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*Laws and Governments proposed for
West New Jersey and Pennsylvania,
1676-1683*

EDWARD BILLING AND WILLIAM PENN, the Quaker promoters of two mid-Atlantic colonies created in the reign of Charles II, seized the opportunity to draft laws and regulations for their settlers. "The Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province of West New Jersey in America," probably drawn up in 1676, was carried over to Burlington where the manuscript is still cherished.¹ By March 1677 over one hundred fifty signatures had been appended to it. Billing's was the first, Penn's the fourth, with many signers in London and others already in the colony. No plans for the colonies are "as worthy of study" as these, averred one scholar; another wrote that they reflected "a kind of wisdom and justice that is anything but doctrinaire," distinguishing them from

¹ The Concessions (cited in text by chapter) are taken from *The Papers of William Penn, I, 1644-1679*, eds. Mary Maples Dunn & Richard S. Dunn (Philadelphia, 1981), 387-410, which reprints it from the Ms at Burlington, N.J. The editors make no absolute decision about authorship. *The West Jersey Concessions and Agreements of 1676/77, A Round table of Historians* (Trenton, 1979) offers six short talks on background, authors, relationship to other colonial agreements, authorship, date, ideas and principles.

such schemes as those for Carolina in 1669, Pennsylvania in 1682, and East New Jersey in 1683.²

The Frame of the Government of the Province of Pennsylvania, in America Together with certain other Laws Agreed upon in England, by the Governor and divers freemen of the aforesaid Province was published in London in 1682 shortly before William Penn first visited the colony. In December he presented to the Assembly at Upland or Chester "The Great Law or Body of Laws of the Province"—hereafter it was frequently called his "Code."³ These productions obtained for the author a European reputation as a legislator. Charles de Secondat, Baron de Montesquieu (1689-1755) dubbed him Lycurgus, though as one commentator has remarked, this was a singularly inept description of so lenient a lawgiver.⁴ Both William Penn and Edward Billing have been credited with the authorships of the Concessions, whose contents seem nearer the context of Billing's earlier life and previous writings than that of the much younger Penn. Analysis of the Concessions and Penn's *Frame* reveals two differing attempts to implement a few of England's mid-century legal reforms as well as the transfer of everyday juridical English customs to the new settlements overseas.

Change in government and law was much debated in the seventeenth century, not only in British territory, but in countries like France and Denmark. In France, for example, Jean Baptiste Colbert (1619-1683) improved, among other legislation, the civil code and appointed a commission anticipating, but not implementing, a digest similar to that achieved by Napoleonic statesmen. In 1660, Denmark's king dismissed the traditional Gothic estates, established an absolute monarchy, and then produced a book of laws admired, even by severe critics of the new establishment like Algernon Sidney (1622-1683)⁵ and Robert Molesworth (1656-1725). The latter, in *An Account of Denmark* (London: 1694), declared that the Danes enjoyed laws "that for Justice, Brevity, and Perspicuity, . . . exceed all that I know of in the World." They were

² John E. Pomfret, *The Province of West New Jersey, 1609-1702* (Princeton: 1956), ch. 6, 86-102.

³ Text of Penn's *Frame* and laws, *Statutes at Large of Pennsylvania, I, 1680-1700*, compiled by Gail McKnight Beckman (New York, 1976). *Frame* and laws cited page; numbers; "The Great Law," first version, in Beckman pp. 128-135, as "Code" by chapter.

⁴ *D.N.B.* life of Penn by Ramsey MacDonald.

⁵ Algernon Sidney, *Discourses Concerning Government* (London, 1698), ch. III, sect. 26.

grounded in equity, written in the tongue of the country, and comprehensible without the aid of counsel or attorney. Suits were quickly settled; few lawyers were required.⁶

The English had long boasted of the rule of law under which they lived, but had also discussed possible amendment and reduction into briefer and simpler form.⁷ Yet the long struggle between the Stuarts and the people was ostensibly chiefly to obtain recognition of rights often claimed to be traditional. By the end of the seventeenth century, to be sure, their definition and confirmation was accomplished. They were briefly: no taxation without representation; frequent parliaments; no standing army in times of peace, the right to petition the crown; and protection in the courts—by Habeas Corpus, production of adequate testimony, trial before a jury of the vicinage, and the prohibition of excessive bail and cruel or unusual punishment. Protestants after the Revolutionary Settlement enjoyed a modicum of religious liberty and considerable freedom of speech and press.⁸ But no overall rectification of law was then attempted, although certain constitutional changes effected by the Long Parliament before hostilities erupted in 1642, for example, the abolition of Star Chamber, were retained. The disuetude into which the Court of Wards had fallen during the wars and some regulation of usury were confirmed by statute at the restoration of Charles II in 1660. The right to the writ of Habeas Corpus was affirmed in 1679. But even much desired and comparatively unrevolutionary practice was annulled by the returned Cavaliers: the ballot ceased to be used in the Commons, and Latin and French were again the usage of the courts, English not becoming the official language until 1731. The achievement of the century was clarification, a monarchy limited by law and a more powerful parliament less frequently challenged by king or would-be reformer, rather than overt legal rectification.

Yet major and minor innovation was the subject of much paper shot:

⁶ Robert Molesworth, *An Account of Denmark* (London, 1694), ch. 15, 232-233.

⁷ William Penn, *England's Present Interest* (London, 1675, ed. used 1698), 85, "a ruling by law"; James Harrington, *The Political Works*, ed. J.G.A. Pocock (Cambridge, 1977), "Aphorisms Political," III, 762. Harrington insisted that England was not governed by arms, but by a government by laws, though "imperfect, or ineffectual laws."

