The wildlife law enforcement officer can also gain such respect and trust if he is properly educated, trained, equipped, and if he lives his personal life in a community in such a way that he is above reproach at all times. He should know and remember that the all-seeing public eye is upon him constantly. He should uphold the reputation of his profession and he should remember that high public esteem built over a long period of years can be impaired by one act of misconduct.

Finally, and I place this above everything else—

HE MUST BELIEVE IN THE JOB HE IS DOING

In closing, let me call to your attention the fact that I have not said very much about the raising of salaries as a means to professional improvement. I did this simply because I think we are already in complete agreement that enforcement personnel are underpaid. Also, because salary structures are usually set by someone higher up the line.

I give you one thought on this. Let's get away from trying to get a Fifteen Dollar or Twenty Dollar monthly increase. Ask for a beginning salary where a professional officer's salary should begin, at least Five Thousand per year.

Even while trying to bring salaries up to where we feel they should be we should ever remember that there are some things you cannot buy (although not many) and I sincerely believe that along with our attempts to establish salaries commensurate to other professional fields of endeavor, we must at the same time purge and improve our organizations.

We must screen applicants for enforcement positions closely and recruit only the properly educated and properly qualified personnel. We must give them adequate training and equipment and we must require them to maintian high standards of integrity. If, and again this is a big "IF," we are successful in doing these things, I sincerely believe that our efforts in the field of salaries will be properly rewarded as most organizations are willing to pay in proportion to services rendered.

Thank you.

LAW ENFORCEMENT

By G. HUGHEL HARRISON, *Assistant Attorney General*
State of Georgia

There are so many areas and facets of law enforcement that would be both of interest and beneficial were they presented that I must explain the particular subject areas which I have chosen. As a matter of expediency, I felt that perhaps the more interesting problems which we have encountered in Georgia Game and Fish law enforcement in the past year would probably be best. Some of these were totally new problems for us, and I feel would be totally new for all of you. Others are not new but are of a nature that has never been satisfactorily resolved.

I believe that all of the states represented here have basically similar if not almost identical statutes in most phases of Game and Fish enforcement. I am certain all of you have certain laws and regulations on fishing with nets, etc., and which provide for the confiscation of nets when found set in violation of law.

Georgia has such a statute, and early this spring, two of our Rangers found three nets set in a stream in violation of the statute. They followed the duty imposed by law by removing the nets and confiscating them to be destroyed. They later apprehended the owner of two of the nets and he was charged with having set nets in violation of the statute. At his trial, he was acquitted of the charge. He then demanded the return of the nets, and upon being refused, brought a bail trover action against the individual Ranger who had taken possession of the nets. The Game and Fish Commission then brought an equitable action to restrain the owner from pursuing this bail trover action any further. Filing a petition requesting such was easy—the search for authority to sustain the Game and Fish position was not quite as simple. However several cases were found, and the rule would seem to be that if the statute provides for the summary destruction by the discovering law

enforcement officer, no bail trover would subsequently lie against the law enforcement officer, provided certain requisite conditions are present. These are: first, that the statute must be a reasonable exercise of the police power of the state in protecting the game from extinction, or to preserve it for the benefit of the public, or some such similar reason which can usually be easily proven; then the statute must provide for summary destruction or confiscation, and not depend upon a separate trial or hearing for condemnation, for in such case, if the owner is acquitted in his trial, he can set up this acquittal as a defense in a condemnation proceeding which is based upon his guilt. Along this line, it might be well to mention that it is our opinion that a summary confiscation does not depend upon the guilt or innocence of the owner, and in fact, even whether or not he had knowledge of the illegal use. This seems harsh to the layman, but is necessary to abate the illegal use, which is also classified as a public nuisance in many states. We found what appears to be the only United States Supreme Court case decided directly upon the subject, which seems to provide a good base upon which to build a supporting brief or opinion. It is *Lawton* v. *Steele*, 152 U. S. 133, and is an appeal from the New York State courts. It is interesting to read, even if you were not pressed by the need of its ruling. Certainly the question presented by our situation and in the *Lawton* case is one upon which will be found sharply divided opinions, both on the part of the general public who will normally feel they are being subjected to "police state" tactics, and on the part of Game and Fish law enforcement officers, who feel it necessary and just; and even among jurists who have not inquired into the problem but are, as the saying goes, "shooting from the hip."

Another interesting problem which arose, and has not been the subject of any litigation in which we have been involved, but which came up as a theoretical problem, concerned retention of custody of an apprehended violator. I am not familiar with the territorial access of other states, but there are certain portions of the Okeefenokee Swamp in Georgia which are only accessible from the State of Florida. Our problem could be this: a Ranger who has entered this area by the route which necessitates going through Florida, discovers, and apprehends a violator. Having taken the violator into custody, he has the problem of returning him to civilization for arraignment. He of course must enter the State of Florida in order to return to Georgia. Now what are the legal merits of this custody if, while in Florida, the violator attempts to "get away."? Does the Ranger have power of custody even while in the State of Florida? Would he be justified in using the same physical control while in Florida as he is authorized to use in Georgia? A ticklish problem.

