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Common Resource or Private Right:
Contested Claims to Seaweed in
19th Century Prince Edward Island

In the nineteenth century, before farmers could purchase inexpensive chemical fertilizers, farmers on Prince Edward Island looked to the sea and the shore for nutrients to add to their soils. When disputes over who had the right to gather seaweed led to litigation, judges ruled that the owners of property fronting on the shore had the exclusive right to seaweed cast up on the shore, both above and below the high water mark. These rulings did little to dispel the popular perception that seaweed, a gift of nature, was a common resource that belonged to the people who collected it. Repeated attempts to settle the matter with legislation produced much talk about what property rights the law should uphold, and why, but ultimately, most Island legislators, as well as colonial administrators in London, proved unwilling to support legislation that might interfere with private property rights protected by the common law.

Au dix-neuvième siècle, avant de pouvoir acheter des fertilisants chimiques peu chers, des agriculteurs de l'Île-du-Prince-Édouard comptaient sur la mer et sur les rivages pour trouver des nutriments à ajouter à leurs terres. Lorsque des différends quant à savoir qui avait le droit de recueillir des algues menaient à des poursuites, les juges tranchaient en affirmant que les propriétaires de terres qui donnaient sur le rivage avaient le droit exclusif aux algues qui y étaient rejetées, tant au-dessus que sous la ligne des hautes eaux. Ces jugements n'ont certainement pas contribué à dissiper la croyance populaire que les algues, cadeau de la nature, étaient une ressource commune appartenant à ceux qui les ramassaient. Des tentatives répétées pour régler le problème en adoptant des lois ont suscité de grandes discussions sur ce que les lois sur les droits de propriété devraient garantir, et pourquoi, mais au bout du compte, la plupart des législateurs de l'Île-du-Prince-Édouard, tout comme les administrateurs coloniaux à Londres, se sont montrés réticents à appuyer des lois qui risquaient d'attaquer les droits de propriété privée protégés par la common law.

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It was a dark and stormy night in the fall of 1870, and waves were throwing seaweed onto the shores at Middleton Cove, on the Gulf of St. Lawrence, where Andrew Doyle owned a farm. At least that is probably what set the scene for an altercation between Andrew Doyle and William Toombs, his neighbour. When William Toombs went down to the shore to gather seaweed to use for manure on his farm, Andrew Doyle attempted to prevent him from doing so, leading Toombs to bring assault charges against Andrew and three other men with the surname Doyle. The charges were one incident in a long-running dispute over who had the right to gather seaweed cast up on the shore.¹

Toombs and Doyle each farmed several different plots of land on Lots 23 and 24 near Rustico, Prince Edward Island. Andrew Doyle had purchased one of these, called Middleton Farm, in 1869. Middleton Farm adjoined the inland farm where Doyle resided, but, more importantly, it fronted on the coast. Doyle said he bought the farm, and paid a premium for it, to obtain the seaweed cast up on the shores of the cove "by what is known in that locality as 'storm-tides.'" Before purchasing Middleton Farm, Doyle obtained advice from Island lawyers who said that, as the owner of land on the coast, he would have the exclusive right to take any seaweed cast up on the shore on which his land fronted. That right, he estimated, added one-quarter to the value of his property.² When his neighbours treated the seaweed as a public resource, both they and Doyle looked to the courts and the legislature to legitimate and enforce their claims.

The confrontation between Doyle and his neighbours was part of a broader struggle to delineate the appropriate limits of exclusive private rights in what was widely perceived as a common resource. At common law, a Crown grant of property "to the seashore" or "bounded by the sea" granted rights to land extending only as far as the landward side of the ordinary high water mark; the foreshore, the strip of land exposed at low tide, was retained by the Crown unless explicitly included in the grant. None of the original Crown grants on Prince Edward Island included a grant of the foreshore; indeed, in two-thirds of these grants, the Crown retained rights to a fishery reserve in the first 500 feet of land above

1. Public Archives and Records Office of Prince Edward Island [PARO], RG 6.1, Supreme Court Fonds, Series 1, Minute Books, Subseries 2, Queen's County, 12, 19, 20 January 1871; *Patriot* (Charlottetown) (19 January 1871); *Examiner* (Charlottetown) (23 January 1871).

2. Prince Edward Island, *Journal of the House of Assembly*, [JHA] (1873), Appendix S, Memorials Against, and Minute of Executive Council in Committee, on the subject of "An Act to define the Law with regard to Seaweed and Kelp on the Sea-coast or outside Shores of this Island, 1872."

the high water mark.³ According to English common law, the owner of land on the shore was entitled to seaweed cast up above the ordinary high water mark. The property regime governing seaweed deposited on the foreshore was less clear, even without the legal complications of the fishery reserves and the factual complications of definitively delineating the ordinary high water mark.⁴ Despite judicial decisions upholding the rights of landowners to seaweed deposited on the shore in front of their farms, and legislators' reluctance to curtail those rights, many Islanders continued to treat seaweed as a public resource. Legal rules allocating rights in the abstract did not definitively determine rights if facts presented possibilities for ambiguity, as was the case when winds and tides moved seaweed back and forth across the lines that mattered in determining who could claim the exclusive right to gather the seaweed. In the century-long struggle to wrest control of Island land from the holders of large proprietorial estates, landowners discovered that they faced considerable barriers to enforcing property rights articulated in formal legal rules that lacked popular support. Even after the resolution of the land question in 1875, with the forced sale of large estates, owners of shore properties met resistance to their efforts to assert monopoly control over the resources

3. Rusty Bittermann & Margaret McCallum, "The One That Got Away: Fishery Reserves in Prince Edward Island" (2005) 28:2 Dal LJ 385. The Crown Surveyor divided the Island into 66 townships of about 20,000 acres each, which were allocated in 1767 to about 100 different grantees. Almost all of the 20,000-acre townships fronted on the sea; an inland township of 10,000 acres was retained by the Crown until 1786.

