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THIS book is a landmark in American legal history. Legal scholars have long lamented the fact that there was no authoritative work on colonial law. Historians have, to be sure, taken excursions into the field, but for the most part this, until the study here reviewed, was virgin territory. The undertaking called for more than the gifts of a historian. It demanded the talents and insight of a legal historian. The authors are legal historians. Professor Goebel particularly is a well-known figure in the field of legal history. The study covers a limited field; it is restricted to criminal procedure in colonial New York.

The authors point out in the foreword that "the hand of time has not dealt gently with our colonial records." War, fire, and indifferent custodianship have each played a part in depleting source materials. Nevertheless they have managed to round out an account that is well-nigh complete. The history of colonial New York begins with the Dutch occupation. The work touches that period, but Dutch law is discussed only at points that bear on the main development of the study.

The task of the reviewer of this book is a difficult one. He might restrict his account to a few general impressions, but these in no way could convey a fair appraisal of a work, one of the main characteristics of which is its faithfulness to detail. The study carefully sets out the steps through which criminal procedures were transplanted from the homeland to colonial New York and describes with equal fidelity their growth and development in this new environment. It must not be taken, however, that the work is dry and uninteresting. It contains minutiae, almost to a fault, but it is livened with sparkling passages which convey vivid impressions.

One of the main theses of the book, which is expressed repeatedly and which finds ample support in its detailed accounts of the procedures employed in the colony, is that there was no abrupt transition in the laws of New York after the Revolution. No new legal system sprang suddenly into being with that event. The people of New York in all

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matters legal went on as they had in colonial days, excepting only that they never again proceeded in the name of the king. Independence had not yet been won when in 1777 they "resolved as a part of their constitution that the acts of the provincial legislature, and such parts of the common law and statutes of England and Great Britain as 'together did form the law of the . . . colony' on the day of the battle of Lexington, were to be the law of the new state."[1] The colonists had worked intently for over a century in the construction of a legal edifice. Their concern after the Revolution was to preserve what they had so laboriously erected.

It is the fashion nowadays to disparage the common law. Perhaps it is a bit too slow-moving and too weighted with the impedimenta of a bygone era for a complex and fast-moving civilization. But let it be said, and may we ever remember, that the liberties which are essential to a free society were fashioned and welded in the heat of the forge of the common law. True, the common law was contentious, but contention is the *sine qua non* of the establishment and maintenance of civil rights. It is noteworthy that the settlers of New York from the earliest days were insistent on having the benefits of the procedures and civil rights afforded by the common law. The marshalled materials of this book bear eloquent testimony to this observation. The significant fact is that, "although nearly every royal act and every instrument upon which jurisdiction in the colony was founded at one time or another were subjected to attack by the colonists, the common law itself as a source of authority was never challenged but, on the contrary, was regarded as the shield and buckler of constitutional right."[2]

The first English governor of New York was Colonel Richard Nicolls, whose period of office began in 1664. The earliest instrument dealing with the governance of the colony was the royal charter to James, Duke of York. The charter centered all legislative, executive, and judicial control in the hands of the proprietor, with the limitations that the duke was subject to the crown's appellate supervision and to the necessity of conforming as nearly as possible to English law. There followed a period of adaptation of the practices of the English inferior courts. "The consequence was that what was erected in New York was nostalgic of memories of old England, for it was indeed a creation of memory and not of exact knowledge."[3]

What might be described as the formative era for the laws of New

[1] Introduction, p. xvii.
[2] P. 57. See additional expressions on this subject, pp. 325, 326.
[3] P. 16.

York began with the governorship of Thomas Dongan in 1683. Immediately upon his accession, an elected assembly enacted a new judicature law which recast the procedural devices of the colony by introducing the English indictment and English process and forms of recordation. "Once common law forms become seated, the second stage of reception passes into a phase that may be described as one of selective reproduction of English legal institutions at large. This is essentially a process of imitation, quickened from time to time by the arrival of able craftsmen—the judge Mompesson, the lawyers Alexander, Murray and Smith, and the two Attorneys General, William and John Tabor Kempe."[4] But while it is eminently descriptive of the procedures adopted in the colony to say that they were an imitation of the old world, it must also be recognized that, with the installation of these procedures over here, they took on a new identity in their new environment.

The sources of jurisdiction in the administration of the province were complicated. Mention has been made of the charter to the Duke of York. The major points of crown policy were couched in commissions and general instructions. These emanated from the governor and the council, which was a microcosmic copy of the king and the privy council, and were exercised by ordinances. The governor possessed also the power of proclamation. Another source of authority that affected the lives of the inhabitants, as did the acts of the assembly and the ordinances of the governor and the council, was local enactment. The mayor and aldermen, sitting as a common council, had the power to pass ordinances which had the force of law for a few months and which became permanent on confirmation of the governor. In the counties the Courts of General Sessions made regulations.

