INDEX.

AUTHORITIES CITED.

STATUTES CITED.

CONSTITUTION.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE STATE OF MISSOURI, APPELLANT,
v.
RAY P. HOLLAND, UNITED STATES GAME WARDEN. } No. 609.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEE.

This is an appeal from a decree of the District Court dismissing a bill filed by the State of Missouri against a United States game warden, seeking to enjoin the enforcement of an Act of Congress known as the Migratory Bird Law. 40 Stat., c. 128, p. 755.

HISTORY OF THE CASE.

In 1913 Congress, recognizing the necessity of preserving the bird life of the country, and also recognizing that in the case of birds which migrated and remained in one section during a part of the year and in another section or another country during other parts of the year the States could not afford adequate protection, passed an Act intended to protect such

migratory birds. 37 Stat., c. 145, pp. 828, 847. In criminal prosecutions commenced under this Act in two districts the District Courts held the Act unconstitutional because beyond the power of Congress. *United States* v. *Shauver*, 214 Fed., 154; *United States* v. *McCullagh*, 221 Fed., 288. In the *Shauver* case, supra, the court sustained a demurrer to an indictment, and the case was brought to this court on writ of error. It was argued at the October Term, 1915, but was later remanded by the court for reargument. In the meantime, however, a treaty with Great Britain was negotiated for the purpose of protecting, by the action of both countries, such birds as customarily migrated at different seasons of the year between Canada and the United States. 39 Stat., Part 2, p. 1702. And later Congress passed an Act to give effect to this treaty. 40 Stat., c. 128, p. 755. Since this statute superseded that of 1913 and established, for the future, the rule of law, the Government did not regard a decision of the *Shauver* case of sufficient importance to justify further prosecution, and hence dismissed its writ of error.

The State of Missouri, claiming to be the owner, as trustee for all its people, of wild game and birds within its borders, filed its bill to enjoin the enforcement of the later act of Congress.

THE TREATY.

The purpose sought to be accomplished by the treaty is recited in the preamble as follows:

> 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; * * * .

Article I contains an enumeration of three general classes of birds which are included in the terms of the convention:

1. Migratory game birds.
2. Migratory insectivorous birds.
3. Other migratory nongame birds.

Article II provides for close seasons, during which no hunting shall be done except for scientific or propagating purposes under permits issued by proper authorities. The close season on migratory game birds, with certain exceptions, is to be between March 10 and September 1, with a provision that 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. The close season on migratory insectivorous birds is to continue throughout the year. The close season on other migratory nongame birds is to continue throughout the year, with a certain exception in favor of the Eskimos and Indians.

Article III provides that during a period of ten years following the going into effect of the Convention, there shall be a continuous close season on certain migratory game birds, which are enumerated.

Article IV provides that special protection shall be given the wood duck and the eider duck, either by a close season extending over a period of at least five years or by the establishment of refuges, or by such other regulations as may be deemed appropriate.

Article V prohibits the taking of nests or eggs of migratory game or insectivorous or nongame birds, except for scientific or propagating purposes.

Article VI contains provisions against the shipment or export of migratory birds or their eggs.

Article VII provides for permits to kill any of the above-named birds under extraordinary conditions.

Article VIII is as follows:

> 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 Covention.

Article IX provides that after ratification the treaty shall remain in force for 15 years, and in the event of neither of the High Contracting Powers having given notification, 12 months before the expiration of the period of 15 years, of its intention to terminate the same, the convention shall continue to remain in force for one year and so on from year to year.

This treaty went into effect on December 8, 1916.

THE ACT OF CONGRESS.

The Act in question is entitled—

> An Act to give effect to the convention between the United States and Great Britain for the protection of migratory birds concluded at Washington, August sixteenth, nineteen hundred and sixteen, and for other purposes.

It follows closely the provisions of the treaty, makes unlawful the things which the treaty provided should be unlawful, and authorizes the Secretary of Agriculture to make proper regulations for carrying into effect the terms of the Act. The Secretary of Agriculture promulgated a set of regulations. No question is made that either the Act or the regulations contain any provision which was not required by the terms of the treaty. They both conflict, however, with some of the provisions of the game laws of the State of Missouri.

QUESTION INVOLVED.

The sole question involved is whether the Act of Congress, the enforcement of which is sought to be enjoined, is a valid Act.

CONTENTIONS OF APPELLANT.

The appellant contends that—

1. In the absence of a treaty, the protection of game within a State is exclusively within the legislative powers of the State and wholly without the power of Congress.

2. The right of a State to regulate the taking of game within its borders can not be curtailed by a treaty between this country and a foreign country.

CONTENTIONS OF THE APPELLEE.

On the other hand, it is contended that—

1. Even if no treaty had been made on the subject, Congress has power to protect migratory birds which are in one State or country during a part of the year and in another during the remainder of the year.

2. Even if Congress, in the absence of a treaty, would be without power to enact legislation of this kind, the protection of migratory birds is a proper matter of negotiation between the countries interested in such birds, and a treaty made for the purpose of affording such protection is operative throughout the United States and supersedes State laws on the same subject.

BRIEF.

I.

The Government insists, strenuously, as it is insisting in another case now before this court, that a State cannot become a litigant merely for the purpose of challenging the constitutionality of a criminal law of the United States operating upon those who are citizens both of the United States and of the State. In this case, however, the State grounds its right to sue upon the allegation that, as trustee for all its people, it is the owner of the game and wild birds within its borders. In substance, therefore, it is charged that the Act assailed infringes the property rights of the States, and the Government is not disposed to question the right of the State of Missouri to call in question the validity of

this Act of Congress and invoke the decision of the Federal courts.

II.

THE ACT OF 1913, INVOLVED IN THE SHAUVER CASE, WAS A CONSTITUTIONAL EXERTION OF POWER BY CONGRESS. THE PRESENT ACT WOULD, THEREFORE, BE VALID, EVEN IF ITS PROVISIONS HAD NOT BEEN ENACTED FOR THE PURPOSE OF GIVING EFFECT TO A TREATY.

While the power of the Federal Government to protect by regulating the killing of migratory birds is so clearly included in the treaty-making power that it can scarcely be necessary in this case to determine what power Congress would have over this subject, in the absence of a treaty, it is insisted that, independent of the treaty, there was ample power to enact the legislation now in question.

This contention rests upon two propositions:

1. A migratory bird law of this kind is authorized by the second paragraph of section 3 of Article IV of the Constitution, which provides that—

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

2. Such a migratory bird law is authorized under the grant to Congress in paragraph 3 of Section 8 of Article I of the Constitution of power—

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The views of the Government in support of these two propositions were clearly and exhaustively set

out in the brief filed by former Solicitor General Davis and former Assistant Attorney General Underwood in the *Shauver* case, *supra*, at the October term, 1915. After a careful perusal of this brief and a study of the questions involved, it can scarcely be hoped to present the case more forcibly than it was then presented. The arguments contained in that brief, therefore, will be printed as Appendix A to this brief and as the Government's argument in support of the two propositions above set out. There will likewise be reprinted from that brief as Appendix B certain excerpts from official publications of the Department of Agriculture and from writings of ornithologists of recognized authority, showing the value of migratory game and insectivorous birds and the necessity for their protection.

The arguments on this question have been further elaborated in a brief which will be filed in this case by Mr. Louis Marshall as amicus curiae.

III.

THE CONSTITUTION EXPRESSLY GRANTS TO CONGRESS THE POWER TO ENACT SUCH LAWS AS MAY BE NECESSARY TO GIVE EFFECT TO TREATIES.

The court below held that, wholly aside from all other considerations, the legislation in question is valid because enacted to put in effect a treaty. Rec., p. 7; 258 Fed. 479.

Two other District Courts have made the same ruling. *United States* v. *Thompson*, 258 Fed. 257; *United States* v. *Rockefeller*, 260 Fed. 846.

In all three of these cases the court gave to the question involved the most careful consideration, and rendered exhaustive opinions. The three opinions delivered in these cases so fully and clearly cover the case that what is said in this brief can be little more than a restatement of what these three learned judges have so well said. Their decisions sustain the legislation in question as being the exertion of a power not merely implied but expressly conferred upon Congress by the Constitution.

No one doubts that the Federal Government possesses the power to make treaties. Article II, Section 2, Clause 2 of the Constitution, in enumerating the powers of the President, provides that—

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.

It is equally clear that whatever treaty-making power this country possesses is vested exclusively in the Federal Government, for Article I, Section 10, Clause 1 of the Constitution provides that—

> No State shall enter into any Treaty, Alliance, or Confederation.

The effect to be given a treaty is determined by Article VI, Clause 2 of the Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

> United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

What we are dealing with now, however, is an act of Congress creating criminal offenses. It is, of course, conceded that Congress has no legislative powers except such as have been expressly, or by necessary implication, conferred by the Constitution. These legislative powers are enumerated in Section 8 of Article I, and the concluding paragraph of that Section is:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Since, as shown above, the power to make treaties is conferred upon the President and the Senate, there is here a power *expressly* given to the Congress to make all laws which shall be necessary and proper for carrying into execution any treaty lawfully made by the President and ratified by the Senate. Such a treaty becomes a part of the supreme law of the land, and, being so, Congress has the power to enact legislation necessary to carry into effect its provisions.

The supreme law of the land and of all the States is the Constitution of the United States and the laws constitutionally enacted by Congress and treaties

made under the authority of the United States together with the necessary laws enacted by Congress for carrying into execution such treaties. Necessarily, then, an act of Congress is valid if it is the exertion of one of the powers directly conferred by the Constitution or if its effect is to carry into execution a treaty made under the authority conferred by the Constitution upon the President and the Senate. It follows that if the effect of an act of Congress is to put into execution a valid treaty, the act itself is valid. Such legislation has always been recognized by the courts as clearly within the power of Congress.

In *Baldwin* v. *Franks*, 120 U. S. 678, the question was whether certain conspiracy statutes authorized an indictment for forcibly driving a number of Chinese from a place in California where they were living and working, upon the ground that a treaty with China provided that Chinese subjects were to be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation, and that the Government of the United States should exert all its powers to devise measures to secure to them these rights. It was held that the statutes in question were not broad enough to include the offense charged and could not, therefore, be treated as laws passed to put the treaty into execution. But it was made clear that Congress did have the power, if it chose to do so, to pass criminal laws for the purpose of

punishing those who violated rights secured by the treaty. It was said, at page 683:

> That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty, we do not doubt.

And in the case of *United States* v. *Jin Fuey Moy*, 241 U. S. 394, Mr. Justice Holmes, in construing a provision of the Act of 1914, relating to the registration and taxing of persons producing and dealing in opium, was careful to show that the provision in question was not required by any treaty between the United States and China, the clear inference being that if it had been so required the statute enacting it would have been entirely valid and the law of the land.