4. For summaries of the common law position, see, e.g., Joseph K Angell, *Treatise on the Right of Property in Tide Waters, the Soil and Shores Thereof* (Boston: Harrison Gray, 1826); Humphrey W Woolrych, *A Treatise of the Law of Waters: Including the Law Relating to Rights in the Sea...* (London: W. Benning, 1851) at 11-12; Arthur Joseph Hunt, *The Law Relating to Boundaries and Fences* (London: Butterworths, 1866) ch 1; Gerard A Lee, "The Right to Take Seaweed from the Foreshore" (1967) 18 NILQ 33. At some times and places, people could agree on a course of conduct even though they disagreed on the nature of the legal rights at stake. For example, when glass manufacturers used potash derived from burning kelp, Scots landlords paid their tenants to gather and burn the kelp for them. Landlords may have regarded the payments as wages for work done on the landlords' property, but crofters regarded themselves as selling the product of their enterprise to the landlords. See Jennifer Neeson, "Coastal Commons, Custom and the Use of Seaweed in the British Isles c. 1700-1900" in F Datini & Simonetta Cavaciocchi, eds, *Ricchezza del mare ricchezza dal mare: secc. XIII-XVIII : atti della trentasettesima Settimana di studi, 11-15 aprile 2005* ([Florence]: Istituto internazionale di storia economica. [Le Monnier]) 343. Mitchell W Feeney provides an overview of historical uses of seaweed and of the problems of one modern regulatory regime in "Regulating Seaweed Harvesting in Maine: The Public and Private Interests in An Emerging Marine Resource Industry" (2002) 7 Ocean & Coastal Law Journal 329.

of the foreshore, which became increasingly important as the population spread across the Island's interior.⁵

To understand why seaweed mattered to settlers in nineteenth-century Prince Edward Island, one needs to know something about the region's agricultural history. Early European agricultural settlement in Prince Edward Island and elsewhere in the Maritimes focused on marshlands and the possibilities they offered for hay production and cropland. Marshlands offered many advantages. Unlike forested land, marshes did not have to be cleared of trees, and, perhaps even more importantly, marshes did not readily lose their fertility. Marshland soils had high nutrient levels, and marshes that were subject to periodic flooding naturally acquired new nutrients that helped to offset those lost by cropping.⁶

With a growing agricultural population, settlers began to clear wooded lands for pastures and fields, moving into a different ecosystem in which nature did not readily replenish the soil nutrients necessary for agriculture. Consequently, farmers began to confront serious challenges in maintaining soil fertility, as the bounty of nutrients released by the clearing process was depleted after a few years of good crops. Without new nutrients, soil fertility declined, often quite rapidly. Thus, the movement of farming onto upland soils almost inevitably generated a scramble to find sources of nutrients to replace those lost by the off-farm sale of crops and livestock, and by soil erosion.⁷

In the nineteenth century, farmers' options were limited. Synthetic nitrogen production and the inexpensive global transportation of minerals containing usable phosphorus, nitrogen and potassium, the main components of modern chemical fertilizer, lay in the distant future.⁸ Farmers with deep pockets or exceptionally valuable crops could, from

5. Rusty Bittermann & Margaret McCallum, "When Private Rights Become Public Wrongs: Property and the State in Prince Edward Island in the 1830s" in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 144; Margaret McCallum, "The Sacred Rights of Property: Title, Entitlement and the Land Question in Nineteenth-Century Prince Edward Island" in G Blaine Baker & Jim Phillips, eds, *Essays in the History of Canadian Law, In Honour of RCB Risk*, vol 8 (Toronto: University of Toronto Press for the Osgoode Society, 1999) 358.

6. J Sherman Bleakney, *Sods, Soil, and Spades: The Acadians at Grand Pré and Their Dykeland Legacy* (Montreal and Kingston: McGill-Queen's University Press, 2004); Andrew H Clark, *Acadia: The Geography of Early Nova Scotia to 1760* (Madison: University of Wisconsin Press, 1968); Matthew G Hatveny, "'Wedded to the Marshes': Salt Marshes and Socio-Economic Differentiation in Early Prince Edward Island" (2001) 30:2 *Acadiensis* 40.

7. Steven Stoll, *Larding the Lean Earth: Soil and Society in Nineteenth-Century America* (New York: Hill and Wang, 2002).

8. Vaclav Smil, *Enriching the Earth: Fritz Haber, Carl Bosch, and the Transformation of World Food Production* (Cambridge: MIT Press, 2001); GJ Leigh, *The World's Greatest Fix: A History of Nitrogen and Agriculture* (Oxford: Oxford University Press, 2004).

the mid-nineteenth century forward, tap into the guano trade or buy other expensive soil amendments, but for the most part farmers in the Maritimes had to find nutrients that were closer to hand and, preferably, there for the taking.⁹ Thus, they dug swamp muck, excavated ancient beds of oyster and mussel shells, and traded fisticuffs and writs to gain access to seaweed. Seaweed was particularly important, not just because it was rich in nitrogen and potassium, but because it was a renewable resource. Each year the ocean produced a new crop, and each year a portion of it came ashore where farmers might collect it and haul it to their fields.¹⁰

Maritime farmers did not lack sources of advice on how best to maintain the fertility of their fields. The enthusiasm for new agricultural practices that grew in Britain and Europe in the late eighteenth and early nineteenth centuries, and that often took the form of elite-led projects for agricultural improvement, gathered articulate support in North America as well. In Nova Scotia, John Young, using the pen-name “Agricola,” assumed a leadership role in advocating, among other things, crop rotations, cultivation of legumes, and the use of composts and manures.¹¹ In Prince Edward Island, James Peters played a similar role. In his *Hints to the Farmers of Prince Edward Island*, which he published in 1851, Peters drew from a rich farming literature to provide nearly 60 pages of advice on progressive scientific farming, and to critique traditional methods.¹² That he devoted half of the book to the management of manures, seaweed included, reflected the existential challenge that maintaining soil fertility posed in an era before the industrial production and distribution of fertilizers. Peters had moved to the Island in the late 1830s in order to help his father-in-law, Samuel Cunard, manage a massive estate that Cunard was in the process of purchasing. It would be a mistake, however, to

9. Gregory T Cushman, *Guano and the Opening of the Pacific World: A Global Ecological History* (Cambridge: Cambridge University Press, 2013). In 1844, the Island legislature provided a grant to the Central Agricultural Society to assist in importing two tons of guano from islands in the Gulf of St. Lawrence as a trial. See *Royal Gazette* (Charlottetown) (14 May 1844).

10. Pound for pound, seaweed was comparable to farmyard manure in nitrogen levels and had almost twice as much potash. See WA Stephenson, *Seaweed in Agriculture and Horticulture* (London: Faber and Faber, 1968) at 45; David Weale, “The Shell-Mud Diggers of Prince Edward Island” in Donald Akenson, ed, *Canadian Papers in Rural History*, vol 2 (Gananoque, Ontario: Langdale Press, 1980) 41.

11. Daniel Samson, *The Spirit of Improvement: Liberal Government and Rural-Industrial Society, Nova Scotia, 1790–1862* (Montreal and Kingston: McGill-Queen’s University Press, 2008) ch 2; Graeme Wynn, “Exciting a Spirit of Emulation Among the ‘Plodholes’: Agricultural Reform in Pre-Confederation Nova Scotia” (1990) 20:1 *Acadiensis* 5.

