

Early Colonial Legislation

An Address

By the Hon. Adrian Lyon

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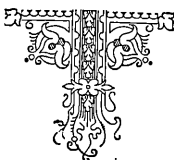
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EARLY COLONIAL LEGISLATION

AN ADDRESS

by the Hon. ADRIAN LYON

REGISTRAR OF THE
EAST JERSEY PROPRIETORS,
AND PRESIDENT OF THE NEW JERSEY
SOCIETY SONS OF THE AMERICAN REVOLUTION



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Early Colonial Legislation

By the Hon. Adrian Lyon

When John and Sebastian Cabot discovered the North American continent they took possession in the name of the English King. With comparatively few exceptions the people who founded these colonies were Englishmen, and the North American colonies became English colonies.

They brought with them the English customs and the English institutions. They knew no other and, even if they had, it would have been hard for them to throw off the traditions and habits of their fathers. Among the outstanding customs brought with them was that system of jurisprudence known as the English common law. Indeed, the outstanding cause of the Revolutionary War was that the King denied to these colonists the rights which they had as Englishmen under the English system.

Not only was this system of laws observed in fact, but the theory was recognized so that when this colony in common with the other colonies threw off the British yoke and became a sovereign state the people put into their constitutions an expressed recognition of the system.

The first Constitution of New Jersey adopted on July 2, 1776, had the following provision:

“That the common law of England, as well as so much of the statute law, as have been heretofore practised in this colony, shall still remain in force, until they shall be altered by a future law of the legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the

law of this colony without repeal, forever"; and this provision has been confirmed in the subsequent constitutions. In the Constitutional Convention "there were men who had studied law at the Inner Temple in London. Edmund Burke stated in the House of Commons in March, 1776, that more books of law were going to America than of any other kind. Of the fifty-five members of the Constitutional Convention, thirty-one were lawyers. Blackstones' Commentaries were taught by Chancellor Wythe in William and Mary College before the Declaration of Independence. John Marshall, Thomas Jefferson and James Monroe were among his pupils."

But this reference is only to the general system of jurisprudence which prevailed. Local color was given to enactments, and the influence of sect was largely responsible for differences in codes regulating the conduct of the people of the different colonies. For instance, when the Dutch government was established at New Amsterdam a code of laws was adopted without reference to the English laws then in force. This code was promulgated "by the Schout and Magistrates of Achtel Kol Assembly, held at Elizabethtown, to make laws and orders" on November 18, 1673. It was singularly mild in the character and extent of the punishments to be inflicted on transgressors; the principal aim of the legislators being, apparently, the protection of the province from the demoralizing effects of sensual indulgence and other vicious propensities, while not unmindful of the needful regulations to secure such rights as, in the infancy of society, become of the first importance. The observance of the Christian Sabbath, the employment of ministers, and the erection of churches, received also a share of their consideration. This code, of course, soon became a nullity by the restoration of the government to the English.

On July 30, 1619, the first legislative assembly that ever convened on the American continent met in the church at Jamestown, Virginia. It consisted of the governor, six counsellors, and twenty burgesses, two from each of ten plantations. In this assembly petitions were addressed to the company in England for permission to change "the savage name of Kecoughtan," for workmen to erect a "uniyersity and college," and for granting the girls and boys of all the old planters a share of land each, "because that in a new

plantation it is not known whether man or woman be the more necessary." Laws were made against idleness, drunkenness, gaming, and other misdemeanors, but the death penalty was prescribed only in case of such "traitors to the colony" as sold fire-arms to the Indians. To prevent extravagance in dress parish taxes were "cessed" (assessed) according to apparel "if he be unmarried, according to his own apparel; if he be married, according to his own and his wife's or either of their apparel".

Marriage in Virginia in those early days was important. It is interesting to note that in the early history of that colony ships came from England with "young maidens" to be sold to the settlers for wives, at the cost of their transportation, viz: one hundred and twenty pounds of tobacco (equal to about \$500 in present currency). What the whirligig of time brings to pass. Now we send our maidens to Europe to buy husbands. The difference is this: in the early days the wives were worth one hundred and twenty pounds of tobacco. Just what the said husbands of the present day are worth is a problem.

