

OUR FIRST COMMON LAW COURT

MR. JUSTICE CHISHOLM

Judge of the Supreme Court of Nova Scotia

ON the 20th day of April, 1721, there was established in His Majesty's garrison of Annapolis Royal the first Court of Judicature to administer the common law of England within what is now the Dominion of Canada. In 1710 Supercase gave up Port Royal to Nicholson, and the peninsula of Nova Scotia then became a British possession, to remain so until the present day. From 1710 to 1721 justice was administered under military law, and the procedure was found unsatisfactory. In 1716 one Mr. Manby was judge advocate, and it appears that for a time he received no pay, as no money had been provided for the purpose. At another time the Governor complained that he had not enough officers to constitute a regular court martial. In 1717 Governor Phillips was appointed, and in 1719 he received instructions from the home authorities to choose a Council for the management of the civil affairs of the province. Until an assembly could be formed he was "to regulate himself by the instructions of the Governor of Virginia."

Whether Governor Phillips had received any more specific instructions touching the establishment of a court does not appear from any documents at present accessible to the writer. At any rate, in April 1721 a court was established, and the official record discloses how this was done.

"At a Council held at his Excellency house in his Majesty Garrison of Annapolis Royall upon Wednesday, the 19th April, 1721.

Present.

HIS EXCELLENCY RICHARD PHILLIPS, ESQ., Governor.

THE HONBLE JOHN DOUCET, ESQ., Lt. Governor.

MAJOR PAUL MASCARENE.

MR. SECRETARY SAVAGE.

JOHN ADAMS

HIB'T NEWTON } ESQES.

WM. SKENE

His Excellency acquainted the Board that he had called them together to consider of Establishing a Court of Judicature to be

held for this Province; that one Article of his Instructions is to make the lawes of Virginia a rule or pattern for this Government where they can be applicable to the present circumstances. That by the lawes of Virginia the Governor and Council were the Supreme Court of Judicature; called by the name of the General Court, which was fully advised on.

Voted. That it would be for his Majesty's service, as well as very much for the satisfaction of the Inhabitants of this Province (under the present circumstances of affaires. That such a Court be held by the Governor and Council as often as it shall be thought necessary.

Order'd: That some minutes relateing to such Court be drawne up by the Secretary in Order to be lay'd before the Board at Ten a Clock to morrow morning, to which time the Board is adjourn'd.

On Thursday 20th of April, 1721: Mett at the same time and place according to adjournment. The same persons present and Wm. Shirreff, Esqe.

The Secretary according to yesterday Order of Council deliver'd in some minutes, for his Excellency and Council's approbation—which were read and approved of and is as follows, viz:

Whereas under the present difficult circumstances of Affaires of this Province, no regular Court of Judicature according to law can be as yet held here for said Province but by his Majesty Governor in Council, and the dayly cry here is for Justice by many of the Inhabitants and residents of this Province, by Memorials, Petition and Complaints to his Excellency the Governor, who, at this time being loaded with more than common weight of Government, has not time and leisure to consider fully of the same without the assistance of Council, and being directed by his Instructions to make the lawes of Virginia the rule and pattern for this Government (where they are applicable to the present circumstances) untill such time as the Government shall be settled upon a sure foundation according to the Lawes of Great Britain, etc.:-

Which matters haueing been fully advised, debated and considered on. Agreed and Order'd: That for the reasons aforesd His Excellency the Governor and Members of his Majesty's Council for this Province hold and keep a Court of Judicature for said Province annually at the respectiue times and place here mentioned, vizt: at Annapolis royal upon the first Tuesday in May, August, November, and Febuary yearly and in every yeare from time to time. Which Court to haue the same Style and Cognizance of all matters and pleas brought before them and power to giue Judgment and award. Execution thereupon, by the same manner and proceedings as the General Court so called

of Governor and Council has in Virginia, and practices at this time. Voted that his Excellency be desired to put out a proclamation relating to the time, and place where the aforesd Court be held and the manner of the Court, and that as soon as may be."¹

Governor Phillips reported his action to the Secretary of State, and in the course of this communication he observed:

"In order to establish civil government the Governor and Council have resolved themselves into a Court, to meet four times a year. The notion that martial law prevails here hinders settlers from coming into the country."²

The present writer has shown elsewhere the extent to which, from the time of Governor Phillips to the time when Governor Cornwallis received his commission and entered upon the discharge of his duties, "the lawes of Virginia" were applied, and were made "the rule and pattern" for the Government of Nova Scotia.

