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PROVINCIAL PARLIAMENT.

LEGISLATIVE COUNCIL.

Wednesday, March 3.

The bill to abolish the fees taken by Judges of the Supreme Court, as passed by the House of Assembly, was taken up by the Council in Committee this morning.—Hon. Mr. Saunders in the Chair

Hon. Solicitor General said, he rose thus early in the debate, to speak more especially on the legality of the Judges' fees, against which so much had been said in other quarters. It was well known that in the year 1784, this Province was divided from Nova Scotia, and erected into a separate Government. In March following, while Governor Carleton was Commander in Chief, the ordinance establishing the Judges' fees was passed by him and his Council, and in the following year, the first Session of the Legislature took place, having been called into existence by authority of the Royal Commission to the Governor. By various Acts of the Legislature, from the earliest period of its Session to the present time, the ordinance fee table had been clearly and expressly recognized, and was therefore now a part of the law of the land.—But notwithstanding the length of time since those fees were first established, and the undisputed manner in which their operation had been carried on—notwithstanding their having been acted on by all the officers of the Courts, from the Judges and Attorneys to the Jurors and Criers, during that long period of time, and under the administration of the most upright Judges, the very legality of these claims is now questioned, and it is seriously doubted by some, whether the ordinance at that time established by the Governor and Council, previously to the existence of a Legislative Body, could now be valid. It is an undoubted principle of the law to be found as far back as the reign of Edward III., that fees, which are taxes, cannot be imposed without the consent of the people, as expressed by the popular branch of Parliament; and in the case in question, that consent could not be obtained. Happily however, for the opinion which he (hon. Solicitor General) had adopted, the legality of the question did not rest there; for the fee book had been recognized, as had been observed, by various Legislative enactments, by which it became as valid as if it had had its origin in a distinct Act of the Legislature. But it was urged by those who were hostile to the Judges' fees, that since those fees had been established apart from legislation, by the sole act of a Governor and Council, the same power could at any time be brought to bear in abolishing them, and they ought consequently now to be abolished by the Governor and Council. From this opinion he entirely dissented, and for this plain reason, that after the establishment of a Legislature the Governor and Council have no power to make a law for any purpose whatever, and consequently they could not legally annul this ordinance by any such unauthorized act. He would now proceed to show their honors, that the ordinance fee table had during the time which had elapsed since its first establishment, been recognized and confirmed by no less than nine Acts of the Legislature passed at various intervals. [Here his honor quoted from the Acts of Assembly to which he had alluded, being the 35 Geo. III. c. 3, 5 Wm. IV. c. 29, 5 Wm. IV. c. 46, 1 Vic. c. 12, 2 Vic. c. 36, 3 Vic. c. 47, 6 Vic. c 29, 8 Vic. c. 110, 11 Vic. c. 16, all of which he contended undeniably and irresistibly confirmed and rendered valid this ordinance fee table.]—Now this fee table was not merely applicable to the Judges' fees, but also to the fees taken by all the other officers of the different Courts of Law and by the public officers of the country. The Judges, the Clerks, the Attorneys, the Sheriffs, the Jurors, the Secretary of the Province, and all the Magistrates, with some exceptions, in the Province, were guided by it, and such of them as had not commuted their fees for salaries, were receiving fees under it to the present day; and where, as in the case of the Clerk of the Pleas and Secretary, salaries were given in lieu of fees, those fees were paid over into the Provincial Treasury, and were the fund from which those officers were now paid. Here his honor read from a law book a quotation proving that when a statute recognizes a fee, although not ancient, it is established by law, and its amount may be determined even by usage. Thus the fee table was not only established and settled by long usage, but by an ordinance passed when there was no higher authority in the country, and what was more cogent still, by the clear recognition of that authority which is conclusive in this Province, namely, the Acts of the Legislature. His honor also alluded to a case in which the four Judges had recently decided in favour of the legality of these fees, which decision he would not urge here further than that it had led him thoroughly to examine the subject, and to find that his own judgment entirely concurred in their decision. But it had been said, that however legal the fees might be, the amount charged by the Judges was improper; and the preamble of the present Bill goes so far as to assert that those charges are made for work *not performed;* which expressions alone would prevent him from going for the bill. Those fees are however what they always were, and in charging ten shillings, which was one of the fees objected to, for every first motion in every cause (not criminal), it is founded on the practice of the Court, and the mode of proceeding which that practice renders necessary. He (hon. Solicitor General) was sorry he should be obliged to take up time by going so minutely into the matter. There are two kinds of motions; the one consists of those made in open Court, where affidavits or papers are read, and arguments heard; and the other of those which are made, as in cases of ejectment, by handing the papers to the Clerk in open Court, by which motion a rule is obtained calling on the opposite party to plead within twenty days; and in other cases where the motion is made by *entering* it on the docket, and is considered the same as actually making the motion in cases where the trial is not proceeded with. Every bill of costs which is made out after the entry of the cause, contains the Attorney's charges for a motion and rule to plead and in bailable cases also for body; and the hon. and learned member opposite, who, he believed, was in favour of this bill, (hon. Mr. Hazen) did himself, what he condemned in the Judges, for on this first motion is founded the Judges to make the charge. If the Judges do wrong so do the Attorneys; but he (hon. Solicitor General) denied that either of them did so. ["We do," by hon. Mr. Hazen.] Well it seems that in these days a discovery has been made that all the Judges from the earliest time, Attorneys, Clerks, and all, have been doing wrong. This is exceedingly new to say the least of it! He (hon. Solicitor General) would not have noticed the mode of charging fees at all, because of its minuteness, were it not that he knew how observations made in another quarter were calculated to prejudice the Judges in the public opinion, whose reputation of all public functionaries it was most desirous