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EDWARD WHELAN]

This is true Liberty, when Free-born Men, having to advise the Public, may speak free.—EURIPIDES.

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## Provincial Parliament.

### LEGISLATIVE COUNCIL.

#### DEBATE ON THE FISHERY RESERVE QUESTION.

[Hon. Colonel Swabey's speech continued.]

Well then, your Honors, I think there can be no doubt that, with respect to that class of the Fishery Reserves, now particularly in question, that is the reserves of which the nature is thus expressed in the original grants:—"And further saving and reserving for the disposal of His Majesty, his heirs and successors, 500 feet from high water mark on the coast of the tract of land hereby granted, to erect stages and other necessary buildings for carrying on the Fishery," the soil is reserved to the Crown, or in other words the fee simple is in the Crown, subject to an easement; and that all the territorial revenue of the Crown, of which these reserves form an important part, having, by the Civil List Act of 1851, been transferred to the Assembly—the disposal of these reserves, with a view to the public service to which they were originally dedicated, is now as completely in the Government of this Colony as ever it was in the Crown. Here, with your Honors' permission, I will say a few words about myself, with reference to the Fishery Reserves Bill. I was not a member of the Government, either at the time when that Bill was sent home, or when it was introduced into the Legislature; and when it came up to this House I did not think (as such of your Honors as were then members of it will recollect), that such an Act was at all required to enable the local Government to deal with the Fishery Reserves. When I considered that, by the Civil List Act of 1851, the Queen had conceded to the Legislature and Government of this Colony all her right, title and interest to and in these Reserves, it appeared to me that such an Act would be superfluous; for we were, and we still are, with respect to the Fishery Reserves, exactly in the same position as that occupied by Her Majesty previous to her relinquishment of her territorial revenue in this Colony to the Legislature thereof. However, thinking that the Bill, if it became law, would do no harm, although it might do no good, I did not oppose it. Such was my opinion then; and circumstances have since shown that it was a correct opinion. The Government instructed the Attorney General to file an information against Mr. Cox, of Morrell, who was in possession of certain portions of Fishery Reserves of which the fee simple is in the Crown, for the purpose of testing the power of the Government to dispossess him of, or eject him from, such reserves, and the verdict was in favor of the Government, with the exception of a reservation of judgment with respect to the extent of the reserves. When such reserves are upon the open sea-coast, or upon the coasts of a bay or harbour, no doubt is, or can be, entertained as to their extent; but when they run up creeks, or small inlets of the sea, or up rivers, there arises doubt and difficulty in attempting to determine their extent. In such cases the reserves are not exactly alike in any two, and consequently the multiplication of legal details, with respect to them, must be very perplexing, if not almost endless. Hence arose the necessity of consulting the authorities at Home, with the view of procuring such a decision or determination concerning the reserves as might render the solution of any question or difficulty arising out of them here a comparatively easy affair. The Fishery Reserves Bill said, it was true, that no more rent should be paid to proprietors for Fishery Reserves of which the fee simple is in the Crown; but it was indeed a begging of the question to all intents and purposes for Sir Edward Bulwer Lytton to say, as he does, "the Act forwarded does not resume the lands for the Queen, who is their owner; but by the abolition of rent, practically transfers them to the tenants who have no right whatever to them except that which they derive from their landlords." Now, so far is this from being the case, that the Act does positively resume the lands for the Queen, in the sense in which she is their owner, or rather the sense in which the Government of this Colony are now their owners; that is for the public service to which they were originally dedicated, by the abolition of the payment of rent to proprietors, who have no just right or claim to it; and by declaring that rent for such lands, when exacted, and paid, shall be exacted by and paid to the party to whom alone it can now, under existing arrangements, become due, that is to the local Government of this Colony, to whom the Bill reserves the right of leasing the said Fishery Reserves land, or any part or portion thereof, and the sole control and management of the same, and of the rents, issues and profits, arising therefrom; and to all this, without the passing of any such Act at all, they are constitutionally and legally entitled, in virtue of Her Majesty's transfer of all her territorial revenues, &c., to the Legislature of the Colony for their disposal. Besides the Despatches to which I have referred, I could, were it necessary to do so, refer to many others from successive Colonial Secretaries, calling upon successive Governors of this Colony to watch carefully over the Crown Lands, and the territorial revenue of the Crown generally therein. But I have already said enough on this head to prove that the Crown has duly asserted, and fully maintained its title to all lands ungranted, and to all lands specifically reserved in any grants of lands in this Island, made by it since 1764 up to the time when all Crown Lands, and the territorial revenue of the Crown generally were transferred by Her Majesty to the Legislature of the Colony; and I think the facts respecting the administration of our public affairs by our local Government since that event occurred, to which I have adverted, have also made it clear that the local Government and the Legislature have been unremittingly watchful for the protection, with no other end in view than the public benefit of all property then transferred to them, and placed under their control and at their disposal, by Her Majesty. It will, therefore, I trust, be freely acknowledged by your Honors, that it is the duty of this House to protest against the declaration made by Sir Edward Bulwer Lytton, in his capacity of Colonial Minister, that the claim asserted by the Legislature and Government of this Colony to the Fishery Reserves, and set forth by them in the Bill to which he says he cannot advise that Her Majesty's consent should be given, is an obsolete claim; and to withstand, to the very utmost of their constitutional power, to resist the intention, or rather the attempt which is being made to transfer or give up to the proprietors a most valuable public property, on no other grounds of justification of such public spoliation, than that the proprietors "have leased it, improved it, and incorporated it into farms;" and that their advice—although most unjust and constantly disputed occupancy thereof defeats the title thereto of the Crown. It is very easy to