12. James H Peters, *Hints to the Farmers of Prince Edward Island* (Charlottetown: Nobel Press, 1851).

view the concern for agricultural improvement and the use of manures to maintain soil fertility as a project of elites alone.¹³

In the census report of 1871, various enumerators noted the advantages of locations where the inhabitants had easy access to seaweed and mussel mud, and noted as well places that lacked good roads to the shore for procuring kelp. The enumerator for Sandhill Road, East of Tracadie Bay, in Lot 36 was, for instance, appalled by the "misery" of the people, which he attributed to "Landlordism in its worst forms," noting that "[s]ea manure of all kinds can be procured here in abundance, and yet the people are comparatively destitute, as compared to other inhabitants of the Island elsewhere."¹⁴ Presumably, if the farmers on the Sandhill Road had enjoyed security of tenure, either as freeholders or leaseholders with long leases, they would have had an incentive to use sea manure to improve the soil.

Advertisements for farms provide extensive evidence of the importance of seaweed for improving Island soil, and the centrality of access to seaweed for viable farming and the value of farm land.¹⁵ In 1812, an advertisement for a 150-acre leasehold on Spry Cove claimed that "[a]s this land borders on the south side of this Island, it can be easily manured with kelp, with which the shores abound."¹⁶ An advertisement in 1820 for 1,000 acres fronting on Orwell Bay and the Pinette River, part of the estate put together by the Earl of Selkirk, noted that the estate included "about 200 acres in different Farms, which can be manured by sea-weed, with little trouble."¹⁷ Some advertisements claimed that seaweed was always available in the vicinity,¹⁸ while others limited that claim to the summer.¹⁹ Farms fronting on bays or at the mouths of rivers were most likely to have ready access to seaweed. An advertisement for a farm on the Hillsborough River, eight miles northeast of the river's mouth at Charlottetown, the Island's principal town, promised that a "large quantity

13. Ian Ross Robertson, "James Horsfield Peters," in *Dictionary of Canadian Biography*, vol 12 (Toronto: University of Toronto Press, 1990) 838.

14. John McNeill, "Report of the Superintendent of Census Returns" (23 August 1871), transcribed by Dave Hunter, online: The Island Register <www.islandregister.com/1871report.html>.

15. Seaweed was also used in Prince Edward Island to insulate buildings. *JHA*, 1860, Appendix O, gives details of a government contract to build a small warehouse, specifying that the walls were to be "rough boarded and shingled outside...and roof boarded inside and packed with seaweed to make it frost proof."

16. *Weekly Recorder* (Charlottetown) (16 March 1812).

17. *Prince Edward Island Gazette* (Charlottetown) (29 February 1820).

18. *Royal Gazette* (Charlottetown) (12 March 1839); *Islander* (Charlottetown) (8 January 1864); *Examiner* (Charlottetown) (18 April 1864); *Examiner* (Charlottetown) (25 February 1867); *Patriot* (Charlottetown) (29 June 1872).

19. *Examiner* (Charlottetown) (24 October 1864).

of Sea Manure can be had on the shore.”²⁰ Advertisements noted abundant seaweed as an advantage of farms on the Island’s west and south coast on the Northumberland Strait,²¹ as well as on the Island’s north shore on the Gulf of St. Lawrence.²²

Claims made in descriptions of farms for sale confirm the existence of a widespread understanding that seaweed was a public resource that was not evenly distributed along the Island’s coast. An advertisement for a farm at Cape Traverse on the Northumberland Strait claimed that it “possesses the principal creek in the neighbourhood for seaweed.”²³ Two different farms at Cavendish on the Gulf of St. Lawrence were advertised as having sea manure in abundance, not because of their ocean frontage, but because they were close to good sites for gathering seaweed in New London Bay.²⁴ Farms with no shore frontage were advertised as being “convenient for sea manure” or as having sea manure available nearby.²⁵ Legislative appropriations to maintain roads to the shore to collect seaweed reinforced the public perception that seaweed was a public resource, there for the taking.²⁶ On one occasion, members of the public were so certain of their right to gather seaweed that they prosecuted a road commissioner for overstepping his authority in closing a road that wound along a particularly good shore for seaweed.²⁷

As farmers turned more Island land into fields and pastures, conflict was inevitable between those who believed that seaweed was a public resource and those who asserted that seaweed cast up on the shore in front of a person’s farm was private property, belonging to the owner of the land fronting on the shore. As early as 1818, when the Island population was less than 20,000, two members of the Island assembly tried, unsuccessfully, to

20. *Royal Gazette* (Charlottetown) (12 December 1848).

21. *Examiner* (Charlottetown) (14 March 1864), (15 August 1864), (19 March 1866); *Royal Gazette* (Charlottetown) (30 May 1848), (15 October 1850); *Colonial Herald* (Charlottetown) (11 June 1842), (27 August 1842); *Islander* (Charlottetown) (26 May 1843), (11 October 1844).

22. *Examiner* (Charlottetown) (27 March 1865), (4 September 1865), (9 October 1865), (25 February 1867); *Islander* (Charlottetown) (22 July 1864); *Patriot* (Charlottetown) (22 June 1872).

23. *Royal Gazette* (Charlottetown) (8 September 1840).

24. *Colonial Herald* (Charlottetown) (12 November 1842); *Islander* (Charlottetown) (10 March 1854).

25. *Islander* (Charlottetown) (26 May 1843), (19 February 1864); *Royal Gazette* (Charlottetown) (15 October 1850); *Examiner* (Charlottetown) (11 July 1864), (18 July 1864), (2 March 1868).

26. *JHA*, (22 March 1855) at 81, 82; *JHA*, (11 March 1856) at 58; *JHA*, 1858, Appendix G; *JHA*, (11 April 1863) at 124; *JHA*, 1866, Appendix V; Prince Edward Island, *Legislative Council Debates and Proceedings* [LCD&P], (31 May 1872) at 52.