to preserve unsullied. The next objectionable item alluded to, is the trial fee to the Judge, the fee for which is only 6s. 8d.; but the 25s fee to Counsel and Attorney, is also charged by the profession, and such fees have always been allowed and taxed, whether the cases are tried or not; and for this simple reason, that the same preparation must be made, and almost the same amount of trouble taken as if they were actually tried, since nobody can foresee the manner or time of their final disposal. On the same ground the Judges charged their fees. They found it necessary to look over the pleadings as entered on the record filed, and be prepared to comprehend at a moment's warning the true nature of the issue to be tried; without which in many cases it might not be possible, while the trial is proceeding, to master the case in all its bearings. It was sometimes the case that two or three of such causes would be tried in the same day; at other times that number would suddenly go off; it was therefore absolutely necessary that the Judge should be fully prepared for the trial by reading and understanding the cases a long way in advance of the cases first expected to be tried. The Judge had therefore the same right to his fee of 6s. 8d. that the Attorney had to his 25s., and the right to both he believed to be undeniable. Two or three years ago a law was passed to give Juries a fee of 30s. in all record cases, and of 15s. in summary causes, and this had to be paid on the entry of every cause, which they were to receive whether it were tried or not.—He (hon. Solicitor General) had at first thought it was unjust to burthen the action with a fee for a duty they did not perform; but yielded his opinion on the very ground of the Judges, Barristers and Attornews, receiving fees under the like circumstances, and for the same reasons. Having thus discussed the legality of the Judges' fees and charges, he would now turn to another branch of this important question. In 1849, the Government thought it necessary to prepare a bill for reducing the salaries of future Judges. The bill was brought forward at that time, because it was deemed the best time to settle a moderate and reasonable standard of remuneration, before vacancies occurred on the bench. It gave the Chief Justice £700, and each of the other Judges £600 per annum, the Attorney General distinctly stating at the time, that if the House preferred these salaries, the fees were to remain; if not, the salaries were to be fixed at £800 for the Chief, and £700 to the other Judges, and abolish the fees altogether, thus estimating the fees at £100 to each Judge. The bill was passed on this understanding at the lesser sums, and thus these very fees, only two years ago, were distinctly recognized as a part of their salaries. The next year, (1850,) was one of great general depression in all departments of business, and the opinion became general that all salaries, even of present holders of office, should be subject to reduction. The Government saw this state of affairs, and judged it wiser to take the matter of reduction into their own hands, than to leave it to be decided altogether by the reckless opinions which were then promulgated, and running like wild-fire throughout the country. Under these circumstances, a measure affecting the salaries of the then holders of office, was introduced; and although they felt, and painfully felt, that it would be a violation of public faith, still they were impelled by a necessity which they saw no way to escape. This measure then, contemplated the reduction of the salaries of all public officers, from the highest to the lowest, and brought those of the Judges once more under consideration. It proposed exactly the same standard as to the present Judges, which had been settled for future incumbents, namely, £700 and £600, still leaving them the fees. But some member of the other branch brought in a bill at the same time, and without the concurrence of the Government, for abolishing those fees; thus leaving the Judiciary as then constituted, in a worse situation than that which had been by the Act of 1849 established for their successors. At the same time, both these bills when passed, came up to this branch so late in the Session as, of itself, occassioned the loss of both, although even the members of the Government in the Council, deeming the abolishing of the fees an infraction of the understanding upon which they acted, assisted in rejecting the bills. It is true the Government had been blamed for not pushing their bills for a general reduction earlier in the Session; but the truth was, they always viewed it as a measure which could only be justified by a great public emergency (a principle in which Lord Grey has since fully concurred) and they delayed it from day to day, hoping that the wide spread feeling for these reductions would eventually subside; and it was only when there no longer existed a hope that such would be the case, they sent down the measures to the House, though, as it turned out, too late after passing the House for consideration in the Council. In 1851 the bill for abolishing the fees again came up, and although again opposed by himself and others, passed with a suspending clause, but the British Government disallowed the bill. The anxiety manifested by the Government to meet the wishes of the people, and at the same time not to violate public faith, had been manifest throughout their whole conduct. There was now no longer any reason for the reduction of the Judges' salaries, of which those fees were a part. There was no such pecuniary depression in the resources of the country, alluded to by Lord Grey, as rendered it necessary to disturb the rights of those now in office. The country was at present prosperous, and the pressure of those fees would not be experienced even if the country were differently circumstanced, because if abolished, they only gave relief to the litigants of the country, and to the profession of which he was a member. It would undoubtedly relieve himself and others practising in the Courts, and especially at this time, when law business was at a low ebb; but he did not consider it fair or just to take from the Judges what was their undoubted right, to benefit the parties referred to, and be of no advantage whatever to the revenue. By the passing of the bill, he (Hon. Solicitor General) would personally be a gainer; but he could not suffer any private considerations to interfere with the observance of his public duties. One word more; the passing of this bill, worded as it is, would not only abolish the fees of the udges, but also put an end to almost all the ees taken by other public officers, because it s evident that it is the ordinance fee table which, by some mistake in the framing of the bill, is repealed, and not the fees intended by the bill; on that ground alone, it would be impossible for hon. members to pass this measure; but although he was fully aware of this error, he had thought the opportunity should not be lost, to set the country right on some points about which much that in his opinion, was erroneous, had been asserted, and endeavour to do justice to those who had no opportunity to defend themselves.

