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Book Reviews

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LAW ENFORCEMENT IN COLONIAL NEW YORK: A Study in Criminal Procedure (1664-1776). Julius Goebel, Jr., and T. Raymond Naughton. New York: The Commonwealth Fund, 1944. Pp. xxxix, 867.

The tone for this work was set by its authors through a trenchant introductory remark to the effect that a legal historical investigation is not to be conceived as "the hasty assembling of matter for a trial memorandum, but as being in the nature of an inquest of office at which the available and relevant data will be collected and made of record."[1] Too often, however, they had found that passing for legal history which consisted of little more than a string of ancient statutes with a case or two thrown in for a measure of respectability, or else which took the form of hasty and dangerous generalizations based upon insufficient preliminary labor in the actual source materials. To combat that attitude as well as to render service to the cause of sound historical treatment for colonial legal materials, this work was undertaken.

Had the authors done no more than write and publish the "Introduction" that they did they would have performed a valuable service, for no one ought to consider preparing a work on the legal history of our ancestors without reading, with profit, the suggestions there found. Those very suggestions may seem harshly critical of the offerings of other writers but, when it is remembered that a true understanding of the past is nowhere more essential than in attempting to make a proper application of law, the validity of such criticism must pass unchallenged.

It is fortunate for the cause of legal history, though, that the authors did not rest at that point. There is ample proof, in the major work itself, of earnest and untiring effort, diligently applied, to uncover and examine the records of the past. Yet this is not a source book so much as it is a guide. It is no mere catalog, but a carefully worked out study which proves that colonial law, at least so far as the criminal jurisprudence of New York was concerned, was neither that of England nor was it a "frontier" product unworthy of attention. Its true form stands revealed as English in substance but subject to mutations made necessary by transplantation to give it a New World identity.

Yet it is not the English law as administered by the principal royal courts so much as it is the procedures and precepts of the shires. Much that is recorded might pass as equally true for the homeland which had long experienced the urgent need for the preservation of law and order. Were it not for local place names and occasional flashes of insight into frontier crudities,[2] the reader might well judge himself at home with the seamy side of life in any boisterous English county of the same period.

[1] See p. xxxi.

[2] Frontier life is exemplified in the troubles of the jailers. One from Ulster County reported that "the key to the prison itself could not be found."—p. 90. Another, for Dutchess County, sought repayment for expenditures "for a Lock and menden the Walls of the Prison" after an escape—p. 90, note 155.

There develops the same need for punishment of rioters, users of false weights, and moral offenders as had been experienced in the land from which the colonists had come. Fencing laws had to be enforced, smuggling had to be suppressed, and bawdy customs known on both sides of the Atlantic[3] had to be put down. These had been the problems of the shire at home and became the problems of the law enforcement officials in the new land. Their response by using the legal tools with which they were most familiar was but the natural result.

Far more serious offences were, of course, committed from time to time but at least in the early period it was possible to say, from a comparison with the other colonies, that the "devil had not yet come to roost" in colonial New York.[4] When he did, the colonial judges applied methods of punishment used by their English contemporaries. Sentences to the lash, the stocks, the pillory, and to "carting," inflicted on female as well as male offenders, were far from uncommon, while fines,[5] imprisonment, and the more ominous judgment of *suspendatur* were imposed with all the vengeful savagery known to the English practice.[6]

It is in the realm of procedural enforcement, however, that the authors trace most clearly the parallels between colonial practices and those followed in England. Here, indeed, may be seen the influence of Dalton's *The Countrey Justice,* Lambard's *Eirenarcha,* and like works, upon the growing jurisprudence of a frontier community where even the sheriff was forced to seek instruction as to his duties.[7] Outlawry as a means of securing the accused person's attendance at court might seem an outlandish device in modern times though not entirely without sense to a stiff-necked Anglo-Saxon. Yet instances of its use in colonial New York are noted,[8] as is also true of the barbarous *peine et forte dure* method of compelling a recalcitrant defendant to plead.[9] Such barbarisms may have been offset, however, by an amplified use of the claim of benefit of clergy[10] and of a willingness to save expense by deporting offenders.[11] Other practices might be referred to which definitely link

[3] A discussion of a possible ancestor of the practice of riding a person out of town on a rail is noted at pp. 196-7.

[4] See p. 66.

[5] A close alliance between the English and the colonial systems would seem demonstrated by the calculation of fines on the basis of a mark, half-mark, etc., even as late as 1766 A.D., although the colonial coinage at that time was definitely on a sterling basis: see p. 169, note 120; p. 596, note 191. Compare with p. 709, notes 163-4.

[6] The account of the slave conspiracy of 1712 and the horrible punishments inflicted on the convicted offenders, noted at p. 118, would shock the modern mind.

[7] Chapter VII, dealing with process, contains some humorous correspondence between such officials and the Attorney General. See particularly pp. 447-51.

[8] It even seems to have prevailed during the period of Dutch administration according to p. 392, note 40.

[9] The authors note but a single instance, and that in a much milder form than was prevalent in England: p. 582.

[10] Notice is made of cases in which this benefit was accorded to women: p. 591, note 177. See also note on punishments, p. 702, note 139.

[11] Page 298, note 60.

the two systems,[12] while dissimilarities can also be pointed to as in the case of extradition[13] and concerning bail,[14] which are later reflected in constitutional mandate. For that matter, the view which favors the limiting of the powers of the judge presiding at a criminal trial so that he is left as a mere umpire between contesting forces would seem not entirely without justification if the conduct of a royal judge in colonial New York was at all typical of the times.[15] An almost contemporary note is injected by the idea that, in times of emergency, judicial views on clemency undergo change.[16]

Much more might be written about the contents of this work, but enough has been said to demonstrate that it contains a really tremendous amount of valuable data that cannot be neglected by any student of colonial law. Such student must, however, be prepared to read slowly and with patience for he should not overlook a single one of the thousands of footnotes. It is to be regretted, however, that much of the material cited is still in manuscript form and will probably so remain until some American equivalent of the Rolls Society or the Selden Society undertakes the arduous work of putting the same into print so that all who will may read.[17] Until that time, the amount of available materials on the history of our colonial law must depend on the endeavors of men such as these authors. It is to be hoped that others will be as capable and conscientious as they are.

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12 Such an illustration exists in the report of the custom of presenting gloves to the judges when a pardon was proffered as reason for withholding sentence: p. 756.

13 See the discussion on pp. 288-9.

14 The colonial practice as to bail in homicide cases, noted at p. 499, appears to conform to the English views expressed in Rex v. Dalton, 2 Strange 911, 93 Eng. Rep. 936 (1731).

15 See charge to the jury by Chief Justice Atwood set out on p. 671, note 232.

16 Compare the release of prisoners for service in the French and Indian War, noted at p. 758, with the stimulated activity of American parole boards of recent date.

17 The enormous amount of research that must have accompanied the preparation of this book leads one to believe that the authors have on hand copies, extracts, photostats, etc., of many of these original records. Would not a service be rendered by compiling the same into a source book of colonial law?