⁸ *English Historical Documents, 1660-1714*, ed. Andrew Browning (London, 1953), prints the achievements of the Revolution—juries, 85-89; Habeas Corpus, 92-96; Bill of Rights, 122-128.

pamphlet warfare proliferated even as war began but especially in the years between the virtual defeat of the King in 1647 and the Cromwells' supremacy. Moderate proposals, like those of 1653 in the report of a commission presented by Matthew Hale (1609-1676),⁹ or in *England's Balme* (London: 1656), by William Sheppard (1595-1674)¹⁰ were ignored either through a general indifference in spite of the articulate minority, or because of persistent, if not obtrusive opposition, from vested interests.

Not surprisingly then much more revolutionary suggestions received less attention than they may have deserved. Tracts expressed the aspirations of Sectaries, Levellers, and others. These questioned the structure of church and state, a matter of concern of course both to the Republic set up in 1649-1653, and the Protectorate, 1653-1659. Further they attacked the whole system of justice. Chancery, court of equity and other widely unpopular institutions were to be abolished or entirely reconstituted. Emphasis was to be laid on local, elective bodies and officials, rather than on the expensive complex at Westminster. The legal process was to be public, with the accused allowed to plead his own cause if he wished, and able to demand the presence of at least two witnesses to his presumed guilt. Freedom of worship was, in varying degrees, permitted, and ecclesiastical jurisdiction diminished or discarded. Punishment was examined and in general greater leniency was advocated: reduction of the death penalty, retribution to the robbed, injured or bereaved, as well as amelioration of the deprivations inflicted upon the next of kin of suicides and those executed. Jails were to be clean and jailers forbidden unjust exactions. A registry of transactions in real property was to be kept; conditions of land tenure drastically revised.¹¹

Overseas the complexity of English law was necessarily less; few

⁹ The Hale Commission is reprinted in *Somers Tracts* (London, 1809-1815) VI, 177-245 from *Several Drafts*. . . (London, 1653). Mary Cotterell, "Interregnum Law Reform, the Hale Commission of 1652," *English History Review* 88 (April, 1968), 689-704.

¹⁰ Nancy Matthews Arson, "William Sheppard, Law Reformer," a thesis submitted to the University of Maryland in 1974—forthcoming from C.U.P. I was graciously allowed a photocopy.

¹¹ David Veall, *The Popular Movement for Law Reform, 1650-1660* (Oxford, 1970); Blair Worden, *The Rump Parliament, 1648-1653* (Cambridge: 1974, paper 1977), 105-118; *Select Essays in Anglo-American Legal History*, 3 v. compiled by a committee of the Associations of American Law Schools (Boston, 1907-1909) I, iv; R. Robinson, "Anticipations under the Commonwealth of Changes in the Law," 467-491. These are useful on proposals and reformers but the literature on any one group, e.g., the Levellers, is enormous.

lawyers emigrated, process was almost perforce in English, and the courts more localized. The common law prevailed, but where conditions required changes, legislation was expected to be approved, revised or rejected in London. During the vicissitudes of the Interregnum, and the comparative inertia, save for a few exceptional years, of most officials responsible for imperial policy under Charles II, and until the appointment of sixteen commissioners and a new Council of Trade in 1696,¹² experiment seemed feasible. Men like John Locke (1632-1704), Anthony Ashley Cooper (1621-1683), first Earl of Shaftesbury, and others tried to bring it about. Such experiments as were contained in the West Jersey Concessions and Penn's arrangements for Pennsylvania will be discovered here to have some unique qualities.

Billing and Penn present in most respects striking contrasts. Penn is the more familiar personage, though like him Billing seems to have been of gentle birth and well educated. Both Quakers were doubly motivated in colonial purpose by the wish for a refuge from religious persecution and by personal financial exigency. Billing, of Cornish origins, was born about 1623.¹³ In 1657 he was a cornet or second lieutenant in the army of George Monck (1608-1670) in Scotland. Before that year no listing of his name has yet been discovered in the records of university, Inns of Court, or army. *A Word of Reproof* (London: 1659), a tract sometimes attributed to him, suggests its author's involvement in 1650 at the battle of Dunbar, and experience before that at Oxford. The rank of cornet after seven years service seems low; *A Word of Reproof* may not be his. George Fox (1624-1691),

¹² Browning, *Documents*, 542-544, Order establishing a Council of Trade naming sixteen commissioners to it.

¹³ Billing, Bylynge, Bylling—he used all spellings, himself—is not noticed in standard biographical dictionaries though the typescript "Dictionary of Quaker Biography," found at Friends Library, London, and Haverford College has a useful note on Billing to which Frederick B. Tolles contributed. Pomfret, n.2, above, is inclined to follow *Essays in Honor of Rufus M. Jones, Children of Light*, ed. Howard E. Brinton (N.Y.: 1938) where no. IV "The Problem of Edward Bylynge" contains much information: i, 83-106; Violet Holdsworth, "His connection with Cornwall" provides, besides a genealogical table, much about the family: ii. John L. Nickalls, "His Writings" attributes the Concessions to him and also *A Word of Reproof*. In Nickalls revised ed. of *The Journal of George Fox* (Philadelphia, 1975) a note, p. 320, identifies the maiden name of Lilius as Hepburn. Nickalls is followed on authorship of the Concessions by H.N. Brailsford, *The Levellers and the English Revolution* (Stanford, 1956) and by Christopher Hill, *The World Turned Upside Down* (N.Y., 1972).

travelling in the north in the fall of 1657, met both Edward and, separately, his then estranged wife, Liliias (d. 1674). The Quaker convinced them both and brought about reconciliation between them. Billing left the army, moved south and thereafter operated a brewery in Millbank not far from the meeting held at the house of Stephen Hart (fl. 1659) in New Palace Yard, Westminster.

