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JUSTICE IN COLONIAL VIRGINIA*

BY OLIVER PERRY CHITWOOD**

CHAPTER III.

THE INFERIOR COURTS

The Monthly or County Courts.—The most important inferior court was the one regularly held in each county. It was at first known as the monthly court, but it was afterwards given the English name of county court. The first monthly courts were established as early as 1624. At that time it was provided by an act of assembly that courts should be held every month in the corporations of Charles City and Elizabeth City.¹

The creation of these courts was the necessary outcome of the rapid growth of the colony which began in 1619. When the cleared areas began to lengthen along the river and to encroach more and more on the wilderness, it be-

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¹ The first installment of this article appeared in the February 1926 issue of the Va. L. Q. at p. 88; and the second installment appeared in the April, 1926 issue at p. 192.

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² In an address made before the Virginia Bar Association in 1894, Judge Waller Stilpas said that monthly courts were first established in 1623. This statement is based on a law passed by the assembly in 1624; the mistake in the date arises, I presume, from an erroneous reading of "1623-4," which is given by Hening as the date of the act.

It is not improbable that these two courts were established as early as the year 1619, and that the act of 1624 was only a statutory recognition of what had already been accomplished in fact. Hening, I, 125. Proceedings Virginia State Bar Association, Vol. VII, 129. McDonald Papers, I, 187.
came very inconvenient for those colonists living at a distance from James City to go there for the arbitration of their minor differences. The need of local adjudication in small matters naturally became felt first in the more remote settlements, and, as one would expect, the first two monthly courts were established on the eastern and western frontiers. The jurisdiction of the county courts was limited to petty cases coming up from the precincts immediately adjacent to them, and thus the judicial authority of the governor and council was, for a considerable part of the country, left unimpaired.

It was not long before the growth of the colony demanded an extension of this branch of the judiciary. By 1632, three other monthly courts had been created, one of which was located on the eastern side of the Chesapeake Bay. In 1634, the colony was divided into eight shires, corresponding to the shires of England, in each of which a court was to be held every month. Other counties were formed from time to time, and each one was given a local court as soon as it was organized. In 1658, there were sixteen counties in Virginia; in 1671, twenty; in 1699, twenty-two; in 1714, twenty-five; and by 1782, the number had increased to seventy-four.

By the acts of 1624, it was provided that the judges of the monthly courts should be "the commanders of the places and such others as the governor and council shall appoint by commission." The judges were at first known as commissioners of the monthly courts, but were afterwards given the title of justice of the peace. The office of justice of the peace was one of dignity, and was generally held by men of influence and ability. Apparently few of the magistrates were learned in the law, and many of them

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2 Hening, I, 168.  
3 Hening, I, 224.  
4 Ibid., 424-491.  
5 Ibid., II, 611, 612.  
6 Virginia Magazine of History and Biography, I, 230-236.  
7 Ibid., II, 8-15.  
8 Jefferson's Notes on Virginia, 116.  
9 Hening, I, 125.  
10 Hening, II, 132, 133; Ibid., II, 70.  
probably had little general education. But the causes determined by the county courts did not, as a rule, involve difficult points of law, and, therefore the sound judgment and good common sense of the justices must in a large measure have compensated for their lack of legal knowledge.

The judges of the monthly courts were at first appointed by the governor and council. In the beginning of the Commonwealth period, the Burgesses and the commissioners sent to Virginia by Parliament ordered that the commissioners of the county courts should be chosen by the House of Burgesses. But this provision was repealed the next year (1653), when the governor and council were given power to appoint commissioners on the recommendation of the county courts. In 1658, it was enacted that appointments so made should be confirmed by the assembly. The method of selecting judges that was employed during the Commonwealth period did not go far towards bringing the county courts into responsibility to the people; for, with the exception of the first year, it gave the people little, if any, control over the appointment of their commissioners. The Puritan Revolution, therefore, did not go far towards democratizing the lower branch of the Virginia judiciary.

From the Restoration to the end of the colonial period, county justices were commissioned by the governors, though they were often, if not generally, appointed with the advice and consent of the council. Justices were not chosen for any definite period of time, and it seems that their commissions could be renewed at the discretion of the governor. But most, if not all, of the old members were usually named

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12 According to an interesting account written by Hartwell, Blair, and Chilton about the end of the seventeenth century, the justices of the peace in their day were less qualified for the duties of their office than were those chosen in the early years. The reason for this, they said, was that the first settlers, having been reared in England, had had better opportunities for acquiring a knowledge of the common law than the Virginians of a later period, who had been brought up in the colony where there were few educational advantages. Hartwell, Blair, and Chilton, 44.


14 Hening, I, 372.

15 Ibid., 376, 402.

16 Ibid., 480.

in the new commissions, and so the appointments were practically made for life. It does not appear whether the practice of filling vacancies in the county commissions on the recommendation of the county courts was discontinued immediately after the Restoration, but if it was, it was afterwards revived. For in the later years we find the justices claiming and exercising the right of making nominations for vacancies in their respective courts. This custom made the county courts self-perpetuating bodies, and rendered them practically independent of the executive.

The number of justices appointed for the county courts varied at different times and in different counties, but usually ranged from about eight to eighteen. But the justices were very irregular in their attendance at courts, and, as a rule, more than one-half of them were absent at every session. The court could not convene for the transaction of business unless as many as four justices were present. It sometimes happened that courts could not be held at the appointed times because there were not


20 We do not find any law compelling the governor to appoint the nominees of the county courts, but it was good policy for him to do so. For if he were to choose as new justices men who were not acceptable to the old ones, it would be liable to stir up opposition against him in the counties. That the justices were jealous of their power to nominate to vacancies is evident from the action taken by the court of Spottsylvania County in 1744 when this privilege was infringed by the governor. Three new justices were put in the commission of Spottsylvania County who had not been recommended by the court. Some of the old justices regarded this as an affront to them, and seven of them refused to sit on the bench. Calendar Virginia State Papers, I, 288.

21 In one of the commissions granted in 1682, only five names are mentioned. In 1642, eleven commissioners were appointed for Accomac County, and eight were put in the commission given to Lower Norfolk County in the same year. In 1661 a law was passed by the assembly restricting the number to eight for each county. In 1690 the average number of justices for all the counties was about twelve; in 1714, a little more than fourteen. Hening, I, 169; II, 21. Accomac County Court Records, 1640-1645, 148. Lower Norfolk County Records, 1637-1645, 169. Sainsbury MSS., 1691-1697, 355. Mercer, Virginia Laws, 62. Henrico County Records, 1677-1692, 244, 382; ibid., 1710-1724, 6; ibid., 1710-1714, 283-300. Rappahannock County Records, 1686-1692, 211. Charles City County Records, 1758-1762, 246. Warwick County Records, 1748-1762, 67. Winder MSS., I, 203. Virginia Magazine of History and Biography, I, 230-235, 504-573; II, 3-15.

22 The following facts regarding the average attendance of justices at courts have been gathered from the court records of the counties mentioned below. The average attendance for Lower Norfolk County from 1638 to 1640 was about five; for Accomac from 1640 to 1646, five; for York from 1672 to 1676, little more than five; for Rappahannock from 1680 to 1692, between four and five; for Henrico from 1710 to 1740, between four and five; for Charles City from 1751 to 1762, about five.


When the monthly courts were first organized, three commissioners constituted a quorum. Hening, I, 135.
enough judges present to make a quorum. This caused considerable inconvenience to witnesses and parties to suits, especially if they lived at considerable distances from the county-seats. This irregularity in the meeting of the courts was complained of from time to time, and attempts were made to compel a more regular attendance of the judges. Laws were passed providing for fines to be imposed on all justices who should be absent from the court sessions without a good excuse. But despite these measures, the county courts continued to be poorly attended by the magistrates during the entire colonial period.23

Long before Virginia was settled, there had grown up in the county court system of England the practice of appointing certain justices of the peace to be of the quorum. By this was meant that no court could be legally held unless one of them was present. This custom probably owed its origin to the ignorance of the justices in matters of law. Judicial skill was not to be expected of every country squire; consequently, it was necessary to appoint certain ones “eminent for their skill and discretion” to be of the quorum and to order that no court should be held in which the salutary advice of at least one of them could not be felt.24 Upon the organization of the monthly courts, this same practice was adopted in Virginia. Whenever a commission was given to the justices of a county, certain of them were mentioned by name as belonging to the quorum. One, at least, of the persons so designated had to be present at every court, else no causes could be tried. The number of the quorum varied from time to time, and in the different counties, and generally increased as the county courts grew in importance.25

Prior to 1643, the statutes ordered that the local courts should be held every month, and, therefore, they were

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23 It is probable that these provisions were not strictly enforced, as the fines for absences were to be imposed by the county courts. One would naturally expect the justices to deal leniently with their colleagues for staying away from the meetings of the courts when they, themselves, were often guilty of the same offense. It was doubtless this failure on the part of the county courts to punish delinquencies in attendance that caused Governor Spotswood, in 1711, to order the sheriffs to report all excuses for absences to him. However, it does not appear whether Governor Spotswood’s plan was a more effective remedy for the evil than were the measures adopted by the assembly. Hening, I, 360, 484; II, 70, 71. Henrico County Records, 1710-1714, 65, 67. Warwick County Records, 1748-1762, 85, 92. Winder MSS., II, 171. Cooley’s Blackstone, I, 349-350.

called monthly courts. At this time it was enacted that they should meet once in two months, and the term county court was substituted for the old name. By the end of the seventeenth century the custom of meeting monthly had been revived, and was kept up from that time until the end of the colonial period.