determine whence Sir Edward Bulwer Lytton has derived his argument and the statements on which it is based. They have certainly not been communicated to him by any friend of the people of this Island. He may have impartially considered the facts which have been supposed to him for his consideration; but as these facts, (as it seems quite fair to infer from his decision,) have all proceeded from parties whose interest in all matters affecting the lands are directly opposed to those of the people of this Island, I should think that, with reference to them, he has had but little room left for impartiality, how much soever he may have been disposed to exercise it. He says, "I could earnestly wish the Legislature would devote its attention to some feasible scheme settling those local questions which have caused so much disquietude in the Island. To the expediency of such a settlement I am fully alive. Most gladly would I co-operate in measures by which it may be practically obtained in a spirit of conciliation and fairness to all parties, and the subject is engaging my anxious deliberation." The amicable adjustment of conflicting claims which Sir Edward recommends, is to be effected, it seems, by means of an arbitration between Proprietors and Tenants; but any thing more visionary, or less likely to eventuate in a satisfactory result—to tenants at least—cannot, I think, be proposed with any semblance of feasibility. Conciliatory measures are to be adopted—conciliatory of the good will of the proprietors! But how the proprietors are to be conciliated with respect to any questions at issue between them and the people, except by the full cession to them of all their claims by the people, I know not. However, if this very absurd scheme for amicable adjustment and conciliation is to be tried, let it be so; the sooner the better. I will now, by your Honors' permission, move the Resolution which I have prepared to submit to your Honors. His Honor then read and moved the following Resolution, which was seconded by the Hon. Mr. Craswell.

Resolved, That this House is of opinion that the right of this Government to dispose of those Fishery Reserves, the soil of which is reserved to the Crown, is not a right depending on any obsolete claim, as stated in the Despatch of the Right Hon. the Secretary of State for the Colonies, dated the 20th October, 1858, but one which is in frequent exercise and cannot be alienated.

His Hon. COLONEL SWABEY, having moved his Resolution, said, I will merely add that, by consulting the Journal for 1859, it will be seen that the right of the Government to dispose of these Reserves was frequently exercised between the years 1813 and 1839; and any one acquainted with the business of the Public Lands Office must know that ever since the establishment of that office, the same right has been exercised therein every day.