And in *The Chinese Exclusion Case*, 130 U. S. 581, 600, it was said:

> A treaty, it is true, is in its nature a contract between nations and is often merely promissory in its character, requiring legislation to carry its stipulations into effect.

In short, whenever a treaty operates of itself, it is to be regarded in the courts as equivalent to an act of Congress. But if it is only promissory and does not operate of itself, it is then clearly within the province of Congress to enact legislation necessary to put it into effect. *Foster and Elam* v. *Neilson*,

2 Pet. 253, 314; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 196.

Indeed, there can scarcely be a serious contention that Congress may not enact legislation to put into effect the provisions of any treaty which the President, with the advice and consent of the Senate, may lawfully negotiate, regardless of whether the subject matter is one within or without the general legislative powers of Congress. If, therefore, the bill in this case can be maintained, it must be because the President, in negotiating this treaty, has dealt with a subject matter which is beyond the treaty-making power of the United States. In other words, before the act of Congress can be held to be invalid, it must be held that the protection of birds which migrate from Canada to the United States, remaining in each country but portions of the year, is not a matter which can lawfully become the subject of a treaty between the two governments.

IV.

THE POWER OF THE STATE OVER GAME IS LIMITED BY SUCH POWERS AS HAVE BEEN CONFERRED UPON THE FEDERAL GOVERNMENT.

While a State, as trustee for its people, owns the game within its borders, its power to protect the same by regulating hunting and fishing is not unlimited. The leading case establishing the rights of the States in game is *Geer* v. *Connecticut*, 161 U. S. 519. But in that case it was said, at page 528:

> It is also certain that the power which the colonies thus possessed passed to the States

with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution.

V.

THE POWER OF CONGRESS TO LEGISLATE TO MAKE TREATIES EFFECTIVE IS NOT LIMITED TO THE SUBJECTS WITH RESPECT TO WHICH IT IS EMPOWERED TO LEGISLATE IN PURELY DOMESTIC AFFAIRS.

Speaking generally, it may be said that, under our form of government, matters of purely local concern are left to the control of State or local authorities, and matters of national concern are committed to the Federal Government. It is also true that there are two classes of national matters with which the Federal Government deals. There are many national questions affecting alone this Government or the people of the United States with which the Federal Government deals. With respect to this class of questions the line of demarcation between the powers of the State governments and those of the Federal Government is clearly marked by the Constitution. The Federal Government has only such powers of legislation as are delegated to it expressly or by necessary implication. All other powers of legislation are reserved to the States by the people thereof.

But when we come to deal with national questions affecting the interests not only of our own country but of other countries as well, we confront

a different situation. At home, we are citizens of dual sovereignties, each supreme within its own sphere. But, in our intercourse with foreign nations, we are one people and one nation. In our relations to foreign countries and their subjects or citizens, our Federal Government is one Government and is invested with the powers which belong to independent nations and which the several States would possess, if separate nations, and the exercise of these powers can be invoked for the maintenance of independence and security throughout the entire country. In war we are one people. In making peace we are one people. In all our commercial relations we are one people. And in respect to all such matters we are but one Government. That Government is invested with power over all the foreign relations of the country—war, peace, and negotiations and intercourse with other nations. *Cohens* v. *Virginia*, 6 Wheat. 264, 413; *Knox* v. *Lee*, 12 Wall. 457, 555; *The Chinese Exclusion Case*, 130 U. S. 581, 604.

In regulating or controlling purely domestic matters, the Government acts through legislation by Congress, and the limits within which the Congress may legislate are fixed by the Constitution. But, manifestly, when the Government must deal with matters in which, not this country alone, but a foreign nation is interested, an act of Congress is wholly inadequate because in no way binding upon the foreign country. Such matters can be settled and controlled only through agreements between the

two Governments. The assent and participation of a foreign government is necessary. It was for the purpose of enabling our Government to deal with matters of this kind that the treaty-making power was by the States conferred upon the Federal Government and, by their own agreement, prohibited to be exercised by the States. In negotiating a treaty, the Government is dealing with a foreign government. For that purpose, as has been seen, there is but one American Nation with one Government, and that is the Federal Government. In exercising the treaty-making power, the Federal Government acts for the entire American people, whether we regard them as citizens of the United States or as citizens of the several States, and likewise for every State. As said by this court in *Hauenstein* v. *Lynham*, 100 U. S. 483, 490:

> If the National Government has not the power to do what is done by such treaties, it can not be done at all, for the States are expressly forbidden to "enter into any treaty, alliance, or confederation."

It follows that there is no way to settle any question n which a foreign government is interested on one side, and either the United States or any of the States of the Union on the other, except through the negotiations of a treaty between the foreign government and the United States.

Since, as seen above, the power was expressly granted to Congress to enact legislation necessary and proper to put into execution a treaty, the validity of

such legislation can not depend upon whether its subject matter is included within the general legislative powers of Congress. Rather, it depends upon whether the treaty which is being enforced is within the treaty-making power of the United States.

Thus, Congress, acting independently, manifestly would have no power to establish a court with jurisdiction to sit and try cases in a foreign country. This could not, in any event, be done without the consent of the foreign country. But it has long been the practice of nations to give this consent through treaties, and, where treaties have provided for them, Congress has repeatedly authorized the establishment of such courts. Speaking of the power of our Government to provide for such tribunals, this court has said:

> It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein. (*In re Ross*, 140 U. S. 453, 463.)

In the exertion of its ordinary legislative powers, Congress can clothe no court with jurisdiction to try accused persons contrary to the constitutional guaranties such as an indictment or trial by jury. But, as held in the case just cited, when, as a result of a treaty, our consular or other officers located in foreign governments are given judicial power, trials held before them are not subject to such constitutional guaranties.

VI.

THE POWER OF THE FEDERAL GOVERNMENT TO MAKE AND ENFORCE TREATIES IS NOT A LIMITATION ON THE RESERVED POWERS OF THE STATES BUT IS THE EXERCISE OF A POWER NOT RESERVED TO THE STATES UNDER THE TENTH AMENDMENT, BEING BOTH EXPRESSLY GRANTED TO THE UNITED STATES AND PROHIBITED TO THE STATES.

By the Constitution the complete and unrestricted treaty-making power possessed by the States is expressly granted to the United States to be exercised by the President and Senate.

The exercise of such power is expressly prohibited to the States. Therefore, except as restrained by prohibitions contained in other clauses of the Constitution, the entire treaty-making power of the States was vested in the United States when that instrument was adopted in 1788.

Amendment X (thereafter adopted) reserves to the States or the people all powers not granted to the United States nor prohibited to the States.

As the treaty powers had been, as above stated, both granted to the United States and prohibited to the States, they were expressly excepted from the reservations of the Tenth Amendment, and it is wholly irrelevant.

A treaty made by the treaty-making power does not derogate from the power of any State. It is an exercise of the treaty-making power of such State in conjunction with the like powers of all of the States by their common government.

By their accession to the Constitution, each State has also covenanted that the treaties thus made shall be laws superior in obligation to the Constitution and laws of each State.

So far from the regulation by treaty of matters in which a State and a foreign country have an interest, being in derogation of state rights, because the subject matter is one which the state government could control internally, or in its relations with the other States of the Union, such regulation of the same matter in relation to a foreign country by a treaty made under the Constitution, is the exercise for the State of its power in the way and through the agency it has appointed in adopting the Constitution of the United States.

It is undoubtedly true that, generally, matters of a purely local nature are reserved for the legislative power of the States. But just what these reserved powers are depends upon the extent to which powers, either expressly or by necessary implication, are conferred upon the Federal Government. The police powers are those most generally regarded as having been reserved to the States. But, if the full exertion of any power conferred upon the Federal Government requires the exercise of police powers within the States, such powers may be exercised to the extent necessary, although they may involve an interference with what would otherwise lie exclusively within the province of the State. As said by Judge Trieber in *United States* v. *Thompson*, 258

Fed. 257, 264, in sustaining the statute now under consideration:

> Even in matters of a purely local nature, Congress, if the Constitution grants it plenary powers over the subject, may exercise what is akin to the police power, a power ordinarily reserved to the States. Thus, under the commerce clause of the Constitution, many acts of Congress have been sustained. The White Slavery Act (Act June 25, 1910, c. 395, 36 Stat. 825), *Hoke* v. *United States*, 227 U. S. 308; the Food and Drugs Act (act June 30, 1906, c. 3915, 34 Stat. 768), *Seven Cases* v. *United States*, 239 U. S. 510; the Webb-Kenyon Act (act March 1, 1913, c. 90, 37 Stat. 699), *Clarke Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311. Under the taxing power, acts of Congress have been sustained which in effect deprived the States of some of their powers. *Veazie Bank* v. *Fenno*, 75 U. S. (8 Wall.) 533; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

The treaty-making power is expressly conferred upon the President and the Senate. The power to enact laws necessary to make treaties effective is just as expressly conferred upon Congress. That the police or other powers of the States cannot be interposed as an obstacle to the exertion of these Federal powers has been too often decided to now admit of doubt. On the contrary, the treaty-making power of the Federal Government is a limitation upon the powers of the States, and no State has any reserved

power as against an exercise of it not forbidden by the Constitution.

Certainly, nothing can be said to be more exclusively within the powers of a State than the enactment of ordinary criminal laws for the purpose of maintaining the peace, and for similar purposes, and the enforcement of these laws in its own courts. Yet it has long been the practice of the Federal Government, without consulting the States, to enter into treaties with foreign countries providing that their consular officers in this country shall have jurisdiction to try those accused of certain offenses committed on board their merchant vessels within the ports of any of the States, although such offenses are punishable under the ordinary criminal laws of the States. The States are thus, by virtue of treaties, deprived of a part of their ordinary police powers and of the right to punish persons violating their local laws. Such treaties, however, have always been held valid and superior to the State laws. Speaking of such a treaty and the right of a consul to try accused persons for offenses so committed in a harbor of the State of New Jersey it was said:

> The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty

> by writ of *habeas corpus* in any proper court of the United States. (*Wildenhus's Case*, 120 U. S. 1, 17.)

In that case, upon an examination of the treaty, the court held that the particular offense charged was not within its terms, and hence denied the writ of habeas corpus. But, as seen above, the power of the United States, by a treaty with Belgium, to supersede the laws of the State of New Jersey and commit the trials of cases which would otherwise be within the jurisdiction of the State courts to foreign consuls was fully recognized.