The place where justice was administered was usually some conveniently located hamlet or village, which might be called the county-seat. In the early years, however, we find that in one or two of the counties, the sessions of the courts were frequently held at the houses of the commissioners. In such cases, the courts generally journeyed from the home of one commissioner to that of another, and thus all the magistrates shared equally the burden of entertaining their colleagues. Sometimes when a county was divided by a large stream, two court-houses were erected, one on each side of the river, and the courts were held in both.

The jurisdiction of the county courts extended to both civil and criminal cases. Chancery causes were also cognizable in them, and the justices were required to take separate oaths as judges in chancery. Once a year, at least, the justices held an orphans' court, which inquired into the management of the estates of orphans and bound out fatherless children who had no property. It was also the business of this court to see that the orphans who had been apprenticed were treated kindly and educated properly. When the monthly courts were first established, their jurisdiction in civil cases was limited to suits involving amounts of not more than one hundred pounds of tobacco. But in a few
years, the limit was raised, first to five and then to ten pounds sterling, and later, to sixteen pounds sterling, or sixteen hundred pounds of tobacco. By the end of the century all these restrictions had been removed; and from that time on all civil causes except those of less value than twenty shillings could be determined by the county courts.

But while the jurisdiction of the county courts was thus being broadened at the top, it was being narrowed at the bottom. It was found expedient to relieve them of many petty cases by allowing the commissioners to perform certain judicial acts out of court. So in 1643 it was provided by law that no suit for a debt under the amount of twenty shillings (afterwards twenty-five) should thereafter be heard in the county courts, but that every controversy of this kind should be decided by the magistrate living nearest the creditor. The magistrate was also authorized to commit to prison the litigant who would not comply with his award. From this time until the end of the colonial period, causes involving amounts of not more than twenty-five shillings or two hundred pounds of tobacco, were determinable by single justices. The judicial authority of single justices was not confined to civil cases, but violations of certain penal laws could also be punished by them. They were to hear complaints of ill-treatment made by servants against their masters, and if they considered the charges well-founded, were to summon the offending masters before the county court. Complaints of servants could also be made directly to the county courts by petition “without the formal process of an action.” Furthermore, masters were not allowed to whip Christian white servants naked without an order from a justice. By these provi-

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The court of Northampton, a county east of Chesapeake Bay, could determine finally all causes involving amounts less than twenty pounds sterling, or 3200 pounds of tobacco. This exception was made against this county because of its distance from James City and the difficulty with which appeals from its court could be prosecuted in the General Court. Hening, I, 346.
For a few years, single justices could hear causes of the value of 350 pounds of tobacco. Hening, I, 485.
37 Webb, Virginia Justice, 204.
38 Hening, I, 255, 440; III, 448, 449; VI, 357, 358. Calendar Virginia State Papers, I, 55.
sions, servants were given easy access to the local judiciary, and the protection of the law was placed in easy reach of them. Appeals from the decisions of single justices were in certain causes allowed to the county courts, but the decisions of the county courts on such appeals were always final. The authority of two justices acting together, one being of the quorum, was greater than that of single magistrates. Proclamations against outlying slaves and warrants for their arrest could be issued by them. They could suppress ordinaries during the intervals between court sessions if the keepers allowed unlawful gaming and drinking on the Sabbath day. By a statute of 1676 (re-enacted next year) any two justices of the quorum were given power to sign probates of wills, and letters of administration.

At first, the criminal jurisdiction of the county courts was limited to petty causes, but it seems that later it was increased so as to include important criminal offenses. This enlargement of the jurisdiction of the local courts was made for the convenience of the people, but the local tribunals were unequal to the new responsibility. So in 1655, by an act of the legislature, this power was taken from them; and it was ordered that offenses "touching life or member" should thereafter be referred to the Quarter Court of the assembly, whichever of them should first be in session. The assembly realized that, in thus restricting the powers of the lower courts, it was departing from English precedent, and was, to that extent, causing their divergence from the line of development which had been followed by the county court system of the mother country. The reason given by the assembly for thus restricting the jurisdiction of the lower courts was that the juries generally empaneled in the sparsely settled counties of Virginia were less informed and less experienced in judicial matters than those in the English shires, and could not, therefore, with equal safety, be entrusted with the fate of criminals charged with high crimes. Thus the law-makers of Virginia realized in this case, as well as in many others, that a constitution which had been made for an old and highly developed society, could not be fitted to a new and rapidly growing state without some adapta-

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29 Starke, Virginia Justice, 10.
tion. 41 From that time until the Revolution, no offenses punishable by loss of life or member, unless they were committed by slaves, were cognizable in the county courts. 42 But the county courts could order the ears of slaves to be cut off as a punishment for hog-stealing, 43 and during the last century of the colonial period, the justices could try slaves charged with capital crimes. 44

In the county courts, as well as in the General Court, decisions were reached by a majority vote of the judges present. 45 Petit juries were called on to decide matters of fact, and offenses were brought before the court by means of presentments and indictments made by the churchwardens and the grand jury.

The offenses which the churchwardens were required to present to the county courts were fornication, adultery, drunkenness, "abusive and blasphemous speaking, absence from church, Sabbath-breaking," and other like violations of the moral code. 46 But the duty of publicly accusing their

41 Hening, I, 397, 399, 476.
43 But this inhuman punishment was inflicted only for the second offense. Other persons, as well as slaves, were severely punished for hog-stealing. For a good many years, the laws provided that all persons found guilty of hog-stealing for the second time were to be required by the county courts to stand in the pillory two hours with their ears nailed to it, and at the end of that time to have their ears cut loose from the nails. Hening, II, 441; III, 179, 276, 277. Beverley, History of Virginia, Book IV, p. 25.
45 Hening, I, 126.

In every parish, which was a subdivision of a county, there were two churchwardens and a vestry composed of twelve men. Usually there were from two to four parishes in a county, though in some of the counties there was only one. The parish was not always bound by the limits of the county, but some of the parishes extended into two counties. The office of churchwarden seems to have been older in Virginia than that of vestryman, for we find mention of churchwardens as early as 1619, and we know that churchwardens were chosen in Accomac County before the vestry was appointed.

Vestrymen were elected differently at different times. The first vestry that is mentioned in the county court records was appointed by the commissioners of the monthly court, and as late as 1632, an old vestry was dissolved and a new one chosen by a county court. Vestrymen were also often elected, especially in the early years, by a majority of the householders of the parish. But in time there grew up the custom of allowing the vestries to fill their own vacancies, and so they became self-perpetuating bodies like the county courts. Every year the vestrymen elected two of their number to the office of churchwarden.

To the vestrymen and the churchwardens was entrusted the management of the affairs of the parish. They appointed ministers, kept the churches in repair, bound out orphan children, and laid the parish levy. Another important duty performed by the vestry was that of "processioning" lands. Every four years (at one time every year) they had to go around the lands of every person in the parish and mark out the bounds and renew the landmarks. This was a wise provision; for it must have prevented many disputes over boundaries which would otherwise have arisen, and thus have removed a very fruitful source of litigation. Hening I, 290, 291; II, 26, 44, 45; III, 396, 590. Hening Parish Vestry Book, 1700-1779, 8, 13, 16, 20-25, 24, 25. Bristol Parish Vestry Book, 1750-1769, 3, 5, 7, 15, 18, 26. Colonial Records of Virginia, 27, 103, 104. Jefferson's Notes on Virginia 116. Richmond County Records of Virginia, 1692-1694, 65. Accomac Records, 1632-1640, 10, 20. Winder MSS. II, 154. Webb, Virginia Justice, Robinson MSS., 235. Beverley, History of Virginia, Book IV, p. 28. Hugh Jones, Present State of Virginia, 63, 65. Warwick Records, 1748-1762, 78, 81, 342.
neighbors of disgraceful deeds must have been a hard one to perform, and so the thankless task was often shirked by them. The churchwardens had power by law to make presentments during the entire colonial period, but in the latter part of it they seem not to have exercised this authority often.

In 1645, the grand jury found its way into the county court, where it joined with the churchwardens in acting the rôle of public accuser. By a statute of this year, it was provided that grand juries should be empaneled at the midsummer and March terms of the county courts "to receive all presentments and informations, and to enquire of the breach of all penal laws and other crimes and misdemeanors not touching life or member, to present the same to the court." In 1658, a law was passed providing that grand juries should be empaneled at every court. But the grand jury system did not prove as efficient in the detection of offenses as its advocates hoped it would, and the law was repealed the same year.