Hon. Mr. DINGWELL. His Honor, Col. Swabey has said, that when the Fishery Reserves are upon lands abutting upon the open Sea, there can be no doubt as to their extent; but that, when they are within bays or harbours, or run up creeks or rivers, it may, very frequently, be a matter of serious difficulty to ascertain their extent. Now, Your Honors, I am of opinion that when the Home Government made the Reserves and specified their extent in the Original Grants, they were very well aware of their real nature. They could not possibly have supposed that the Reserves were upon lands abutting upon the sea only; for they must have known, quite as well as we do, that although the fish may be taken in the open sea, the open sea-coast could afford no shelter for the fishing craft, or facilities for the safe keeping of boats, fish, or any other property of fishermen; and that unless the Reserves were to extend along the coasts of the bays and harbours, and up inlets of the sea, creeks, and rivers, the making of them at all would be a mere mockery; for, otherwise, they would afford none of the necessary facilities for the prosecuting of the Fisheries, to any extent, successfully. I am glad to be able to admit that, in one respect, the Home Government acted wisely when granting away the lands of this Island; although, at the same time, I admit that the wholesome mode in which they did it is now most justly condemned by all who are conscious of its results. The wisdom for which I am happy in being able to commend them, is that which they displayed in making the Fishery Reserves, and in making them as they did. The lands were bestowed upon the Original Grantees for little or nothing; but, in making the Fishery Reserves, which have been legally defined as extending up inlets of the sea, creeks, and rivers, as well as along the open coasts of the sea, they evinced a prospective regard for the interests of those who would become the actual settlers in the Island, the cultivators of its soil, and the openers up of its resources; and of its natural resources, they must well have known that the Fisheries, if not actually the greatest, would be among the principal. In defining the extent of the Reserves, the Crown Law Officers have, I believe, given it as their opinion that they must be held to extend, not only along the sea coasts, but up inlets of the sea, creeks, rivers, and streams as far as the tide flows; and, I think, any other definition of their extent would be fallacious and absurd, although I admit that some authority in the Island should be invested with a discretionary power, by the due exercise of which their being carried too far inland might be prevented. Their extent in such direction certainly cannot, I think, be fairly determined, unless highwater mark, or the flow of the tide inland, be made the ground of the determination. Any deviation from their extent so indicated would, almost invariably, lead parties into doubts, difficulties, disputes, and very probably, in the end, into law suits. I will just mention, (for the purpose of shewing that power should be conferred upon some authority to prevent their being carried to an undue extent inland,) a circumstance which came within my own knowledge many years ago. A person who was settled a long way inland, thought proper to engage in fishing on a small scale, and in returning home, from the open sea, having to go up a brook, he took down a rail or fence which, as a boundary partition had been run across the brook, and for doing so he was prosecuted by the party who had put up the fence or barrier, and involved in a vexatious law suit. If such a liberty is to be denied or withheld, it will frequently be very difficult for a man engaged in the fisheries to tell where he can find or be allowed a suitable place to cure his fish. This question, involved as it is in that of the extent of the Fishery Reserves inland, is one of very great importance; but yet it is one which I think might easily be settled if a spirit of fairness and moderation were brought directly to bear upon it. I am not, however, such an advocate for the exercise of this liberty as to wish or seek to disturb the recognized rights of property by insisting upon it to any thing that could fairly be deemed an unreasonable or unjust extent. In many cases, I do not mean all, I think, the best way would be to allow the proprietors who have improperly leased Fishery Reserves, to pay the rents arising from them

to the Government, and to allow the tenants to remain in undisturbed possession of them, at least until they should actually be wanted, for bona fide fishing purposes, by fishermen. As respects Fishery Reserves, which proprietors have sold, I think that, whilst the purchasers should be left in undisturbed possession of them, except when they should really be required by fishermen, for fishing purposes, the proprietors or the representatives of the proprietors who sold them, should pay rent for them to the Government.