In 1691 the assembly enacted a judicature act which created sessions similar to the Quarter Sessions of England and a Supreme Court of Judicature, which was the keystone of the judicial system of the colony. This court was endowed with the powers of the King's Bench, Common Bench and Exchequer. It held a position of supremacy in the judicial system that was greater in fact than that of the King's Bench in

[4] Introduction, p. xxv.

"In the capital were congregated the most skillful lawyers, and from the beginning of the eighteenth century onwafd, these courts were peopled by men who had legal training. These urban sources standing alone are traverse enough of the stuff propagated as American legal history. They reveal that in one outpost of Europe litigation was conducted as skillfully as at York or Bristol, and that the picture of an oafish frontier jurisprudence is a mirage of writers who have never blown the dust from indictment, pleading or judgment roll." Introduction, p. xxvi.

England, since the possibility of a review of its decisions was very restricted.

High tribute is due the courts of the province. The attentive reader of this book will find in it ample evidence of the imperative necessity of a strong and independent judiciary, for only through the officers of a court so endowed can human rights be defined and preserved. In provincial New York the struggle over jurisdiction, the authors point out, "revolved about the warring theories of Crown and colonists—on the one hand a policy of close control and centralized administration, on the other a strong predilection for local autonomy and decentralization. It was in disputes over the law and legal institutions that resentment was nurtured against what were conceived to be the oppressions and injustices of royal officials. It was in the courts that the colonists were indoctrinated to revolution."[5] The Supreme Court of provincial New York consistently refused to give ear to challenges of its jurisdiction. Its primacy was achieved by the "constancy with which it superintended the inferior common law courts and by the diligent husbanding of the generous endowment of jurisdiction conveyed to it by ordinance and statute."[6]

A provincial act passed in 1741 gave the judges of the supreme court nisi prius jurisdiction ex officio. The supervisory powers of the court over inferior courts extended beyond the jurisdiction exercised at bar and through nisi prius, since under a provincial act passed in 1692, one or more of the judges were required to "'go the circuit and hold and keep the Supreme Court for the several counties.'"[7] Under this program a member of the court "came down annually on circuit, with the hardier members of the bar at his heels, and at a Court of Oyer and Terminer and General Gaol Delivery and a Court of Causes brought to Issue in the Supreme Court gave demonstration of the metropolitan way."[8] Thus the finger of the central authority was kept upon the local courts. For proceedings which were not rightly handled at sessions, there was the writ of certiorari, and for foolish, incompetent or knavish officials there were the information, the attachment of contempt, or the governor's power of removal. As an adjunct to the annual visits of the circuit court, special commissions were employed to try cases. Down the scale of jurisdiction there were Courts of General Sessions kept by a small army of justices of the peace, empowered to hear and determine cases involving minor crimes.[9]

[5] P. 1. [6] P. 311. [7] P. 80. See also p. 74.
[8] Introduction, p. xxvii. [9] Pp. 90, 91.

In the initiation of proceedings, accusation by a grand jury was commonly employed in the prosecution of persons suspected of felonies and of the more serious misdemeanors. This was not the sole means of beginning prosecutions, for in cases in which "the Crown had some particular stake, or where there was reason to suppose an indictment would not be returned, there was the alternative of an information brought by the Attorney General."[10] This officer, in fact, made frequent resort to this method of accusation, which practice eventually became a source of considerable irritation to the colonists.

Two types of informations were used—those in the name of the king and those at the suit of an informer. The crown's information was employed as a means of securing a criminal sanction for violation of the king's rights, and it became a most effective weapon. There seems to have been nothing inherently unfair in the procedure, but it inevitably was associated in the colonists' minds with the suppression of those activities by which they attempted to promote their liberties. This feeling resulted in the passage in 1727 of a provincial act which required that all pending informations be quashed and which prohibited the exhibition of any information in the future except by order of the governor and signed by the council. It is interesting to observe, however, that although the colonists objected to the king's information, they made no objection to the deprivations effected by common law summary proceedings employed in dealing with a variety of petty misdemeanors.[11]

While summary procedures were commonly resorted to in minor offenses, a petit jury was invariably employed in felony cases and in misdemeanors prosecuted by information or indictment in which the defendant pleaded the general issue.[12] In all criminal trials common law practices prevailed. According to the authors, it is possible to plot the course of a typical criminal trial of the Eighteenth Century with the *Office of the Clerk of Assize* or the *Crown Circuit Companion* in one hand and Hawkins' *Pleas of the Crown* in the other.[13]

In the development of appellate procedures, the colonists lagged behind the advances made in the mother country, inconsiderable though these were. The study records just two clear instances where motions in arrest of judgment were employed in the sessions courts and states that only occasionally was resort made to them in the supreme court.[14]

[10] P. 337.