Another question seems to have arisen from the careless habit of some fishermen in falling from their boat or the bank into the water so that they either lose their fishing license, or it becomes so water logged as to be illegible. Realizing their slothful infirmities, some fishermen have attempted to avoid loss or rendering their licenses illegible by having photostatic copies made, and carrying these copies in their possession. Georgia's licenses and permits are required to be in possession of the licensee at all times while engaged in the sport for which issued. Does a photostatic copy fulfill this requirement? We take the position that it is only evidence of a valid license issued to that person, and that a Ranger is justified in requiring the person to produce the original.

A problem which arises at the beginning of every hunting season, and it seems almost continually during fishing seasons, concerns the right to hunt or fish upon the property of another. Our licenses state in bold type across their tops:

> "This license does not authorize you to hunt or fish on private property without permission."

Still, people will tend to ignore this, thinking "Well. I'm only going to hunt on Old Jack's place, and he won't care if *I* hunt there." Too often, Old Jack does care. And because someone who actually has no permission but to whom Old Jack doesn't object is hunting on the property with the unwanted persons, he won't get mad enough to call the sheriff to come run "those infernal hunters" off his land, or even himself go over and ask them to leave for fear of offending his friend. He nevertheless thinks

that since the game warden is there checking licenses and birds, the warden should run the hunters off if they don't have permission. Now this sort of puts a warden on the spot. Should he demand that the hunter produce written permission from the owner? Of course it is not the simplest nor the worst of our problems but it is *one.*

Probably the most troublesome items along this line concern fishing. In Georgia, an adjoining property owner owns to the center line of a non-navigable stream. And if he owns on both sides then he owns the entire stream bed and is entitled to exclusive fishing rights in that portion of the stream running through his property. If the stream is navigable, then he only owns to the low-water mark, ad is not entitled to exclusive fishing. Seems simple at first, but what is a navigable stream as compared with one that is non-navigable? It is a somewhat confused question in Georgia law, with some streams having been judicially determined to be navigable or non-navigable but others not having been the subject of controversy. At least they never got to the appellate courts. And of course, there is the fisherman who uses a boat, comes upstream, anchors, and begins fishing. Farmer Jones owns the land on both sides, and since the stream is non-navigable, is entitled to exclusive fishing rights. You cannot make fishermen understand, though, that they are trespassing. To make matters even worse, Georgia is now blessed with a great number of large lakes, and many smaller ones. Often the entity or person constructing the lake will purchase all the land to be covered and will own even a strip around the lake. If so, and he or they wish to make it a private lake, then no one else can fish or use it. But what about the situation where they only own the lake bed up to the water line? Can they stop Jack who owns land right down to the water from sitting on his own land and fishing in the lake? Isn't he an adjoining property owner who is entitled to riparian rights? Or is he?

The technical legal problems of law enforcement are certainly many and interesting, though somewhat distressing at times.

The above illustrations tend to emphasize the role that the Game and Fish Commission plays in the enforcement of the laws. As many of you well know, prosecutions for Game and Fish violations are handled by the Solicitor of the City Court in those counties where a City Court is located, and in others by the Solicitor General of the Judicial Circuit. All violations of the Game and Fish laws are misdemeanors. In addition, the procedure provided for the condemnation of shrimp nets requires that the Commission give notice to the Solicitor General within ten days of the seizure whereupon it is made the duty of the Solicitor General to file a petition to condemn the net in the Superior Court. This procedure is specified in Georgia Code Ann., Section 45-905, and requires that upon the completion of the condemnation proceedings the net will be sold. This, on its face, sounds good, and would seem to be adequate to provide a deterrent for the illegal use of shrimp nets. In practice it has not been entirely successful because it has happened that at the time of the sale, there would be very few bidders. It is hoped that through continued action with the local law enforcement officers and court officials, a means will be provided whereby this procedure will become more and more effective.

We have had one interesting illustration of what can result from the seizure of shrimp and the net used to catch them when the strict condemnation procedure is not followed. A Ranger seized a net and in addition, a certain quantity of shrimp. The requisite notice was placed in the mail on the tenth day, and the Solicitor General did not receive the same until the eleventh day. Notwithstanding the general rule that notice by mail is deemed completed when the notice is placed in the mail, it was subsequently held in this case that the requisite notice was not given.