In Whitehead's History of East Jersey under the Proprietors he gives a very interesting picture of the differences in the exercise of legislative powers arising out of a lack of uniformity in opinions and customs. He says that for a period of time prior to the surrender of the Proprietors to the Crown in 1702, the government had been so unsettled that at the time of the surrender the laws were marked by much of that instability and inapplicability to the wants and circumstances of the people which usually characterize those of inexperienced or young communities. The diversity of national habits, of associations and education among the people tended not a little to increase the difficulty and prevent the adoption of a systematic code of laws. The descendent of Puritans from New England, the persecuted dissenter from Britain, the peaceful republican Quaker, and the staunch friend of royalty, here met on common ground; naturally disposed to carry out each his own views as to what constituted good government, and either to withhold his approbation to measures proposed by his fellow legislators, or to profit by the first opportunity to substitute his own. Even when apparently united in a desire to advance the prosperity of

the province by wholesome laws, a wrong estimate of the means to be adopted too often thwarted their endeavors.

He further says that the spirit of the settlers from New England is plainly manifested in the penal laws which were easily passed, and—although modified to some extent by the views of the less rigid immigrants from Europe—continued for the most part in force during the whole period of the proprietary governments. Drawing upon the Levitical code for many of the provisions and for much of the language of their laws, the descendants of the Puritans set up, in the penalties prescribed for their offending neighbors, an enduring memorial of the influence they possessed and exercised over their fellow colonists from other quarters; and it is fortunate that the rights and privileges of the inhabitants of East Jersey, in relation to religious liberty, were so expressly guaranteed in the concessions and fundamental constitutions of the province, or we might have to read a record of assumed powers for the regulation of man's belief. Gordon, in his History of New Jersey, when comparing the laws of the Eastern and Western provinces, observes that, "the genius of Calvinism, which rules by terror and the ever suspended sword in this and in the future world, is strongly impressed upon the one, whilst a prudent reserve in naming crimes, and a human forbearance in their punishment characterize the other. The ancient lawgivers prescribed no punishment for parricide, and a human forbearance in their punishment characterize the other. The ancient lawgivers prescribed no punishment for parricide, deeming the offense impossible; the Quaker legislators had no enactment against arson, no prescribed punishment for murder, or treason, and other heinous offences; and yet during four and twenty years of their administration, no instance of such crimes was known within their territories."

In East Jersey there were thirteen classes of offences against which the penalty of death was denounced, while in West Jersey such punishment was unknown to the law.

In New England in the middle of the seventeenth century the laws were worthy of the traditions that have come down to us concerning the strictness of the Puritans. Marriage was a mere civil contract, and the burials took place without funeral service or sermon. Stern laws were made against card-playing, drinking healths, and wearing certain articles, such as gold and silver girdles, hat bands, belts, ruffs, and beaver hats. The penal legislation was

severe. Fifteen crimes were punishable with death, while numerous petty offences were severely punished. A fine was imposed upon every woman who should cut her hair like that of a man. Families whose young women did not spin the required daily amount of flax or wool were fined. All persons were forbidden to run, or even walk, except reverently to and from church on Sunday. A man was put in the stocks for being in the company of drunkards, and another was severely whipped for suspicion of slander, idleness, and stubbornness. One Josias Plaistowe, who stole four baskets of corn from the Indians, was ordered to return to them eight baskets, to be fined five pounds, and thereafter to be called by the name of Josias, and not Mr. Plaistowe, as formerly. The grandjurors were directed to admonish those who wore apparel too costly for their incomes, and, if they did not heed the warning, to fine them. In 1646 in Massachusetts a law was passed which imposed the penalty of flogging for kissing a woman in the street, even by way of honest salute. This law was rigidly enforced one hundred years after it was enacted, because it was not repealed. The captain of a British war vessel which entered the harbor of Boston, who was hastening to his home in that town, met his wife in the street and kissed her. He was accused, found guilty, and mildly whipped. He determined upon a retaliation, and just before sailing on another cruise he invited his accuser, the magistrates, and others who approved the punishment to dine on board his vessel. When all were merry he ordered his officers to flog the magistrates. The astonished guests were driven pell-mell over the side of the ship into a boat waiting to receive them.

One of the laws enacted by the early New Jersey Assembly, which it considered necessary to preserve the peace of the province and the honor of the king, was the following:

“That all women of whatever age, rank, profession, or degree, whether virgins, maids, or widows, who shall after this act impose upon, seduce, and betray into matrimony any of his Majesty’s subjects by virtue of scents, cosmetics, washes, paints, artificial teeth, false hair, or high-heeled shoes, shall incur the penalty of the law now in force against witchcraft and like misdemeanors.”