27. *Colonial Herald* (Charlottetown) (15 July 1843). The road commissioner was found guilty, but acquitted after a second two-day trial before a special jury.

obtain support for legislation to regulate the gathering of seaweed for the encouragement of agriculture.²⁸

The matter was raised again in the courts and the legislature in the 1840s. In October 1842, the Island's Chief Justice, Edward Jarvis, presided over John Clark's trespass action against John Bell, Sr., for gathering and carrying away seaweed and sea manure from the shore adjoining a marsh that Clark held on a 999-year lease. Bell testified that for several years, he and his family had collected seaweed on the seaward side of a dike enclosing Clark's marsh, following a long-standing community practice. Clark testified that his marsh extended beyond the dike, and that the previous leaseholder, who had assigned the lease to him, had permitted people to cut hay there and to collect seaweed on the shore, and had received compensation for giving that permission. The Chief Justice instructed the jury that there was no common law right in the public to take the seaweed left by the tide on the shore, whether above or below the high water mark, as it belonged to the owner of the land fronting on the foreshore. The jury found for the plaintiff, and assessed damages at 20 shillings.²⁹

According to the newspaper account of *Clark v. Bell*, the case attracted considerable attention, and may have prompted the Island legislature to consider the question of rights to seaweed in 1843. William Cooper, who was the leader of the anti-proprietorial party in the legislature, and also an improving farmer, introduced a bill to recognize a public right to gather seaweed cast up on the shore. Cooper collected seaweed to fertilize his own farm, which sloped gently down to Howe Bay on the Northumberland Strait. Nonetheless, his bill declared that the owner of land adjoining the shore did not have an exclusive right to any seaweed below the high water mark.³⁰ The bill passed in the assembly but stalled in the upper house, the appointed legislative council.³¹

The following year, bolstered by a petition in support of the seaweed bill, the assembly passed it again.³² The legislative council received competing petitions, one asking that farmers be permitted to carry away seaweed when their neighbours "shall not appropriate the same, but leave it to be swept away by the tide," and another asking that the legislative

28. *JHA*, (11 Nov 1818) at 13; AH Clark, *Three Centuries and the Island* (Toronto: University of Toronto Press, 1959) at 66 and 237, n 2, provides a population figure for 1807 of 8,730 and 23,000 for 1827.

29. *Colonial Herald* (Charlottetown) (15 October 1842).

30. *JHA*, (3 March 1843) at 53, 73; *Colonial Herald* (Charlottetown) (18 March 1843); Rusty Bittermann, *Sailor's Hope: The Life and Times of William Cooper, Agrarian Radical in an Age of Revolutions* (Montreal and Kingston: McGill-Queen's University Press, 2010) at 44-74, 226-227.

31. *JHA*, (28 March 1843) at 95.

32. *JHA*, (9 February 1844) at 23; *JHA*, (22 February 1844) at 38.

council reject the bill passed by the assembly. The majority in the council willingly complied with the latter request, issuing stern warnings of the dangers of legislation that failed to protect private property. The only councillor to vote for the bill was Charles Young, who had supported William Cooper's positions in the past. As might be expected of the son of "Agricola," Young spoke of the need to add manures to Island soils. As well, he deplored the "dog-in-the manger feeling" toward seaweed that prevented farmers from making use of what nature offered as "a common bounty."³³ There is no evidence that those on either side of the question invoked the precedent of a similar dispute in the 1830s on the shore at Minudie, Nova Scotia, just across the Northumberland Strait from Prince Edward Island. The owner of land adjoining good sites for quarrying stone for grindstones was initially unsuccessful in asserting a private property claim to the quarries, in the face of a local tradition of treating the quarries as public property, with access regulated by the quarriers. Ultimately, the Crown managed both to assert its right to regulate access to the quarries and to support the landowner against the independent quarriers by making an express grant of the disputed property to the landowner.³⁴

With the defeat of Cooper's bill in the Island's legislative council, the seaweed question disappeared from the legislative debates for more than two decades, except for a petition to the legislative council in 1854 from some Charlottetown landowners asking for public access to a nearby estuary so that they could gather seaweed and mussel mud for manuring their land.³⁵ The question of whether seaweed was a public or private resource continued to generate disputes, however, and in 1864 the government attempted to clarify the law with a legal action against Charles Lord, William Lord, and Artemas Lord, charging them with creating a nuisance by obstructing the public right of way over the foreshore. The Lords, who owned land on Lot 28 at Cumberland Cove on the Northumberland Strait, had built a weir extending into the water at the front of their farm to trap seaweed brought by wind and waves.³⁶ The trial was presided over by

33. Prince Edward Island, *Journals of the Legislative Council [JLC]*, (9 February 1844) at 14-15; *JLC*, (27 February 1844) at 30-31; *Islander* (Charlottetown) (10 May 1844); Rusty Bittermann, *Rural Protest on Prince Edward Island: From British Colonization to the Escheat Movement* (Toronto: University of Toronto Press, 2006) at 263-264.

34. Samson, *supra* note 11 at 122-138; National Archives (Kew, UK) [NA]: Campbell to Glenelg (13 July 1836), CO 217/161 at 679-681; Campbell to Glenelg (13 August 1836), CO 217/161 at 699-706; Campbell to Glenelg (2 August 1839), CO 217/170 at 101-106.

35. *JLC*, (27 March 1854) at 32.

36. There was no fishery reserves clause included in the original Crown grant of Lot 28, made to Samuel Holland on 31 December 1768. See Nova Scotia Crown Lands Record Centre (Halifax), Book 8, Page 7.

James Peters, who had developed a reputation for ruthlessness as Cunard's land agent prior to being appointed to the bench in 1848. After hearing two days of evidence, the jury determined that people in the neighbourhood had used the sea shore for the previous 15 years for hauling seaweed, stone and shellfish. The jury also found that horses, carts and carriages could pass above the Lords' weir at low tide, although there was no room to pass around it on its lower end where it extended into the water. Asked specifically whether the weir impeded the public in travelling, hauling, or in any way getting seaweed, stone, shellfish, or any other thing, the jury answered no.³⁷

On these facts, Justice Peters ruled that the defendants were not guilty of nuisance. In concluding his 15 pages of reasons for decision, Peters acknowledged that his "examination of the authorities has led us to a length which may be considered prolix," but the Attorney General "pressed us for a decision on the points expressly raised to determine a question of much public importance." For that reason, Peters had not limited his discussion to the narrowest ground on which he could have decided the case, but had attempted to "settle a question heretofore prolific of disputes." That question, of course, was whether owners of land on the shore could assert an exclusive right to gather seaweed on the foreshore.³⁸

Making no mention of Chief Justice Jarvis's earlier unreported decision in *Clark v. Bell*, Justice Peters framed the question in terms of competing rights analogous to the competing public rights of navigation and of fishing. Although the right of navigation was paramount where the two rights conflicted, where possible, the right of navigation had to be exercised so as not to interfere with the right to fish. In the same way, although the public enjoyed a right of way along the foreshore, the exercise of that right might be limited by the Lords' right to collect the seaweed. Unlike public rights to highways, where any obstruction is a nuisance, the public right of way across the shore is not a right over the whole foreshore but a right of way as necessary in order to exercise the rights of navigation and fishing. If landowners had the exclusive right to the seaweed, they had as well the right to erect structures below the ordinary high water mark to collect seaweed floating at high tide, providing in doing so they left some room for public passage along the shore.³⁹

37. *R v Charles, William and Artemas Lord* (1864), Haszard & Warburton, *Prince Edward Island Reports* [PEIR], vol 1 at 246-247 [*R v Lord*].