The owner of the net filed a petition against the Supervisor of Coastal Fisheries seeking (1) a recovery of the net, and (2) seeking recovery of the shrimp or in lieu thereof the value of the shrimp confiscated. Following the normal procedure, the matter was set down for hearing and at the hearing it was developed that the boat towing the shrimp net in fact grounded it was so close into shore. Despite objection that the suit was sworn against the state, and other defenses, the court ruled that the petition stated a cause of action. After hearing the merits of the case, the Court awarded custody of the net to the owner upon the condi-

tion that he post an appearance bond. The Court ruled that the fisherman was not entitled to recover the shrimp. By agreement the case was dismissed after the defendant had entered a plea of guilty to an independent and separate charge of shrimping in a closed area.

Another law enforcement problem that I am sure that each of you encounter is under the Motorboat Numbering Act, or the "Bonner Bill." It is hoped that the differences that have arisen will be solved in a manner that is most beneficial to the boating public and that we can obtain a clear and a distinct delineation of the respective areas of enforcement.

The above has been an attempt to deal with some of the highlights or areas of special and particular interest in law enforcement. I realize fully that it is impossible to treat such a broad subject as it should be treated in the time allotted. Volumes could be written concerning law enforcement. However, it is hoped that through continued efforts toward improving law enforcement, and in particular, the procedures utilized therein, we will procure and bring about an enforcement program that is effective and that has the cooperation of the affected interests.

FULTON LOVELL, as Director of the Game & Fish Commission of the State of Georgia

v.

GEORGE CAULEY

No. 246 in the Superior Court of Jenkins County, Ga. November Term 1961

MEMORANDUM BRIEF OF PLAINTIFF IN SUPPORT OF PETITION FOR INJUNCTION AGAINST DEFENDANT GEORGE CAULEY, PLAINTIFF IN BAIL TROVER ACTION.

In the petition filed and in the evidence by Petitioner, it is shown that Ranger Mixon, the defendant in the Bail Trover action was acting, in his official capacity and under a duty imposed by law in seizing the shad net being illegally and unlawfully used in the waters of the Ogeechee River for the purpose of catching fish. Defendant in the pending action here has by his answer sought to deny the allegations of the petition, and raise questions of fact as to whether the net was so unlawfully set and used. He further seeks to use the prior prosecution and acquital of defendant in the City Court of Millen on the charge of having illegally and unlawfully used the net, as a previous and binding determination of the factual question involved.

As to the effect of a prior verdict in a criminal proceeding see 50 C.J.S. JUDGMENTS § 754 b (1), wherein it is stated: "Except to the extent that statutes may otherwise provide, a judgment or sentence in a criminal prosecution generally is neither a bar to a subsequent civil proceeding founded on the same facts, nor ordinarily is it proof of anything in such civil proceedings, except . . . the mere fact of its rendition. The issues previously determined in a criminal proceeding may be relitigated in the civil action, . . ." The following full Bench decisions are set forth as supporting the stated proposition: *Padgett v. Williams*, 82 Ga. App. 509, 61 S. E. 2d 676; *Keebler v. Willard*, 91 Ga. App. 551, 86 S. E. 2d 379; *Crawford v. Sumerau*, 100 Ga. App. 499, 111 S. E. 2d 746. And further it is stated: "Where the same acts or transactions constituted a crime and also give a right of action for damages or for a penalty, the acquittal of defendant when tried for the criminal offense is no bar to the prosecution of the civil action against him, nor is it

evidence of his innocence in such action." *Roberson v. City of Rome*, 72 Ga. App. 55, 33 S. E. 2d 33.

For an often cited Georgia Supreme Court case on the point of whether issues determined in a criminal proceeding are finally determined, even as to subsequent civil proceedings, see *Cottingham v. Weeks*, 54 Ga. 275. In that case, a widow had brought action in tort for the homicide of her husband. The defendant sought to introduce into evidence his previous acquittal on indictment for the murder of plaintiff's husband. The court there said: "We have looked carefully into the authorities for cases or principles to sustain the right to introduce this judgment in the criminal case as evidence in the civil one. It is not between the same parties; different rules, as to the competency of witnesses and as to the weight of evidence necessary to the finding exist. Besides, the present plaintiff was in no sense a party; she had no part nor lot in it; she could not even examine or cross-examine a witness. Suffice it that there is, so far as we can find, no case to be found to sustain the introduction."

For further cases approving of the principle laid down above, see *Tumlin v. Parrott*, 82 Ga. 732, wherein it was stated at page 735, "The defendant having been indicted, tried and acquitted of the shooting, as an offense against the State, the offense charged being malicious mischief, and the plaintiff being the prosecutor, offered the record of his acquittal in evidence. The court rejected it. This was correct. (Citing *Cottingham v Weeks*.) That the plaintiff was the prosecutor and failed to convict the defendant of the tort as a crime, would not tend to prove that the tort was not committed." Other cases are: *Powell v. Wiley*, 125 Ga. 823; *S.A.L. Ry. v. O'Quinn;* 124 Ga. 357.