The influence of Puritanism took hold of East Jersey and many laws passed by the early assemblies compared well in strictness

with those of New England. The crimes for which death might be incurred in East Jersey were arson, murder, perjury to the prejudice of life, stealing away any of mankind, burglary and robbery on the commission of the third offence, as incorrigible, theft if incorrigible, witchcraft, conspiracy to invade or surprise a town or fort, smiting or cursing their parents by children without provocation, on the complaint of the parents only, rape, subject to the discretion of the court, gross and unnatural licentiousness; but life was not to be taken save on proof of two or three witnesses.

Infidelity in the married life was made punishable by divorce, corporal punishment, or banishment, as the court might award; but in 1682, the parties were made subject to a fine and were bound to behave themselves for a year. A want of chastity was at first made punishable by fine, marriage, or corporal punishment, but in 1682, three months' imprisonment or a fine of five pounds was incurred, and in 1686 ten stripes at the public whipping post were substituted in place of the imprisonment, should the fine not be paid.

Night walkers, or Revellers after nine o'clock, were to be secured by the constable till morning, and unless excused on examination to be bound over to appear at court.

Local tribunals, too, reflected the sentiment of those early days and made ordinances or regulations which in our day would be considered as a violation of our liberties. After all what are liberties, as they are related to legislative enactment securing or restraining them, seem often to be determined by the temporary sentiment of the age. For example in Perth Amboy there were two rival hostelries, each being the headquarters of opposition lines of boats and stages running between New York and Philadelphia. In order to prevent either a ruinous competition or to protect the innocent public, the Justices of the Peace, at the October Quarter Sessions of 1748, established the following uniform and moderate rate of charges for all the taverns of the county. Hot meal of meat, etc., 10 d; Cold meat do, 7 d; Lodging per night, 4 d; Rum by the quartern 4 d; Brandy do, 6 d; wine by the quartern 2 s., 8 d; strong beer do, 5 d; cider do, 4 d; Lunch do, 1 s., 2 d; also similar provisions for horses.

This early period in the history of our Country was a religious age. Compared with what seems to be the prevailing motives and sentiments of men in our day we would say it was a distinctively religious age. They did not always agree. They frequently bitterly disagreed. But their actions, whether in common or in opposition, were inspired by what they believed were the sanctions of religion. We do not hear much of sacrifice in these days purely for the sake of formal religious belief.

You answer by asking: What about the foreign missionaries of the Christian Churches who go to the utmost parts of the Earth? What about the Armenian Christians of the Near East who are suffering untold privations and misery and death for the sake of their Christian faith? Or, of the Jews in Russia for the sake of their faith? These suffer for the sake of their fundamental beliefs, and not for the sake of a mere formal expression of that belief.

When a thousand Puritan ministers sent a petition to King James I asking for certain reforms in the Anglican Church, he denied their request with the statement, "I will make them conform or I will harrow them out of the land". A result was the landing of a band of Pilgrims on Plymouth Rock.

Roger Williams could not agree with the Puritans and so he went out into the wilderness and founded Rhode Island. William Penn likewise sought a home for his persecuted Quakers and so came to New Jersey and Pennsylvania. Lord Baltimore established a Catholic colony in Maryland.

Some will say what a splendid thing it is that the tendency of the age is for men to forget mere matters of form in religion, and seek out the basic principles of their belief; and that if men are so engaged it evidences a deeper religious movement than the other observance. True it would be if the appeal of an inner religious life were more impelling to action than the adherence to an outward conventional form, which so often enlist the sympathies and class alliances.

However I think it will be agreed that in the sense in which their beliefs were manifested in their early institutions and laws it was a religious age.

Bancroft gives a very impressive picture of Roger Williams in the founding of a state on the basis of his religion. He says that "at a time when Germany was desolated by the implacable wars of religion, when even Holland could not pacify vengeful sects; when France was still to go through the fearful struggle with bigotry; when England was gasping under the despotism of intolerance; almost half a century before William Penn became an American proprietary; and while Descartes was constructing modern philosophy on the method of free reflection, Roger Williams asserted the great doctrine of intellectual liberty, and made it the cornerstone of a political constitution. He was the first person in modern Christendom to establish civil government on the doctrine of the liberty of conscience, the equality of opinions before the law. His wisdom compassed mankind. He would permit persecution of no opinion, of no religion, leaving heresy unharmed by law, and orthodox unprotected by the terrors of penal statutes".