The court established by Governor Phillips and his Council was invested with the powers ordinarily exercised by an English common law court. It had jurisdiction in both civil and criminal matters, and a perusal of the original Minutes of His Majesty's Council at Annapolis Royal will disclose the varied character of the causes which came before our first court for adjudication. It was a common law court; that is to say, it administered the common law—that collection of principles which constitutes the basis of the administration of justice in England, as distinguished from the maxims of the Roman code generally known as the civil law. One of its greatest expositors³ says of it:

"It is emphatically the custom of the realm of England, and has no authority beyond her own territory and the colonies which she has planted in various parts of the world. It is no small proof of its excellence, however, that where it has once taken root it has never been superseded. . . . The common law is the *lex non scripta*, that is, the unwritten law which cannot now be traced back to any positive text, but is composed of customs and usages and maxims deriving their authority from immemorial practice, and the recognition of courts of justice."

Although, as the same learned writer observes, it had its origin in ignorant and barbarous ages, and abounded in artificial distinctions and crafty subtleties, it so developed as to become the law of liberty and the watchful, inflexible guardian of private property

¹ Cf. Nova Scotia Archives, Vol. III, pp. 28, 29.

² Virginia Law Register, Vol. II, N. S. No. 10, Feb. 1921.

³ Joseph Story.

and public rights. The establishment, then, of a court in Nova Scotia two centuries ago to administer the great system of jurisprudence to which we owe in so large a measure the development and security of our most important rights and interests, was no small event. It is eminently proper than the Bench and Bar of Canada should suitably celebrate its bi-centenary.

It had a small beginning in that old fort. The members of the court were not trained lawyers, and there is nothing to show that a regularly admitted or certificated lawyer ever pleaded before it. Disputes between individuals were dealt with on due notice to all the parties interested, and after proper hearing were disposed of in accordance with the usual forms of law. The proceedings normally began with the setting forth by the complainant of his complaint in a petition, letter, or other writing addressed to the Council. Upon receipt of this all parties were summoned to appear before the Council, that they might be examined and heard. The case was then reserved, and within a very short time a decision was pronounced.

A few cases will illustrate the mode of conducting business, as well as the penalties imposed for the offences complained about. In September, 1723, one Prudane Robichau was summoned before the Governor and Council, charged with supplying rum to enemy Indians. The evidence of several witnesses was taken, and the accused was called upon to make a statement of his conduct. When he had done so,

“The Honourable Lt. Governour & Council, not finding full proof of the Accusation, Reprimanded the Said Prudane Robichau, adviseing him to beware of giving any Such Suspensions of holding Correspondence with any of the Enemy Indians for the future, and so Dismissed him.”

On the 24th of July, 1733, the storekeeper of the Board of Ordnance reported to the Council that William Haw had sold liquor without licence to artificers employed on the King's work, making them so drunk that they neglected their business to the prejudice of the service. It was also charged against him that he spoke very disrespectfully of the Governor, “with Cursings and threatenings to shoot him”. He was asked what he had to say in his own defence, and he answered that he was drunk, and remembered nothing of the matter. The Board were of opinion that he should be severely punished, and it was voted that on the following day, between the hours of nine and ten o'clock,

“he be whip'd at the Cart's Tail, and receive ten lashes with a Cat of nine tails on his bare Back at the ffort gate, Ten at Mr. Blonden's in the Cape, Ten more on his return from Mr. Blonden's at the ffort gate, and in the lower Town viztt. Ten lashes opposite to his own House, Ten more between Mr. Douglass's and Doctor Watt's Houses, being in all fifty; and that before he is Released out of Prison he Should find two good Suretys to be bound in ffifty pounds Each, and himself in one hundred pounds for his Good behaviour for a year and a Day.”

At a meeting of the Council held on the 22nd of September, 1726, the case against Robert Nichols, the Governor's servant, for assault upon the Governor, was tried. The prisoner denied the charge, but was found guilty. It is recorded that the Court was of opinion the prisoner should be made an example of by being severely punished for his audacious violence “in order to terrifie all such bold harden'd villains”. On the following day, after the prisoner had been asked whether he had anything further to say for himself or any objections to make why sentence should not be pronounced, and had replied that he had nothing to say, the Court pronounced sentence as follows:

“The Punishment therefore Inflicted on thee is to Sitt upon a Gallowes three Days, half an hour each day, with a Rope about thy Neck and a paper upon your Breast Whereon shall be Writt in Capitall Letters *Audacious Villain*, and afterwards thou art to be Whipt at a Cart's Tail from the Prison up to the Uppermost house of the Cape and from thence Back again to the Prison Receiving Each hundred paces five Stripes Upon your Bare Back with a Catt of Nine tails and then thou art to be turned over for a Soldier.”

In 1734 Mary Davis sent a petition to the Council setting forth that Jean Picot, wife of Lewis Thebauld, had scandalously reported of her that she had murdered two children. Witnesses were examined, and the report was found to be groundless. The Court directed that Jean Picot should be ducked on the following Saturday at high water. Then, at the request of Mary Davis that the sentence be reversed and that said Picot should ask her pardon on Sunday at the Mass house door, it was ordered accordingly.