Duncan v. State, 149 Ga. 195, decided with one Justice absent, is a case in this field which must be approached with caution. The case involved condemnation proceedings for forfeiture of defendant's automobile as provided in the Penal Code § 1065 (Ga. Laws, Ex. Sess. 1917, p. 7). Defendant had been charged with transporting spirituous liquors and in addition to being punishable for such transporting, an added penalty was forfeiture of the vehicle under condemnation proceedings. Defendant was tried and acquitted on the charge of transporting liquors. He then sought to set up the acquittal as a defense to the civil action of condemnation of the vehicle. The Court held that such was a good defense when set up by the person who had been so charged and acquitted. "The record of his acquittal of the offense of transporting whiskey, based upon the *identical transaction* upon which the State relies in the condemnation proceeding, is admissible in evidence in the proceeding to forfeit the automobile. Generally, where the condemnation proceeding is resisted by a third party, who makes claim to the automobile, the record of the acquittal of the defendant in the criminal case would be inadmissible in the trial of the condemnation proceedings." The case must be distinguished from the present proceedings where the Plaintiff in the bail trover action is seeking the return of property confiscated because illegally used. Under the statute out of which this litigation arose, the Legislature has seen fit to exercise its police powers to provide for the summary seizure and destruction of property found being used in violation of the statute. There has been no attack upon the constitutionality of the statute authorizing the seizure and destruction. Therefore, the presumption of validity remains with the act and transaction taken thereunder. The confiscation does not, as in the Duncan case, depend upon subsequent civil proceedings which must be initiated by the State. Here the confiscation does not depend upon the discovery, prosecution and conviction of the person owning, or so using the property in the manner which has been determined to be illegal. The statute states that the nets are to be seized and destroyed upon discovery. Therefore, the question of the subsequent determination of the owner, and his guilt or innocence in a criminal action has no bearing upon the duty to, and the legality of, the seizure under the statute by the enforcing officer. A clear duty was imposed upon Ranger Mixon, and he has acted pursuant to it.

That the State has the power to impose such a duty cannot be questioned. *Lawton v. Steele*, 152 U. S. 133, was an appeal from the New York State Courts. Plaintiff in that case had instituted an action against

the defendant, an official of the New York Game and Fish Commission for conversion of fifteen nets belonging to plaintiff which were taken and destroyed by defendant. Defendant acted under a statute which read "any net . . . found in or upon any of the waters of this state . . . in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be, and is, a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector and every game constable to seize and remove and forthwith destroy same . . ." Against a constitutional attack on the validity of the statute, the court held the statute to be a valid exercise of the State police power, being enacted for the conservation of fish as a source of food supply. The Court also referred to the small value of the nets which might deter the State if it had to pursue a regular judicial condemnation proceeding, the cost of which would be prohibitive in comparison to value of the nets. "It is not easy to draw a line between cases where property illegally used may be destroyed summarily, and where judicial proceedings are necessary for its condemnation . . . But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the Legislature to order its summary abatement." The case has been cited and approved in at least two Georgia Supreme Court decisions. In *Price v. Hamilton, et al.*, 146 Ga. 705, a full Bench decision, the Court upheld the action of a sheriff in destroying a trap set in violation of a statute, § 603 of Penal Code of 1917, which provided that no trap should be set unless at least 10 feet of open water space was provided around it. The decision, which cited *Lawton v. Steele*, supra, held the destruction of the trap did not violate separation of powers, unlawful search and seizure, or due process.

In a recent case, another full Bench decision, *Creaser, et al. v. Durant, et al.*, 197 Ga. 531, Game and Fish agents, acting under § 45-108 of the Georgia Code, seized shrimp found in plaintiff's possession. Plaintiff secured an injunction to restrain the Game and Fish Commission from such further interference on the grounds such interference (seizure) was unconstitutional. The injunction was reversed by the Georgia Supreme Court which cited *Price v. Hamilton*, and *Lawton v. Steele*, holding that the case being decided was an even stronger case than the previous two cases cited. "The basis of the authority vested in the Legislature to order police powers for protection of general welfare and . . . is therefore outside the range of due process clauses of the Federal and State Constitutions."

SUMMARY

The evidence before the Court is without conflict or doubt that the net was seized by Ranger Mixon and Beasley at a time when the net, along with other nets not involved in this litigation, was set in violation of the laws of this State. The seizure was authorized and required to be made by the Rangers in the performance of their duties. Not one scintilla of evidence is before the Court that the seizure was made by the Rangers in their individual capacities. The authority cited above clearly shows that the acquittal in the criminal proceeding does not affect the issues involved in this case.

It is therefore respectfully submitted and requested that the Court grant the interlocutory injunction continuing in effect the ex parte restraining order.

Respectfully submitted,

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