With others Billing signed the 16 April 1659 petition urging Parliament to relieve the sufferings of Quakers.¹⁴ In the October of that year, during the anarchy prevailing after the fall of Richard Cromwell (1626-1712), protector since the death of his father Oliver (1599-1658), the book collector George Thomason (fl. 1666) purchased *A Mite of Affection manifested in 31 Proposals. . . for a Settlement in this Day and Hour of the World's Confusion* (London: Giles Calvert, 1659). This work, to be discussed later, bears a close relation to the Concessions.¹⁵ Monck's soldiers, by now in London, on 6 February 1659-1660 rudely entered Hart's house and so roughly treated both men and women worshipping there, amongst them the Billings, that the diarist, Samuel Pepys (1633-1703) expressed sympathy, and the General forbade repetition of such affrays.¹⁶

Harassment of Quakers by fine and imprisonment continued under Charles II; Billing, never one to suffer quietly, wrote vividly of persecutions endured. *An Alarm to all Flesh* (London: Robert Wilson, 1660) by E.B. began "Howle, howle, shriek, yell and roar. . . ye sensual, Earthly Inhabitants of the whole Earth," and a little further on declared "Edward Billing," a prisoner afraid of no man (p. 9). This was followed by *Words in the Word to be read by Friends*, written in the Gatehouse prison by E.B. in 1661, urging tradesmen not to encourage luxury by selling the superfluous. *A Faithful Testimony* (London: for the Author, 1664) addressed Episcopalian persecutors about "the un-

¹⁴ *The Clarke Papers*, ed. C.H. Firth, III (London: 1899), a newsletter, p. 100, identifies one of the signers as Cornet Billing.

¹⁵ *A Mite of Affection* (hereafter *A Mite* and ch. quoted) is reprinted in *Early Quaker Writings*, ed. Hugh Barbour and Arthur Roberts (Grand Rapids, Michigan, 1973), 407-421; on 411 Monck's army marched south 1659-1660, not 1660-1601 as stated.

¹⁶ Haverford Quaker Collection has a photo-copy of a Swarthmore MS, V. 93 where a letter attributed to Billing describes the affair. *The Diary of Samuel Pepys*, ed. R. Latham & Wm. Matthews (Berkeley: 1970) I. 44. Pepys' other references to Billing show him jeering at a republican M.P. about the coming restoration, 50, talking with the Diarist who found him "a cunning fellow," 279, and Billing upbraiding Pepys about naval mismanagement, VIII (1974) 349.

natural Act" (p. 4), that is 13 & 14 Car II.c.1—against Quakers denying them the rights of Englishmen, established in Magna Carta. Billing described indignities like mouths stuffed with rolled-up handkerchiefs, the canes and cudgels used, as well as the faulty legal process in the Old Bailey where but one witness was called. Justice was continually abused. Punishment was very severe. *A Certain Sound* (London: 1665), described infections incurred in filthy confinement and insisted that no similar banishment or death was suffered by Roman Catholics (p. 12). In a tract of 1678, *A Copy of a Letter*, Billing denied dubbing the Pontiff "Anti-Christ" or "Whore of Babylon," but emphatically questioned his claims to dominion over body and soul.¹⁷

Energetic and knowledgeable, Billing was also, by March 1674, deeply in debt through, he declared, the extravagance of his recently deceased wife.¹⁸ The extremity of the laws against Quakers imposed on him must have greatly added to his burden.¹⁹ To remedy his money troubles, he and another ex-Cromwellian soldier turned Quaker, Major John Fenwick (1618-1683)²⁰ in 1674 purchased from John, Lord Berkeley, (d. 1678) West New Jersey, an area bestowed upon that nobleman ten years previously by James, (1633-1701) Duke of York. The partners soon quarrelled about their respective shares. Penn, Gawan Lawrie (d. 1687) and Nicholas Lucas (1607-1688), appointed by the Society of Friends to arbitrate, awarded Fenwick one tenth, and the remainder to Billing. Fenwick promptly made his way to Salem in the new colony; Billing never crossed the Atlantic, dying in London in January 1687, aged sixty-three. In his last years he was at odds with the West Jerseymen over the hereditary proprietaryship finally granted him by Charles II. Since the purchase itself could confer no ruling powers, until then Billing's position had been dubious, and the Concessions of no legal standing. But Penn and Robert Barclay (1648-

¹⁷ All Billing's known tracts are in the Haverford College Quaker Collection, including the rare *A Word of Reproof* graciously sent in photo-copy from the Clements Library, Ann Arbor, Michigan. *A Copy of a letter [to the pope] Harleian Miscellany*, 12v. (London, 1810) VIII, 436-440. *The Case put and Decided*, tracts of the Billing, Budd-Jenning dispute (reprinted Philadelphia, 1880).

¹⁸ HMC 70, *Pepys MSS* (London, 1911), 268, March 1674.

¹⁹ The letter to Arlington printed in *State Papers relating to Friends 1654-1672*, ed. Norman Penney (N.Y.: 1913), 307.

²⁰ Robert W. Harpee, *John Fenwick and Salem County in the Province of West New Jersey, 1609-1700* (Salem, N.J., 1978).