38. *Ibid* at 260-261.

39. *Ibid* at 248-250.

As might be expected of an improving farmer, and land agent for the largest estate on the Island (the Cunard estate was more than 200,000 acres, close to one-seventh of Island land),⁴⁰ Justice Peters concluded that the rights of landowners prevailed over the rights of the public. Once the seaweed lodged on the shore, even on that part of the shore belonging to the Crown, it became the property of the owner of the land fronting on the shore. Peters supported this ruling with references to a leading American treatise on littoral property rights, quoting with approval from a decision reproduced in the treatise in which New York's Chief Justice Kent invoked unspecified principles of justice and equity to hold that seaweed thrown up on the shore belonged to the owner of the adjoining land, as "reasonable compensation to him for the gradual encroachments of the sea to which other parts of his estate may be exposed." It followed from this principle, according to Peters, that when "agriculturists" erected "contrivances...to catch or secure seaweed," they did not create a nuisance, providing they did not interfere with "the fair, useful and legitimate exercise of the right of navigation on the one hand, or of passing along the shore on the other."⁴¹

Disputes over rights to seaweed continued, despite Justice Peters's efforts to provide a comprehensive and definitive ruling. Lawyers might argue that the ruling in the *Lord* case should apply only to seaweed that accumulated gradually, and not to seaweed that was heaped up on the foreshore in vast quantities by high waves or high winds, as happened in Middleton Cove.⁴² Lawyers could also argue that Peters's comments on the ownership of seaweed were of limited precedential value because they were *obiter*, unnecessary to determine whether the Lords' weir constituted a nuisance. Indeed, in a legal opinion offered in 1867, three years after Justice Peters's decision, Edward Palmer, a leading Island lawyer and politician, asserted that no Island court had ruled directly on the question of whether seaweed lodged on the shore above the low water mark belonged to the owner of the adjoining land. Palmer considered it likely that an island court would rule in the landowner's favour, but, as the question was "an important one in this colony," it was appropriate for the

40. *JHA*, 1875, Appendix E, Prince Edward Island Land Question, Statement, showing the Number of Acres of Land Purchased by the Government of the Province of P.E. Island.

41. *R v Lord*, *supra* note 37 at 250-252, citing Joseph K Angell, *A Treatise on the Right of Property in Tide Waters, and in the Soil and Shores Thereof* (Boston: Harrison Gray, 1826) and *Emans v Turnbull*, 2 Johnson's Reports 313.

42. In the passage from *Emans v Turnbull* quoted in *R v Lord* at 251, Chief Justice Kent characterized seaweed as "one of those marine increases arising by slow degrees" and thus belonging to the owner of the adjoining land under the common law rule that "if the increase be by small and almost imperceptible degrees it goes to the owner of the land, but if it be sudden and considerable, it belongs to the Sovereign. Seaweed is supposed to have accumulated gradually."

legislature to resolve it.⁴³ Palmer would be part of the debate in that forum, as he represented Charlottetown in the house of assembly from 1835 until 1860, and then served in the legislative council until his appointment to the bench in 1873.⁴⁴

The Island assembly next considered the seaweed question in 1868, prompted in part by a petition from settlers on Lots 33 and 34, on the Island's Gulf of St. Lawrence Shore, to the east of the Lot where Andrew Doyle lived. The petitioners asked the assembly to pass a law which, "while duly respecting the just rights of private property," would enable "the agriculturists of this colony" to collect seaweed and kelp and other sea manure without interference from those who claimed the right to prevent the public from hauling seaweed to manure their fields, even when the seaweed would be "carried out to sea again and lost."⁴⁵

In the ensuing debate, the members of the assembly raised most of the issues that made rights to seaweed "a troublesome subject to legislate upon," as T. H. Haviland, leader of the opposition, described it. Haviland noted that despite years of agitation "in the neighboring Republic, ... the statesmen there have never succeeded in passing a law which has settled the question." Joseph Hensley, the attorney general, and Frederick Brecken, who was Haviland's law partner and had argued the Lord case in 1864, maintained that the public had the right, by law or custom, to collect seaweed on the foreshore, providing the owner of land fronting on the coast did not have a grant that extended to the low water mark.⁴⁶ Cornelius Howatt pointed to the popular rejection of court rulings that denied people the right to collect seaweed on the foreshore, concluding "[i]t is therefore necessary that these matters should be regulated, in order to have peace and harmony."⁴⁷

43. PARO, Acc 2849, Palmer Family Fonds, Series 2: Edward Palmer Papers, Item 29: Palmer to Gentlemen (17 August 1867).

44. Ian Ross Robertson, "Edward Palmer" in *Dictionary of Canadian Biography*, vol 11 (Toronto: University of Toronto Press, 1982) 664; *JLC*, (16 February 1860) at 3. The Legislative Council, initially an appointed body, was made elective in 1862. See Frank MacKinnon, *The Government of Prince Edward Island* (Toronto: University of Toronto Press, 1951) at 101-103.

45. *JHA*, (19 March 1868) at 17.

46. Prince Edward Island, *House of Assembly Debates and Proceedings [HADP]*, (19 March 1868) at 64; G Edward MacDonald, "Joseph Hensley" in *Dictionary of Canadian Biography*, vol 12 (Toronto: University of Toronto Press, 1990) 425; H T Holman, "Brecken, Frederick de St Croix" in *Dictionary of Canadian Biography*, vol 13 (Toronto: University of Toronto Press, 1994) 110; Andrew Robb, "Thomas Heath Haviland" in *Dictionary of Canadian Biography*, vol 12 (Toronto: University of Toronto Press, 1990) 415.

47. *HADP*, *ibid* at 64.

