

SOME FIRST THINGS

There was a silver lining behind the cloud that shed the rain that came through the roof covering the house that Sam Archibald built in Nova Scotia three quarters of a century ago.

For three score years I have enjoyed that lining and my pleasure will be increased in the sharing it with others.

The rain did come through the roof and, when the cloud was gone and the sun once more was shining, I clambered up through the scuttle in the ceiling of the upstairs hall, armed with a long awl to locate the leak. By a tiny beam of light that came through a small hole into the windowless attic, I found the leak and thrust the awl up through the shingles as a guide to my father who duly repaired the leak. Then, by the dim light from the scuttle I saw a box against one of the chimneys. It contained many discarded articles. All that I can now remember of them is a pair of sheep shears and a battered brown book, already over a hundred years old. I have no idea what became of the shears, but the book is still in my possession. Its calf binding is broken, its leaves yellow and brittle, but the print, with its lavish use of italics and capitals, is as clear as ever.

It is a book of many of Canada's First Things. It is in itself a First Thing; the first revised statutes printed in Canada; and it contains the first statutes passed by the first representative parliament to sit in Canada. It is the Book of Genesis of English Law in Canada.

The makeup of the book is peculiar. The first 67 pages contain a number of statutes passed in the years 1758 to 1768, some mentioned only by their titles, others given in full. Then follows a title page as follows,—

“The Perpetual Acts of the General Assemblies of His Majesty's Province of Nova Scotia. Halifax in Nova Scotia. Printed by Robert Fletcher. M.DCC.LXVII.”

Following the title page is the dedication,—

“TO HIS EXCELLENCY THE RIGHT HONOURABLE LORD WILLIAM CAMPBELL CAPTAIN GENERAL AND GOVERNOR IN CHIEF OVER HIS MAJESTY'S PROVINCE OF NOVA SCOTIA AND THE TERRITORIES THEREUPON DEPENDING, THIS EDITION OF THE LAWS OF NOVA SCOTIA, PERFECTED BY YOUR LORDSHIP'S PATRONAGE, IS MOST HUMBLY INSCRIBED, WITH ALL DUE RESPECT BY YOUR LORDSHIP'S MOST DEVOTED AND MOST OBEDIENT SERVANT. JONATHAN BELCHER.”

Then follow the statutes for 1758 to 1767, an index and the statutes for 1768 to 1770.

According to a foreword signed by Richard Bulkeley, Secretary of the Province, this edition of the statutes was "prepared and collated with the records by John Duport, Esq.; with revisal and marginal references — by Mr. Chief Justice Belcher". This foreword is dated May 13th, 1767.

The dedication however makes no reference to the industrious Mr. Duport and all credit goes to the Chief Justice.

As the title page indicates the statutes thus collected are only those of a permanent nature. Statutes passed for a temporary purpose, or whose purpose had been fulfilled, are mentioned only by their titles, sometimes with a side note "exec." (*i.e.* executed).

There are five statutes mentioned by titles only, with a side note "Repealed by His Majesty in Council".

1. 1758, c. 7, "An Act for establishing the rate of Spanish dollars and the interest on money within the Province."

2. 1759, c. 5, "An Act to enable proprietors to divide their lands held in common and not divided."

3. 1759, c. 7, "An Act to prevent the importing disabled, infirm and other useless persons into the Province."

4. 1759, c. 13, "An Act to prevent any private trade or commerce with the Indians".

5. "An Act for regulating the procedure of the courts of judicature."

With only the titles as guides, it is impossible to say why these Acts were repealed by His Majesty. With regard to the Act to prevent private trade with the Indians, one may hazard the guess that it interfered with the interests of some one high in favour with the British government. The Act to exclude useless persons from the Province may have been repealed because the government desired to get rid of just such persons from the old country. I think that every lawyer would be glad to read the full text of the Act to regulate procedure in the courts. It would have been our first Judicature Act.

One of the many boasts of the Nova Scotian is that St. Paul's Church is the oldest Protestant Church in Canada. Few of them, however, will know to what they owe this proud distinction. It is to be found in the preamble to Anno Trices-

simo Secundo Georgii II chapter 5, which preamble, omitting out of mercy to the compositor the italics and now unnecessary capitals, is as follows :

“Forasmuch as His Majesty, upon the settlement of the Province, was pleased, in His pious concern for the advancement of God’s Glory and the more decent celebration of the Divine ordinances amongst us, to erect a church for religious worship according to the usage of the Church of England, in humble imitation of His Royal example and for the more effectual attainment of His Majesty’s pious intentions, that we might in the exercise of religious duties, be seeking for the Divine favour and protection, Be it therefore enacted etc.”