1690) also close to James, persuaded the Stuart brothers to remedy the anomalous position of the owner by appointing Billing governor and confirming this by patent in 1683. Billing having already received the assurance of authority, dispatched Samuel Jenning (d. 1708) in 1681 as deputy. That deputy found the inhabitants furious for the Concessions had promised only elective officials. Additional controversy about Billing's acceptance of the King's mandate embittered matters, and the constitutional situation remained unclear even after Billing's death, until the province passed under royal control in 1702.²¹

The Penns²² were a family from Minety in Gloucestershire. The elder William (1621-1670) took to the sea and fought in the naval wars of the forties and fifties in Irish and Caribbean seas. Sympathetic to the Stuarts and angry over his treatment by Cromwell, he quarrelled with him and lived from 1656 until 1660 on those Irish estates with which his services had been rewarded. At the restoration of Charles II, ownership of those estates was confirmed, he was knighted, and he rejoined the navy becoming a favorite colleague of James. His son William was born in London in October, 1644, carefully educated and, when religious dissidence ended his few months at Oxford, was sent abroad for travel and further study at Saumur, a center of moderate Calvinism, where he lived with the famous theologian Moses Amyraut (1596-1664). Back in England, his formal instruction, if it ever began at Lincoln's Inn, was ended by the Great Plague which in 1665 closed metropolitan institutions. Dispatched to Ireland to care for the family property young William Penn met, probably for the third time, the Quaker Thomas Loe (d. 1668), and sometime in 1667, became a Friend. Suffering severe persecution in spite of the family position, he thereafter vigorously wrote and preached his faith both in England and western Europe. Records of arguments in tract and courtroom reveal Penn's familiarity, perhaps gained in the enforced leisure of prison life, with traditional legal literature; this expertise not only resulted in the important decision about the independence of the jury in *Bushell's Case*

²¹ Pomfret as cited *passim*; tracts in *The Case Put and Decided*.

²² The best so far among Penn's many biographers is Catherine Owens Peare (Philadelphia, 1957) though occasional inaccuracies mar the text, and the index has omissions. An early life by Samuel Janney (Philadelphia, 1852) is good. A brief assessment of Penn's eighteenth-century reputation may be found in Caroline Robbins, "The Efforts of William Penn to lay a foundation for future ages," *Aspects of American Liberty* (Philadelphia, 1977), 67-80.

of 1670,²³ but in the tenor of *England's Present Interest* (London: 1675), other polemics, and eventually in the laws devised for Pennsylvania.²⁴

The Stuarts liked not only the Admiral but his son. Penn was thus able at times to mitigate the lot of fellow Quakers as well as his own. Through Charles and James he acquired, as a result of a petition to them the previous summer, an American domain by the charter of 4 March 1681. Penn's influence with James, who succeeded his brother in 1685, was widely noticed and later caused considerable embarrassment. After that monarch fled to France late in 1688, Penn experienced frequent interrogations, brief imprisonments, and the loss for two years of his province. Retreat in the face of varied attacks from those who suspected him of Jacobitism served, at least temporarily, to lessen the esteem in which members of the Society of Friends had held him; for the duty of early Quakers was, as Barclay had declared in *An Apology* (c. 1678), to face up to persecution.²⁵

The son of a courtier welcome in royal circles, Penn had a large acquaintance outside the religious group for which he so devotedly exercised himself. Powerful persons of the ruling class, to which he, as the proprietor of a large colony belonged, came to his aid on many occasions: after the Glorious Revolution, in connection with the recovery of Pennsylvania, and when he proposed a Union of American settlements. Such people received his appeals when he feared that the new board or council of trade threatened the proprietary colonies, and assisted his release from a debtors' prison where the persistent claims of his former steward's family for sums owed or said to have been owed to Philip Ford had placed him in 1708.

Penn's friendship with James II raised the question of his loyalty to William and Mary in his day and has also continued to evoke varying theories. Quite certainly James and Penn were sympathetic towards nonconformists to the established church of England, the King because

²³ Reports of the trial of 1670 have frequently been reprinted: conveniently in *The Witness of William Penn*, ed. Fred B. Tolles & E. Gordon Alderfer (N.Y.: 1957), 87-105: additional information is in *The Papers of William Penn* I, 171-180.

²⁴ Besides *England's Present interest*, reports of the trial, *England's Great Interest in the Choice of the New Parliament* (London, 1679), Penn wrote on liberty of conscience and the Frame and laws but other political works (outside maintenance of rights and urging freedom of worship) are relatively few.

²⁵ Robert Barclay, *An Apology for the True Christian Divinity; . . . Of the people called Quakers* (c. 1678; edition quoted London, 1780), 507-512.

of the afflictions suffered by Catholics, Penn because of the persecution of his own and other sects. Evidently Gulielma Penn and Queen Maria D'Este were on good terms; indeed some have suggested the Penns visited her and James in their French exile. Penn was greatly indebted to the Stuarts, and evidently believed James sincere in his protestations about toleration. But James did not heed his advice about Oxford or the trial of the bishops and their intimacy may have been exaggerated. Though frankly admitting to questioners, his obligations to the late king, Penn would not have engaged in armed conspiracy to overthrow the new government in England. In the present connection the relationship would simply demonstrate that Penn was not anti-monarchical in sentiment. And aristocratic friends do not seem unnatural to a man of a family always of the gentry, and moderately prosperous, who had recently risen into society's upper echelon.²⁶ Penn's Quaker friends also helped him, but in him, the odd mixture of religious and social or secular has seemed to some students inconsistent or inexplicable. Penn wrote no tracts advocating republican sentiments.