With little likelihood that the dispute would be resolved by further debate, the assembly referred the question to a committee.⁴⁸ Before the committee reported, the assembly received two more petitions, one opposing the first petition and the other supporting it. Given the diversity of views expressed, the committee took the safe course, and recommended doing nothing until the subject had received “careful and protracted consideration.”⁴⁹

The legislative council also received opposing petitions in 1868 on who should be able to claim property rights in seaweed, and, as in the assembly, referred the petitions to a committee.⁵⁰ The committee attempted to provide a definitive statement of the law on the question. Its report began with the relatively uncontroversial statement that a grant of land bounded by the sea did not extinguish the right of the public to use the foreshore for such purposes as navigation, for loading or unloading vessels and carrying the cargo to any right of way leading away from the shore, or for harvesting shellfish and other fish, subject to exclusive rights acquired by grant or prescription. Seaweed, kelp and similar substances “lodged on the seashore,” however, were governed by different legal principles. “In no case that your Committee can find has it been decided, by any judicial tribunal, that the public have a right to them.” The report noted that a decision in Ireland in 1833 prohibited people from harvesting seaweed unless they had obtained permission from the owner of the land on the landward side of the high water mark, and that judicial decisions in the United States of America declared seaweed cast on the shore to be the property of the owner of the land fronting on the shore, “on the principle of the law of *Alluvion*, or imperceptible increase to the land adjoining the sea-shore, produced by the action of the sea slowly and gradually washing up sand, earth &c., and thereby increasing the adjoining land.”⁵¹

In the debate that followed, John Balderston argued that whatever the common law said, Island law should recognize that the public had the right to gather seaweed on public land.

When a large quantity of seaweed comes on a man’s shore—more than he can make use of—why should not the public be allowed to take it, instead of leaving it there to no purpose, or allowing it to be carried out

48. *Ibid* at 65.

49. *JHA*, (28 March 1868) at 39-40; *JHA*, (30 March 1868) at 44; *JHA*, (22 April 1868) at 120.

50. Prince Edward Island, *Legislative Council Debates and Proceedings [LCDP]* (20 March 1868) at 21-22; *LCDP*, (27 March 1868) at 37; *LCDP*, (30 March 1868) at 47; *LCDP*, (23 April 1868) at 168. The committee was composed of Henry Beer, R P Haythorne and James Muirhead. Muirhead dissented from the committee’s report.

51. *Royal Gazette* (Charlottetown) (14 May 1868).

to sea again? ...I do not see what right a proprietor has to claim anything below the land that has been surveyed to him. ...I think it is privilege enough for a man to have a shore farm, without claiming all the seaweed that comes from it."⁵²

Patrick Walker, a merchant from Charlottetown, responded with a reminder that farms on the shore were subject to "wasting by the action of the sea." He had heard from his father of a shorefront farmer who had lost at least 66 feet of land in only a few years. "Now, surely, if any seaweed was thrown up there, he was entitled to it."⁵³

R. P. Haythorne made the same argument. Until 1864, he had been the proprietor of a large estate, but faced with an Island-wide agitation against the proprietorial system, including rent strikes, he began selling farms to the leaseholders who occupied them. In his words, "I wished to part on pleasant terms with my tenants."⁵⁴ He estimated that his own shorefront farm receded by about three feet every year, "caused in a great measure, by the removal of the seaweed." In his view, people with shore farms had paid for the right to the seaweed, and "to give the public the privilege of taking the seaweed, is nothing less than taking the property of one individual, and giving it to others. If there is more seaweed comes upon a man's shore than he requires, it is competent for others to go and buy or beg it." Furthermore, "every article should have an owner...for otherwise there would be continual quarrelling. If all had an equal right to an article, you would often find the stronger man displacing the weaker."⁵⁵

Edward Palmer offered a somewhat different perspective on the role of law in minimizing conflict. Although the common law did not recognize any right to take seaweed from the foreshore, legislation might be necessary to prevent further litigation as the demand for seaweed increased. The problem lay in balancing the rights of the owner of shorefront land, who would have calculated the value of the seaweed in the price paid for the land, against the claims of the public, who would rightly ask why they should be denied the right to collect the seaweed they needed for their fields "by the arbitrary will of a person on whose shore it is thrown, and who has a superabundance of the article." Everyone agreed that there was

52. LCDP, (23 April 1868) at 168-169.

53. *Ibid* at 170.

54. P S MacGowan, *Report of the Proceedings Before the Commissioners Appointed Under the Provisions of the Land Purchase Act, 1875* (Charlottetown: Bowers Printer, 1875) at 47; Ian Ross Robertson, *The Tenant League of Prince Edward Island, 1864-1867* (Toronto: University of Toronto Press, 1996); Andrew Robb, "Robert Poore Haythorne" in *Dictionary of Canadian Biography*, vol 12 (Toronto: University of Toronto Press, 1990) 418.

55. LCDP, (23 April 1868) at 169.

no easy legislative solution, and the debate ended with the legislative council voting to print the report to encourage expressions of opinion from the public.⁵⁶

After further petitions on the subject in 1869 and 1870, the assembly referred the matter to a committee which drafted a bill recognizing the right of the public to take seaweed and kelp on the coast below the ordinary high tide mark.⁵⁷ The bill passed in the assembly, but stalled in the legislative council.⁵⁸ Some councillors objected that the bill did not define the right created with sufficient clarity, and would only lead to litigation. Edward Palmer agreed with that criticism, and suggested, as had Kenneth Henderson two years earlier in the assembly, that the government might appoint conservators with the power to authorize the public to gather seaweed where doing so would not infringe on private rights. In that way, the law could both protect the person who had paid a premium for shorefront land, and ensure that seaweed was not wasted.⁵⁹ Haythorne considered that protecting the rights of private property was more important than conserving the seaweed resource. He said that he permitted his neighbours to take excess seaweed thrown up on the shore of his farm, and they took perhaps a hundred loads every year, but he would not support a bill giving the public any rights unless private rights were protected; he did not think that appointing conservators would do that. He and Richard B. Reid also reiterated that seaweed protected the shore from erosion.⁶⁰

Early in 1871, the dispute moved to the Supreme Court, with the trial of the assault charges brought by William Toombs against Andrew Doyle, Thomas Doyle, John Doyle, and Andrew Doyle the younger. When the jury could not agree on a conviction, Toombs filed an appeal, which was dismissed the following year.⁶¹ Not content with his successful defence on the assault charges, Andrew Doyle brought an action for damages for trespass against Toombs, Alexander Houston, Archibald Warren, and Samuel Sellick. After a trial extending over three days in January 1872, the jury could not agree on a verdict, despite Justice Peters trying to focus their attention on the law as he had stated it in the Crown's nuisance action

56. *Ibid* at 168-172.

57. Prince Edward Island, *Parliamentary Reporter* (10 March 1869) at 45; *JLC*, (17 March 1869) at 43; *JHA*, (9 March 1870) at 10; *JHA*, (23 March 1870) at 34.

58. *JHA*, (29 March 1870) at 43; *JHA*, (12 April 1870) at 94.

59. *LCDP*, (1 April 1870) at 49-50; *HADP*, (19 March 1868) at 63.

60. *LCDP*, *ibid* at 50-51, 58-59.

