted. The oyster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other states from taking them, except under such limitations and restrictions as the laws may prescribe.