Another thing which is especially within the general powers residing in the States is the rights of property, including the laws of descent and distribution. All of the States have their own laws on this subject. Usually they provide how and by whom property may be inherited, and quite frequently there have been provisions denying such rights to aliens. But while citizens of other countries would thus be cut off from inheriting property in this country, the same rule would exclude our citizens in other countries. The reciprocal rights in this respect of our citizens and those of foreign countries was early recognized as a proper matter for negotiations between the Governments. Many such treaties have been negotiated and very often their provisions have conflicted with the laws of some of the States. This court, however, has never hesitated to hold that this, being a subject in which the two countries had reciprocal interests,

was a proper matter to be dealt with under the treaty-making power. Hence, it has held time and again that any rule established by the law of any State which conflicts with the provisions of such a treaty is changed by the adoption of the treaty, which must be regarded as the supreme law. *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259, 276; *Geofrey* v. *Riggs*, 133 U. S. 258, 266.

Still another matter exclusively within the power of the States is the right to fix, by statutes of limitation, the time within which actions may be commenced in their courts. Certainly, nothing could be of a more local nature than this, and yet it has been held that the Federal Government may, by treaty with a foreign government, suspend such statutes of limitation so far as the subjects of a foreign country are concerned. *Hopkirk* v. *Bell*, 3 Cranch 453.

Treaties with the Indian Nations, in which there were provisions against introducing intoxicating liquors into territory ceded by the treaties, have been held to be valid and binding even after the ceded territory had been organized into a county of one of the States. *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188.

In the same way, fishing rights secured to Indians in such a treaty have been held beyond the control of the State of which the ceded territory became a part. *United States* v. *Winans*, 198 U. S. 371.

These cases can leave no doubt but that treaties supersede all State laws which are in conflict with them. And the fact that such treaties deal with

matters ordinarily exclusively within the legislative control of the State is unimportant, if the subject matter is one proper for negotiations between the two governments.

As has been seen, the only government in this country having any power to negotiate a treaty is the Federal Government. Obviously, then, in making treaties, it was intended that the Federal Government should act for and represent both the people of the United States and the several States.

Taking the Constitution of the United States as our infallible guide, State legislation is supreme in purely domestic matters when it deals with a subject matter not delegated to the Congress and when it does not contravene any provision of the Constitution, or of any valid treaty made under authority of the United States or of any Act of Congress necessary to put such a treaty into execution. A State law, however, must necessarily give way to a treaty negotiated with a foreign country under the authority of the United States because the Constitution makes the Federal Government the only authorized agent to act in such matters. When, as in this case, a treaty has been negotiated, it is, by the express terms of the Constitution, superior to any State constitution or State law, unless it can be shown that, for some reason, the treaty is one beyond the power of the Federal Government to make. This brings us to inquire into the nature and extent of the treaty-making power of the United States.

VII.

THE TREATY-MAKING POWER OF THE UNITED STATES EMBRACES ALL SUCH POWER AS WOULD HAVE BELONGED TO THE SEVERAL STATES IF THE CONSTITUTION HAD NOT BEEN ADOPTED. IN THE EXERCISE OF THAT POWER THE FEDERAL GOVERNMENT IS THE ACCREDITED AGENT OF BOTH THE PEOPLE OF THE UNITED STATES AND THE STATES THEMSELVES.

The treaty-making power is of the utmost importance to any nation. A treaty is the means through which wars are terminated. Treaties are equally the means through which friendly relations and commercial intercourse with foreign governments are maintained, and are thus most potent factors in preventing war. Before the Federal Government was formed, each State was an independent sovereignty and possessed all the treaty-making powers of any other government. The Constitutional provision as to treaty making is twofold—it confers upon the President and the Senate the power to make treaties and it provides that no State shall have such power. In other words, when each State became a party to the Constitution it agreed that the Federal Government should have the power to make treaties, and, at the same time, it agreed with all the other States that it would refrain from itself making treaties. It is inconceivable that, since the States were to be denied the treaty-making power, the framers of the Constitution intended that the treaty-making power conferred upon the Government which was being created should be less than that possessed by any other independent govern-

ment and less than that possessed by the State conferring it. The very general language used in conferring the power negatives such an intention. What was conferred was obviously that power to negotiate treaties, which is essential if there is to be intercourse between nations.

Again, those representing the States in the Constitutional Convention understood too well the necessity for the exercise of such a power to have been willing to deprive the States of the ample power that they had unless, at least, as full power was to be vested in some other agency. The agency in which they were, by the Constitution, vesting the general powers relating to foreign relations was the new Government of the United States. With respect to foreign nations, it was obviously to the interests of all that we should be able to speak as one nation. It was neither practicable nor desirable that each of the several States should maintain diplomatic relations with other governments.

It must be remembered that every power which was conferred upon the Federal Government was taken from those powers which the State had the right to exercise, and it would seem impossible to construe the two provisions of the Constitution, above referred to, as accomplishing anything short of the transfer of all the treaty-making power which the several States had to the new Federal Government, and so this court has said:

> That the treaty-making power has been surrendered by the States and given to the United

> States is unquestionable. It is true, also, that the treaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States. (*Baldwin* v. *Franks*, 120 U. S. 678, 682–683.)

When the Constitution was formed, there was a distribution of the powers of government and the selection of agencies for the exercise of these powers. The people of the United States and of the several States agreed that, as to certain matters, their sovereignty should be exercised through the agency of State governments, and that, as to others, this sovereignty should be exercised through the agency of the Federal Government. The making of treaties falls within the latter class. When the United States Government, therefore, negotiates a treaty, it acts as the agent of all the people. When the matters dealt with are matters affecting the interests of a particular State or its citizens, it acts as the accredited agent of the State or its people. It is for this reason that a treaty is, by the Constitution, made superior to any legislation which the States may enact. It has been made the law of the land by that agency designated by the Constitution for that purpose.

VIII.

UNSOUNDNESS OF APPELLANT'S CONTENTIONS.

The entire case of the appellant is predicated upon the theory that the power to regulate the killing of game within its borders is one of the powers reserved

to the States, and that to attempt, by treaty, to regulate the killing of migratory birds is an encroachment, by the Federal Government, on these reserved rights.

The fallacy in this theory is obvious when it is remembered that, under the Constitution, we have in this country three classes of laws:

1. State laws, which, in purely local matters not concerning foreign countries or their subjects, are supreme.

2. Laws enacted by Congress, which, in matters purely domestic and not concerning foreign countries and falling within the enumerated powers of Congress, are supreme.

3. Treaties of the United States, and Acts of Congress carrying the same into execution, which, in matters in which foreign countries are concerned, whether also national or local in character, are supreme.

Ordinary acts of Congress, within its enumerated powers, are valid because the power to enact them has been specially delegated. Treaties and laws for their enforcement are likewise valid for the same reason—that is, the power to make the treaties has been specially delegated to the President and the Senate, and the power to enact necessary legislation to carry them into execution has been just as expressly delegated to the Congress. Both classes of national laws, therefore, involve the exercise of delegated and enumerated powers.

Originally, all the powers inherent in sovereignty belonged to the States or the people thereof. All these powers are still in the States or the people thereof, except such as have been especially delegated to some other agency. There are, however, two classes of delegated powers. Certain enumerated powers were delegated and Congress was made the agent for their exercise, because it was believed that the interests of the whole people would be best promoted through their exercise by the National Government. Another class of powers is likewise delegated and the treaty-making power of the United States established as the agent for their exercise, in order that, in all matters in which the assent or participation of a foreign country is necessary, this country may act as one nation. It follows that to ascertain what are the reserved powers of the States, we must first deduct those powers which have been delegated to Congress and then likewise deduct the powers which have been delegated to the treaty-making authorities of the United States. The remaining powers are, in the last analysis, the powers reserved for all purposes to the several States or the people thereof.

What has just been said answers completely every contention made by the appellant and serves to distinguish and harmonize with the Government's contention all the authorities cited in the brief. It is said:

> Our Government had no prototype in history. The Federal Government and the States are separate and distinct sovereignties. The

> one, within the sphere of its delegated powers is supreme; the other, within the sphere of its undelegated and reserved powers, is no less supreme. It was never intended that the States should be shorn of their sovereignty in internal affairs.

There is no quarrel with this statement as far as it goes. It has, however, no significance against the Government's contention in this case, for the reason that the power to make and enforce treaties is expressly conferred upon the Federal Government, and is therefore within the sphere of its delegated powers. It is also said:

> Under the ancient law, feudal law, and the common law in England the absolute control of wild game was an attribute of government and a necessary incident of sovereignty. When, therefore, the United States Colonies became "free and independent States" with full power to do all "acts and things which independent States may of right do," the power to control the taking of wild game passed to the States.

This is true, and before the adoption of the Constitution it can not be doubted that each State could not only enact such laws as it deemed necessary for the protection of game within its borders, but could, likewise, enter into a treaty with any other State or foreign country for the protection of migratory game which remained within its borders only a portion of the year. After the adoption of the Constitution, however, as said in *Geer* v. *Connecticut*, 161

U. S. 519, 528, this power remained in the States only "in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution." But if the protection of migratory game is a proper subject matter for treaties between independent nations, the power to secure this protection was expressly conferred upon the Federal Government as a part of the treaty-making power. Again it is said:

> Missouri, upon her admission to the Union, became entitled to and possessed of all the rights and dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. Equality of constitutional right and power is the condition of all the States of the Union, old and new.

This is undoubtedly sound, but it, of course, implies that Missouri has no more power than any other State. When she was admitted to the Union, she consented to be deprived of the exercise of all the powers of the exercise of which the original States had deprived themselves by the adoption of the Constitution. She, like all the other States, has agreed that whatever treaty-making power she had shall now be exercised for her and belong to the Federal Government. Like all the other States, she has no power to enter into treaties for the protection of migratory game, but has agreed that, so far as treaties may be necessary for this purpose, the Federal Government shall have ample power to make them.

Another proposition announced is:

> This power of the State over wild game within its borders, which "cannot be questioned" and "will not be gainsaid," is derived from the peculiar nature of such property and its common ownership by all the citizens of the State in their collective sovereign capacity. The State in its sovereign capacity is the representative of the people in their common ownership of the wild game within the borders of the State, and holds the same in trust for the benefit of all its people.

Assuming that this is an entirely sound statement as applied to game which remains permanently within a State, and which may be amply protected by local laws, the peculiar nature of its property in *migratory* game, which is in one country during a part of the year and in another during the remainder of the year, makes it impossible for the laws of one State or one country to give ample protection. This can be accomplished only by concert of action on the part of two or more States or countries. This, in the very nature of things, cannot be secured except through the medium of treaties. And the people of the United States and of all the States have agreed that the treaty-making power shall be exclusively in the Federal Government. Again, it is said:

> But the power of the State over wild game within its borders is not dependent solely upon the authority which the State derives from common ownership and the trust for the bene-

> fit of the people; the power of the State to control wild game is a necessary incident of the power of police. The power of police is an attribute of State sovereignty.