But the repeal of this statute proved to be an unwise measure for it left the counties without adequate provision for the detection of offenses. In a year or so it was noticed that the laws were not being properly respected, and a renewal of the grand jury system in the counties was voted by the assembly. By an act of 1662, it was ordered that grand juries should thereafter be empaneled in all the counties, and that all breaches of the penal laws committed within their respective counties should be presented by them to the county courts at the April and December terms. In fifteen years this statute had almost become a dead letter because it had not provided any penalty for non-compliance with its provisions. For this reason, a law was passed in 1677 which provided for a fine of two thousand pounds of tobacco to be imposed on every court that should fail to swear a grand jury once a year, and a fine of two hundred pounds of tobacco on every juror who should be absent from court without a lawful excuse.

47 Hening, I, 291, 310.
49 Hening, I, 304, 468, 521.
50 Ibid., II, 74.
51 Ibid., II, 407, 408.
From this time until the end of the colonial period, the grand jury was a permanent part of the county court system. By the end of the seventeenth century, it had reached its complete development, and no material changes were made in it from that time until the Revolution. It was the custom during the eighteenth century for the sheriff to summon twenty-four freeholders to be present at the May and November courts. Those that obeyed the summons constituted the grand jury, provided the number that attended was not less than fifteen. If enough jurors were absent to bring the number below fifteen, no jury was empaneled and the absentees were fined.

By 1642 the practice of calling on petit juries to try causes had been introduced in the county courts. A law was passed in that year which gave either party to a controversy pending in any court in the colony the right of having a jury summoned to sit in judgment on his case, provided it was important enough to be tried by a jury. Litigants were not slow to avail themselves of this privilege, and almost immediately we meet with jury trials in the county courts.

From this time on, the county courts referred important causes to juries for trial. The usual practice in the eighteenth century was for a jury of twelve men to be selected from the bystanders every day the court was in session, which was called on to decide all causes that should be tried by a jury. According to the laws that were in force during this century, none but those who possessed property of the value of fifty pounds sterling could serve on juries in the county courts. In the county court, as well as in the General Court, it was the practice in the early years for juries to be kept from food until after they had rendered their reports. Each juror made an individual report of the offenses that had come within his knowledge. York Records, 1671-1684, 125. Henrico Records, 1677-1692, 32, 33. Elizabeth City County Records, 1684-1699, 4, 93. Richmond County Records, 1692-1694, 136, 197. Henrico Records, 1710-1714, 55, 110, 123, 278. Ibid., 1737-1744, 5, 34, 39. Warwick Records, 1748-1762, 103, 184, 355. Charles City County Records, 1763-1762, 75, 115. Hening, III, 367-368; IV, 232.

Juries are mentioned in the county court records before this time; but they were not empaneled to try causes but only to appraise estates and goods about which suits were pending in the courts. Accomac Records, 1650-1646, 179, 189, 204, 222. Hening, I, 273.

Accomac Records, 1640-1645, 179, 188, 190, 204, 222.


Richmond County Records, 1692-1694, 91. Hening, III, 176, 370; V, 625.

Hening, I, 503; II, 74.
A few instances are recorded in which juries of women were called on to decide questions of fact in cases in which women were charged with witchcraft or of concealing bastard children. A jury of twelve women brought suit in the court of Princess Anne County against Luke Hill and his wife in an action of trespass of assault and battery and recovered damages to the amount of twenty shillings. Soon after this, Luke Hill and his wife brought before the same court an accusation of witchcraft against Grace Sherwood. The early justices sometimes invented penalties and fitted them to offenses without the guidance of any legal precedent. The unique way in which this was done argued more for the originality of the judges than for their knowledge of the law.

There was no lack of variety in the punishments that the early justices inflicted on criminals. Fines were imposed, and often resort was had to the lash to induce offenders to repent of their misdeeds. As a rule, the number of stripes given did not exceed thirty-nine, but they were generally made on the bare back.

In the early records of Lower Norfolk County, three cases appear in which culprits were
punished by receiving one hundred lashes on the bare shoulders.\textsuperscript{63} One case is also given in the records of Essex County in which this punishment took a very severe form. The court, on a certain occasion, ordered the sheriff to give an offender one hundred and twenty lashes on the bare back.\textsuperscript{64} However, law-breakers were seldom subjected to such harsh treatment, and it seems that, on the whole, the penal laws of Virginia as interpreted by the judiciary in the colonial period were not harsher than could be expected at that time.

The early commissioners did not rely solely on physical punishments for the correction of wrong-doing, but some of the penalties that they ordered must have appealed strongly to the self-esteem of those who had brought themselves under the censure of the court. Slanderers frequently were required to ask pardon of the injured parties in church or in open court, and were sometimes compelled to sit in the stocks on Sunday during divine service. Those who had abused their neighbors might also be subjected to the humiliation of lying neck and heels together at the church door.\textsuperscript{65} Fornication and adultery were very much frowned upon by the county courts. In the early years, men and women who had committed these sins were sometimes whipped, and sometimes were compelled to acknowledge their fault in church before the whole congregation. A few instances are recorded in which women who had erred from the path of virtue or had slandered their neighbors were compelled to make public confession while standing on stools in the church, with white sheets wrapped around them and white wands in their hands.\textsuperscript{66} Transgressors did not always go through this terrible ordeal without demurring. In Lower Norfolk County we find a woman refusing to do penance properly, and even going so far as to cut her sheet. But the court would brook no disobedience to

\textsuperscript{63} In one of these cases the offense was a mutiny of slaves against an overseer in the absence of their master. In one of the other two cases, a woman had wrongfully charged a man with being the father of a bastard child born of his servant. In the other, a woman-servant had falsely accused her mistress of acts of unchastity. Lower Norfolk County Records, 1637-1643, 12, 14, 15, 16.\textsuperscript{64} Essex County Records, 1633-1636, 49. These are the only examples of such undue severity that have been found though it is not claimed that no others are on record.\textsuperscript{65} Accomack Records, 1632-1640, 59, 112, 145, 151: ibid., 1640-1645, 49, 58, 200.\textsuperscript{66} Accomack Records, 1632-1640, 123, 145. Lower Norfolk County Records, 1637-1643, 219, 226. Accomack Records, 1640-1645, 200.
its orders, and obstinacy on the part of the criminal only increased the severity of the original sentence. In the same county a woman was sentenced by the court to ask forgiveness in church for having slandered one of her neighbors. Having refused to comply with this order, she was summoned before the court to answer for her contempt. She did not obey this summons, and the commissioners, in her absence, voted an order which showed that they were not in a mood to tolerate further obstinacy on her part. The decree was as follows: "The sheriff shall take her to the house of a commissioner and there she shall receive twenty lashes; she is then to be taken to church the next Sabbath to make confession according to the former order of the court. If she refuses, she is to be taken to a commissioner and to be given thirty lashes, and again given opportunity to do penance in church. If she still refuses to obey the order of court, she is then to receive fifty lashes. If she continues in her contempt, she is receive fifty lashes, and thereafter fifty every Monday until she performs her penance."  

The oldest county court proceedings that are now extant are those of Accomac, which date from 1632. These records are particularly interesting because of the unique methods employed by the commissioners in their administration of justice in the first half of the seventeenth century. These early commissioners seemed often to consult the dictates of expediency in rendering their decisions, and frequently prescribed such punishments as would wring from crime an income to the community. Indeed, from the penalties that they attached to certain offenses, one would think that the judges inclined to the belief that the wickedness of man should be harnessed and made to do service in the cause of righteousness. A few cases are recorded in which wrong-doers were required to build a pair of stocks and dedicate them to the county by sitting in them during divine worship, and in 1638 a man who had been guilty of the sin of fornication was ordered to build a ferry-boat for the use of the people. We also find a court in 1634

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67 Lower Norfolk County Records, 1637-1648, 121, 197.  
68 Accomac Records, 1632-1640, 28, 69, 123. Lower Norfolk County Records, 1637-1648, 15.
order a man, for abusing another, to “daub the church as soon as the roof can be repaired.” On another occasion, disobedience to a country regulation regarding the carrying of arms was punished by requiring the offenders to repair to the church the following Saturday and pull up all the weeds growing in the churchyard and the paths leading to it.

Some of these unusual modes of punishment, ducking and pillorying for example, were employed by the courts in the later, as well as in the earlier, part of the colonial period. By laws passed late in the eighteenth century, it was provided that ducking-stools, stocks and pillories should be erected in every county.

For the punishment of breaches of the penal laws committed by servants, a special arrangement had to be made, as they could not pay the fines imposed on them by the court. Additions of time to their terms of service were sometimes made, and in the eighteenth century, it was the custom for the court to allow servants to bind themselves out to a term of service to any one who would pay their fines. But if they could not get any one to assume their fines, they had to undergo corporal punishment and receive twenty-five stripes for every 500 pounds of tobacco of the fine.

The justices had many duties to perform in addition to those of trying causes. They ordered the opening of new roads and saw that surveyors appointed by them kept the highways open and cleared. The levy of the county was apportioned by them, and the lists of tithables were sometimes taken either by themselves or by officers chosen by them for that purpose. The justices also licensed taverns and regulated the prices at which drinks could be sold.