Hon. Mr. BAGNALL. I have some little knowledge of the manner in which some portions of the Fishery Reserves have been dealt with by the Government of this Colony; particularly as respects a certain portion of them, which, it appears, was granted by Governor Smith, in the year 1820, to Richard Rollings, subject to the conditions and reservations mentioned in the Royal Instructions, relating to Fisheries to be carried on upon the coasts of this Island; and also, as respects another certain portion of them, granted by Governor Ready to George Clark and another, the same being a part of the shore of Peter's Island, Rustico, "to be held," as appears by a record of the Grant, "so long as the said George Clark and another, their heirs and assigns, shall actually carry on and conduct a Fishery on the said premises—to cease, determine, and be void, if they shall cease from so carrying on or conducting the same for a longer period than eight months at any one time." These two cases of the disposal of portions of the Fishery Reserves, and others which have subsequently been made, from time to time, by successive Governors or Governments of the Island, up to the present time, are quite sufficient, I should think, in the opinion of any reasonable man, to prove that the right of the Crown, or of the Government of this Island to dispose of such Fishery Reserves, has never been relinquished, or even more, that it has never ceased to be exercised, except during very short intervals. This being the real state of the question, I know not on what grounds the present Secretary of State for the Colonies has presumed to call the claim, on which our Legislature has based the provisions of the Fishery Reserves Bill, "an obsolete claim." The claim is most certainly anything but obsolete; for not only has it been duly asserted and acted upon ever since the first Order in Council, made in 1764, for the granting of the lands of this Island, came into effect in the Island, up to the present time, as has been most clearly shewn by His Honor Colonel Swabey; but the people have always been fully alive to the great value of the advantages which the strict preservation of these Reserves and their due allotment to the purposes to which they were originally dedicated, are calculated to confer upon them generally; and I believe they have never failed to take advantage of every suitable occasion to give public expression of their sentiments to this effect. With respect to another portion of the Fishery Reserves, at Rustico, on Middleton's Cove, I may also be allowed to state, that when, years ago, the establishment of a Fishery was first projected there, the project was abandoned because, as there were no roads to the Reserve, or shore, through any of the farms adjoining the Reserve, or abutting on the shore, and consequently no access to the Reserve, except by and from the water, it was thought it could not be carried on with any reasonable prospect of success. But a few years ago, roads having been previously opened to the shore, through the lands abutting thereon, Mr. Dean obtained a licence of occupation of this Reserve for the purpose of conducting a fishery thereon, and the concern has, under good and judicious management, grown up into a large, successful, and very useful establishment. The determining of the real extent of the Fishery Reserves up creeks, inlets, rivers, and streams, has hitherto puzzled the wisdom of all our legislators; and all the legal acumen of the Crown Lawyers has been brought to bear upon it in vain; but His Honor, Mr. Dingwell, appears, nevertheless, to have got completely over the difficulty; and I, therefore, beg leave to congratulate him upon his happy solution of so difficult a question.

Hon. Mr. DINGWELL explained. I merely said that, in my opinion, the extent of the Fishery Reserves, in such cases, could not be ascertained in anything like a certain and satisfactory manner, unless it were to be determined by the extent to which the sea flows up the rivers, creeks, inlets, and streams; and I certainly think that any other mode of determining their extent would be unjust and arbitrary.