The West New Jersey Concessions embodying much of the republicanism of *A Mite of Affection*, certainly owed many of its assumptions to this 1659 tract. If Billing, as seems likely, wrote both, this poses no problem. Billing, an adult during the Interregnum and a soldier in Monck's army, was exposed to levelling and other political novelties. Penn, on the other hand, was but sixteen when he entered Oxford after his father's warm reception by Charles II. Though there is evidence of early religious inclination and experience, Penn shows little political or legal predisposition before his conversion to defend himself and his friends. Even then, he chiefly stressed those juridical claims made by most Englishmen and eventually protected by the Bill of Rights in 1689. He and William Meade (1628-1713), co-defendants in 1670, quoted Magna Carta with equal ease. Penn adding the witticism that their judges made the great document "a nose of wax."²⁷

To the traditional rights of Englishmen Penn added liberty of con-

²⁶ The letters for the most part still on microfilm at HSP illustrate his wide acquaintance with the nobility. Alison Olson, "William Penn and the Politicians," *WMQ* ser. 3, 8 (1961), 176-195, is useful on Penn's non-partisan preference among correspondents and Ian Steele, "Board of Trade, 1699-1702," *WMQ*, 3 ser. 23 (1966), 596-619, though not specific on Penn, illuminates his concerns in those years.

²⁷ *The Witness of William Penn*, 102.

science, a fundamental property or propriety. This interpretation was also mooted by men like his friend George Villiers (1628-1687), second Duke of Buckingham, who declared 16 November 1675,

There is a thing called *Property*, (whatever some men may think) that the People of *England* are fondest of. It is this that they will never part with, and that His Majesty in His Speech has promised to take particular care of. This, my Lords, in my Opinion, can never be done, without an *Indulgence to all Protestant Dissenters*.

Perhaps the Duke derived this concept from *The Great Case of Liberty of Conscience* (London: 1670). Penn was to defend him in 1685 when under attack because of his support for the dissenters. Even in ostensibly political tracts written after the dissolution of parliament urging the election of men like Sidney for the new Commons, in the hope that they would repeal the penal laws, Penn seldom took a partisan or innovative stance on issues other than religious liberty and the legal injustice often inflicted during the enforcement of persecution by officials oblivious to the rights of Englishmen.²⁸

Commentators and biographers have often conceived of Penn as republican and thus a possible author of the Concessions in 1676, attributing the changed pattern of the Frame and laws to growing conservatism. Scrutiny of *A Mite of Affection* and the Concessions finds in them much that seems closely affiliated with reforms proposed during the period of experiment in the Commonwealth rather than the Restoration. Nothing in Penn's writing indicates any knowledge of the literature of innovation. He signed and must have read the Concessions. Anything he later decreed about debtors, punishment, the use of English in court, to cite but a few examples, might well have been prompted by the Concessions. No contemporary attributed the Concessions to his pen; on the contrary, the angry colonists in Jersey referred to it as Billing's composition.²⁹ Five years separated the Concessions from the arrangements for Pennsylvania. One provides almost manhood suffrage, absolute liberty of conscience, a yearly rotation of office, almost all holders of it to be elected; the other prescribes a tri-partite scheme of government, a governor endowed with consider-

²⁸ *State Tracts*. . . Printed in the Reign of Charles II (London, 1689), 62. On the defence of Buckingham, see M.M. Dunn, *William Penn* (Princeton, 1967), 145-147; *The Witness*, 75; *Fruits of Solitude*, I, 330-369.

²⁹ See n. 17, *The Case put*.

able power over appointment, a council or second chamber and an assembly chosen for a three-year term by voters qualified by property holdings. The constitution of East New Jersey of whose twenty-four proprietors after 1683, Penn was one, followed a similar plan save in the multiplicity of proprietors.³⁰

Not only the supposed authorship of the Concessions, or a major part in it, but also the existence of ideas publicized in the *Oceana* (London, 1656) of James Harrington (1611-1677) in the proposed constitutions for the colonies established during the reign of Charles II, have suggested republicanism.³¹ Harrington's work had added to the already considerable familiarity in England with the "famous Venetian System." But by no means all admirers of Venice were classical republicans. Thomas Sheridan (fl. 1661-1703), secretary to James II in exile, included in *A Discourse of the Rise and Power of Parliaments* (London, 1677) not only a recognition of the Venetian government, but a readiness to adapt many of its practices to the improvement of English institutions.³² Penn's inclusion then of the ballot, rotation in office, a separation of initiative from confirmation of legislation, and a double vote for the chief executive, did not make him a republican. As noticed, both constitutions set up in Pennsylvania and East New Jersey resembled the English as much as the Venetian form. The Concessions included the ballot, rotation in office, and the seven appointed to guard the "fundamentals" (*Con.* 14) against treasonable alteration; these provisions also mirrored the Italian state and differed from other colonies in franchise, selection of officers, and a uni-cameral legislature. The West New Jersey province offered, therefore, in spite of imperial ties, a republican, almost levelling experiment. The settlers felt this experiment had been betrayed by Billing's acceptance of the royal grant.

Among sectaries, republicanism also occasionally implied some egalitarianism, but Quakers, in spite of their acceptance of the ministry of women, denied levelling aspirations. They deplored undue luxury,³³

³⁰ John E. Pomfret, *The Province of East New Jersey 1609-1702* (Princeton, 1962) *passim*, and the early constitution in *Archives of New Jersey I, 1621, 1687*, ed. Wm. A. White (Newark, 1880).