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69 Accomac Records, 1632-1640, 16.
70 Accomac Records, 1640-1645, 85.
Another important duty of the court was to issue certificates for land grants. Every "adventurer" who brought over emigrants to Virginia was entitled to fifty acres of land for every person transported. These grants were made by the governor upon certificates given by the county courts stating the number of persons the claimant had landed.\(^{75}\)

The county courts were also required to hear complaints and to examine claims. Once before every session of the assembly, a court was held for these purposes, public notice of it having been given beforehand. All claims for dues from the general government were examined, and the just ones were certified to and sent on to the assembly with the recommendation that they be allowed. If the people had any grievances against the government, they were at liberty to bring them before this court to be likewise sent on to the assembly.\(^{76}\) During a considerable part of the seventeenth century, the county courts had the power to make or to assist in making the by-laws of their respective counties.\(^{77}\)

We see, therefore, that in the county government there were no well-defined limits separating the judiciary from the legislature and the executive. Nor were the lines that divided the county courts from the other branches of the colonial government sharply drawn. The Burgesses chosen by the counties were very often justices of the peace, and so the county courts and the assembly were kept in close relation with each other.\(^{78}\) During a part of the seventeenth century, the county courts were in like manner connected with the General Court. Councillors were not inel...
JUSTICE IN COLONIAL VIRGINIA

The office of justice of the peace, and by a law of 1624, they were empowered to sit in the court of any county, even if they were not in the commission, and were authorized to hold a court on occasions of emergency in the absence of the quorum.7 The interdependence thus established between the higher and lower tribunals must have been a great advantage to the latter, for it not only gave the inexperienced justices the benefit of the advice of a councillor, but it also enabled the decisions of the Quarter and county courts to be rendered with something like uniformity. But there was one objection to allowing the councillors this privilege. It permitted the Quarter Court to assist in giving decisions, the responsibility for which had to be borne by the county courts. For this reason a provision was put in one of Bacon's laws, passed in 1676, forbidding councillors to vote with the justices in the county courts.8

In the records that have been examined no mention is made of any great abuses in the practice of the county courts, and on the whole, justice seems to have been administered fairly by them. And yet there were certain defects in the county court system which were unfavorable to good government in the counties. As the people had no voice, either direct or indirect, in the selection of justices, public opinion was probably not as effective in restraining the judges from unfair decisions as it should have been. Besides, the custom of filling vacancies in the court on the nomination of the justices made the court a self-perpetuating body. The justices would naturally be inclined to give the vacant places on the bench to their friends and relatives, and so it was easy for a few families to get and keep a monopoly of the government in each county.

But despite these defects, the county court system was well adapted to the conditions that obtained in Virginia in colonial times. From the experience gained from the performance of their judicial and administrative duties, the justices learnt much of the art of government, and were thus qualified for taking part in the organization of the commonwealth government when Virginia severed her rela-

8 Hening, II, 398.
tions with Great Britain. The fact that Virginia had a numerous class of men who had already known the responsibilities of governing, no doubt, accounts, in large measure, for the absence of radicalism in the constitutional changes made in 1776. To the opportunities for political training afforded by the county courts and the other governmental agencies of the colony, Virginia was also largely indebted for the number and prominence of her leaders in the struggles for independence.

The county courts were not only a training-school for statesmen, but were also incidentally an agency for the education of the people. "Court-day was a holiday for all the country-side, especially in the fall and spring. From all directions came in the people on horseback, in wagons and afoot. On the court-house green assembled, in indiscriminate confusion, people of all classes, the hunter from the backwoods, the owner of a few acres, the grand proprietor, and the grinning, needless negro. Old debts were settled, and new ones made; there were auctions, transfers of property, and, if election times were near, stump-speaking." These public gatherings brought the people in contact with each other, and gave the ignorant an opportunity to learn from the more enlightened. The education that comes from association with people is a kind that is particularly needed in a society in which the inhabitants are isolated from each other; and, therefore, the educational advantages afforded by the monthly meetings at the county seats atoned to some extent for the lack of adequate opportunities for school education in colonial Virginia.

Circuit Courts.—As the General Court was held only at the capital, appeals from the counties could not be prosecuted in it without considerable delay and inconvenience. So there arose the need for an appellate court to act as intermediary between the higher and lower tribunals. The assembly realized this, and soon after the Restoration, attempted to remedy this defect in the Virginia judiciary by the formation of a new court. In 1662 a law was passed providing for the establishment of circuit courts, which were to be held once a year in every county. The colony

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was divided into circuits, and to each was assigned the governor and one councillor or two councillors. During the month of August, these judges of the General Court were to hold courts in every county of their respective circuits on the days regularly appointed for the county courts. Whenever a circuit court was held in a county, all appeals that had been allowed since the preceding March by the regular courts of that county were to be brought before it for trial. Appeals from the county courts that were allowed from October to December were to be tried by the General Court. The reason why appeals were to be taken to the General Court during these months and not during the spring and summer, was that the sessions of the General Court were held oftener in winter than in summer. The decisions of the circuit court were not final but could be appealed from to the assembly or the General Court. Whenever the judges of a circuit court were the governor and one councillor, appeals from it were to be allowed to the assembly; but when the intinerant judges were two councillors appeals from their decisions were to be tried by the General Court. But this new tribunal was short-lived, for the law which brought it into being was repealed in December of this same year. The circuit courts were discontinued because of the great expense incurred in holding them.

Courts of Examination.—In the early years, before the special courts of examination had grown up, all persons who were charged with any violations of the penal laws, except those who were punished by loss of life or member, were brought before the county courts for examination. These causes were determined by the county courts, except those which the justices saw fit to refer to the governor and council, which were sent on to the Quarter Court for trial. It seems, however, that important criminal offenses in the early years were not given a preliminary hearing in the county courts before they were brought before the Quarter Court for trial. But before the end of the seventeenth century there had grown up a well-defined system for the examination of prisoners in the counties.

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82 Hening, II, 64, 65.
83 Ibid., II, 178.
84 Ibid., I, 304. Accomac Records, 1632-1640, 48, 47; ibid., 1640-1645, 260.
85 We do not find a law recognizing the existence of courts of examination until 1704, but we know that such a court had been established in Rappahannock County as early as 1690. Rappahannock Records, 1686-1692, 163. Hening, III, 226.
ever a justice issued a warrant for the arrest of a criminal charged with an offense which, in his opinion, was not cognizable in the county court, he ordered the sheriff to summon his fellow magistrates together in a special court of examination, which was held within ten days after the issuance of the warrant. The offender and his witnesses were brought before this court and examined, and if he was found innocent of the charge brought against him he was discharged. If, however, the evidence gave grounds for a trial the case was sent to the next grand jury court of the county, provided it was matter of which the county court took cognizance. But if it proved to be a case over which the county court had no jurisdiction, it was sent up to the General Court for determination. Whenever a cause was referred to the General Court, the prisoner was turned over to the custody of the sheriff to be taken at once to the public jail at the capital, unless the offense was a bailable one, in which case he was given twenty days in which to find bail. This method of examining criminals was employed from the last decade of the seventeenth century to the end of the colonial period. By means of these special courts criminal cases were all sifted, and only those in which there was some chance of conviction were passed on to the General Court. In this way criminal offenses were disposed of with less expense than they would have been if all of them had been tried directly by the General Court.

Slave Courts.—A good deal of special legislation for the punishment of slaves is found in the colonial laws. When a runaway slave was caught, he was taken from one constable to another until he was brought back to his owner. Each constable who took part in conveying the fugitive back to his master whipped him before turning him over to the next constable. If it was not known to whom the fugitive belonged, he was confined in the county jail and a notice of his capture was posted on the courthouse door. At the end of two months, if he was not claimed by his owner, he was sent to the public jail at Williamsburg and was kept in the custody of the sheriff there until his master was found. In the Virginia Gazette

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were published notices of all such fugitives, in which minute descriptions of their personal appearance were given. Two justices, one being of the quorum, could issue proclamations against outlying slaves, ordering them to return to their masters. These orders were to be read every Sunday twice in succession in every church in the county immediately after divine service. After this announcement had once been made any outlying slave who failed to obey it could be killed by any one without fear of punishment. Besides, the county courts for some years had the power to punish incorrigible and runaway slaves by castration. But by 1769 the assembly had come to realize that this penalty was "revolting to the principles of humanity" and was "often disproportionate to the offense." By a law passed in this year, the county courts were deprived of the power to order the castration of outlying slaves and were limited in the use of this punishment to attempts at rape made by negroes against white women. As has already been shown, there was no law extending the benefit of clergy to slaves until 1732, and even after that time, this privilege was not allowed in all cases in which it could be claimed by freemen. There was also some discrimination against slaves in the punishments prescribed by the laws for penal offenses.