But all the powers of police are not reserved to the States. So far as necessary for the full execution of the powers delegated to the Federal Government, they may be exerted by that Government. To the extent that police powers are necessary for the regulation of our relations with foreign governments and for carrying into execution treaties lawfully made, they have been as expressly delegated to the Federal Government as any other power.

Another proposition asserted is:

> The fact that the present act of Congress purports to give effect to a treaty between the United States and Great Britain can not validate such act of Congress when its effect is not only to accomplish that which under the Constitution Congress has no power to do, but also to do that which is forbidden to the entire Federal Government in all or any of its departments under the terms of the Constitution. Any and every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor the treaty-making power in conjunction with any or all other departments of the Government, can bind the Government to do that which the Constitution forbids.

This proposition need not be disputed. No provision of the Constitution, however, is pointed out

which forbids the making of any treaty dealing with something which is the proper subject matter of a treaty between two independent nations. It is also said:

> The Federal Government is a government not only of enumerated powers, but it is also a government to which certain powers are denied. Powers denied are not to be implied; they are to be obtained, if obtained at all, from, and in the manner provided by, those who originally granted the enumerated powers, but who at the same time denied other powers—the people.

The treaty-making power, however, is expressly denied not to the Federal Government but to the States, who are forbidden to exercise it. If, therefore, the protection of migratory birds is properly subject matter for a treaty between independent nations, the power to make such a treaty so far from being denied to the Federal Government is expressly conferred upon it.

Again, it is said:

> Among those powers denied to the Federal Government until secured by amendment are those which are "reserved" to the States respectively or to the people. These reserved powers include those purely internal affairs which "concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State." Without exception wild game has been held to be a part of this mass which is within the exclusive and absolute power of the State. When the power of the States over their

> purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed.

Whatever may be said of this proposition when applied to the ordinary legislative powers of Congress and the legislative powers of the several States, it has no application to the treaty-making power, for the reason that, as shown above, the reserved powers of the State are those powers which remain after deducting from the full powers of sovereignty those which were committed to Congress to be exercised in purely domestic affairs, and also those powers included in the treaty-making power which are necessary for the regulation of our relations with foreign countries. If necessary, in order to secure reciprocal rights for our own citizens residing abroad, or to secure protection which can be obtained only by the action of two governments, the power of the Federal Government to supersede local or State laws by the making of a treaty is expressly conferred by the Constitution.

When all is said, if the protection of migratory game is a proper subject for a treaty between two countries interested; if prior to the transfer to the Federal Government of all the treaty-making power possessed by the States any State could have entered into a treaty for this purpose; there is nothing in any of the authorities cited by appellant which militates against the Government's contention. The question, at last, is whether the protection of migratory game is a proper matter of negotiation between independent governments.

IX.

THE TREATY-MAKING POWER APPLIES TO ALL MATTERS WHICH MAY PROPERLY BE THE SUBJECT OF NEGOTIATIONS BETWEEN THE TWO GOVERNMENTS.

As has been seen, the treaty-making power is conferred by the Constitution in the most general terms. There is no effort to define it, nor is there any limitation expressly imposed upon it. The greatest of all States Rights Advocates, Mr. Calhoun, said this:

> This country within is divided into two distinct sovereignties. Exact enumeration here is necessary to prevent the most dangerous consequences. The enumeration of legislative powers in the Constitution has relation, then, not to the treaty-making power, but to the powers of the States. In our relation to the rest of the world, the case is reversed. Here the States disappear. Divided within, we present, without, the exterior of undivided sovereignty. The wisdom of the Constitution appears conspicuous. When enumeration was needed, there we find the powers enumerated and exactly defined; when not, we do not find what would be vain and pernicious to attempt. Whatever, then, concerns our foreign relations, whatever requires the consent of another nation, belongs to the treaty power—can only be regulated by it; and it is competent to regulate all such subjects, provided—and here are its true limits—such regulations are not inconsistent with the Constitution. If so, they are void. No treaty can alter the fabric

> of our government; nor can it do that which the Constitution has expressly forbidden to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited. (4 Elliott's Debates, p. 464.)

Precisely the same view was taken by Mr. Justice Story in his work on the Constitution, fifth edition, in section 1508, as follows:

> The power "to make treaties" is by the Constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliance or succors; for indenmity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other. But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution can not be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and can not supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional

> powers, would be void; because it would destroy, what it was designed merely to fulfill, the will of the people. Whether there are any other restrictions necessarily growing out of the structure of the government, will remain to be considered whenever the exigency shall arise.

It is thus clear that the enumerated powers of Congress merely mark the line of demarcation between the legislative power of Congress and that of the States in dealing with purely domestic affairs. When, however, a matter must be dealt with which requires the consent of another nation, the States disappear and the Federal Government may make any treaty which one of the States could have made if it had not been deprived by the Constitution of its original treaty-making power. The views thus expressed are those which have consistently been followed by this court, and it is believed that no treaty yet made by our Federal Government has ever been declared by its courts to be invalid. The court, it is true, has several times said that there are certain limitations to be implied from the Constitution. The limitations thus suggested, however, relate to matters which can scarcely be said to be the proper subject of negotiations between governments. And it is safe to say that when it is once conceded that a particular matter is one proper for such negotiations the power to make treaties concerning it is unlimited.

In the present case, the effort is to engraft on the treaty-making power a limitation to the effect that

it can not apply to those matters which, as between Congress and the States, belong exclusively to the latter. This, however, is not only contrary to the theory that, in making treaties, the Federal Government acts for the States and with authority to bind them, but is directly in conflict with what this court has said. Thus, in the early case of *Ware* v. *Hylton*, 3 Dall. 198, 235, it was said:

> There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty can not be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only, by a repeal, or nullification by a state legislature, this certain consequence follows, that the will

> of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the national constitution, or laws of any of the states, contrary to a treaty, shall be disregarded.

And in *Geofrey* v. *Riggs*, 133 U. S. 258, 266, the court said:

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and

> of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of the negotiation with a foreign country.

And in *In re Ross*, 140 U. S. 453, 463, it was said:

> The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments.

The substance of the matter is that, while, in general, the State has reserved to itself the control of its internal affairs, it has agreed that in all matters in which a foreign government may have an interest, and which may properly be the subject of negotiations with that Government, the Federal Government shall act for it and that any treaty made in pursuance of this authority shall be superior to its own laws, even though relating to its internal affairs.

The ultimate question in this case, then, is whether the protection of migratory birds which remain during a part of the year in Canada and the remainder of the year in the United States is a proper subject of negotiation between this Government and that of Great Britain.

X.

THE PROTECTION OF MIGRATORY GAME IS A PROPER SUBJECT OF NEGOTIATIONS AND TREATIES BETWEEN THE GOVERNMENTS OF THE COUNTRIES INTERESTED IN SUCH GAME.

Whether a treaty with a foreign government by which the United States should agree to certain regulations for the protection of game which remains permanently within the United States would be a valid exercise of the treaty-making power need not now be considered. This case does not present that question. The treaty is limited to regulations for the protection of birds which regularly migrate between the United States and Canada. That this is a matter of very great importance to both countries will not admit of doubt. Game birds are valuable as furnishing food supply. As shown by the data printed in Appendix B of this brief, the importance to the material interests of both countries of preserving insectivorous birds, many of whom are migratory, can scarcely be exaggerated. It is also beyond doubt that, unless controlled by adequate regulations, there will be such destruction of these migratory birds that they will become extinct, to the great damage of both countries. It is obvious that neither country, acting alone, can possibly afford adequate protection against this destruction. No matter how rigid the regulations adopted by the States might be, if the birds during their sojourn in Canada are subject to wholesale destruction, they are likely, in time, to become extinct. They must be protected in both countries, or the protection afforded

will necessarily be inadequate. Such protection can, in the very nature of things, be secured only by negotiations between the two governments.

His Honor, Judge Van Valkenburgh, in the court below, stated his conclusions thus:

> Seals go regularly to their breeding and feeding grounds. Fishes migrate during the spawning season. Migratory birds nest in the north and feed in the south with the regularity of the seasons. The movements of all these forms of life may be computed almost with mathematical precision. Their courses through the water and through the air are almost as well defined as though marked by Old Trails' monuments. Their movements are dictated by neither whim nor caprice, but are impelled by an instinct which inheres in the law of their being. If this be true, what distinction can we draw between the fish which swims through one of the great natural elements and the bird which flies through another? The controlling consideration is the effect upon the mutual interests of the two nations concerned. By this treaty the United States profits by the protection which is accorded such wild fowl in Canada during the nesting and feeding seasons before the migration sets in to the south. Canada gains by the same protection which is thrown about the same birds during their stay within the United States. The people of both countries, of our entire Union and of all the States, benefit by the mutual and reciprocal advantages which accrue from this arrangement. If this be so, then the subject matter comes properly within

> the treaty-making power. If it curtails any right which would otherwise be lodged in an individual State, it does so only through the full and untrammeled exercise of a federal power to negotiate with a foreign government. The conflict of jurisdiction, if one can be said to exist, differs in no respect from that which is experienced in the exercise of any power concededly lodged in the federal government which comes in contact with the ordinary powers of the State over the same subject matter. (Rec., pp. 12–13; 258 Fed. 479, 484).

And in *United States* v. *Rockefeller*, 260 U. S. 346, 347–8, another District Judge has well stated the case thus:

> Fisheries have been the subject of treaties always, and the principles and objects thereof are equally applicable and desirable in relation to migratory birds and other game. So doubtless of air and water, their protection from pollution, their conservation, apportionment, and use. The object of all thereof is to peacefully share those natural resources which are the property of no one till reduced to possession, from which all may take when within their territory, which are alternately found within the territory of the several nations and in places common to all as the high seas, which may be wholly seized and exterminated by one to the great and irreparable damage of all, which in accord may be preserved and enjoyed a blessing to all, but in discord may be annihilated to the injury of all, and which may become legitimate causes for war, to obviate which is one of the most ancient and important objects of treaties.

> * * * Civilized nations have awakened to the value of certain wild life, and to the necessity of cooperation to conserve and perpetuate it. Not otherwise can migratory birds be preserved from extinction. It avails little to protect them at one of their resorts, if they are mercilessly slaughtered at others. If wild ducks, or their eggs and nests, are destroyed on the northern breeding grounds, there will be little sport and profit in duck shooting in the southern fields; and if these birds are exposed to unregulated killing in their winter resorts, there will be few to propagate their kind in the marshes of the north. Their continued existence is beyond the power of separate states and nations. It can be accomplished only by treaty to that end between nations. A state can protect wild life only within its territory; the United States by treaty can protect it everywhere. This treaty tends thereto.