³¹ Besides Pomfret on West New Jersey, H.F. Russell Smith, *Harrington and his Oceana* [1914] N.Y.: 1971) ch. VII, 152-184, deals with Carolina, the Jerseys and Pennsylvania, placing great emphasis on Penn's republicanism.

³² Thos. Sheridan, *A Discourse passim*, pp. 24, 31, 58, 70, 234.

³³ *The Select Works of Wm. Penn* in 3 v (London, 1825, reprint, N.Y., 1971) I, "No Cross, No Crown," Part I, ch. xii on avarice; xiv, 441-461 on luxury; *Fruits of Solitude*, II, 227.

but Penn's *Advice to his Children* (London, 1726) and *Fruits of Solitude* accepted the existence of a structured society, and outlined the duties of the various categories of rank ordained by the Almighty in all nature, including mankind.³⁴

Analysis of the documents for these Quaker colonies brings out nuances of approach. What is apparent is that Billing, author of *A Mite of Affection*, whatever help he later obtained from trustees, was largely responsible for the Concessions. Penn, writing only a few years later with the thoughtfulness and hesitancy shown in the various drafts of 1681-1682, and in spite of the advice offered by republicans like Benjamin Furly (1636-1714) and Sidney, was undoubtedly the chief architect of the government and laws of Pennsylvania. Some repetition will be inevitable here in relating the schemes for the provinces to each other and to suggestions of the turbulent but fruitful years which preceded them. That repetition will also emphasize both Penn and Billing's anticipation of those rights of Englishmen defined by the end of the century, and enumerated more than sixty years later as natural rights by revolutionary Americans.

A Mite of Affection assumed a republic. The magistrate was to have no coercive power whatever in religious matters (*A Mite*, 1). Government was to be decentralized; much administrative authority was to rest in local, elected bodies representing community units, after a re-organization of county, hundred and parish on Harringtonian lines (*A Mite*, 14). No office could be held more than one consecutive year (*A Mite*, 30). The general parliament or assembly, when elected, should be annual (*A Mite*, 27). No provision was made for protector, governor or executive council. Juridical proposals will be considered later in discussions of those in the concessions and the Code.

Such a tract naturally related to contemporary English conditions as well as to reforms put forward by a variety of persons. Rejecting servile and copyhold tenures, "badge or yoke of the conquest," land ownership should be adjusted to the general well-being and everyman's due property (*A Mite*, 6). A court of record—that is, a register—was to be set up in each county (*A Mite*, 9). Apprentices and those who had attained to knowledge of their craft should not be prohibited by any

³⁴ Penn's *Advice to his Children* written c. 1699, posthumously published, 1725; and *Fruits of Solitude* I, 199, 207, II, 255-268; Barclay *An Apology*, 516.

pretended charter from pursuing their occupation (*A Mite*, 22). King's Bench prison was to be abolished (*A Mite*, 17). Any people unjustly excluded from civil and military positions by the "late single person," obviously Oliver Cromwell, should be restored to his place (*A Mite*, 26). Persecutors were to have no role in government (*A Mite*, 4). Images in churches, presumably any remaining by 1659, were to be removed. Here, as well as in the prohibition of cards, dice and other profane pastimes, the puritan rather than the Leveller speaks (*A Mite*, 20, 21). Sequestered estates of royalists were to be used for the care of the maimed, or for the families of those killed in the late wars; any overplus was to help defray public expenses (*A Mite*, 24). Assistance to the indigent, of course, partially echoes the traditional poor law (*A Mite*, 19). Free trade (*A Mite*, 28), and standardized weights and measures throughout the British Isles were to unite England, Scotland and Ireland (*A Mite*, 23).

A Mite of Affection expressed hopes for England in 1659; arrangements proposed for West Jersey and Pennsylvania, 1676-82, included chapters relevant only to the New World including fair relations with the indigenous inhabitants, and good understanding between white and red man (*Concessions*, 25, 26; *Code*, 18). The sale of spirituous liquor to Indians was forbidden. Penn's attempt to acquire some skill in their language and benevolent intentions were long remembered and respected by the tribes.

New colonies perforce regulated acquisition and use of land: price, dues or rents paid, and the interval allowable between sale and settlement. The first twelve chapters of the *Concessions* dealt with these, and outlined projected streets and highways. Parts of Penn's *Frame*, laws and *Code* were likewise concerned, but with the difference that the *Charter* granted him wide powers and privileges as Proprietor. Quit rents were to be the source of much friction between the Penns, their agents and the purchasers and occupiers down to the Revolution of 1776, while this problem was of little consequence in New Jersey.

As already suggested, the political assumptions of Penn and Billing were very different. Both endorsed the juridical rights demanded by Englishmen and allowed considerable freedom of worship. Billing's acceptance of an hereditary proprietorship challenged the levelling concepts implied in the *Concessions*. In the later history of Jersey and Pennsylvania, royal action and recalcitrant colonists changed some of the early arrangements. Many innovations were short-lived.

Rotation in office in West Jersey was annual; in Pennsylvania service was for a three-year stint, for Councillors has been noted; moreover, the absence of a chief executive in the plan of 1659 as well as in that of 1676 contrasted with the powers Penn enjoyed. Both the council and assembly in Pennsylvania were elected, but only the former could initiate legislation. The assembly obtained this function by the Charter of Liberties in 1701, signed as Penn departed from his second and last brief visit. The West Jersey body, on the other hand, determined its own times of meeting and adjournment, delegating certain of its members to carry on during the suspension of session. It also appointed important officers like the chief justice. The assembly could bring forward any grievance or problems the members or their constituents wished to consider, though these must not attempt to change the "fundamentals" laid down in the first chapters of the Concessions.