Hon. Mr. BAGNALL. Well, it is certainly very clear that if fishermen were to be excluded from the bays or harbours, or even to be prevented from prosecuting or carrying on the business of the Fisheries freely in the creeks, inlets, rivers, and streams, as far up as the tide flows and as natural facilities are to be found for fishing purposes, such exclusion and prevention would, in fact, amount to little less than actual prohibition of the trade, as respects the people of the Island themselves. The fishermen must be allowed freely to enter our bays and creeks, and freely to ascend up our rivers, streams, and inlets, and to come within the bars of our harbours, not only for the purpose of sheltering their fishing craft and boats, but also for that of drying and curing their fish, or the privileges afforded to them, as fishermen, upon the open sea coasts would be of very little value to them. And, with respect to the views of the present Secretary of State for the Colonies, Sir Edward Bulwer Lytton, concerning that class of Reserves in which the fee simple is in the Crown, as he has expressed them in the Despatch now before us, I certainly think that were legislative or legal effect given to them, that effect would amount to nothing short of a most grievous public robbery—a total deprivation of the only right, privilege, or benefit prospectively reserved for the people by the Crown, when granting away, without consideration, the lands of this Island. But, whatever, may be determined elsewhere respecting the very humble and submissive mode of conciliating the proprietors, recommended for the adoption of this Legislature, by Sir Edward Bulwer Lytton, I hope this House at least will evince so much independent regard for the interests of the people, as most steadfastly to refuse their sanction to it.

Hon. COLONEL SWABEY. The answer of the Crown Law Officers to the query, What is the legal meaning of the word "Coasts" in the Grants? is this:—"The word 'Coasts' has no clearly defined legal meaning; and its meaning in any particular Grant, may depend upon the other parts of the Deed, and the description and local situation of the premises. We should conceive, however, that generally it would be taken to apply to those places in which the sea ebbs and flows, and that it would extend, therefore, to those portions of the Bays, Harbours, and Rivers, in which there was an ebb and flow of the sea."

Taking this general interpretation of the word "Coasts," and being governed by it, in seeking to ascertain the extent of any Reserves in any locality, little or no difficulty would attend it; and I imagine that, with respect to the extent of the Reserves from which the late Government have sought to eject Mr. Cox, it would be found they extend a long way past Mr. Cox's property. In 1850, persuaded that, independently of any Statute

Law, the Government was in a position to assert the claim of the Crown to all Reserves in which the fee simple is in the Crown, I advised the instituting of legal suits, at Common Law, against individuals having and retaining unjustifiable possession of any portions of such Reserves. But, important as it is that the Government should be able, on certain and positive grounds, to procure a final decision, in every case, in which the extent of any Reserve is in dispute, we had better not allow ourselves to be in any way perplexed by the consideration of that question at present; but confine ourselves to that which is properly under discussion.

(To be continued.)

#### SUMMARY OF PROCEEDINGS.

##### MISCELLANEOUS PETITIONS.

The following petitions were presented to the House, and the same were severally received and read, viz:—

By Hon. Mr. Dingwell.—A petition of divers inhabitants of St. Peter's Lake, Township No. 39 and vicinity, praying that the Act for the protection of the Alewives Fishery may be amended by preventing the setting of nets or seining within a certain distance of the mouth or entrance of the Lake.

By Hon. Mr. Forgan.—A petition of the Mayor and Common Council of the City of Charlottetown, setting forth that in consequence of the outer end of Pownall-street wharf being appropriated to the use of the steamer *Westward*, to the exclusion of all other vessels, the amount of wharfage is considerably lessened—that a sum of £600 will be required to repair the said wharf. Memorialists, therefore, respectfully submit that a portion of the public revenue ought to be expended for that purpose, and pray that the premises may receive the favorable consideration of the House.

By Hon. Mr. Forgan.—A petition of divers inhabitants of Townships Nos. 65 and 30, praying that the Legislative Council will concur with the House of Assembly in granting a sum sufficient to provide a Rope and Winch for the Scow at Elliot River Ferry.

By Hon. Mr. Bagnall.—A petition of divers inhabitants of Township No. 25, praying that a Post Office may be established at the residence of Joseph Rogers.

By Hon. Mr. Bagnall.—A petition of divers inhabitants of Summerside and vicinity, praying that the Legislative Council will concur with the House of Assembly in the making of a pecuniary grant in aid of individual subscriptions towards purchasing a Fire Engine.