It may be that, while migratory birds are within a State, that State, as trustee for its people, has the same title to them that it has to birds which remain permanently within its borders. But this title is necessarily something of a floating title. When the birds return to Canada, the Government of Canada, as trustee for its people, has exactly the same title that the State has when they are in the United States. Moreover, while the birds are in Canada, the States to which they customarily migrate are still interested in them, because, when they return, its title again attaches. Manifestly, then, the States of the United States are as much interested in the preservation of these birds while in

Canada as while in the United States. A State, however, is powerless to protect them except when within its own borders. For the purpose of preserving birds remaining permanently within its territory, the State can pass all necessary laws. But for the protection of migratory birds in which it has an interest, while they are in a foreign country it is powerless. While in the one case, therefore, it resorts to its own legislative power, in the other it must have resort to an exercise of power by the agent which it has agreed shall act for it in negotiating and making treaties with foreign governments. The making and enforcing of such a treaty no more interferes with its internal affairs or its reserved powers than the conferring by treaty of judicial power upon the representatives of a foreign country within one of the States, or the suspending of a State statute of limitation by treaty, or the abrogating of a State law against the inheriting by aliens of property. It is simply an exercise of power which the people of the States, by adopting or acceding to the Constitution, have agreed shall be exercised by the Federal Government for and on behalf of all the States and all the people.

CONCLUSION.

It is respectfully submitted that the judgment of the court below is right and should be affirmed.

WILLIAM L. FRIERSON,
Assistant Attorney General.
ALEX. C. KING,
Solicitor General.

FEBRUARY, 1920.

APPENDIX A.

THE MIGRATORY BIRD LAW IS AUTHORIZED BY THE SECOND PARAGRAPH OF SECTION 3 OF ARTICLE IV OF THE CONSTITUTION, WHICH PROVIDES: "THE CONGRESS SHALL HAVE POWER TO DISPOSE OF AND MAKE ALL NEEDFUL RULES AND REGULATIONS RESPECTING THE TERRITORY OR OTHER PROPERTY BELONGING TO THE UNITED STATES."

That the ownership of wild game is in the sovereign is a legal principle founded entirely on interpretation given to the common law. In no instance does it rest on any statute or other written declaration of the sovereign.

In this case the question is what sovereign owns the migratory wild life in the United States, whether the Nation as a whole or the several States. On account of the peculiar dual nature of our Government, decisions other than our own are not very helpful in determining conflicts between Federal and State rights and powers. Therefore the decisions of foreign courts will not assist us except in establishing the principle that such ownership is in the sovereign, a conclusion reached by the courts of all nations. (*Geer* v. *Connecticut*, 161 U. S. 519.)

The question of ownership of wild game has arisen in this country only in cases which did not involve claim of ownership in the United States Government or the distinction between migratory animals and those local to a particular State. In several cases the courts have referred to these questions, but in each instance expressly declined to pass on them,

leaving them open for future determination, as was done by this court in the cases of *The Abby Dodge*, 223 U. S., 166, and *Manchester* v. *Massachusetts*, 139 U. S., 240.

The question presented in this case, therefore, is an original one involving the nature and source of property rights, and this decision, being the first of its kind, must declare the common law determining such rights, and may do so upon principle, uninfluenced by supposed authority.

> * * * The first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For, after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just. (*Kansas* v. *Colorado*, 206 U. S., 46, 97.)

The question involved being justiciable and necessarily one of common law, the court in this case must declare "what is right and just" in this particular matter, based upon present-day conditions.

> Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. (*In re Debs*, 158 U. S., 564, 591.)

Let us then examine this common law principle of the sovereign's title to animals *ferœ naturæ* and endeavor to apply it to present conditions in the United States, keeping in mind that the people is the sovereign.

Animals *ferœ naturæ* are common property, belonging, by the law of nature, in common to all citizens of the sovereignty. This has been recognized from time immemorial, not only by common-law writers, but also by the civilians.

Like recognition of the fundamental principle [common ownership] upon which the property in game rests has led to similar history and identical results in the common law of Germany, in the law of Austria, Italy, and, indeed, it may be safely said in the law of all the countries of Europe. (Saint Joseph Concordance, vol. 1, p. 68.) The common law of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority. (*Geer* v. *Connecticut*, 161 U. S., 519, 526.)

Thus it appears by the common law that a property in those living creatures which, by reason of their swiftness or fierceness, were not naturally under the power of man, was gained by the mere caption or seizure of them, and that all men had an equal right to hunt and kill them. (Vol. 4, Bacon's Abridgment, Title "Game," p. 435.)

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the Government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this court in *Martin* v. *Waddell*, 16 Pet., 410, represents its people, and the ownership is that of the people in their united sovereignty. (*Geer* v. *Connecticut*, 161 U. S., 519, 529.)

> Here [in the United States] the sovereign power is in the people, and the principle, founded upon reason and justice, obtains, that by the law of nature every man, of whatever rank or station, has an equal right of taking, for his own use, all creatures fit for food that are wild by nature, so long as he does no injury to another's right. (*Sterling* v. *Jackson*, 69 Mich., 488.)

The property being common to all citizens, each has the same right to its enjoyment. That this right may be safeguarded and rendered available to all, the common law vests the title to animals *ferœ naturœ* in the Government, in trust for the people, "in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession may be ultimately efficaciously enjoyed." (*Ohio Oil Co.* v. *Indiana*, 177 U. S., 190, 210.)

The only reason or purpose subserved by so placing the title is that the common property may be protected and controlled. If there is no government which has power to protect, there is no reason for a trustee, and the title, as well as the beneficial ownership, may well rest in the people. The Government's title, therefore, to animals *ferœ naturœ* has its source in and depends upon its ability to protect and control same for the benefit of all. This being true, the common law, in case of conflict, will uphold the title of that Government which has the superior power to protect and control such property for the benefit of its common owners.

Let us apply this principle to our peculiar system of governments within a government.

The State, in contradistinction to the United States, has for the benefit of, and in trust for, its people, ownership of all wild animals remaining per-

manently within its territorial limits. Having entire control over such animals, the State can protect and conserve them by its laws for all of its people. From this power of control and protection the common law, as interpreted by both Federal and State courts, has deduced State ownership of animals *ferœ naturœ*.

In the case of migratory wild life, however, the several States have not such control or power over same as renders possible its protection by the States for the benefit of the people. While such animals are on other territory than their own, they have absolutely no power over them and can not enter into treaties with other Governments for their protection or even make agreements concerning the same among themselves, without consent of Congress. For the greater part of the time, a particular State has, therefore, because of express provisions of the Constitution, no power to control or protect migratory wild life. The Federal Government alone can protect and regulate, at all times, animals *ferœ naturœ* remaining permanently within the limits of the United States yet migrating over several States, and is also the only Government which can enter into treaties with foreign countries where such animals migrate beyond the limits of the United States. Therefore, by reasoning from this exclusive power analogous to that which vests title to local game in the State, the common law should declare ownership of migratory birds to be in the United States as trustee for all the people.

> * * * There is a domain which the States can not reach and over which Congress alone has power; *and if such power be exerted to control what the States can not, it is an argument for—not against—its legality.* Its exertion does not encroach upon the juris-

> diction of the States. (*Hoke* v. *United States*, 227 U. S., 308, 321.) [Italics ours.]
>
> Our dual form of Government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. (*Hoke* v. *United States*, 227 U. S., 308, 322.)
>
> The genius and character of the whole Government seem to be that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government. (*Gibbons* v. *Ogden*, 9 Wheat., 1, 195.)

This common law interpretation of property rights fits in with our constitutional system of enumerated powers. When the Constitution of the United States was ratified, a new and distinct sovereignty and people were created. This new Government emanated from the people and not from the States as such.

> Its powers are granted by them and are to be exercised *directly on them, and for their benefit.* * * * It is the Government of all; its powers are delegated by all; it represents all and acts for all. (*McCulloch* v. *Maryland*, 4 Wheat., 316, 405.) [Italics ours.]

By ratifying the Constitution, the people expressly delegated to the Federal Government the exclusive right to protect wild life by treaties with foreign nations, and at the same time withdrew from the

States the right, without the consent of Congress, to make among themselves agreements for such purpose, thus vesting in Congress the ultimate control and protection of same. By thus stripping the States of all power to protect migratory wild life for the greater part of the time, and expressly granting such power to the Federal Government, the people, by necessary implication from these express grants and the nature of the property, changed their trustee and vested the title to all migratory animals *ferœ naturœ* in the Federal Government in trust for themselves, the people of the United States and the common owners of such animals.

By analogous reasoning, this court seems to have upheld the constitutionality of a statute enacted for the protection of Indians.

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes. (*United States* v. *Kagama*, 118 U. S., 375, 384–385.)

The principle announced in the *Kagama* case has been repeatedly upheld, and the above excerpt has been quoted with approval by this court in the following cases: *United States* v. *Sandoval*, 231 U. S., 28, 46; *Tiger* v. *Western Investment Co.*, 221 U. S., 286, 312; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553, 566, 567; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S., 641, 655; *United States* v. *Thomas*, 151 U. S.,

577, 586; *Stephens* v. *Cherokee Nation*, 174 U. S., 445, 486.

In this connection see also the opinions in *Downes* v. *Bidwell*, 187 U. S., 244 (especially the concurring opinion, p. 287), and *Jones* v. *United States*, 137 U. S., 202.

The total extinction of three species of birds, including the prolific carrier pigeon, which formerly existed in enormous numbers, as well as the appalling decrease in other species, until now only approximately 10 per cent of their previous number exists (Appendix, p. 35), show the impotency of State protection. The following excerpt from a report to the Legislature of Ohio in 1857 shows how incredible to the legislators of that time would have been the prophecy that the last of these "myriads" would die in 1914, caged as a curiosity in a zoological park. Yet such has been the fate of this now extinct bird:

> The passenger pigeon needs no protection. Wonderfully prolific, having the vast forests of the North as its breeding grounds, traveling hundreds of miles in search of food, it is here to-day and elsewhere to-morrow, and no ordinary destruction can lessen them or be missed from the myriads that are yearly produced.

On the other hand, the remarkable increase since the passage of the Migratory Bird Law, reported by the officials of 40 States of the Union, show the efficiency of Federal protection and control. See Appendix, page 35.

The doctrine that the United States own migratory wild game is not contrary to existing authority. In the cases cited to establish the claim that wild game belongs exclusively to the several States, we find that in each either the animals were local to the particular

State, as in the cases involving the taking of oysters and sponges, or the question of their migratory character was not raised.

Furthermore, we find that the decisions of this court have expressly left open the question of ownership and regulation of migratory wild life by the Federal Government.

