

REPORT

Of D. G. Smith, Commissioner,

—ON—

BAY DU VIN ISLAND NET STANDS

In Dispute Between

DUDLEY PERLEY and T. B. WILLISTON,

May 14th, 1896.

REPORT

To F. Gourdreau Esq., Deputy Minister of Marine and Fisheries, Ottawa.

Sir: I have the honor to report that, pursuant to instructions from the Department of Marine and Fisheries, covered by acting Deputy Minister Hardie's communication of 1st. instant, numbered 137, and your telegram of 7th. instant, directing me to investigate the claims of Dudley Perley and Thomas(B) Williston to certain salmon stands at Bay du Vin, I duly notified Messrs. Perley and Williston respectively of my intention to open the enquiry forthwith, especially as you required my report at "earliest convenience".

The salmon-stands in dispute, being located at Bay du Vin Island, about twenty two miles down river from Chatham, and a mile from the mainland, and deeming it necessary to a proper understanding of the subject of enquiry that I should personally examine the locality, I notified the parties to be present on Bay du Vin Island on Saturday, 9th. May inst., at noon, when the enquiry would begin at that place .

I requested both parties to have any witnesses they desired present, and Mr.T.B.Williston, one of the claimants was to notify the Overseer of the district, Mr.John G.Williston, to be also in attendance.

In accordance with these arrangements, the enquiry was opened at the place and time appointed, in the presence of the claimants, Messrs Perley and Williston, Mr.W. C. Winslow, Counsel for Mr.Williston (Mr.Perley being unrepresented by counsel) and others.

I examined Messrs Perley and Williston, the claimants, and also Mr. Joseph Williston, called in behalf of Mr. Thomas B. Williston - all under oath.

There being no more witnesses available at the time, I then proceeded, together with the claimants and Mr. Williston's counsel, to examine the lands and shore contiguous to the stands in dispute.

Mr. John G. Williston, the Overseer of the district did not attend, although, as Mr. T. B. Williston informed me, he requested him to do so, in his behalf. Mr. Williston said the Overseer had stated he would not come for the commissioner or anyone else, unless directed by the Department to do so.

Leaving the Island in a boat with Mr. T. B. Williston and others - Messrs Perley and Winslow going in another boat, the latter landing at a place half a mile away from where we did - I proceeded to the house of the Overseer, some three miles from the Island accompanied by Mr. T. B. Williston. As we were approaching it through a field, Messrs Perley and Winslow drove up, but passed on, en route for Chatham, as the Overseer was not at home. Failing to obtain a pen and ink at the Overseer's with which to write a summons for him, I procured them at a store about a mile away. Having prepared the summons requiring the Overseer to be present at my office in Chatham, at 10 o'clock a.m. on Monday, 11th. May, instant, I personally informed Mr. T. B. Williston that the enquiry would be resumed there at that hour, and read over to him the summons to the Overseer, showing that the latter was to bring with him all papers, etc., relating to the fishing

fishing stands in dispute. He undertook to deliver the summons to the Overseer, which, as I afterwards learned from him, he did promptly, and with the desired effect.

On Monday at about 9 o'clock a.m. I went personally to Mr. Winslow's office, and he not being present, I notified him through his clerk, Mr. A. Haviland, of the time and place when and where the enquiry was to be resumed, which I had not opportunity to do in either his case or Mr. Perley's on Saturday afternoon, owing to their driving away before I had myself ascertained that Overseer Williston was not at home. I also notified Mr. Perley, on Monday morning, of the time the enquiry would be resumed.

Soon after ten a.m. on Monday the enquiry was resumed at my office. Overseer John G. Williston was present pursuant to summons, as were also Messrs Perley and Williston, the claimants. Mr. T. B. Williston's counsel was not present but Mr. Williston made no objection to going on without him.

Overseer John G. Williston was sworn and examined at length by me, and also questioned by both Mr. T. B. Williston and Dudley Perley, the claimants.

In order to correctly ascertain the manner in which the Williston portion of the Island of Bay du Vin has been from time to time held, it was necessary (and the most expeditious method) to get the information from Mr. George Burchill of the Village of Nelson, seven miles above Chatham. I ascertained from him, on Monday afternoon 13th. inst., that the Williston portion of the Island was, years ago, owned by the estate of the late John Percival and leased by it to the late Alex.