I do not know that history records this particular King’s concern for the advancement of God’s Glory, but “the evil men do lives after them, the good is oft interred with their bones”. So perhaps I need not apologize for disturbing this virtue’s long slumber in the tomb of the statutes.

And so, as a monument to a scarcely known virtue of George II, St. Paul’s still stands at the south end of the parade; the police station at the north end. Possibly a fitting antithesis. The parade must have been an important part of the life of the young town of Halifax. There the laws were published, for c. 22 of the Statutes of 1758 ordains “that the publick reading of any law of the Province by the Provost Marshal or his Deputy, on the Parade of Halifax, after notice by beat of Drum shall be deemed a sufficient publication thereof.” There also alarms were given by the firing of four guns on the parade. Probably the stocks and pillory, which played so important a part in the administration of justice, also stood on the parade.

Let us look at a few of the First Things which may be of particular interest to lawyers.

The first criminal statute is c. 13 of the Statutes of 1758, “An Act dealing with Treasons and Felonies”. It sets out the overt acts which are to constitute treason, and with the exception of counterfeiting and the acts which constitute petty treason, these are little different from the overt acts set out in our Criminal Code.

In the section dealing with rape there is a proviso, which might very well be added to our present section, to the effect that if complaint be not made of a ravishment within ten days afterwards, before one of His Majesty’s Justices of the Peace or other Magistrate, then such act shall be judged to have been committed by and with the consent of the woman.

Section 21 of this statute is peculiar in that it couples together the sending of anonymous letters demanding money and maliciously shooting at any person in a dwelling house or other place.

The next penal statute is c. 20 of the same year, "An Act for punishing criminal offenders", some of the sections of which are interesting.

Sec. 1. "If any person shall presume wilfully to blaspheme the Holy Name of God, Father, Son or Holy Ghost, or to deny, curse or reproach the True God, his creation or government of the world, or to deny, curse or reproach the Holy Word of God, that is the canonical scriptures in the books of the Old and New Testaments, every such offender, being thereof duly convicted at the Court of Assize and General Gaol Delivery, or Sessions of the Peace, shall be set twice in the pillory for the space of one hour each time, or be imprisoned for three months, at the discretion of the Court where such person shall be convicted."

Sec. 2. "If any person shall profanely swear or curse in the presence or hearing of any Justice of the Peace, or shall be thereof convicted by the oath of one credible witness or by confession of the party before any Justice of the Peace," he was to forfeit for the use of the poor for the first offence two shillings, for the second four shillings and for the third six shillings to be collected by distress, and failing distress, if the person were above sixteen years of age, to be set on the stocks one hour "for every single offence and for any number of offences whereof he shall be convicted at one time two hours." If the person were under sixteen he was to be whipped by the constable or by his parent, guardian or master in the presence of the constable. There was a time limit of ten days fixed for launching the prosecution.

By sec. 3, Drunkenness was punished by a fine of five shillings or not more than three hours in the stocks. For a second offence, in addition to the above mentioned penalties the convicted person must give sureties in £10 for good behaviour.

With regard to other offences the only interest lies in the penalties. The forger was to be set on the pillory and have one ear cut off and also imprisoned for one year "without bail or mainprize". The perjurer was fined £20, one half to His Majesty and one half to the person grieved, and imprisoned six months without bail or mainprize. In default of payment he was to be set in the pillory for one hour and both ears nailed to the pillory.

Having regard to the long period in which the divorce laws of England remained in an unsatisfactory state and the great trouble met in their amendment, c. 18 of 1758 indicates that the General Assembly of Nova Scotia was born before its time for one section provides that a decree of divorce might be obtained for impotence, consanguinity, adultery or desertion and failure to maintain for three years together. To be sure, in 1761, this section was repealed as being inconsistent with the laws of England.

And here is our first Highway Traffic Act, c. 8 of the Statutes of 1759.