The penalties inflicted in criminal cases will appear very cruel, but they did not surpass in severity the penalties imposed in the courts of the motherland during the same period. The rigour of the penal laws had not as yet been mitigated. In no case was capital punishment inflicted by the court at Annapolis. In fact, Governor Armstrong was of opinion that the court was not em-

powered to try capital crimes or to inflict condign punishment upon those guilty of them.

An exceedingly troublesome man was William Winniet, who was himself for a time a member of the Council. In 1729 he was appointed and took the oath of office, and in the minute of Council he is spoken of by Governor Phillipps as "the most considerable merchant, and one of ye first British inhabitants of this place and represented to me as one eminent in his zeal for His Majesty's Service." On Nov. 30, 1734, Governor Armstrong wrote to the Board of Trade:

"Although English subjects, on account of their fewness, ought to be used with tenderness, a vacancy is better than a deceitful member, and A. has suspended Wm. Winniet from his seat, on information laid against him and his other disrespectful and Contemptuous behaviour not only in Court but likewise abroad."

He was involved in the first contentious law matter that is reported in the minutes of the Council after the court was established. It was a dispute about a debt and the case was decided against him.

On July 25, 1732, there was a meeting of the Council at which were present Lieut. Governor Armstrong and seven other members. At that meeting the petition of one Mr. Jennings respecting a grant of land was read and Mr. Winniet, it was announced, was opposed to the grant. The papers were delivered to Mr. Winniet to make answer to them at the next meeting. When this was held, Mr. Winniet presented his answer, and, when he had withdrawn from his place at the Council, evidence was taken touching the matters in issue. Both parties were heard, and they too were then asked to withdraw. The respective claims were reviewed at length, and the decision arrived at is stated as follows:

"The Board therefore unamously agreed that as Mr. Jennings's Right is much preferable to any claim or Pretensions Advanced to the Board by Mr. Winniet That his, the said Mr. Jennings's, Right and Tittle to the said house and Gardens Are Valid and Good."

It was decided to announce the decision at the next Council day, but on that day the Governor stated that Mr. Winniet had sent an excuse that he could not attend "because of being employed about ffish." The Council decided that Wm. Winniet should pay the costs. Three weeks later it was ordered that the excuse sent by Wm. Winniet for not attending be noted, and the constable,

being called and asked what it was, answered that Mr. Winniet said he had not time to be there. He sent a similar excuse for not attending a later meeting. These excuses continued for five or six months. The subject matter of the dispute again came up at a meeting on June 6, 1733, at which Wm. Winniet was present, and stated that he had received injustice at the Board in the decision of the affair and that he would carry an appeal to His Majesty's Privy Council. The Council by motion ordered him to be called back to show wherein he had received injustice, and charged him with insulting and reflecting upon them. His only answer was that he did not know whether his attorney would prosecute or not. At the next meeting on July 7, 1733, the Governor reported that he had perused his instructions, and had found that by the 14th Article of the Virginia Instructions it was expressly ordered that no appeal be admitted unless the sum exceed £300 sterling, and that within fourteen days after the decision good and sufficient security be given for that purpose. It was therefore found that Mr. Winniet could not appeal and the judgment was ordered to be confirmed.

Then the Secretary informed the Council that Wm. Winniet had sent word by the constable that he could not attend because he was not well. The Governor then put the question whether Wm. Winniet was not guilty of a great contempt, not only for absenting himself so frequently but for his reflections upon the Governor and His Council. It was decided that he was guilty, and that he should be admonished.

The end of Mr. Winniet's career as a member of the Council came at a later meeting, and it is recorded in the following terms:

"Then his Honr. Informed the Board That he had summoned William Winniet, Esqe. As Usual to Attend the Council And that as he had frequently Refused to Attend by sending frivolous Excuses, As Appears by the Minutes of Council, And had on several Occasions behaved himself Disrespectfully, That Therefore, And Other Reasons, which he Would Lay before his Majesty, he did suspend him, the said William Winniet, Esqe., from being a Member of this Board Till His Majesty's Pleasure be thereon further known."

The examples given show how men untrained in the law administered justice in civil and criminal cases at the beginning of British colonization in Canada. The court carried on until the founding of Halifax by Cornwallis, when the seat of government was changed. Cornwallis had express instructions to establish courts of justice. In December, 1749, he appointed a committee

to inquire into and report upon the matter; and on March 19, 1750, he wrote to the Lords of Trade and Plantations:

“The first thing I set about after the departure of the Charleston was to establish Courts of Judicature.”

In 1754, Jonathan Belcher was appointed Chief Justice of Nova Scotia, and the history of our courts thereafter will be found in a series of interesting articles contributed to the *Canadian Law Times* of Toronto by the Hon. Sir Charles Townshend, retired Chief Justice of the Supreme Court of Nova Scotia.