Williston,

Williston, father of the claimant, Williston, April 12th., 1866; held under that lease until Nov. 6, 1878, and sold on that day to T. B. Williston, claimant in this case, who subsequently - in November 1893 - assigned it by Mortgage to the Bank of Montreal. The deed to Williston conveyed all the Island excepting the portion of it owned by Perley.

The Perley lot is 13 chains wide, was first granted to the late Hon. Joseph Cunard by the Crown in 1835 and deeded by the estate of Cunard to Asa Perley, father of Dudley Perley, more than thirty five years ago, and left by will of Asa Perley to his son Dudley, the present owner and claimant of the stands in question.

I append a sketch plan of the Island, taken from a copy of the Crown Land Office plan, Fredericton, by permission of the Surveyor General, and corrected to show changes of formation since original survey, after my personal examination of the ground on Saturday last.

From the testimony taken and of the facts elicited I beg to report as follows;-

There is full agreement between Messrs Perley and Williston as to the tenure by which their fathers and they have respectively held the lands with which the salmon fishing stands in question, as well as others connected with the exchange or "swap" of privileges, which I shall hereinafter refer to, are connected.

They agree, and their statements is sustained in a remarkably clear manner by Joseph Williston, son of the "Squire" John Williston, deceased, late Overseer of the

district

district, that, about twenty seven years ago, Perley, senior, acquired from Williston, senior, father of T. B. Williston, the right to undisturbed enjoyment of the fishing privileges in question, (which were off said Williston's land) on the south shore of the Island in so far as Williston, senior, could renounce and bestow upon another those privileges.

The consideration for which the fishery was transferred to Perley by Williston, as proved by the three witnesses named, and not questioned, was the relinquishing by Perley to Williston senior, in exchange, of the undisturbed enjoyment of the fishing privileges connected with his, Perley's lot fronting on the north shore of the Island.

It is proved by the claimants, Perley and Williston, as well as by the present Overseer, John G. Williston, that when the claimant, T. B. Williston, applied for the licenses of the two stands in dispute - some ten years after he had acquired the land by purchase, as I have already stated - the late Inspector of Fisheries, W. H. Venning, after being informed of all the facts, refused to entertain the application, and ordered the Overseer to change the name in the Licenses from that of "Asa" Perley to "Dudley" Perley, Asa's son, the present claimant, he having succeeded his father in the right to the fishery.

That arrangement continued up to 1892.

In the year 1892, Inspector Chapman took these licenses in dispute from Dudley Perley under the circumstances detailed in evidence pages 4, 7, 8, 10, 12, 20, 22, 23, 32 etc, and gave them to Williston.

You will observe, on reading the testimony of Overseer Williston on this point, that his memory entirely failed

when he was questioned as to the manipulation of nets in this disputed water by the claimant Williston in 1892 - the first season of the bestowal of the licenses upon Williston - although he admitted (page 25) that "Tom as moving and shifting all summer. It was hard to keep the run of him".

In 1893, the testimony of Perley proves, Inspector Chapman promised to go to Bay du Vin and investigate the claims of Williston and him to these stands, and because he had a charge (page 33) against the Overseer, but while the Inspector went to Bay du Vin, he did not go to the Island on the day promised, but remained at the Overseer's house "indisposed" and told Perley, without even the courtesy of hearing a statement of his claims or, the "charge", that he had decided the matter from his plans and maps and that Williston was to have the fishery.

It will be observed that Overseer Williston attempted to convey the idea that the Inspector decided after hearing Perley, but would not venture to so state positively, and finally said he could not trust his memory.

As stated by Mr. Winslow, counsel for Mr. T. B. Williston, ^{the} ~~that~~ latter claims ~~that~~ he ought not to be bound by the exchange of privileges between his father and Perley, but as he bought the land 18 years ago (which was only leased to his father up to that time) he has nothing to do with that exchange.

In this connection I think it is equitable to remember that Mr. T. B. Williston fished the exchanged privilege on the north side of the Island continuously for twenty two years, first under his father and afterwards when he, himself, was owner, and it has not been shown that he made any attempt

to recover the privilege by arrangement with Perley for the revocation of the exchange, and only sought to take the inside fishing from Perley "because it was better than on the outside" (page 14 of evidence)

As neither of the parties can claim any title to the water in which these stands were licensed, but the Department, through its Inspectors and Overseers, recognised the exchange or "swap" of privileges for twenty two years, and gave Perley the licenses continuously for that period, it does not seem equitable that it should so lightly brush aside that time-honoured agreement, as its present Inspector did in 1892, and arbitrarily deprive Perley of his acquired right under it.