The testimony of Indians, negroes, and mulattoes, bond and free, was allowed in the trial of slaves for capital crimes. For a while persons of that description who professed Christianity and "could give some account of the principles of the Christian religion," served as witnesses in the cases regularly tried by the General Court. But their testimony was very unreliable and was rejected by some juries while it was admitted by others. Just decisions could not be reached so long as they were based on such untrustworthy evidence, and so in 1732 it was enacted by the assembly that no negro, Indian, or mulatto, bond or free, should thereafter be allowed to bear witness in court except in the trial of slaves charged with capital offenses.

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87 Hening, III, 456-457; IV, 168-169; V, 552, 554; VI, 362-365. Virginia Gazette, June 3, 1737; July 7 and September 24, 1769; December 7, 1769.
88 Hening, III, 460; VI, 110.
89 Hening, III, 460, 461; IV, 132; VIII, 358.
90 See page 69.
After this kind of testimony was excluded, it frequently happened the persons so discriminated against were relieved from paying their just debts because they could not be proved in court. Therefore, it became necessary to modify the rule against negro and Indian testimony, and in 1744 it was provided by law that free Christian negroes, Indians, and mulattoes should be allowed to bear witness for or against any negro, Indian, or mulatto, free or slave, in any court in the colony in both civil and criminal cases.\(^9\)

Prior to 1692, there were no special courts for the trial of slaves charged with capital crimes. Like freemen who were accused of the same offenses, they were never sentenced to death except at Jamestown and only after they had been given a trial by jury. Not only was this method of trial expensive, but it also prevented a speedy administration of justice. But the punishment of negroes for capital offenses had to be inflicted without delay if it was to be most effective in deterring other slaves from crime. For these reasons a special court of oyer and terminer for the trial of slaves was created in 1692 by an act of assembly. This law provided that the sheriff of a county should notify the governor whenever he had arrested a slave for a capital crime. Upon receipt of this notice, the governor was to issue a special commission of oyer and terminer to such persons of the county as he should deem fit, and the persons so named—who were, as a rule, justices of the peace—were to meet at once in a court at the county seat. The prisoner was to be brought before this court and tried without the aid of a jury.

Other laws were passed from time to time which reaffirmed and enlarged the provisions of this act. By a statute of 1705 masters were to be allowed to appear in defense of their slaves "as to matters of fact, but not as to technicalities of procedure," and were to be indemnified for the loss of their slaves whenever they were executed by order of the court. This indemnity was an inducement to the people to report the crimes of their slaves to the authorities. When the law was revised in 1723, it was provided that the testimony of negroes, Indians, or mulattoes, bond

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\(^9\) Hening, IV. 127, 327; V. 244, 245; VI, 106. Henrico County Records, 1737-1740, 254, 286.
or free, when supported by "pregnant circumstances or the testimony of one or more credible witnesses," should be accepted by the court as sufficient evidence for conviction or acquittal. If a non-Christian negro, Indian, or mulatto should give false testimony he was to be severely punished. His ears were to be nailed to the pillory one hour each and were to be cut loose from the nails, after which he was to receive thirty-nine lashes "on his bare back, well-laid on." In 1748, unanimity of the judges present was required for conviction; but by a law of 1772, sentences could be voted by any four of the justices, being a majority of those present.

But even this method of trying slaves was attended with some inconvenience, for the commissions of oyer and terminer given by the governor for every court could not be sent to the counties without considerable trouble and expense. Besides, the time limit of these commissions was sometimes reached before sentences had been given by the courts. These objections were met by a law passed in 1765, which provided that the justices should be given a standing commission of oyer and terminer empowering them to try all criminal offenses committed by slaves in their respective counties. Whenever a warrant was issued for the arrest of a slave charged with a capital crime, the justices of the county were summoned by the sheriff to meet at once in a special court. Any four or more of the justices who obeyed this summons were to constitute a court, before which the prisoner was arraigned for trial. Sentences were given as before without the assistance of a jury.

Clergy was allowed by the slave courts for those offenses to which it had been extended by law. For crimes without the benefit of clergy, hanging was the usual punishment, though occasionally the death penalty came in a more barbarous form. One instance has been found in which a slave was burnt for murder, and another is given in which the heads and quarters of some negroes who had been hanged

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94 Virginia Gazette, February 18, 1737.
were set up in the county as a warning to their fellow-slaves. The sentences given by the court were executed without delay. In Henrico county in the early part of the eighteenth century slaves convicted by this court seem usually to have been hanged on the first Friday after their trial, and two cases are recorded in which only two days elapsed between the trial of a slave and his execution. By such a speedy administration of justice the criminal was deprived of the opportunity of seeking a pardon from the governor, and, in 1748, it was provided by law that death sentences against slaves should never be executed except in cases of conspiracy, rebellion, or insurrection until after ten days had elapsed.

The prohibition of trials by jury in the slave courts was not an unjust discrimination against the slaves. On the contrary, it was an advantage to the slave that he was tried by the justices and not by a jury, especially during the period when convictions could not be made except by a unanimous vote of the judges present. For the justices were better qualified than an average jury to decide causes, and were less liable to give unjust sentences.

Courts of Hustings.—In 1705, Governor Nott was instructed by the Queen to recommend to the assembly the enactment of a law which would bring about the establishment of towns in Virginia. In obedience to this order, the assembly in 1705 passed a law, which was to take effect three years later, designating certain places as ports, from which all exports from the colony were to be sent, and into which all imports were to be received. It was thought that the monopoly of the colony's foreign commerce thus given to these shipping points would cause towns to grow up around them, and by this same act a detailed scheme of government was mapped out for these towns. The assembly seemed to think that towns could be legislated into being despite the fact that economic conditions in Vir-

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86 Henrico Records, 1719-1724, 39, 169, 647; ibid., 1727-1746, 234-235.
87 Starke, Virginia Justice, 272. Hening, VI, 105.
88 Ballagh, History of Slavery in Virginia, 85.
89 Other abortive attempts to establish towns were made by the assembly prior to this time. Hening, I, 862, 397. Ingle, Local Institutions of Virginia, J. H. U. Studies, III, 101-109.
90 Hening, III, 404-419.
Virginia were unfavorable to city life. To planters who lived on the navigable rivers with wharfs at their doors, the law requiring them to take their tobacco miles away to load it at a would-be-town seemed a useless and oppressive measure.\textsuperscript{101} It was not long before the folly of this act of paternalism had become plainly apparent to the Lords of Trade, as no attempt was made to settle these towns.\textsuperscript{102} They recommended that the Queen repeal the law, and in 1710 Governor Spottswood issued a proclamation declaring it null and void.\textsuperscript{103}

While the assembly and the Lords of Trade failed in their attempt to impose city life on rural Virginia, commerce and trade did select a few places for towns. The first of the towns to grow into such importance as to require a court of Hustings was Williamsburg, the capital. In 1722, Williamsburg received a charter from the King which constituted it a city and gave it a separate government. The management of the affairs of the city was entrusted to a mayor, recorder, six aldermen and twelve councilmen. The King appointed the first mayor, recorder, and alderman, who were to elect twelve councilmen to hold office during good behavior. Every year at the feast of St. Andrew the mayor, aldermen, and councilmen were to meet and select one of the aldermen to be mayor for the ensuing year. Whenever vacancies occurred in the board of aldermen by the death or resignation of any of its members, they were to be filled from the common council by the mayor, recorder, aldermen, and common council. When a vacancy occurred in the common council, the mayor, recorder, alderman, and common council chose some freeholder to fill it. The government of the town was thus placed in the hands of officers in the election of whom the people had no voice at all.

The mayor, recorder (who was to be learned in the law), and the six aldermen were the judges of the Court of Hustings, and were also justices of the peace in Williamsburg. But no alderman was to sit in the Court of Hustings of Williamsburg, unless he was also commissioned a justice of the peace in some county. The mayor, recorder, and alder-

\textsuperscript{101} Byrd MSS., II, 162-165.
\textsuperscript{102} Sainsbury MSS., 1706-1714, 215.
\textsuperscript{103} Henrico Records, 1710-1714, 17.
men performed legislative, administrative, and judicial duties; and so in Williamsburg, as well as in the counties, the judiciary was closely connected with the other branches of the local government. The meetings of the Hustings Court were to be held monthly.104 The court was at first limited in its jurisdiction to those causes in which the amounts involved did not exceed twenty pounds sterling, or 4000 pounds of tobacco, and appeals were allowed to the General Court. The jurisdiction of the court was enlarged from time to time, and in 1736 it was provided by an act of assembly that the court of Hustings of Williamsburg was to "have jurisdiction and hold plea of all actions, personal and mixt, and attachments, whereof any county court within this colony, by law, have or can take cognizance." This court also decided chancery causes, and examined criminals that were sent from Williamsburg to the General Court and oyer and terminer courts for trial, but it seems not to have had authority to try slaves charged with capital offenses.105

In 1736, Norfolk was granted a charter which contained about the same provisions as the one given to Williamsburg in 1722. The governmental machinery provided for by this charter was almost an exact replica of that of Williamsburg, except that in Norfolk the number of aldermen was to be eight instead of six, and the number of councilmen, sixteen instead of twelve. In Norfolk, as in Williamsburg, the mayor, recorder, and aldermen constituted the Court of Hustings, which was at first to take cognizance only of those causes in which the amounts involved did not exceed twenty pounds sterling, or 4000 pounds of tobacco. The jurisdiction of the Norfolk court was extended by subsequent statutes, and during the last years of the colonial period the courts of Norfolk and Williamsburg exercised the same jurisdiction. These were the only cities in which corporation courts were organized before the Revolution.106