61. PARO, RG 6.1 Supreme Court Fonds, Series 1, Minute Books, Subseries 2, Queen's County, 1871, 12, 19, 20 January 1871; 1872, 23 January; *Patriot* (Charlottetown) (19, 21 January 1871).

against the Lords in 1864. In his instructions to the jury, Peters noted that they:

had heard a great deal, in the course of this trial, about 'high-water mark' and 'low-water mark' but these were matters of no consequence whatever to them. If a man entered upon the shore front of another's farm and carried away the dulse or seaweed deposited thereon, without the permission of the owner of the adjoining land, he was, in the eye of the law, a trespasser. If the owner had no other use for this dulse or seaweed, and it was suffered to remain where it was deposited by the tides, it would protect the bank and prevent its being washed away. The owner of the land...was as much protected with respect to the seaweed deposited on the shore front of his farm as [he] was [with respect to] the manure heap in his barn-yard.⁶²

In a second trial before Justice Peters in June 1872, with a different jury, Doyle obtained nominal damages against each defendant. When this verdict was upheld on appeal, Toombs had to pay significant costs.⁶³

Both sides in the litigation also pressed their positions in the Island legislature. In March 1871, the assembly created a committee to consider the petition of William Houston and others from the Island's Gulf Shore, asking for legislation confirming the right of the general public to sea manure thrown up on the shore below the high water mark.⁶⁴ When the committee reported with a draft bill granting the petitioners' request, Andrew Doyle presented a counter petition arguing for the status quo. Doyle also obtained a government grant of the shore in front of his property, in order to protect himself from any legislation recognizing a public right to gather seaweed on the foreshore.⁶⁵

Despite Doyle's protests, the bill passed third reading in the assembly, and the petitioners shifted their attention to the legislative council, which again allowed the bill to die on the order paper.⁶⁶ In the course of debate about whether the bill would prevent or produce litigation, Balderston

62. PARO, RG 6.1 Supreme Court Fonds, Series 1, Minute Books, Subseries 2, Queen's County, 1872, 16, 17, 18, January 1872; *Patriot* (Charlottetown) (18, 23 January (1872), (10 February 1872).

63. PARO, RG 6.1 Supreme Court Fonds, Series 1, Minute Books, Subseries 2, Queen's County, 1872, 28 June, 1, 15 July 1872; RG 6, Supreme Court case files, 1872, *A Doyle v W Toombs; Island Argus* (Charlottetown) (9 July 1872).

64. *JHA*, (13 March 1871) at 53.

65. *JHA*, (18 March 1871) at 69; PARO, RG 16, Land Records, Liber 94/691-2, 20 March 1871, Commissioner of Public Lands to Andrew Doyle; the original Crown grant for Lot 24, of which the Middleton farm was a part, contained a fishery reserve clause "saving and reserving for the Disposal of His Majesty, His Heirs & Successors Five Hundred feet from High Water mark on the Coast of the Tract hereby granted, to erect Stages and other necessary Buildings for carrying on the Fishery." See Nova Scotia Crown Lands Record Centre, Gov Campbell to Charles Lee and Francis Maclean, Liber 8/69, copy at Liber 9/126.

66. *JHA*, (23 March 1871) at 79; *JLC*, (15 March 1871) at 50; *JLC*, (28 March 1871) at 76.

suggested an amendment to give justices of the peace the power to delineate the high water mark on the request of local residents, but other councillors responded that coastal erosion would make that exercise meaningless. Furthermore, the legislation would still interfere with private rights and “revolutionize the law of real property.”⁶⁷

The following year, after the familiar petitions and discussions, the assembly again passed a bill recognizing the public right to gather seaweed on the foreshore.⁶⁸ In the legislative council, some councillors referred to the support for the bill in the assembly, and suggested giving it a trial.⁶⁹ William Gamble Strong, a merchant and shipbuilder from Summerside, expressed surprise at this suggestion. He reminded the councillors that the previous year, when he had argued that “seaweed was the gift of God, and was designed for the public good,” he had been told that the law was otherwise, and that the proposed legislation was defective in various ways. Councillors had reiterated those objections, and so he was “almost inclined to think” that they were “not sincere, and that the bill will not receive royal assent.” Strong suggested that the bill could reconcile public and private rights by providing for some small compensation to owners of adjoining land for permitting public access to gather seaweed.⁷⁰ Daniel Gordon, a merchant and shipbuilder from Georgetown, responded that the bill should not receive royal assent because it was “founded upon a principle of socialism or communism—that those who have more of this world’s goods than they require should divide with others who have not enough.” He was going to vote for it, nonetheless, because he did not want people saying the bill would pass but for the opposition of the legislative council.⁷¹ Haythorne, who the previous year had assumed the role of Premier, concluded that no “great injury” would follow from passing the bill, as those who opposed it could petition Her Majesty to withhold her consent.⁷²

With that prospect clearly before them, the councillors passed the legislation, but with several clauses that drastically restricted its effect. First, as was customary with colonial legislation affecting property rights,

67. LCDP, (28 March 1871) at 110-113.

68. JHA, (6 May 1872) at 39; JHA, (11 May 1872) at 55-56; JHA, (14 May 1872) at 58; JHA, (21 May 1872) at 76-77; JHA, (29 May 1872) at 82.

69. LCDP, (31 May 1872) at 45-56.

70. Ibid at 48; *The Canadian Biographical Dictionary and Portrait Gallery of Eminent and Self-made Men: Quebec and Maritime Provinces*, vol 2 (Chicago, New York and Toronto: American Biographical, 1881) at 741-742 [The Canadian Biographical Dictionary].

71. LCDP, (31 May 1872) at 49; *The Canadian Biographical Dictionary*, *ibid* at 731-732.

72. LCDP, *ibid* at 50-51; Frank MacKinnon, *The Government of Prince Edward Island* (Toronto: University of Toronto Press, 1951) at 104 [Mackinnon].

the act contained a suspending clause providing that it would not come into effect until confirmed by the imperial authorities at the colonial office in London. Even if the act passed that hurdle, it would, by a sunset clause added in the legislative council, expire after two years. As well, the bill applied only to seaweed or kelp cast up or floating “on the outside or sea shores” of the Island, and not to property fronting on the Island’s bays and rivers, thus denying any public right to gather seaweed at some sites where it was known to be abundant. Nor would the act apply in any pending litigation, or where the owner of land on the shore had a Crown grant of the foreshore.⁷³ Thus, even if the imperial authorities confirmed the act, Andrew Doyle could continue to claim exclusive rights to seaweed on the shore of Middleton Cove, into which, according to Balderston, “nearly all the seaweed and kelp around that part of the coast drifts.”⁷⁴

