36.—AN IMPORTANT FISH-WAY CAUSE.

By MERWIN P. SNELL.

The case of William Parker *versus* The People of the State of Illinois has come to the supreme court of Illinois on a plea of error from the circuit court of Kendall County. It is a somewhat important one from a fish-cultural point of view, as it involves the question whether or not a land-owner upon an unnavigable stream can acquire a prescriptive right to obstruct the passage of fish by a dam which has no fish-way.

Mr. William Parker, the plaintiff in error, owns a flour mill and a furniture factory, which are situated upon his own land, on opposite sides of the Fox River, in Kendall County, the necessary machinery being moved by water-power supplied through the means of a dam with a six-foot head. An Illinois statute, similar to ones existing in many of the States, makes it the duty of all persons owning or erecting dams to furnish them with suitable fish-ways, so that the migrating species of fish may have free passage to and from their spawning-grounds. Mr. Parker, convicted before a justice of the peace for a violation of this act, appealed to the circuit court, in which judgment being rendered against him, he prosecutes a writ of error in the supreme court of the State.

The rather elaborate argument of the counsel for the people, Messrs. Eugene Canfield and R. P. Goodwin, appears in the Forest and Stream for April 5, 1883, under the heading The Fox River Fish-way Case.

It had been claimed in behalf of Mr. Parker that the stream not being a navigable one, the right of fishing therein did not belong to the public, but was vested in the riparian proprietors, and that, as the dam had been in existence for about fifty years without having caused any complaint on the part of the other proprietors, its owner had acquired against them a prescriptive right to prevent the passage of fish.

It was also held that the general act under which he was prosecuted was unconstitutional, since it impaired the obligations of the contract contained in a certain private act, passed in 1857, which allowed one of his remote grantors the right to increase the height of the dam in question, and thus to cause the water of the stream to overflow the lands of neighboring proprietors, upon making due reparation.

This latter branch of the argument has little general interest, as the case is in this particular an unusual one, and the disputed points are outside the range of what may be properly termed fishery law; it will be sufficient to say that the counsel for the people seem to have demonstrated, not only that nothing secured by the private act was affected by the provision regarding the erection of fish-ways, but that the private act itself had become void on the adoption of the State constitution of 1870.

The first point, however, is one of considerable interest, and it may be worth while to present the principal points of the argument in detail.

I. It is claimed by the plaintiff in error that, the stream being unnavigable, the question is one of private right, in which the people of the State at large have no interest.

On the part of the people it is held: (1) That the fish, which are called "game fish" in the statutes of the State, are game in the same sense that birds and mammals not domesticated are (*vide* Phelps *vs.* Racey, 60 N. Y., 10), and have the same legal status. The fact that they live in the water instead of in the air or upon the land makes no difference. (2) "The ownership of all fish and game which are free or not domesticated within the State, is in the State as the sovereign power, * * * the right of capture being * * * a mere boon, expressly or impliedly permitted by the State to the citizen, to be limited or revoked at pleasure (Wagner *vs.* The People, 97 Ill., 320)." (3) "This being so, the prescriptive rights claimed against the riparian owners who happen in this regard to be injuriously affected by the obstruction to the free passage of fish amount to nothing. If, outside of the question of prescription, the State, under what is called the police power, has a right to regulate the passage of fish in the natural streams of the State for the benefit of the people, or any portion of them, no prescriptive right can be set up by one who maintains an obstruction in such a stream against the will of the legislature expressed under the forms required by its organic law. One who had owned and occupied land in this State for twenty years before the enactment of the first act of our legislature making it unlawful to kill prairie chickens during a certain portion of the year, might as well be allowed to set up as a defense to a prosecution for violating the act, that he had for the entire period of twenty years killed every bird of that species which had come upon his land during the prohibited season, and so had a prescriptive right to set the law of the State at defiance."

II. It is claimed by the plaintiff that since the right concerned is a private one, it may be prescribed for like other private rights; and he having exercised it freely for nearly half a century, may clearly claim it now by prescription.

On the other hand, leaving out the question of the police power of the State, mentioned in the quotation just above, it is held: (1) That it is well established that the time giving the right to any servitude (as in this case giving to the owner of the dam the right to prevent fish by it from reaching the lands of his neighbors) "does not begin to run until the injury is done and becomes apparent." (See Washburn on Easements, pp. 128, 129, 355, 468, and 530.) (2) That "it was not until a very recent period that it became known that the spawning beds of the most valuable fish which naturally frequent the stream in question, which largely supply this stream, were the bayous and overflowed lands along the Illinois and Mississippi Rivers, and that these mill-dams in any very

material respect tended to the depopulation of the streams of such fish." (3) That, since the injury must be apparent when the time giving the prescriptive right commences to run (1), and since the injury in this case was not apparent until shortly before the time when the right was called in question (2), it must follow that Mr. Parker cannot claim a prescriptive right to obstruct the passage of fish by his dam. (4) That no one can prescribe for a public nuisance (Washburn on Easements, p. 481). *a.* "The appropriation to one's self of public property which should be common to all is a *purpestre* and a public nuisance (Wood on Nuisances, § 14; Downing *vs.* The City of Aurora, 40 Ill., 481)." *b.* "The fouling of a stream with waste from mills, like sawdust and the like, is of the same character (Weazie *vs.* Divinel, 50 Minn., 495, 496; David *vs.* Winslow, 51 Maine, 93; Gerrick *vs.* Brown, *Ib.*, 256)." *c.* "From these cases it appears that any use of property in a stream which violates that 'golden rule of the law' (State *vs.* Glen, 7 Jones, N. C., 327) *Sic utere tuo ut non alienum lædas*, especially when it affects a large number of the citizens of the State, constitutes a nuisance." *d.* Hence the right to maintain an impassable dam, and thus deprive a water-course of fish, is a public nuisance and cannot be prescribed for.

This is a test case, and upon its decision may largely depend the success or failure of the efforts which are being made for the restocking of those waters of the State concerned from which the most highly-esteemed food-fishes have been driven by the encroachments of the manufacturing interests. It is somewhat doubtful whether the common law recognizes fish in an unnavigable stream to be in any sense public property, and if it shall be held that the owner of a dam may acquire by prescription a right to interrupt by its means the migrations of fish, in the face of a law requiring the erection of fish-ways, the latter will become a dead letter and the good end for which it was devised will fail of accomplishment. It does not seem probable, however, that such a decision will be made, especially in view of the opinion of the Supreme Court of the United States in the case of Holyoke County *vs.* Lyman (15 Wallace, 500), which is cited by Messrs. Canfield and Goodwin in that portion of their argument bearing upon the question of the private act mentioned in the first part of this article. They observed that by the Supreme Court "it was held that the right to have migratory fishes pass in their accustomed course up and down rivers and streams, though not technically navigable, was a public right, and might be regulated and protected by the legislature in such a manner, through such officers, and by means of such form of judicial process, as it might deem appropriate; and that every grant of the right to maintain a mill-dam across a stream where such fish are accustomed to pass is subject to the condition or limitation that a sufficient and reasonable way shall be allowed for the fish, unless cut off by express provision or obvious implications in the grant."