104 Charter of Williamsburg, published in the William and Mary College Quarterly, X, 84-91.
105 Hening, IV, 542; V, 204-207; VIII, 401-402. Webb, Virginia Justice, 105, 106.
Coroners' Courts.—Coroners were appointed by the governor, and justices of the peace were usually, though not always selected for the office. In 1702 the number of coroners in the different counties varied from one to four. These offices had ministerial, as well as judicial duties to perform. When a sheriff was personally interested in a suit or was for any other reason disqualified from serving the county court, the process could be directed to one of the coroners and could be executed by him. But the main duty of the coroners was to hold inquests over the bodies of persons who had met with violent deaths. Whenever the occasion for an inquest arose a coroner would order the constable of his precinct to summon twenty-four freeholders to the coroner's court. From this number a jury of twelve was chosen to view the body and make a report as to the cause of the death. Witnesses were summoned if necessary, and a few instances are recorded in which resort was had to the ordeal of touch to decide the guilt or innocence of persons accused of murder. In 1656, a jury of inquest was sworn in Northampton County to examine the body of a man supposed to have been murdered. This jury gave the following verdict: "Have reviewed the body of Paul Rynnuse, late of this county dec'd, and have caused Mr. Wm. Custis (the person questioned) to touch the face and stroke of the said Paul Rynnuse (which he very willingly did). But no sign did appear unto us of question in law." 107

Military Courts.—The militia of the colony included all the able-bodied men between the ages of sixteen, eighteen, or twenty, and sixty (these were the different limits at different times), except certain classes of persons who were exempted from militia duty by law. In 1721, the militia men constituted about one-sixth of the entire white population of the colony. The militia of every county was organized into a regiment, which was commanded by a colonel or an inferior officer. It was necessary for the militia officers to call their men together frequently for the purpose of drill-


In the trial of Grace Sherwood for witchcraft (see p. 87), the ordeal was appealed to by a county court.
ing them. Each captain was to hold what was called a private muster for the members of his company four times a year, or oftener if the commander of the regiment required it. In addition to these private musters, a general muster was held in each county usually once or twice a year, at which all the militiamen of the county were to be present. 108

These musters could not be conducted properly unless the officers were given power to punish their men for insubordination, absence from the drills, and other delinquencies. Accordingly, it was provided that whenever a militiaman should refuse to obey an order of an officer at a muster, the ranking officer present could punish the offender by imposing a fine on him or by ordering him to be bound neck and heels together for a few minutes. If he repeated the offense, he was to be tried by the captains and field-officers present, who by a majority vote could send him to prison for a term not exceeding ten days. At all the musters, general as well as private, the captains were to keep a record of the offenses and delinquencies in attendance and equipment of all the men of their respective companies, and were to report the same to the court martial. The court martial was convened once a year at the county seat on the day following that of the general muster. In this military court sat a majority or all of the captains and field-officers of the county. The court inquired into the ages and capabilities of all those on the muster list, and decided which ones should be dropped on the grounds of old age or physical disability. It also inquired into the absences and other delinquencies reported by the captains and imposed fines for the same. 109

Apparently there never were any regular parish courts in colonial times, though there is an intimation in the records of Accomac that the vestry of that county in the early years had judicial powers in cases involving certain viola-

108 In 1674 general musters appear to have been held oftener than twice a year. General Court Records, 1670-1676, 197.
In 1656, a court was established for Bristol, an outlying parish of Henrico and Charles City counties; but the judges of this court were not the vestry-men, but were the commissioners living in the parish. The jurisdiction of the court was the same as that of the county courts, but in all cases appeals were to be allowed to Charles City and Henrico county courts. When Lord Culpeper and others were granted the territory known as the Northern Neck, which lies between the Rappahannock and Potomac Rivers, they were given power to establish courts-baron and courts-leet and to hold frank-pledge of all the inhabitants. The court-leet was to have jurisdiction over all the tenants and other inhabitants of the hundred in which it was held, except those that had received land grants from the governor and council prior to 1669. The jurisdiction of the court-baron was to be limited to causes involving amounts not exceeding forty shillings in value and appeals were to be allowed to the Quarter Court. However, it is more than probable that this bit of feudalism never, in actual practice, found a place in the Virginia judiciary, for no mention has been found of any attempt to carry out these instructions.

110 The Accomac County court decreed in one case that "all who have been freemen since 1684 and have not contributed towards the charges of the church officers' business shall be liable to stand to the judgment of the vestry." At another time (1641) the vestry ordered a servant to stand in a white sheet in church for the sin of fornication, but this decree was set aside by the court. Accomac Records, 1632-1645, 97.

111 By a special provision a similar court was to be established in 1679 for a frontier settlement to be made by Captain Lawrence Smith and Colonel William Byrd. Bening, I. 450; II, 450-451.

112 The grant was first made in 1649, and was renewed in 1669.

113 Sainsbury MSS., 1640-1691, 189-198.
CHAPTER IV.

COURT OFFICIALS AND LAWYERS

By the year 1634, when the shires were organized, the development of the colony had gone far enough to necessitate the appointment of sheriffs for the counties. Before that time, the duties of the sheriffalty were, as we have seen, performed mainly by the provost marshal, though the commander of the hundred also sometimes executed the orders of the governor. As late as 1633, we find the provost marshall making arrests, warning the courts, imprisoning offenders, and inflicting on them such punishments as ducking, tying them by the heels, and setting them in the stocks. The fee which he received for the performance of each of these duties was set by the assembly. He was also intrusted with the care of prisoners, and had to provide them with “diet and lodging.” For this he received a compensation which was paid by the prisoners themselves, and the amount of which was determined by agreement with them.

It seems that the monthly courts at first elected sheriffs, but soon it became the custom for the governor and council to appoint them on the recommendation of the county commissioners. Vacancies were temporarily filled by the commissioners. According to a later practice, the office devolved on the justices in rotation. The oldest justice in the commission first served a term of one year, and then all the others followed in succession. However, the old method of selecting sheriffs was afterwards revived, and from the end of the seventeenth century to the Revolution, sheriffs were appointed by the governor. During the greater

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1 Hening, I, 224. Accomac Records, 1632-1640, 17.
3 Robinson MSS., 58. Hening, I, 176, 177, 201, 220.
4 Accomac Records, 1632-1640, 18.
7 These appointments were sometimes, and probably generally, made with the advice of the council. Council Journal, 1721-1784, 285, 286, 289, 331, 382.
part of the eighteenth century, it was the custom for the court of each county every year to recommend three of its justices as suitable persons for the sheriffalty, one of whom the governor would appoint sheriff for a term of one year. The first of the three justices was often, if not usually, selected by the governor, and so the power of choosing sheriffs was by this custom practically placed in the hands of the county courts. The sheriff did not sit as a judge in the county court, but he became a justice again after his term had expired. Sheriffs were appointed for only one year; but during a considerable part of the colonial period, their commissions could be renewed by the governor for a second term.

According to an account of Virginia written at the end of the seventeenth century, the place of sheriff was a lucrative one and was much sought after. But by the end of the first decade of the next century the tobacco currency had fallen so low that it had become difficult to get suitable persons to accept the sheriffalty. This refusal on the part of the justices to serve when appointed sheriff led the assembly to pass a law in 1710 which imposed a heavy fine on any one who should refuse the office when elected to it.

Sheriffs in Virginia performed many of the same duties that they did in England, but they did not have power to hold courts as in the mother country. They executed the orders and sentences of the courts and the assembly, made arrests, summoned jurors and others to court. They also sometimes took the lists of tithables and usually collected the taxes. In the early years sheriffs were wont to attend public meetings for the purpose of making arrests and serving warrants. The fear of meeting this officer caused

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10 Hartwell, Blair, and Chilton, 27, 28.
many people to absent themselves from musters and from church on Sundays. This falling off of the attendance at these places not only affected the spiritual welfare of the people, but also hindered the transaction of public and private business. The assembly realized that this obstacle in the way of public meeting should be removed, and so in 1658 enacted that no warrants should thereafter be served on any one on the Sabbath or on muster days.\textsuperscript{14} By subsequent statutes it was provided that no arrests except for felony, riots, and suspicion of treason, were to be made on Sundays, certain holidays, and muster and election days, and that no persons except residents of the town were to be arrested in James City during the period beginning five days before and ending five days after the meetings of the General Court and the assembly. Witnesses were also granted exemption from arrests except at the King's suit while attending the county or other courts and also while coming to and returning from the same. Councillors and sheriffs were privileged from arrest for debt and trespass while attending and going to and returning from the General Court and council meetings.\textsuperscript{15}

