

by A.C. McEwen

The protection of boundary marks has engaged public attention from the earliest times, and history provides many illustrations of punishments, divine and temporal, which have been threatened against those who might violate the sanctity of the stake.

One passage with which many Ontario Land Surveyors are familiar is taken from the 1798 Statute, 38 Geo III, Chapter I, Upper Canada, and reads - " --- if any person or persons shall knowingly and wilfully pull down, deface, alter, or remove any such monument so erected as aforesaid, he, she, or they shall be adjudged guilty of felony, and shall suffer death without benefit of clergy."

The last phrase is intriguing and appears at first sight to impose a final humiliation on the offender by denying him last rites or burial in consecrated ground, but it means none of these things, and refers simply to a form of pleading which, however, was once of great importance in English Criminal Law.

In the 12th Century, clerks in holy orders who had transgressed the law obtained exemption from prosecution in the lay courts and became subject solely to the ecclesiastical authorities who exacted canonical purgation by oath. As a result, the common law courts abandoned the death sentence in capital cases where the guilty party was not only a member of the clergy but who was literate, and could therefore, qualify for entry into orders. By 1350 the privilege had been extended to secular, as well as religious clerks; the test of clerkship being based on the ability to read the opening words of the first verse of Psalm 51, from thenceforth known as the "neck-verse".

In 1487 it was enacted that every layman, when convicted of a clergyable felony, should be branded on the thumb and barred from claiming the benefit a second time. The plea was successfully invoked on many occasions by offenders whose actions were anything but clerical, and was granted in 1598 to the Elizabethan dramatist, Ben Jonson, who had killed an actor in a duel.

Peers, whether or not they could read, received the benefit in 1547, and it was later extended to women. The neck-verse requirement was abrogated in 1705.

Subsequent penal reforms followed a traditional English practice of modifying the severity of the law by the use of antiquated legal fictions and benefit of clergy was widely used. It did not apply to the more atrocious crimes and felonies came to be divided into clergyable and non-clergyable. Where a breach of statute was intended to be punishable by death, the words "without benefit of clergy" were always inserted. That this provision applied to the disturbance of boundary marks points to the seriousness with which this infraction of the law was regarded.

Benefit of clergy was abolished in 1827 for commoners and for peers in 1841. Wilful disturbance of survey marks in Canada is now an indictable offence under Section 384 of The Criminal Code which provides a penalty of imprisonment for five years.

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