By the Hon. Mr. Forgan.—A petition of the Minister, Trustees, and Members of the Calvinistic Baptist Church of Bedouque, praying for an Act of Incorporation.

Ordered, That the last six preceding petitions be referred to the Special Committee appointed to report on all petitions relating to miscellaneous subjects.

##### TEACHERS' PETITIONS.

By Hon. Mr. McIntyre.—A petition of Artemas Morrow, Teacher, and the Trustees of the Morrell District School, praying that the Legislative Council will concur with the House of Assembly in granting a sum of money as a remuneration for the services of the said Teacher.

By Hon. Mr. McIntyre.—A petition of divers inhabitants of Little Harbour School District, Township No. 45, praying remuneration for the services of Matthew Reville, an unlicensed Teacher.

By Hon. Mr. Forgan, a petition of John Stewart, Teacher, of the Rona District School, Township No. 62, praying that the Legislative Council will concur with the House of Assembly in granting the sum of £14 2s. 6d. which was deducted from his usual semi-annual allowance, in consequence of his not having had the average attendance of scholars required by law.

By Hon. Mr. Bagnall, a petition of Robine Richardson, an unlicensed Teacher, praying remuneration for her services as such at Summerside.

By Hon. Mr. Bagnall, a petition of Ellen Walsh, Teacher, praying that the Legislative Council will concur with the House of Assembly in granting her the sum of £8 15s. 0d., which sum has been deducted from her usual half year's allowance in consequence of her not having had the average attendance of scholars required by law.

Ordered, That the five last preceding petitions be referred to the special committee appointed to report on all petitions relating to education.

WEDNESDAY, April 27, 1859.

The following petitions were presented to the House by the Hon. Mr. DINGWELL, and the same were severally received and read, viz:

A petition of Charlotte Jane Alley, praying that the Legislative Council will concur with the House of Assembly in granting her allowance as a Teacher for six months at Cardigan, which has been withheld on the ground of deficiency on the average daily attendance of pupils.

A petition of John McDonald, late Teacher of the Pownall District School, Township No. 69, praying that the Legislative Council will concur with the House of Assembly in granting him the sum of £11 17s. 6d. which he claims for six months' services, and which was withheld in consequence of his not having had the daily average attendance of pupils required by law.

A petition of Mary Ann Anderson, of Sea Cow Head, West Bedouque, licensed Teacher, praying remuneration for her services for six months amounting to £17 10s. 0d., which has been withheld in consequence of an alleged irregularity or breach of the rules of the Government schools.

A petition of Henry Vickerson, late Teacher at Elliot River, praying that the Legislative Council will concur with the House of Assembly in granting him the sum of £12 0s. 7½d. which he claims as the balance for his services for six months, and which has been withheld in consequence of a very slight deficiency in the daily average attendance of pupils required by law.

Ordered, That these four petitions be referred to the special committee appointed to report on all petitions relating to education.

THURSDAY, April 28.

The following petitions were presented to the House, and the same were severally received and read, viz:

By Hon. Mr. Forgan, a petition of Margaret Morrison, of Bonshaw, in indigent circumstances, with an aged parent, who is very infirm, praying relief.

A petition of William G. Magford, of Charlottetown, a cripple, in destitute circumstances, praying relief.

Ordered, That these two petitions be referred to the special committee appointed to report on all petitions relating to paupers.

A petition of John McKinnon, late a Preventive Officer, at Charlottetown, regarding the seizure of the schooner "Dragonet" in the year 1855, for a breach of the Revenue Law, and praying compensation for services performed by him.

A petition of Duncan McPhee and Hector McLean, praying to be indemnified for certain work performed at Prince-street Wharf, and materials provided, in the year 1856.

Ordered, That the last two petitions be referred to the special committee appointed to report on petitions relating to miscellaneous subjects.

(For continuation see last page.)