In each county there was a jail, in which were detained offenders who had been sentenced to imprisonment by the county court and those criminals who were waiting to be sent to the public jail at Jamestown or Williamsburg. During the first part of the colonial period, criminals who were to be tried by the Quarter Court or the assembly were kept in the county jails while awaiting their trials. On the first day of every term of the Quarter Court or the assembly the sheriff of each county delivered the criminals that were in his custody to the sheriff of James City, who brought them before the governor and council or the assembly for trial.\textsuperscript{16} But by the beginning of the eighteenth century (1705), it had become the custom to send criminals charged with offenses cognizable in the superior courts to the public jail at Williamsburg immediately after they had been given a preliminary hearing before the courts of examina-

\textsuperscript{14} Hening, I, 457. 
\textsuperscript{16} Hening, I, 264, 265, 298, 444.
tion in the counties.\textsuperscript{17} Prisoners for debt, as well as criminals were confined in the public jail at the capital. In 1724, there were two public prisons at Williamsburg; one for debtors, and another for criminals.\textsuperscript{18} By a law of 1746 both classes of prisoners were to be kept in the same building, but one part of the prison was to be occupied by debtors and the other by criminals.\textsuperscript{19}

The keeper of the prison in each county was the sheriff, who had to answer for all escapes due to his own negligence, but the commissioners were held responsible for those that were permitted by the insecurity of the prison-houses. Owing to the poverty of the counties, they did not in the early years have strong jails, and escapes from them were frequently made. The responsibility for these bore heavily on the sheriffs and commissioners, and the assembly declared, in a law passed in 1647 and re-enacted in 1658 and 1662, that any prison that was as strong as an average Virginia house, and from which an escape could not be effected without breaking through some part of the building, should be deemed sufficiently secure. Persons breaking out of such a house on being retaken were to be adjudged felons, and the sheriffs and commissioners were not to be answerable for jail-breakings in such cases.\textsuperscript{20} Prison rules were in one respect more humane than they are at present. The prisoners were not all shut off from the advantages of fresh air and exercise, but most of them were allowed to walk about during the daytime within a certain area around the jail. The limits within which prisoners were allowed their freedom were marked out by the justices, and by an act of 1765 were to include an area of not less than five nor more than ten acres. All prisoners except those charged with felony or treason\textsuperscript{21} who would give bond not to escape were allowed the freedom of the prison grounds. But if any one abused this privilege by going outside of the prescribed limits, he was deprived of this liberty. The leniency of these regulations enabled some of the prisoners to reduce the punishment of confinement almost to a minimum.

\textsuperscript{17} Hening, III, 390.
\textsuperscript{18} Hugh Jones, Present State of Virginia, 30.
\textsuperscript{19} Hening, VI, 185.
\textsuperscript{21} By a law passed in 1662 this exception was also made against persons under execution for debt. Hening, II, 77.
Many persons sent to jail for debt took houses within the prison limits, and thus lived at home while serving out their terms of imprisonment. But the assembly did not intend that debtors should get off with a nominal punishment, and so in 1661 passed a law by which persons living within the limits of a prison were not to be allowed to lodge in their own houses or be permitted to walk over the grounds, but were to be kept in close confinement.22

The laws providing for the payment of prison fees varied from time to time. It was often required that the prisoner himself pay the cost of his maintenance while in prison. By laws enacted in 1711 and 1748, it was provided that prisoners for debt were to have an allowance from the assembly if they were not able to pay their prison fees. Other statutes of this century placed upon creditors the burden of defraying the charges incurred in keeping insolvent debtors in prison.23

In colonial times, as well as at the present, the constables shared with the sheriff in the performance of the executive duties of the counties. We cannot say exactly when constables were first appointed, but we know that by 1687 the office had become an established part of the governmental machinery of the counties.24 Constables were usually appointed by the county courts, though the first ones were chosen by the assembly.25 Every county was divided into precincts, in each of which a constable was elected every year by the county court. Any person elected constable could be forced to accept the office, though he could be relieved from serving at the end of one year.26 Many of the duties performed by the constable were the same as those discharged by the same officer in England, and were about the same as those that have engaged his successors in Virginia up to the present time.

24 Accomac Records, 1632-1640, 69.
26 Webb, 'Virginia Justice,' 98.
Not only did he have to execute orders and decrees of the courts and the assembly, but he was also a conservator of the peace and had to arrest all those who were guilty of riotous and disorderly conduct. He was enjoined to “keep a watchful eye over the drinking and-victualling houses and such persons as unlawfully frequent” such places. On him also devolved the duty of seeing that each farmer planted as many acres in corn as the law required, and did not allow suckers to grow after his tobacco had been cut.27

Constables took the leading part in the hue and cry. Whenever a robbery or murder was committed, the person robbed or any one else who was present could go to the nearest constable and “require him to raise the hue and cry to pursue the offender.” Upon receiving such notice, the constable was to call on all the men of his precinct to assist him in his search for the felon. If they failed to find him in that precinct, the constable was to notify the constable of the next precinct, and he the next, and so on until the offender “was apprehended or pursued to the seashore.” The hue and cry could be raised by a constable without an order from a magistrate, but it was usually not done without a warrant from a justice.28 The hue and cry could also be raised to pursue runaway slaves and servants.29

Another important office was that of clerk of the county court. County clerks were usually appointed by the secretary of state, and were regarded as his deputies. The appointments were not made for any definite period, but were revocable at the pleasure of the secretary.30 This patronage not only extended the influence of the secretary throughout the colony, but also proved a source of considerable revenue to him, as it was the custom for all the clerks to pay him a fee every year. In 1700 these fees annually amounted to 36,200 pounds of tobacco.31 In 1718, a bill was offered in

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29 Hening, I, 489; II, 299.
30 In one of Bacon’s laws it was provided that county clerks should be elected by the county courts. From the Accomac and Henrico court records we find that clerks were occasionally commissioned by the governor. But these exceptions to the usual method of choosing clerks seem not to have remained in force very long. Hening, II, 205. Accomac Records, 1640-1645, 145. Henrico Records, 1719-1724, 53; ibid., 1710-1714, 201; ibid., 1730-1740, 191. Sainsbury MSS., 1705-1717, 394, 408.
the assembly providing that the power of appointing and removing clerks should be taken from the secretary and given to the justices of the peace. The reasons given by the advocates of the measure for the proposed changes in the method of choosing county clerks was that these clerks were often elected Burgesses, and as long as they held office at the pleasure of the secretary, an appointee of the king, the assembly would be too much under the influence of the governor. Governor Spottswood rightly considered the bill an attack on the King's prerogative, and declared his intention of vetoing it if it passed the assembly. The measure, therefore, failed, and county clerks continued to be appointed as before. 32

The General Court and the oyer and terminer courts were served by the sheriffs of the county or counties in which the capital was located. According to Hartwell, Blair, and Chilton, the secretary of state was nominally the clerk of the General Court, and drew the salary that went with the place; but the duties of the office were performed by a deputy, who was styled clerk of the General Court, with the assistance of one or more under clerks. The place of secretary was one of the oldest and most important offices in the colony, and, as we have just seen, was considered of sufficient dignity to be filled by a direct commission from the King. In the office of the secretary, were kept the proceedings of the General Court and also a record of all probates and administrations, certificates of birth, marriage licenses, and the fines imposed by the county courts. 33

Prior to 1662, there was not a notary public in Virginia. Owing to the lack of such an officer to attest oaths, statements sworn to in Virginia were not given the credit in foreign countries to which they were entitled. For this reason the assembly in 1662 appointed one notary public for the colony, and some years later authorized him to choose deputies throughout the colony. 34

Lawyers are seldom alluded to in the early county court records, 35 though frequent mention is made of attorneys.

32 Spottswood's Letters, II, 279.
34 Hening, II, 135, 316, 456, 457.
But these attorneys were not always lawyers. A person living in one county and owning property in another frequently appointed an attorney to represent him in the county in which his property was situated. These powers of attorney, as well as notices of the termination of the legal agency created by them, were recorded in the proceedings of the county courts. Though the lawyers in the earliest years were few in number, yet by 1643 they had become important enough to call forth special legislation for their profession. In this year it was provided by an act of assembly that lawyers should not be allowed to practice in any court until after they had been licensed in the Quarter Court. They were also restricted in their charges to twenty pounds of tobacco for every cause pleaded in the monthly courts and to fifty pounds for every one in the Quarter Court. Besides no case could be refused by any lawyer unless he had already been employed on the other side. Within two years the assembly regretted having allowed lawyers this small amount of liberty, and it passed a law prohibiting attorneys from practicing in the courts for money. The reason given by the assembly for this action was that suits had been unnecessarily multiplied by the "unskillfulness and covetousness of attorneys." The exclusion of lawyers from the courts must have worked a hardship on those parties to suits who were intellectually inferior to their opponents, and it soon became necessary to modify this statute. A less stringent law against attorneys was passed two years later, though by it compensation was still denied professional lawyers. By this act it was provided that whenever a court perceived that a litigant would suffer injustice because of his inability to cope with his opponent, the court was either to open the cause itself or else "appoint some fitt man out of the people to plead the cause and allow him satisfaction requisite." By 1656, the assembly had come to realize the inconvenience attendant upon the administration of justice without the assistance of lawyers, and this time voted a repeal of all the laws