> Again, in *Manchester* v. *Massachusetts*, 139 U. S., 240, in upholding a statute of the State of Massachusetts, regulating the taking of menhaden in Buzzards Bay, the doctrine of the case just cited was expressly reiterated. True, further in that case, probably having in mind the declaration made in the opinion in the *McCready* case, that fish running within the tidewaters of the several States were subject to State ownership "so far as they are capable of ownership while so running," the *question was reserved as to whether or not Congress would have the right to control the menhaden fisheries.* But here also for the reason that the question arising relates only to sponges growing on the soil covered by water *we are not concerned with the subject of running fish and the extent of State and National power over such subject.* (*The Abby Dodge*, 223 U. S., 166, 174–175.) [Italics ours.]

From the above quotation, in which all of the pertinent decisions of this court were referred to, it will be seen that the court, in their latest expression on the subject, took pains to say that this question had not been decided and would be left open for future determination.

But even had the courts decided that migratory animals were subject to State jurisdiction, nevertheless such decisions would still not be hostile to the present argument. Until the enactment of this law Congress had not assumed control over the subject,

and it was therefore entirely within the police power of the several States to pass laws for the protection of wild game until Congress should act.

> * * * But there is no occasion to consider the power of the United States to regulate or control, either by treaty or legislation, the fisheries in these waters, because there are no existing treaties or acts of Congress which relate to the menhaden fisheries within such a bay. * * * and the subject is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States. * * * if it [the Federal Government] does not assert by affirmative legislation its right or will to assume the control of menhaden fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays. (*Manchester* v. *Massachusetts*, 139 U. S., 240, 264, 265, 266.)
>
> Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. (*Kidd* v. *Pearson*, 128 U. S., 1; *Hall* v. *De Cuir*, 95 U. S., 485; *Sherlock* v. *Alling*, 93 U. S., 99, 103; *Gibbons* v. *Ogden*, 9 Wheat., 1.) Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the State to preserve for its people a valuable food supply. (*Geer* v. *Connecticut*, 161 U. S., 519, 534.)

> While the State can not, under cover of exerting its police power, directly regulate or burden interstate commerce, a police regulation which has real relation to the proper protection of the people, and is reasonable in its terms, and does not conflict with any valid act of Congress, is not unconstitutional because it may incidentally affect interstate commerce. (*Savage* v. *Jones*, 225 U. S., 501, headnote 7.)

In the *Geer* case the court held that the State has the power to protect wild game subject to its jurisdiction by the exercise of the police power and also by virtue of its common ownership of such game. It is not claimed in this argument, however, that the United States have the right to protect migratory wild birds by the exercise of a general police power independent of the ownership or authority granted by the Constitution, such as was declared, in the *Kansas-Colorado case*, not to exist in the Federal Government; but it is maintained that the United States have such power by virtue of their ownership of migratory birds as trustee for all the people of the United States. It is a question of ownership of property and not of extending the power to "make all needful rules and regulations respecting the territory" of the United States to embrace "legislative control over the States." The act merely provides "needful rules and regulations" respecting *property* of the United States within the territory of the several States, a power daily exercised by the Federal Government.

While there are many features of this case that appeal to the esthetic and one longs to see upheld a law that will conserve for the future the fascinating creatures which charm us with their song and beauty, amaze us by their marvelous skill and wonderful flight, or delight us in the chase, nevertheless, the case is not here because of these features, but be-

cause property rights of great economic value are involved, the property in birds which afford annually a food supply valued at millions of dollars (Appendix, p. 36), and which by their policing of the air save our forests, our animals, and our crops.

> It was clearly shown that the economic aspect was twofold. The game birds yield a considerable and an important amount of highly valued food, and if given adequate protection will be a constant valuable asset. The insectivorous migratory birds destroy annually thousands of tons of noxious weed seed and billions of harmful insects. These birds are the deadliest foe yet found of the boll weevil, the gypsy and brown-tailed moths, and other like pests. The yearly value of a meadow lark in a 10-acre field of cotton, corn, or wheat is reckoned by experts at $5. The damage done to growing crops in the United States by insects each year is estimated, by those who have made the matter a special study, at about $800,000,000. (House Committee Report on Migratory Bird Bill, 49th Cong. Rec., pt. 2, p. 1485.)

Excerpts from official publications of the Department of Agriculture, and treatises of ornithologists of recognized authority, quoted in the appendix (pp. 23–34), show how great is the insect peril and how dependent we are upon the migratory insectivorous birds for protection against it.

Migratory birds, therefore, being property of the United States, Congress, by virtue of the authority granted by the Constitution to "make all needful rules and regulations respecting the territory or other property belonging to the United States," may pass any laws it may deem proper for the protection of same, though such laws may have the quality of police

regulations. (*Hoke* v. *United States*, 227 U. S., 308, 323.)

> All the public lands of the Nation are held in trust for the people of the whole country. (*United States* v. *Trinidad Coal Company*, 137 U. S., 160.) And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. (*Light* v. *United States*, 220 U. S., 523, 537.)
>
> The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. (*Camfield* v. *United States*, 167 U. S., 518, 525.)

THE MIGRATORY BIRD LAW IS AUTHORIZED UNDER THE GRANT TO CONGRESS IN PARAGRAPH THREE OF SECTION EIGHT OF ARTICLE ONE OF THE CONSTITUTION OF POWER "TO REGULATE COMMERCE WITH FOREIGN NATIONS, AND AMONG THE SEVERAL STATES, AND WITH THE INDIAN TRIBES."

Should it be admitted, for the purposes of this argument, that the title to migratory birds while actually within a State is in such State, then of necessity title thereto must pass from one State to another as such birds cross the boundary line between the States. Thus a migratory bird flying from one State into another, under such theory, passes from the ownership of the former into that of the latter State.

If this be true, a thing recognized by the courts as an article of commerce when passing between individuals passes from the ownership of individuals in their collective capacity to other individuals in their collective capacity, the ownership of the States

being merely ownership in trust for their respective citizens.

Such transmission of title in connection with the actual passage of the birds from one State to another constitutes, it is submitted, interstate commerce within the meaning of the Constitution.

It is to be remarked that the Constitution does not define the word "commerce." Likewise, the courts, no doubt purposely, have refused to attempt an all-inclusive definition of this word, but have contented themselves with deciding as occasions arose whether the facts of the case before them constituted commerce within the meaning of the Constitution. Wisely have they done so, for human mind can not foresee all the possible combinations of facts which might properly constitute commerce.

The Supreme Court have said, however, that—

> Commerce, as defined by this court, means something more than traffic—*it is intercourse;* and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse. (*Lottery Case*, 188 U. S., 321, 348.)
>
> Commerce was defined in *Gibbons* v. *Ogden*, 9 Wheat., 1, 189, to be "*intercourse*," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. (*Covington, etc., Bridge Co.* v. *Kentucky*, 154 U. S., 204, 218.)
>
> Commerce with foreign countries and among the States, strictly considered, consists in *intercourse* and traffic, including in these terms navigation and the transportation and *transit of persons and property*, as well as the purchase, sale, and exchange of commodities. (*County of Mobile* v. *Kimball*, 102 U. S., 691, 702.) [All italics ours.]

From the last quotation it will be seen that the mere "transit" of persons or property, independently of purchase, sale, or exchange, was such intercourse as falls within the meaning of the word "commerce." "Transit" means "the act of passing over or through; passage." (New Standard Dictionary.) The word "commerce" as used in the Constitution and defined by this court is sufficiently comprehensive to include the periodical and systematic "passage" of migratory birds among the States. Therefore, under the power to regulate commerce among the States, Congress was acting entirely within its authority in passing this act for the protection of migratory birds.

It is under definitions like the above that such phenomena as purely social intercourse over the telephone or telegraph between citizens of different States (*Telegraph Co.* v. *Texas*, 105 U. S., 460; *Western Union Tel. Co.* v. *Milling Co.*, 218 U. S., 406); or the mere passage, for social intercourse or pleasure, of a person over an interstate bridge (*Covington, etc., Bridge Co.* v. *Kentucky*, 154 U. S., 204, 218); or the driving of sheep on foot from one State into another (*Kelley* v. *Rhoads*, 188 U. S., 1), are held to constitute interstate commerce within the meaning of the Constitution. The cases of *Pedersen* v. *Del., L. & W. Railroad*, 229 U. S., 146; *Hoke* v. *United States*, 227 U. S., 308; *Hipolite Egg Co.* v. *United States*, 220 U. S., 45; *McDermott* v. *Wisconsin*, 228 U. S., 115, are other examples of the liberal construction always given by this court to the commerce clause of the Constitution.

It is sought now merely to extend the principle of these cases to new facts. To illustrate this identity in principle, suppose the ranch of a cattle owner is

situated wholly within a quarantined State but near the boundary line between two States, and that his cattle, affected with the foot-and-mouth disease, may roam at will, on account of liberal stock laws, over grazing lands located in the two States. Undoubtedly, under *Kelley* v. *Rhoads*, 188 U. S., 1, the Federal Government could prevent the owner from driving diseased cattle from the quarantined State into the other. It is submitted that the fact that the same cattle cross the quarantine line of their own volition instead of that of their owner does not so change their status as participants in interstate intercourse as to destroy the power of Congress to prevent their crossing the State line.

If the Federal Government may prevent such intercourse between States because it is harmful, under the same principle beneficial intercourse between the States may be safeguarded.

It would seem, therefore, under the theory of State ownership, that the facts in this case, especially since there is a transmission of title, as well as a "transit" or "passage" of property from one State to another, bring the case within the commerce clause of the Constitution.

APPENDIX B.

EXCERPTS FROM OFFICIAL PUBLICATIONS OF THE DEPARTMENT OF AGRICULTURE AND FROM WRITINGS OF ORNITHOLOGISTS OF RECOGNIZED AUTHORITY, SHOWING THE VALUE OF MIGRATORY GAME AND INSECTIVOROUS BIRDS AND NECESSITY FOR THEIR PROTECTION.

I.

VALUE OF INSECTIVOROUS BIRDS.

THE INSECT PERIL.

Few people know how enormous is the number of insect species or how amazing is their power of multiplication. The number of insect species is greater by far than that of the species of all other living creatures combined. * * *

The fecundity of certain insect forms is astounding, the numbers bred reaching such prodigious proportions as to be almost beyond belief. Riley once computed that the hop aphis, developing 13 generations in a single year, would, if unchecked to the end of the twelfth generation, have multiplied to the inconceivable number of ten sextillions of individuals. * * *

Kirkland has computed that one pair of gypsy moths, if unchecked, would produce enough progeny in eight years to destroy all the foliage in the United States.

* * * * *

The voracity of insects is almost as astounding as their power of reproduction. The daily ration in leaves of a caterpillar is equal to twice its own weight.

If a horse were to feed at the same rate, he would have to eat a ton of hay every 24 hours.