Hon. Mr. Connell said it was almost presumption in him to speak on this question immediately after the hon. and learned Solicitor General; but he did not mean to allude to the legality or illegality of the question; he would leave those more competent to decide that question, and content himself with saying a few words on the plain common sense view of the subject as it now stood before him. He would grant that the Judges had long and quietly enjoyed their fees, but what he had to consider was, whether their respective salaries were not large enough to give them an independent living irrespective of fees altogether. It was his opinion that they had not only enough, but too much salary without fees. He (Hon. Mr. C.) had been in the other branch at the introduction of the bill alluded to, and it was he who had prepared an amendment abolishing the fees, but it was said that such would destroy the bill, and he was compelled to submit, although adverse to that opinion. With respect to the principle involved, if there had been any breach of public faith, it had been made by the Government of the day, and the plain acknowledgement was, that if they did not bring the bill they must lose their places. ["That is your view of it," by hon. Solicitor General.]—Yes, and the country viewed it in the same light, for it was everywhere called for by the people. It was under these circumstances that the Government brought in a bill including all the salaries in the Province, from the Governor's down, and this they did, as they confessed, to meet the views of the people. If he (Hon. Mr. C) recollected right, that measure was, however, introduced at too late a period to be discussed; and however much the Government wished to consult the wishes of the people, it was not their design to affect the salaries. This was the very way, he thought, to violate a great public principle. With regard to the passing of this bill, he thought it could violate no constitutional principle, as it was in perfect accordance with Lord John Russell's despatch in '49, which left the whole local matter of the Colony to be settled by its own Legislature in such manner as they might think most conducive to the general welfare. This had already been applied to the case of Mr. Baillie; and if any doubt could exist in the matter of the Hon. Judge Parker, it could by no means apply to the other three Judges, who held office immediately under its conditions. There was no breach of faith connected with the bill of 1850, and he regretted deeply that it had not been carried out, for in commencing at the Governor's salary it began at the right place, and the local clamour which then existed on that subject, will doubtless be called forth again, when it would be found that an earlier day would be chosen for the introduction of the bill than that adopted in the case of the one which had failed. The only one who had the slightest claim to exemption was Judge Parker. ["That destroys the bill," by Hon. Mr. Botsford.] He thought not, for it was an established maxim with him, that any one holding office, no matter how long, should have his salary so arranged as to suit the exigencies of the country. Earl Grey's objection, that no compensation had been given in lieu of the fees, could not by any means apply to any other than Judge Parker, as the other Judges had taken office with the full understand that they were to hold the amount of their salaries subject to the will of the people. With respect to the bill, it had passed last year by a large majority, and so far as the Provincial Legislature was concerned it had become the law of the land; but it was subsequently arrested in another quarter, and as he (Hon. Mr C.) believed, by the adverse protest of the Government. This would be fully understood by the documents by which it had been accompanied to England. [Hon. Solicitor General,—"That was Sir Edmund Head's opinion."] Yes, but