In Penn's province an affirmation of fidelity to the Proprietor and his family was demanded of officials. The owners of East New Jersey made all appointments that did not infringe the right there of self-governing boroughs. In all three colonies voting was originally by ballot, marriage legally a civil ceremony and freedom of worship, at least to the god-fearing, was assured.

The Concessions and Penn's Code differ on religious liberty. *A Mite of Affection* declared that the magistrate had no authority in the matter. All believers in Jesus Christ were to enjoy independence of worship, and none with faith in the eternal and ever-living God could be excluded from peaceful habitation. No forced payment towards support of any minister was allowed (*A Mite*, 1). Chapter 16 of the Concessions reiterated even more strongly the sentiment expressed in *A Mite*, and did not require any expression of Christian belief. Penn's Code, on the other hand, though permitting freedom of worship to all Christians and believers in God, limited office to trinitarians. Strict Sabbath observance was also commanded. (*Code*, 1, 2).

Quaker practice as well as Leveller prejudice outlawed the use of oaths in *A Mite* (2) and prompted the provision in the Concessions (c. 18 & 20) for averment and solemn declaration. Penn prohibited swearing, probably including in that term not only official oaths but everyday blasphemy (*Code*, c.3). He also made the Quaker calendar legally acceptable (*Code*, 41). Puritan and Quaker ideology was responsible for the ban on "profane pastimes" as noted in *A Mite*, ignored in the Concessions, but listed at length in the Code (c. 29-30), along

with penalties for clandestine marriage (*Code*, 9-14). Penn also legislated in some detail against malicious and seditious speech, defaming and clamorous railing (*Code*, 31-34). Such interest may have been partially stimulated by reaction against the vices and loose talk of the Stuart court. Penn regulated the price of beer and ale, forbade unlicensed taverns, and ruled that meals served to travellers and stabling for horses, should be of fair quality and reasonable cost (*Code*, 40). Thus he, unlike the authors of *Concessions* and *The Fundamental Constitution of East New Jersey*, was aware of a variety of both social crimes and everyday needs.

Crime was followed by punishment, the nature of which greatly interested many thinkers during the Interregnum distressed by the often savage penalties then imposed. *A Mite* specifically forbade the death penalty for theft (*A Mite*, 7). The *Concessions* on the other hand seemed more anxious that civil and criminal trials should be fair "as far as in us lies, free from oppression and slavery (*Con.* c.23). The day of execution for those convicted of capital offences was left to the general Assembly to determine as they in "the wisdom of the Lord shall judge meet" (*Con.* 31). Appeal, unavailable for criminal offenses in England, was thus possible (*A Mite*, 11). In Pennsylvania the only capital crimes were murder and treason. Penn listed fines and terms of imprisonment of varying severity and length for many transgressions (*Code*, 9-17, etc.). *A Mite* left the nature of the penalty to the decision of the jury, then to elected justices, and by them to an "unconcerned person" (11 & 12); the *Code*, to the magistrate where not otherwise defined (ch. 66). Part of the property of the convicted should go to the family and part to that of the victim (*A Mite*, 16; *Con.* 30; *Code*, 7). *The Concessions* (30) also provided that the estate of a suicide should devolve on the family, a concession later allowed in Pennsylvania. Restitution was decreed for the victims of certain offences (*Con.* 28, 30; *Code*, 20, 22, 44, etc.).

The plight of the debtor in England was notorious, at least from the sixteenth to the nineteenth century, when Dickens made it generally and unfavorably known to those who, by chance, were not already cognizant of it. The rich, to be sure, sometimes welcomed the confinement that wealth could always ameliorate in order to avoid paying creditors. The moneyless man was imprisoned, often abruptly, and was thus rendered powerless to work off his obligations. *A Mite* (17) not only proposed forcing the well-to-do to pay up, but also made it possible for those able

and willing to work to discharge their debts. *The Concessions* devoted one of the longest chapters (18) to this matter. Due notice of process was to be given, allowing time sufficient for travelling the necessary distance to court. Should property be found sufficient to pay the debt, this should be confiscated for the purpose. On the other hand, if the testimony of honest compurgators proved the debtor without the where-withal, he should be discharged forthwith. Penn ruled that debts should be paid, but in cases where legal issue existed, and land owned had been purchased before the contraction of debt, then "all goods and one half the land" should be exempted from seizure (*Code*, 61). Furthermore, he suggested the possibility of full and free discussion about debts owed or claimed between defendant and plaintiff (*Code*, 49), a reflection of favored Quaker practice.

In *A Certain Sound Billing* vividly portrayed the noxious conditions of the prisons in which he and his fellows were incarcerated. Save for those, like Penn himself in 1708, who were able to improve personal indignities, inmates found all jails dreadful and badly in need of that overhaul, only seriously undertaken largely at the instigation of John Howard (1726-1790) more than a century later. *A Mite* declared that prisons should be warm and clean and condemned the impoverishment caused by exacting jailers (*A Mite*, 18). *The Concessions*, though against payment of fees to officials (*Con.* 22), neglected the subject of jails as such. Penn limited costs, declaring that all charges should be made public and rated as low as possible (*Code*, 47-48). Rooms should not be rented to inmates and should be clean. Prisoners should be allowed to provide themselves with necessities (*Code*, 63). All prisons should be workhouses for felons, thieves, vagrants and loose livers (*Code*, 64). The term "houses of correction" (*Code*, 24) was intended literally to stress the remedial purpose of confinement. Possibly Quakers had noticed the purpose of the Corporation of the Poor in London in the 1650's to prepare indigent children and vagrants for usefulness in society.³⁵ Those jailed through the testimony of false informers could obtain damages from their accusers (*Code*, 65).