* * * * *

Some years ago the agriculturists of Hungary, moved to the insane step by ignorance and prejudice, succeeded in getting the sparrow (*Passer domesticus*) doomed to destruction. Within five years the country was overrun with insects, and these same men were crying frantically for the bird to be given back to them, lest they should perish. The sparrow was brought back, and, driving out the hordes of devastating insects, proved the salvation of the country.

* * * * *

In 1895 the ravages of two species of cutworms and some 10 species of locusts produced a famine in the region of Ekaterinburg, which is in Russian Siberia. The local Society of Natural Sciences inquired into the cause which had permitted such numerous propagation of insect pests, and reported that it was due to the almost complete destruction of birds, most of which had been killed and sent abroad by wagon loads for millinery purposes.

Those grass ticks which now make the keeping of most breeds of cattle impossible in Jamaica are not mentioned in the records of the early nineteenth century. The appalling destruction in more recent years of insect-eating birds, chiefly to supply the demands of the millinery market, has led to an inordinate increase of the ticks and to the dying out of all but Indian cattle. This correlation of birds and ticks—to say nothing of mosquitoes and other insect plagues in Jamaica—was put fully and circumstantially before the secretary of state for the colonies by a deputation in 1909.

* * * * *

This worthy [Frederick the Great], in a fit of passion because a flock of sparrows had pecked at some of his cherries, ordered every small bird that could be searched out to be instantly killed. Within two years his cherry trees, though bare of fruit, were weighed down with a splendid crop of caterpillars.

* * * * *

Though I could give a hundred cases similar to the foregoing, I must rely on the few I have cited to show that the wholesale destruction of birds is surely followed by disaster to man. (Value of Birds to Man, by James Buckland, Ann. Rept. Smithsonian Inst., 1913, pp. 439, 440, 441, 442, 448.)

* * * * *

The enormous losses which have occurred in the United States from the destruction of growing crops by insects must seem incredible to those who do not realize how vast are the numbers of insects, how stupendous their power of multiplication, how insatiable their voracity.

* * * * *

In 1854 the loss in New York State alone from the ravages of the insignificant wheat midge (*Contarinia tritici*), as estimated by the secretary of the New York State Agricultural Society, was $15,000,000, whole fields of wheat were left ungarnered. So destructive was this insect in the following years as to stop the raising of white wheat and reduce the value of all wheat lands 40 per cent.

* * * * *

Dr. C. L. Marlatt, of the Bureau of Entomology of the United States Department of Agriculture, who has made careful calculations of the loss still occasioned by the Hessian fly (*Mayetiola destructor*) in

the wheat-growing States, says that in comparatively few years does it cause a loss of less than 10 per cent of the crop. On the valuation of the crop of 1904 this would amount to over $50,000,000. Dr. Marlatt states that in the year 1900 the loss in the wheat-growing States from this tiny midge undoubtedly approached $100,000,000.

The chinch bug (*Blissus leucopterus*) attacks many staple crops, and has been a seriously destructive pest in the Mississippi Valley States for many years, where it injures chiefly wheat and corn. Dr. Shimer in his notes on this insect estimates the loss caused by it in the Mississippi Valley in 1864 as $100,000,000, while Dr. Riley gives the loss in that year as $73,000,000 in Illinois alone.

* * * * *

The Rocky Mountain locust (*Melanoplus spretus*) began to destroy crops as soon as the country it inhabits was settled, and is still injurious. From time to time its enormous flights have traversed a great part of the Mississippi Valley. It reached a maximum of destructiveness from 1874 to 1877, when the total loss from its ravages in Kansas, Nebraska, Iowa, Missouri, and neighboring States, including injury by depression of business and general ruin, was estimated at $200,000,000. * * * (Useful Birds and Their Protection, 4th ed., 1913, Edward H. Forbush, Ornithologist to the Massachusetts Board of Agriculture, pp. 27, 32, 33, 34.)

The gypsy moth (*Porthetria dispar*), a well-known pest of European countries, was introduced into Medford, Mass., by Leopold Trouvelot, in 1868 or 1869. Twenty years later the moths had increased in numbers to such an extent that they were destroying the trees and shrubbery in that section of Medford where they were first liberated.

They swarmed over the houses of the inhabitants, invaded their gardens, and became such a public nuisance that in 1890 the legislature appropriated $50,000 for their extermination. It was learned within the next two years that the moths had spread over 30 towns. The State board of agriculture was given charge of the work in 1891 and over $1,000,000 were expended within the next 10 years in the attempt to exterminate the insect. As at the expiration of that time all the larger moth colonies had been destroyed, the legislature, deeming further expenditures unwise, gave up the work, despite the protest of the Board of Agriculture, and its prediction that a speedy rise of the moth would follow the cessation of concerted effort against it. This prediction has been abundantly fulfilled, and the policy of the board has been fully justified.

Dr. Marlatt, who in 1904 visited the region infested by the moth, reported to the Bureau of Entomology at Washington that the people of the infested district were then fighting the insect at a greater annual cost than that formerly assumed by the State. Since the State gave up the work, a single citizen, Gen. Samuel C. Lawrence, of Medford, has expended over $75,000 to protect the trees and plants on his estate.

Finally, in 1905, the legislature was obliged to renew the fight, and appropriate the sum of $300,000 for work against both this insect and another imported pest, the brown-tail moth (*Euproctis chrysorrhea*), which had been introduced into Somerville some time in the latter part of the nineteenth century.

The State has also been obliged to call on municipalities and individuals to assist in the work of suppressing these moths, at an annual expense to those concerned which exceeds all previous yearly expenditures for this purpose.

These insects have gained a much larger territory than ever before, and thousands of acres of woodland have been attacked by them during the present year (1905), and many pine and other trees have been killed.

The gypsy moth has been found in Rhode Island, Connecticut, and New Hampshire, and the brown-tail moth is also spreading into other States.

The prospect now seems to be that our protective expenses against these two insects, as well as the injury done by them, will increase constantly; and that other States also will be put to similar expense, with no prospect of permanent relief save by such checks as may come, in time, through natural causes. (Useful Birds and Their Protection, Forbush, 4th ed., pp. 38–40.)

According to an official report in the Yearbook of the Department of Agriculture for 1904, the table here shown gives the annual values of farm products in the United States and losses chargeable to insect pests:

Product.	Value.	Percentage of loss.	Amount of loss.
Cereals	$2,000,000,000	10	$200,000,000
Hay	530,000,000	10	53,000,000
Cotton	600,000,000	10	60,000,000
Tobacco	53,000,000	10	5,300,000
Truck crops	265,000,000	20	53,000,000
Sugars	50,000,000	10	5,000,000
Fruits	135,000,000	20	27,000,000
Farm forests	110,000,000	10	11,000,000
Miscellaneous crops	58,000,000	10	5,800,000
Total	3,801,000,000	.....	420,100,000
Animal products	1,750,000,000	10	175,000,000
Natural forests and forest products	.....	.....	100,000,000
Products in storage	.....	.....	100,000,000
Grand total	5,551,000,000	.....	795,100,000

—(Cong. Rec., v. 49, pt. 5, p. 4336.)

Who or what is it that prevents these ravening hordes from overrunning the earth and consuming the food supply of all? It is not man. Man, by the use of mechanically applied poisons, which are expensive, unnatural, and dangerous, is able to repel to an extent the attacks on his orchard and garden. Out in the fields and in the forests he becomes, before any very great irruption of insects, a panic-stricken fugitive. Neither is it disease, or the weather, or animals, or fungi, or parasitic and predaceous insects within their own ranks. However large may be the share of these particular natural agencies in keeping insects in check, experience has shown that it is lamentably insufficient. Then what is it? The bird. Bird life, by reason of its predominating insect diet, is the most indispensable balancing force in nature (Value of Birds to Man, by James Buckland, Ann. Rept. Smithsonian Inst., 1913, p. 440.)

The chickadee returns to her brood about 200 times a day with not less than 25 plant lice each time for the young. It has been found that a cuckoo consumes daily from 50 to 400 caterpillars or their equivalent, while a chickadee will eat from 200 to 500 insects, or up to 4,000 insect or worm eggs. One hundred insects a day is a conservative estimate of the quantity consumed by each individual insectivorous bird. By carefully estimating the birds in several areas it has been found that in Massachusetts there are not less than five insect-eating birds per acre. Thus the State, with its 8,000 square miles, has a useful bird population of not less than 25,600,000 which, for each day's fare, requires not less than the enormous total of 2,560,000,000 insects. Or better to express such figures in common measurements, 120,000 average

insects fill a bushel measure. This means that the daily consumption of chiefly obnoxious insects in Massachusetts is about 21,000 bushels. This estimate is good for above five months in the year—May to September, inclusive—during the remainder of the year the insects, eggs, and larvæ destroyed by the winter, late fall, and early spring migrants will be equivalent to nearly half this quantity.

* * * * *

Birds afford a natural check upon the injurious insects, and wherever forests denote the presence of great numbers of destructive caterpillars or grasses indicate the grubs are destroying the grass roots the birds are not slow to assemble and help restore equilibrium.

* * * * *

The Mexican cotton-boll weevil, that has cost the United States Government so much money, probably about $1,000,000 in direct appropriations, and $5,000,000 to the growers in lessening the crop production, can not be controlled by man, but the following birds are proving almost a specific remedy against the weevil: Six species of orioles, the nighthawk, the martin, the bank swallow, the barn swallow, the rough wing, and the cliff swallow. (The Economic Value of Birds to the Farmer, by R. J. H. de Loach, Cong. Rec., vol. 49, pt. 5, pp. 4332, 4333.)

In his report on Egypt for the year 1912 Lord Kitchener stated that the indiscriminate destruction of bird life had allowed an enormous increase of insect pests, steps for the combating of which were to be taken. Lord Kitchener knew that in spite of the improved methods of fighting insects there was only one step that he could take that would be effective. A khedivial decree was issued forbidding

the catching or killing of, or taking the eggs of, Egypt's insectivorous birds. (Value of Birds to Man, Buckland, Ann. Rept. Smithsonian Inst., 1913, p. 453.)

Shore birds perform an important service by their inroads upon mosquitoes, some of which play so conspicuous a part in the dissemination of diseases. Thus, nine species are known to feed upon mosquitoes, and hundreds of the larvæ or "wigglers" were found in several stomachs. Fifty-three per cent of the food of 28 northern phalaropes from one locality consisted of mosquito larvæ. The insects eaten include the salt-marsh mosquito (*Aedes sollicitans*), for the suppression of which the State of New Jersey has gone to great expense. (Our Vanishing Shorebirds, by W. L. McAtee, Bureau of Biological Survey, Circular No. 79.)