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12 York Records, 1638-1694, 11.  
14 This act did not apply to special attorneys or those that had letters of procuration from England. Hening, I, 275, 276.  
15 Ibid., I, 302.  
16 Hening, I, 349.
against "mercenary attorneys." But professional attorneys were given only a short lease of life by this act of repeal. In 1658, it was enacted that any one receiving pay for pleading in any case in any court in the colony should be fined 5000 pounds of tobacco. Every one that pleaded as an attorney for another had to take an oath that he would take no compensation either directly or indirectly for his services: At this time the question was raised by the governor and council whether this law was not a violation of Magna Charta. But the Burgesses saw nothing in the measure that was contrary to the principles of that document, and it became a law despite the doubt as to its constitutionality. The courts must have gotten along badly without the assistance of paid attorneys; for in 1680 the assembly again passed a law which recognized the right of lawyers to charge for their services. This same statute also provided that no attorney-at-law should plead in any court until after he had been licensed by the governor. The reason given by the assembly for imposing this restriction on the practice of the law was that the courts had been annoyed by ignorant and impertinent persons pleading in the interest of their friends. These volunteer attorneys sometimes pleaded for parties to suits without being asked to do so by them, and often did injury to the causes advocated by them. The law of 1680 was soon afterwards repealed, but professional attorneys had been again admitted to the courts by 1718. During the eighteenth century we find no statutes forbidding lawyers to receive compensation for their services, but the fees charged by them continued to be restricted by the assembly. By the laws of 1680 and 1718, lawyers' fees were fixed at fifty shillings, or 500 pounds of tobacco, for every cause pleaded in the General Court and fifteen shillings, or 150 pounds of tobacco, for every one in the county courts.

It is not easy to explain this opposition of the assembly to the legal profession. Mr. John B. Minor thought that it had its origin in the jealousy between the aristocracy of

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40 Hening, I, 419.
41 Hening, I, 482, 483, 495, 496.
42 Hening, II, 478, 479.
birth represented by the assembly and the aristocracy of merit represented by the lawyers. It is more probable that this unfriendly attitude of the ruling class towards the legal fraternity was caused by the lack of ability and character of the early lawyers. Attorneys' fees, even when allowed to be charged, were fixed so low by law that little encouragement was given to men of ability to qualify themselves properly for the profession. It is not unlikely, therefore, that during the greater part of the seventeenth century the attempts at pleading made by many of the lawyers were a hindrance to the proper administration of justice, and if so, the prejudice of the assembly against "mercenary attorneys" was not without foundation. This feeling of hostility to lawyers still finds its counterpart in the present-day belief of many people, especially in the backward districts, that the duties of the legal profession are incompatible with high moral rectitude.

While professional lawyers were not excluded from the courts by the laws passed in the eighteenth century, yet the courts were, for a considerable part of this century, closed to those would-be lawyers who had not been properly licensed. It has just been shown that the statutes of 1643 and 1680 provided for the licensing of attorneys by the governor or Quarter Court. Similar provisions are found in laws enacted in the eighteenth century. According to a law passed in 1732, the governor and council were to receive all applications for licenses to practice in the inferior courts, and were to refer them to such persons, learned in the law, as they should see fit to select, who were to examine the candidates and report to the governor and council as to their qualifications. Upon the receipt of this report, the governor and council were to license such of the candidates as had proved themselves qualified to enter upon the profession and were to reject the others. The governor and council could also, for just cause, suspend any lawyer from practicing in the inferior courts. If a practitioner in an inferior court should at any time be neglectful of his duty, he was to pay all the damage occasioned by such neglect. But the provisions of this act did not extend to
lawyers practicing in the General Court or to "any counsellor or barrister at law whatsoever." This law was repealed in 1742, but another was passed in 1745, which contained about the same provision for the licensing of attorneys except that it required the governor and council to select only councillors as examiners of applicants for licenses.

It does not appear whether the government ever entirely recovered from its early prejudice against professional attorneys; but from an order made by the court of Augusta County in 1746, it would seem that the justices of that region were still of the belief that the conduct of lawyers in court sometimes became a nuisance. The following order was made by the court in February of that year: "That any attorney interrupting another at the bar, or speaking when he is not employed, forfeit five shillings." Apparently, the General Court also regarded the much-speaking of the lawyers as a nuisance, as the assembly felt called upon to pass a law in 1748 forbidding more than two lawyers on a side to plead in the General Court except in cases of life and death.

During the first years of the colony's history, there was no attorney-general in Virginia to give legal advice to the Quarter Court. But the governor and council could send to England for an opinion if a cause came before them involving a question of law which they felt incapable of deciding. The first attorney-general mentioned in the records was Richard Lee, who was appointed in 1643. It is not stated from whom Lee received his appointment; but the latter attorneys-general were appointed by the governor, and sometimes with the consent of the King. Prior to 1703, the attorney-general was not required to live at the capital, but in that year the salary of the office was raised from forty to one hundred pounds sterling, and its incumbent was required to take up his residence in Williams-

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43 Hening, IV, 860-862.
44 Ibid., V, 171, 345; VI, 140-143, 371-372.
45 Virginia Historical Register, Vol. II, No. 1, p. 15.
46 Hening, VI, 143.
47 Sainsbury MSS., 1618-1624, 109-110.
49 Sainsbury MSS., 1625-1705, 66, 77; ibid., 1691-1697, 331; ibid., 1706-1714, 440.
50 Virginia Gazette, Nov. 18, 1787.
The attorney-general had to prosecute criminals before the General Court and the oyer and terminer courts, and to give his advice to these courts whenever it was needed. In 1711, it was found necessary to appoint prosecuting attorneys for the counties. At that time breaches of the penal laws were prosecuted in the counties by those persons who had reported them to the courts, and informers were given one-half of all the fines imposed for offenses reported by them. It sometimes happened that the informer would compound with the accused for his half of the fines and would then stop the prosecution. This would cause the case to be thrown out of court, and, so the crown would fail to receive its half of the fine. There was need, therefore, of a better method of prosecuting offenders in the counties, and Governor Spottswood, following a recommendation of the attorney-general, issued a proclamation appointing prosecuting attorneys for the counties. These new officers came to stay, and from this time on we find them performing their duties in the county courts. They were deputies of the attorney-general and had to prosecute offenders in the county courts as the attorney-general did in the General Court and oyer and terminer courts. They were also required to see that all the fines imposed by the county courts were reported to the secretary's office to be recorded.

CONCLUSIONS

From the facts presented in this study, the following conclusions may be drawn:

(1) The judiciary was in all its branches closely allied to the other departments of the government. Prior to 1682, the legislature was the highest court of appeal in the colony, and it was closely connected with both the superior and in-
Interest courts during the entire colonial period. The judges of the General Court constituted the upper house of the assembly, and the justices of the county courts were often elected to seats in the lower house. Besides, the judges of the General Court, as members of the governor’s council, performed executive duties for the colony at large, and the justices of the county courts performed administrative duties in their respective counties.

(2) The authority of the judiciary was subordinate to that of the legislature. No law enacted by the assembly could be declared unconstitutional and set aside by the courts.

(3) The judiciary was aristocratic in its organization, and from 1682 to the Revolution the people had no voice, either direct or indirect, in the choice of their judges. Even prior to 1682, the assembly was the only court in which the judges were elected directly by the people. During the Commonwealth period, the judges of the General Court were chosen by the representatives of the people, and for a short while during this period justices of the county courts were appointed with the consent of the assembly. But with these exceptions, the colonial judiciary was thoroughly aristocratic in all its branches.

(4) The position of judge in both the superior and inferior courts was one of honor and dignity, and was usually held by men of ability. The judges of the General Court were very influential in the colony, and were often able to curb the power of the governor. Their opposition to the King’s representative probably contributed much towards keeping the colony from falling into a state of close dependence upon the crown. It is also not improbable that out of this opposition to the governor there grew up that spirit of resistance to the crown which both the aristocracy and the people showed in the Revolutionary period.

(5) The courts were bound in their decisions by the common law of England, the Parliamentary statutes passed prior to 1607, and by the statutes enacted by the Virginia Assembly. But a legal education was not a requisite qualification for judges, and apparently many, if not most, of the judges both of the superior and inferior courts, came to
the bench without special legal training. Therefore, in arriving at decisions, they frequently had to rely, especially in the early years, on their own judgment for guidance more than on law and precedents.

(6) Each county had a court which met at regular intervals and the justices of the peace exercised certain judicial powers out of court. As these magistrates lived in different parts of the county, justice was thus brought almost to the doors of the people. In the documents that have been examined very few complaints against the inferior courts are recorded, and it seems that these tribunals as a rule administered justice fairly and impartially.

(7) There were certain latent weaknesses in the constitution of the General Court which occasionally gave rise to abuses in actual practice. But as only a few cases of such abuses have been found it may safely be inferred that justice was as a rule fairly administered by the superior, as well as the inferior, courts.

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