[11] Pp. 370, 373, 379.

[12] Pp. 603, 609.

[13] Pp. 558, 573. The book does not gloss over miscarriages of justice. Observe the references to King v. Leisler et al., pp. 83, 582-583.

[14] Pp. 277, 278.

Only one case is mentioned in which a motion for a new trial was made. This neglect of appellate review may be attributed in part to the fact that the colonists had developed an elaborate system of transfer jurisdiction which tended to eliminate the opportunity for review, and in part to the restricted role played by counsel in criminal cases. Only with respect to certiorari did the provincial bar exhibit a disposition to indulge in experimentation.[15]

From the point of view of the individual and his rights, the matter of process lies at the core of all procedure. In the colonial period, the term "due process" had not yet taken on a magic meaning, but it was during the Seventeenth and Eighteenth Centuries, which centuries also mark the colonial era in America, that many of the rights that have come to be covered by that expression were defined and established. The words "due process" are given content and meaning only when studied in the light of the growth and development of common law precepts. We hear mention today of the "American heritage." The foundation for the American heritage was laid in colonial America through the insistence of the colonists on their rights. "And should contemporary judicial distaste for 'substantive' due process become more pronounced, it will be prudent for the citizen to have at hand the record of the procedural expectations of his ancestors who made the phrase 'due process' immortal in our constitutions."[16]

Colonial practice as to punishment was built on English practice with all of its harshness and measures of compassion. With respect to felonies, the penalty was death. The ultimate mercy of the law for the felon was the pardon, which appears to have been employed not ungenerously. Where discretion was available in minor offenses, there was merely a choice between bodily affliction and a fine.

As an incident to punishment, the colonists made interesting use of recognizance. In fact, the recognizance was widely employed as a device in aid of law enforcement. It was used as a measure to bind the peace and good behavior. It appears to have been a boon to nervous women. But in a broader application, security devices were used to fortify and insure the progress of a trial at all points, from the arrest of a defendant or the formulation of a charge against him down through the final execution of sentence. In relation to punishment it came to be used as a sort of parole device. This usage can be understood with reference to the schedule of penalties and punishments employed in this period. Imprisonment was primarily used as a means of custody pre-

[15] P. 284.

[16] P. 484.

liminary to trial; it was principally a phase of procedure rather than of punishment. When a jail sentence was meted out, it was most often ancillary; that is to say, it formed a part of a complex sentence composed of fine, pillory, or whipping,[17] and sometimes security after the punishment had been inflicted. The parole use of recognizance to secure good behavior after conviction was a logical extension of the powers respecting sureties to keep the peace.

The authors are severe in their censure of other writers who have ventured to make appraisals of colonial law.[18] The Revolution successful, the post-Revolution judges, lawyers, and legal writers, under the spell of Blackstone, Kent, and Story, passed by the readily accessible colonial practice and turned for guides and precedents to English cases and treatises. Observing this, some American writers have concluded that for all practical purposes the history of American common law began after the Revolution. It is this inference that the authors heatedly aim to refute. This book is a monument to the fact that the history of American common law began in colonial America. Nevertheless, the post-Revolution theory of conception cannot summarily be ignored, for it is true that Kent, Story, and an army of judges and lawyers, after the Revolution, by-passed the colonial period and turned for source material to English law.

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[17] "The cases on the permutations and combinations of punishment are interesting and so far as any rule can be extracted it appears that if a sentence was very severe corporal punishment no bond was exacted. Thus in 1727 David Wallace and David Willson were convicted of a cheat in passing counterfeit bills, and it was ordered 'that on Dec. 12 . . . or, if foul weather, the next fair day thereafter the defendants shall stand in the pillory for one hour.' They were then to be put in a cart and carted with a halter on their necks and be so placed as to be publicly seen. Wallace was then to get thirty-nine stripes and Willson twenty-eight. The sheriff of New York, having seen execution done, was to deliver them to the sheriff of Kings County, where they were to be imprisoned and pilloried an hour and Wallace was to get thirty-nine lashes, Willson twenty-eight. They were then to be delivered to the sheriff of Queens where the same punishment was to be meted out in Jamaica, and next they were to be sent to Westchester County for the same punishment. Then they were to be returned to New York where Wallace was to be imprisoned for six months and Willson for three months, whereupon they were both to be discharged upon payment of their fees.

"It may be that the expectation of Wallace and Willson surviving was so slight no bond was thought necessary." P. 515.

[18] See Introduction, pp. xviii-xxxiii, and writers there cited.