After many years of study, in New Hampshire as well as many other States, of these relations of birds to agriculture, we are convinced that the birds are a most potent factor in making crop production possible, that without them we should be overrun with pests—vertebrate and invertebrate—to an extent of which we now have no conception. (Birds in Their Relation to Man, Weed and Dearborn, p. 4.)

Birds attain their greatest usefulness in the forests, because the conditions there closely approach the primeval. Forest trees have their natural insect foes, to which they give food and shelter, and these insects in turn have their natural enemies among the birds, to which the tree also gives food and shelter. Hence it follows that the existence of each one of these forms of life is dependent upon the existence of the others. * * *

I regard as profoundly true Frank N. Chapman's statement "that it can be clearly demonstrated that

if we should lose our birds we should also lose our forests." (Value of Birds to Man, Buckland, Ann. Rept. Smithsonian Inst., 1913, pp. 446, 447.)

It is especially with regard to insects and plants that the regulative influence of the work of birds is felt. In agriculture experience has taught us that some work, which is indispensable to the productivity of the soil, can be carried on only by winged squads of workmen. * * *

It was in the second half of the nineteenth century, after the development of intensive agriculture, that insects commenced to increase in a most alarming way. In Europe the German farmers and foresters proved that this change was connected with the rapid decrease of birds useful in agriculture, and they were the first to take public action. In 1868 the twenty-sixth general convention of German farmers and foresters recognized the necessity of securing international protection for the birds useful in farming and forestry.

This assembly decided to intrust to Austria-Hungary the duty of taking the initiative and prayed in 1868 that the minister of foreign affairs of these two States take steps toward establishing among all European States an agreement for the protection of birds useful in agriculture and forestry. (Report of the General Convention of the International Institute of Agriculture, December, 1909, pp. 1, 4.)

Birds useful in agriculture, especially insectivorous ones, more particularly the birds enumerated in the list No. 1, annexed to this agreement, which list shall be subject to additions by legislation of each country, shall enjoy absolute protection, in such a way that it shall be forbidden to kill them at any time or in any way whatsoever, or to destroy their nests, eggs, or young. (Translation Article 1 of Agreement of Paris,

entered into in 1902, for the protection of birds useful in agriculture, by Austria-Hungary, Germany, Belgium, Spain, France, Greece, Luxembourg, Monaco, Portugal, Sweden, Norway, and Switzerland.)

II.

VALUE OF GAME BIRDS AND EFFICACY OF MIGRATORY-BIRD LAW.

Formerly migratory waterfowl frequented the United States in enormous numbers, and the supply appeared to be inexhaustible. During the last 75 years, however, the growth of population and the vast increase in the number of hunters, combined with greatly improved firearms and an extraordinary increase in the facilities for rapid transportation to the most remote haunts of wild life, has resulted in an appalling reduction in their numbers. It is believed to be a conservative estimate that the gross number of migratory game birds of all kinds existing to-day in the United States does not exceed 10 per cent of the number which existed here 75 years ago. The decrease has been especially rapid during the last 25 years. During this period some species have become extinct, while others are nearly so.

Thoughtful sportsmen and others interested in our wild life have long realized the impossibility of saving what was left of this great national asset by State action. The rapid progress of our waterfowl toward extinction under State laws was too obvious. To save the dwindling remnant, in 1913 the Federal migratory-bird law was enacted. The law has now been in effect about two years, and an extended inquiry has been made by the Biological Survey as to its effect on migratory game birds. A large number of reports from State and Federal game officials and

private individuals in nearly all of the States of the Union have been received. The replies from a small number of States have been doubtful, usually owing to a lack of definite information on the subject. From 40 of the States, extending from Maine to California and from the Gulf States to the Canadian border, is given unimpeachable evidence of an extraordinary increase in waterfowl during the short period the law has been in effect. The increase is commonly stated, according to the locality, to be from 10 to several hundred per cent, and includes such important species as mallards, black mallards, widgeon, sprigtails, blue-winged teal, green-winged teal, wood ducks, canvasbacks, Canada geese, and swans.

Many of the reports are to the effect that the number of waterfowl remaining to breed exceeds anything seen during the past 10 to 25 years. The results indicate what may be expected from a long period of adequate protection.

The importance of our wild fowl as a national asset is evident when their great aggregate value is considered. The State of Maine estimates the annual income from its game resources at $13,000,000, of which about 5 per cent, or $650,000, can safely be allotted to the returns from migratory wild fowl. Oregon values the annual returns from its game resources at $5,000,000. Of this amount about $1,000,000 may be attributed to migratory wild fowl. It is evident that the actual annual returns from this source in the several States reach a very large amount, and the value of this resource to the Nation amounts to hundreds of millions of dollars. (Weekly News Letter, an official publication of the Department of Agriculture, issue of Sept. 15, 1915.)

III.

THREATENED EXTERMINATION OF BIRDS.

More interest is evinced in the history of the passenger pigeon and its fate than in that of any other North American bird. Its story reads like a romance. Once the most abundant species, in its flights and on its nesting grounds, ever known in any country, ranging over the greater part of the continent of North America in innumerable hordes, the race seems to have disappeared within the past 30 years, leaving no trace.

* * * * *

The last great nesting place of which we have adequate record was in Michigan, in 1878. Prof. H. B. Roney states in the American Field (vol. 10, 1879, pp. 345–347) that the nesting near Petoskey that year covered something like 100,000 acres, and included not less than 150,000 acres within its limits. It was estimated to be about 40 miles in length and from 3 to 10 miles in width. It is difficult to approximate the number of millions of pigeons that occupied that great nesting place.

* * * * *

It has been stated that the wild pigeon "went off like dynamite." Even the naturalists failed to secure sufficient specimens and notes, as no one had an idea that extinction was imminent. (Game Birds, Wild Fowl, and Shorebirds, Forbush, pp. 433, 446, 455.)

Shorebirds were found by the early settlers of this country in vast numbers on the coasts, the inland lakes, and even on the prairies, and while comparatively few now remain it was not until the early seventies that there was a marked lessening of their

numbers. Since then shorebirds have been so persecuted that vigorous measures must be taken, and immediately, to save them.

* * * * *

How they abounded formerly and how they were slaughtered by southern gunners is forcibly shown by the record of a single hunter in Louisiana, who, during the 20 years from 1867 to 1887, killed 69,087 birds—an average of 3,500 snipe a winter. In 1870 about 100 snipe were killed by this man for each day that he hunted. The maximum was reached in 1875, with 150 birds a day; this fell to 100 in 1880 and to 80 in 1887.

* * * * *

One of the most striking examples of the havoc wrought by man in the ranks of shorebirds is afforded by the Eskimo curlew. When Audubon visited the Labrador coast in 1833 he said of their numbers: "The accounts given of these birds border on the miraculous"; and later, when he saw them for himself, he reports that they "arrived in such dense flocks as to remind me of the passenger pigeons."

* * * * *

These enormous flocks now exist only in memory; scarcely a dozen individual birds have been seen in the last dozen years. (Wells W. Cooke, Yearbook of the Department of Agriculture for 1914, pp. 275, 279, 286, 287, 289.)

Many years ago the wood duck was the most abundant of all wild fowl in many well-wooded regions of the United States. Hundreds flocked along the wooded streams and about the woodland ponds. * * *

This species is the loveliest of all wild fowl. Even the Mandarin duck of China is not so strikingly beautiful.

* * * * *

Within my own recollection it bred commonly over a considerable part of Massachusetts, but at the beginning of this century the species was evidently in danger of extinction. (Forbush, Game Birds, Wild Fowl, and Shore-birds, pp. 106, 107.)

From the records that with great pains and labor were gathered by the State game commission, and which were furnished me for use here by President Frank M. Miller, we set forth this remarkable exhibit of old-fashioned abundance in game, A. D. 1909:

Official record of game killed in Louisiana during the season (12 months) of 1909–10.

Wild ducks, sea and river	3,176,000
Coots	280,740
Geese and brant	202,210
Snipe, sandpiper, and plover	606,635
Quail (bobwhite)	1,140,750
Doves	310,660
Wild turkeys	2,219
Total number of game birds killed	5,719,214

* * * * *

Here is a case by way of illustration, copied very recently from the Atlanta Journal:

> EDITOR JOURNAL: I located a robin roost up the Trinity River, 6 miles from Dallas, and prevailed on six Dallas sportsmen to go with me on a torchlight bird hunt. This style of hunting was, of course, new to the Texans, but they finally consented to go, and I had the pleasure of showing them how it was done.

Equipped with torchlights and shotguns, we proceeded. After reaching the hunting grounds the sport began in reality, and continued for 2 hours and 10 minutes, with a total slaughter of 10,157 birds, an average of 1,451 birds killed by each man.

But the Texans give me credit for killing at least 2,000 of the entire number. I was called "the king of bird hunters" by the sportsmen of Dallas, Tex., and have been invited to command in chief the next party of hunters which go from Dallas to the Indian Territory in search of large game. F. L. Crow, Dallas, Tex., former Atlantan.

Dallas, Tex., papers and Oklahoma papers please copy.

As a further illustration of the spirit manifested in the South toward robins, I quote the following story from Dr. P. P. Claxton, of the University of Tennessee, as related in Audubon Educational Leaflet No. 46, by Mr. T. Gilbert Pearson:

* * * * *

A man would climb a cedar tree with a torch, while his companions with poles and clubs would disturb the sleeping birds on the adjacent trees. Blinded by the light, the suddenly awakened birds flew to the torchbearer; who, *as he seized each bird would quickly pull off its head*, and drop it into a sack suspended from his shoulders.

The capture of three or four hundred birds was an ordinary night's work. Men and boys would come in wagons from all the adjoining counties and camp near the roost for the purpose of killing robins. Many times 100 or more hunters with torches and clubs would be at work in a single night. For three years this tremendous slaughter continued in winter—and then the survivors deserted the roost.

* * * One small hamlet sent to market annually enough dead robins to return $500 *at 5 cents per dozen;* which means 120,000 birds!

* * * * *

There is time and space only in which to notice the most prominent of the doomed species, and perhaps discuss a few examples by way of illustration. Here is a—

PARTIAL LIST OF NORTH AMERICAN BIRDS THREATENED WITH EARLY EXTERMINATION.

Whooping crane.
Trumpeter swan.
American flamingo.
Roseate spoonbill.
Scarlet ibis.
Long-billed curlew.
Hudsonian godwit.
Upland plover.
Red-breasted sandpiper.
Golden plover.
Dowitcher.
Willet.
Pectoral sandpiper.
Black-capped petrel.
American egret.
Snowy egret.
Wood duck.
Band-tailed pigeon.
Heath hen.
Sage grouse.
Prairie sharp-tail.
Pinnated grouse.
White-tailed kite.

—(Our Vanishing Wild Life, Wm. T. Hornaday, pp. 5, 106, 107, 18.)