1. "No person shall on any pretence whatever, gallop or ride at full speed on horseback, or having the charge of driving any horse or horses in any cart, truck or sled, shall ride upon such horse or horses, or remain placed in or upon any part of such cart, truck or sled, within any of the streets or highways of the town of Halifax or any other town within the Province, and no such driver or drivers shall omit, during such time, to lead the shaft or thill horse by an halter, not exceeding four feet in length, or shall drive any such horse or horses faster than a foot pace, upon penalty of ten shillings for every such offence, to be paid upon conviction, by the testimony of one credible witness, before any one of His Majesty's Justices of the Peace, within twenty-four hours after such offence committed; and in case of any such offender's refusal to pay the same, said offender shall be put to labour for the space of four days in repairing the said highways, under the direction of the surveyor or surveyors of the highways or any of them; and in case of refusal or neglect to perform such labour, it shall and may be lawful for any Justice of the Peace, upon complaint of the said surveyor or surveyors or any of them, to cause such offender to be committed to the House of Correction, where he shall forthwith receive ten stripes in the usual manner of correcting offenders at the said house and thereupon be discharged."

By section 2 all owners of sleds or slays used for the carriage of goods or persons were directed to affix at least six horse bells on the horse harness and were forbidden to drive the same in a disorderly manner upon penalty of twenty shillings to be levied by distress.

By section 3 all fines and penalties under the Act are to be expended in the repair of the highways.

In these days of high speed we may indulge in a smile of superiority at what our forefathers deemed "driving to the

common danger", but apart from that the Act has virtues which offset this. Long before Gilbert and Sullivan's *Mikado* was created, the Legislature of Nova Scotia achieved the object most sublime of making the punishment fit the crime. For what punishment could be more fitting to the offence of those who abuse the privileges of the highways than that the offender should be "put to labour" in their repair and maintenance?

Apparently, too, the modern concept of reformation as an element of punishment was coupled with the old idea of retribution, since the infliction of "stripes" was evidently considered to be "a manner of *correcting* offenders."

The application of the fines and penalties toward the repair of the highways would meet with the approval of a large number of motorists who contend that the registration fees of motor cars and the gasoline taxes ought to be allocated to the building and maintenance of highways.

Chapter 1 of the statutes passed at the second session of the Assembly in 1758 gives us some idea of the "usual manner of correcting offenders" in the House of Correction.

This Act for the establishment of a House of Correction or Work House provides that the Justices of the Peace in General Session or one Justice of the Peace out of Court might commit to the House of Correction, "to be kept governed and punished according to the rules and orders of the House of Correction all disorderly and idle persons and such who shall be found begging or practicing any unlawful games, or pretending to fortune telling, common drunkards, persons of lewd behaviour, vagabonds, runaways, stubborn servants and children and persons who notoriously misspend their time to the neglect and prejudice of their own or their family's support."

The Master or Keeper of the House is authorized to put such persons to work and labour and to "punish them by putting fetters and shackles upon them, if necessary, and by moderate whipping, not exceeding ten stripes at once, which (unless the warrant of commitment shall otherwise direct) shall be inflicted on their first coming in, and from time to time afterwards at his discretion in case of their being stubborn or idle — and to abridge them of their food, as the case may require, until they be reduced to better behaviour."

One might query whether the Legislature intended that the abridgment of food should be carried to such an extent as to reduce the offender to a physical condition that would render him incapable of active misbehaviour or only to the extent

necessary to act as a deterrent. Probably the Master or Keeper used his own discretion.

Our first Conscription Act was passed in 1758. It requires every able-bodied male over sixteen years of age to enroll in the militia and also to furnish himself with a "musket, gun or fusil not less than four feet long in the barrel, two spare flints and twelve charges of powder and ball." This was probably an equipment sufficient unto the day.

One is struck with the excellent draftsmanship of these old statutes, particularly having regard to the fact that the settlement was only a few years old. A good many of the statutes, however, were copied from English statutes, but it must also be mentioned that quite a number of the members of the Legislature, laymen as well as lawyers, had come from the New England colonies and had either attended such colleges as Harvard, or been educated in the universities of England. They were not by any means the usual type of pioneer settler. They and their fathers had been long accustomed to a degree of self-government, were anxious for a greater degree, and were quite capable of framing laws for the peace-order and good government of their adoptive province.

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