It appears from Overseer J. G. Williston's testimony that it is a general practice on the Miramichi river (I myself, know it is so all the way down to Point Aux Bar) for stands of salmon nets to be started from the westerly lines of the lots of riparian proprietors. If this practice were honored by observance on Bay du Vin Island, Perley would have room under the regulations for two stands of nets off his own land on the south side, instead of one, and one hundred feet to spare - even under the hard and fast application of the new rule affirmed by the Inspector that riparian proprietors must have the licenses off their lands, regardless of rights such as that which Perley acquired under the exchange bargain so fully proved by the evidence.

After a careful review of the evidence and facts, I have therefore, to report that in my opinion injustice has been done to Dudley Perley, in depriving him of the licenses held by his father and him continuously for twenty two years, until 1892, by virtue of the fair exchange proved to have been

-7-

made


made between the late Alex. Williston and Asa Perley, and by which, in consideration of Perley abandoning and giving to Williston his privileges in the fishing off his land on the North side of Bay du Vin Island, Williston abandoned and gave to Perley his fishing privilege connected with his land on the south side, which bargain, or exchange, was recognised and acted upon by the department for said period of twenty two years in issuing the licenses for the stands, respectively

In view of the special partnership proved between Thos. B. Williston and the Overseer of the district, J. G. Williston it is not difficult to understand how it came about that Perley was so annoyed and interfered with in 1892 by T. B. Williston being allowed to put down an unlicensed stand of nets between the stands licensed to Perley and himself respectively; nor need we seek far for a motive for the incorrect information which seems to have been given to the late Inspector Verming in the latter's office, which caused the Inspector to say in his letter to the Overseer (page 19 of evidence) "This is a very different story from that told by T. B. Williston on the occasion of your visit to St. John. You now state" etc. It would doubtless lead to a harmonious and equitable enjoyment of fishing privileges such as those in question by parties justly entitled to them, if the officers were entirely disinterested, which I regret to state I do not find Overseer J. G. Williston is or can be, especially in matters affecting the affairs of Mr. T. B. Williston.

I hereto append minutes containing the testimony taken at the enquiry, on which my report is based.

I have the honor to be,

Your obedient servant,

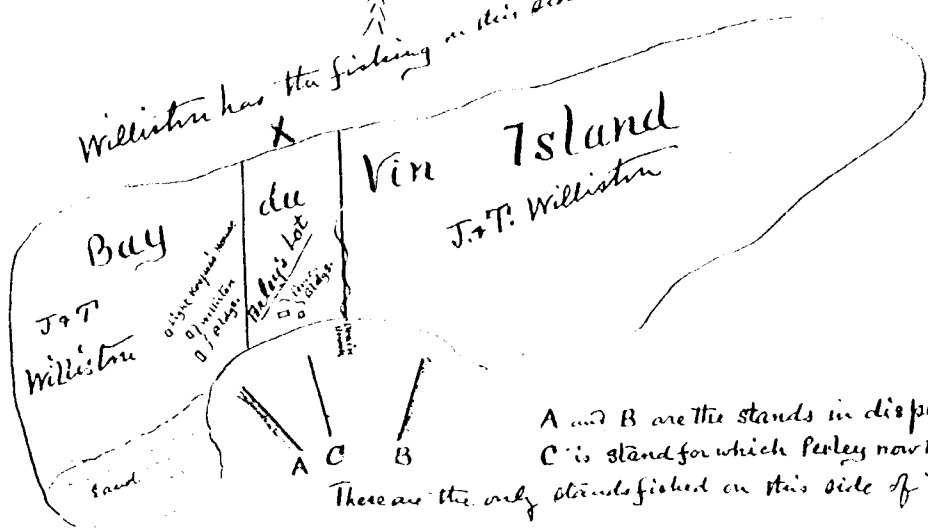


Commissioner.

Chatham N.B.
May 14th 1896

N
^

Williston has the fishing on this side exclusively



A and B are the stands in dispute,
C is stand for which Perley now has license
These are the only stands fished on this side of the Island