It is well that this was so because one of the greatest elements, if not the greatest, which went into the establishment of this nation on an enduring basis was the element of religion.

The Supreme Court of the United States has declared that "this is a religious people". In an important case decided in 1892 it said that "no purpose of action against religion could be imputed to any legislation" when the language did not clearly state it, for the reason that from the commission given by Ferdinand and Isabella to Columbus down through all the charters to the colonies, as well as in the Declaration of Independence and in the constitutions of all the states, there is to be found a "profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the United States."

It is interesting to note, too, that while freedom of religion has been assured to the people of this country from the earliest times, and that no sect may have advantage over any other, a pretense of religion cannot be an excuse for practices which shock the common conscience of the people. In 1890 the Supreme Court held in a case which came up to it from Utah, that the National Government had "a perfect right to prohibit polygamy and all other open offences against the enlightened sentiment of mankind, notwith-

standing the pretense of religious convictions by which they may be advocated and practiced.”

Queen Anne’s instructions to Lord Cornbury contained a very especial injunction concerning religious worship. They contained the following provision :

“You shall take especial care, that God Almighty be devoutly and duly served throughout your government, the book of common prayer as by law established, read each Sunday, and holy-day, and the Blessed Sacrament administered according to the rights of the Church of England.”

Then followed provisions in reference to the care of churches, and the careful selection and maintenance of ministers. There was also a very strong provision against vice in the following language: “You are to take care that drunkenness and debauchery, swearing and blasphemy, be discountenanced and punished. And for the further discountenance of vice, and encouragement of virtue and good living, (that by such example the infidels may be invited and desire to partake of the Christian religion) you are not to admit any person to public trusts and employments in our said Province, under your government, whose ill fame and conversation may occasion scandal.”

Very interesting are these strict instructions to care for the virtue of the Province, given to a man who was himself so profligate and unprincipled that he cheated the citizens, lost his office, and got thrown into jail for his offences.

One of the laws passed in Carteret’s time was as follows:

“Concerning that beastly vice drunkenness, it is hereby enacted, that if any person be found to be drunk, he shall pay one shilling fine for the first time, two shillings for the second, and for the third time, and for every time after two shillings and six pence, and such as have nothing to pay, shall suffer corporal punishment, and for those that are unruly and disturbers of the peace, they shall be put in the stocks, until they are sober, or during the pleasure of the officer in chief in the place where he is drunk.”

Another was concerning swearing as follows: “If any person or persons shall profanely take the name of God in vain, by swear-

ing or cursing, he or they shall pay for every such offence one shilling, half to the informer, and the other half to the country."

As interesting as it might be to pursue further these illustrations of early colonial legislation, sufficient has been given to indicate the thought and policies of men of early times. Civilization was primitive in those days. It was free from the complications of our present civic and commercial life. Therefore, the laws had so largely to do with personal conduct. There was little else for them to think about or for their legislative bodies to act upon. They lived in God's great outdoors. They were in constant communication with the forces of nature and the majesty of the eternal hills. They had to challenge the winds and waves of the ocean with the frail craft of an imperfect age. They were in constant conflict with the elements on the land. They fought the Indians in the forests, and disease and death on every hand. No wonder their thoughts were so largely turned to matters of personal conduct and their relations to the omnipotent God.

Our laws today are largely concerned with regulations of a greatly advanced scientific and industrial age. Our congested population in great cities involving health and tenement regulations, the accumulation of property in individual and in corporate hands, our railroads, and steamships, and automobiles, and air-ships, the more or less complicated machinery of our courts, all contribute to a mass of enactments which swell our law libraries and engulf us in a mass of detail, in which we lose the sterner and more fundamental bases of our lives.

But we must not forget the fact that although they may now be overlooked, they remain as the foundation upon which our commonwealth was built. Our forefathers were God-fearing men. Their beliefs and attitude toward life and the few problems they had then to solve may not have been what ours is today in the light of advanced thought and scientific discovery, but they contributed to the strength of this nation in a marvelous degree, and to them we owe the solidity of the structure of our civil government and the strength of the institutions which the American people now enjoy.