At the end of the session, the seaweed bill was forwarded to London, along with two petitions opposing its coming into force. One, with 159 signatures, described the bill as “unnecessary” because the law on the matter was clear, and “unjust” because the bill deprived landowners “of valuable rights for which they have paid high prices, and to which, by the common law, they are entitled.” The other petition, signed by Andrew Doyle, set out the particulars of his situation, including his purchase of Middleton Farm specifically to obtain access to seaweed. He noted his success in having his exclusive right to seaweed that lodged on the shore upheld in the Island Supreme Court, and stated that seaweed provided some protection against erosion of the shore, and some compensation to shorefront landowners for the land they lost to the sea, which on Middleton Farm amounted to several chains since it had been first occupied.⁷⁵

The Island’s executive council, the lieutenant governor’s advisors chosen from the assembly and the legislative council, provided the colonial office with its reasons for supporting the act. Until the last 20 years or so, they explained, Island farmers “were in the habit of using the seaweed and kelp cast on the shore below high water mark in common as a marine production belonging to the public.” But as population growth and increased agricultural production made seaweed more valuable, owners of shorefront farms began to claim an exclusive right to seaweed both above

73. *LCDP*, (4 June 1872) at 67-70; *JLC*, (4 June 1872) at 59; *JLC*, (11 June 1872) at 64; MacKinnon, *ibid* at 74, 95-96; PARO, RG 4, Acts, 1872, An Act to Define the law with regard to Sea Weed and Kelp on the Sea Coast or Outside Shores of this Island.

74. *LCDP*, (31 May 1872) at 52.

75. NA, Memorial of AEC Hollard and Others [1872], CO 226/110 at 182-184; NA, Andrew Doyle to Earl of Kimberley (6 September 1872), CO 226/110 at 188-195; *JHA*, 1873, Appendix S: a chain is sixty-six feet.

and below the high water mark. Court rulings upholding these claims “caused considerable dissatisfaction.” Seaweed cast up by one tide could be carried away by the next, and “[m]uch discontent, and often no little excitement, is created amongst the local inhabitants by losing what they consider they have all a common right to. Hence, acts of violence often occur when the public claim is resisted.” The seaweed bill, passed by the legislature after several attempts, protected the right of the public to take seaweed below the high water mark on the outside shores where it was most vulnerable to being swept away. The explanation for excluding bays, arms of the sea and rivers was far from convincing.

It is considered that the owner of the land adjoining the sea-shore, being nearer to the seaweed...than any other person, and thereby enabled, on all occasions, to procure a supply with greater facility and more expedition than any other person, will possess an advantage in securing it over all other persons[.]

The executive council concluded with a very equivocal endorsement: “[s]hould the Act be found occasionally to operate with injustice to any particular individual, the very short time for which it passed will not admit of any serious injury to be sustained.”⁷⁶

Not surprisingly, given the lack of enthusiasm for the act in the legislative and executive councils, and the petitions against it, the imperial authorities refused to confirm the *Seaweed Act*, giving as their reason that it destroyed rights recognized at common law without providing for any compensation.⁷⁷ Thus, after five years of concerted effort to secure legislative recognition of public rights to gather seaweed, the law remained as confused and contentious it had been since the first seaweed bill was introduced in the assembly in 1818. Various authorities had tried, and failed, to convince legislators, litigants and the general public that the law clearly demarcated the division between private property and public rights.

The impasse in the legislature reflected, to some extent, the diversity of views on the question within the colony. Even without legislation recognizing a public right to gather seaweed on the foreshore, Island

76. NA, Extract from Minutes of Executive Council of Prince Edward Island (20 December 1872), CO 226/110 at 185-188; *JHA*, 1873, Appendix S: the executive council estimated the extent of the “sea or outside coast” at 330 miles; the Island government tells tourists to enjoy its 1,000 miles of coast; the official coastline inventory figure for 2000, which includes bays, offshore islands, sand dunes and inlets, measured at the average high tide mark, is 1,783 miles. See Bittermann & McCallum, *supra* note 3.

77. NA, Minute [1873], CO 226/110 at 101, 122; *JHA*, 1873, Appendix S. The *Seaweed Act*, passed but not in force in 1872, remained on the Island’s statute books as *Statutes of PEI* 1872, c 16.

farmers without land on the shore continued to use seaweed well into the 20th century to maintain soil fertility.⁷⁸ Those who claimed the exclusive right to the seaweed in front of their farms were undoubtedly frustrated at having to spend time and money on litigation to assert those rights, but their success in the courts gave them a strong argument to refute the view that seaweed on the foreshore should belong to anyone who was willing to do the work of gathering it. In the face of arguments for legislative intervention to prevent waste of the seaweed resource, owners of shorefront farms had successfully invoked the importance of protecting private property, and the risk of legislative interference with fundamental principles of the common law.

There were no further attempts to legislate on the subject. Defenders of a public right to harvest seaweed may have given up on getting the necessary legislation through a legislative council that had been constructed to protect the interests of the propertied elite. They may have realized, too, that the imperial authorities were not likely to authorize legislation that the Island's executive council characterized as a threat to private property rights.⁷⁹ Those who sought to protect public access to seaweed could have tried again to secure legislation after Prince Edward Island joined the new Canadian confederation in 1873, when the imperial government transferred its power to review Island legislation to the federal government in Ottawa. The prospect of being able to enact legislation that would break up the large proprietorial estates on the Island had been one of the inducements for the Island to become a Canadian province, and implementing such legislation one of the benefits of doing so.⁸⁰ Instead, those who needed seaweed for their farms looked for more immediate solutions. Challenging the property claims of men like Andrew Doyle was costly and unlikely to be successful, but there were other shorefronts where one might gather seaweed, and other landowners who might choose to share the seaweed resource with their neighbours, even while they resisted any attempt to force them to do so. Although it had proven impossible to pass legislation that might be characterized as an uncompensated taking of private property, it was possible to use the power of the state to broaden public access to seaweed by other means. In the years that followed, the Island assembly continued

78. See, e.g., the annual reports of Department of Agriculture in Prince Edward Island, *Journal of the Legislative Assembly [JLA]* (1907) and (1912).

79. Even after the legislative council was made elective, a significant property requirement for voters maintained a distinction between it and the assembly. See MacKinnon, *supra* note 72 at 102-103.

80. Rusty Bittermann & Margaret McCallum, "Upholding the Land Legislation of a 'Communitistic and Socialistic Assembly': The Benefits of Confederation for Prince Edward Island" (2006) 87:1 *Canadian Historical Review* 1.

to fund roads that provided public access to beaches where the public gathered seaweed, despite the various rulings that had given priority to private property claims rather than defining seaweed on the foreshore as a common resource.⁸¹

81. See, e.g., *JLA*, (1894) at 49, 255; *JLA*, (1899) at 102; *JLA*, (1930) at 31.