The law's delays had long been criticized. Speedier and cheaper justice was desired by all at the mercy of the legal process. The bewildering divisions of function and power of the Westminster Courts,

³⁵ Valerie Pearl, "Puritans and Poor Relief," in *Puritans and Revolutionaries: Essays presented to Christopher Hill*, ed. Donald Pennington and Keith Thomas (Oxford, 1978), 206-232.

the existence of ecclesiastical tribunals, of Chancery, and of the legal role of the houses of parliament, all contributed to unnecessary and expensive proceedings. Much of this system was not established overseas. Many eccentricities of the English system never developed in America. Decentralization, as promoted in tracts like *A Mite of Affection*, was forced by circumstance upon the colonies. The absence of many professional lawyers before the eighteenth century served to keep costs down and proceedings simple, if occasionally chaotic. The early role of those few men of law in the colonies was largely in office. Among colonists in Pennsylvania and West New Jersey, Robert West and William Bacon were said to have been of Middle Temple; attorney-like Thomas Rudyard, briefly deputy governor of East New Jersey, were sometimes credited with helping write the early drafts of laws. Thomas Story and David Lloyd, the latter chief instigator of Pennsylvania's Judiciary Act of 1701, learned law not at the Inns of Court, but under London barristers.³⁶

Besides endorsing traditional juridical rights, both the Concessions and the Code protected testamentary arrangements, and the situation of indigents and orphans (*Con.* 29; *Code*, 53-56) in an attempt to avoid those lengthy proceedings for which Chancery was notorious. A saving of legal fees was made possible by settlement out of court, Quaker fashion (*Con.* 21; *Code*, 49, 62) and by the right to plead one's own case without professional aid. Frequent jail delivery was decreed (*A Mite*, 12; *Code*, 45 & 62). Legal officials were to be popularly elected in West New Jersey (*Con.* 41). In Pennsylvania nominations were gathered locally but the final choice, at least at the upper level, was by the executive. All these regulations, the emphasis on low and publicly advertised fees, and the openness of the courts were designed to keep expense to a minimum (*Con.* 22, 23; *Code*, 42).

Another obstacle to prolonged litigation was the Register of legal transactions, in land, often proposed but never implemented in Stuart England. *A Mite of Affection* (9) proposed one; the Concessions provided that such was to be kept both in the Province and in London (*Con.* 24). The Code legislated for a record, not only of transactions in land, but also of births, deaths, marriages and the hiring of servants. The wages of these last were to be reported (*Code*, 52-57).

³⁶ Search of genealogical works like *Passengers and Ships prior to 1684* compiled by Walter L. Sheppard (Baltimore: 1970) turns up remarkably few lawyers even in the city later proverbially famous for its men of that occupation—Philadelphia.

In a new colony it was especially important that the law should be known as widely as possible. *A Mite of Affection* had complained of laws the accused neither knew nor had heard of, often in a language he did not understand. It proposed, as other contemporaries had unsuccessfully done, bringing out a simpler digest in English (*A Mite*, 8). The Concessions, anxious for familiarity with law as well as for the avoidance of alterations in the fundamentals, ruled that The Agreements should be read twice a year at the beginning and dispersal of the Assembly, and displayed in every common hall of justice where they were to be read four times a year (*Con.* 13-15). The Code stipulated the use of English in all juridical proceedings, which should be readily understood and speedily administered (*Code*, 45). When printed the laws should be read in schools (*Code*, 70). All laws thus designated referred of course to those drawn up specifically for the colonies or especially appropriate for them.

The laws and governments set up in West New Jersey in 1676-1677 and Pennsylvania in 1682 have been discussed here as they were offered to the colonists; unlike Billing's tract of 1659, they had therefore a brief period of actual testing. They have been discussed as written and as part of the appropriate general context. To summarize, however succinctly, the working out of the experiments over the nearly quarter of a century when they were ostensibly still in some kind of working order is too complex a task. Courts, schools, towns and counties had yet to be created, some almost at once, others not for a time. Quarrels about Billing's changed status, wrangles in Pennsylvania for more power for the assembly and few obligations to the Proprietor, and developments in the English government and policy make the story of law reform a separate chapter in colonial history. Innovative measures were sometimes reversed, and civil organization grew. The population increased and became more diverse. By 1705 even toleration was diminished, though still greater than in most other areas. Punishment inflicted was more severe. Herbert William Fitzroy makes a dismal story of deterioration in the eighteenth century as Pennsylvania attempted to bring the criminal law code into conformity with English practice.³⁷ Whatever the case, after 1776 men began to see a need for law reform and

³⁷ Herbert William Fitzroy, "Crime and Punishment in Pennsylvania," *PMHB*, LX (1936), 202-269; West Jersey John M. Murrin and F.R. Black, "The Fate", "The Ideas and Principles of the Concessions and Agreements" in *The West Jersey Concessions and Agreements*, a round table, 42-49.

studied the work of Cesare Beccaria (1738-1794) and John Howard. Philadelphia built the Walnut Street prison; other states followed with their own improvements. How much the legend of the great legislator, or of the reputation of the Concessions and Agreements influenced post-revolutionary endeavor is difficult, if not impossible to determine. Yet even a tradition of liberty, justice and equality has its value in the history of freedom.

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