April 1926

Justice in Colonial Virginia

Oliver Perry Chitwood
West Virginia University

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Legal History Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol32/iss3/3

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
Next to the assembly in the order of jurisdiction came the Quarter Court, which was afterwards known as the General Court. This tribunal was the successor of the council court, which administered justice in the colony during the first few years of its existence. As the local council and its president were the judges of the Council Court, so the governor and his council constituted the Quarter or General Court. An exact date for the origin of the Quarter Court cannot be given. We know, however, that the governor and his council performed judicial duties as early as 1619, and it is not improbable that Lord De La Warr and the military rulers who succeeded him advised with their councils in the administration of justice.

Not only is it difficult to say just when the councillors began to share with the governor the responsibilities of meting out justice, but it is also equally difficult to determine the precise date at which their executive and judicial duties began to be performed in separate sessions. In Governor Wyatt’s instructions, given in 1621, there is an intimation that the governor and his council sat at different times as a court of justice and as a council of state. In these same instructions, the governor and council are ordered to “appoint proper times for the administration of justice.” From this, therefore, it would seem that as early as 1621 the governor and his council, as a rule, discharged their judicial duties while sitting as a court of justice and agreed on their executive measures while sitting as a council of
state. But if there was a line of cleavage separating the judicial from the other business transacted by the council, it could not, at first, have been a clearly defined one; for in the early proceedings of the council we find judicial, executive, and legislative measures all recorded together. Nor can it be said that the executive and judicial sessions of the council were held at different times of the year. The councillors could not come together without considerable inconvenience owing to the distance at which they lived from each other, and when they assembled, in all probability, they did not adjourn until they had dispatched all the business of every kind that was before them. Certain days, or parts of days, were perhaps set apart for deciding suits and others for performing executive duties.

During the first years of which we have any record of them, the meetings of the council for the trial of causes were held at irregular intervals. It was not many years, however, before a system of regular quarterly terms had been evolved. When that stage was reached by the court, the name Quarter Court could be properly used, and its development in the direction of independence of the executive was practically complete, or rather about as nearly complete as it was at any time during the colonial period. But we are unable to say just when the court arrived at this point in its development. A step towards quarter sessions was taken in 1621, when the council was ordered by the Company to assemble four times a year and remain in session one week each time. These meetings were to be devoted to "state affairs and law suits." This order came in response to a complaint made by Governor Yeardley to the effect that the councillors did not come together as often as the public interests demanded. The reasons assigned by him for this indifferent attendance were that they were few in number, lived at considerable distances from each other and received no compensation for their services in the colony. By 1626 the term Quarter Court had come into use, being applied to the quarterly meetings of the councillors. But meetings of the council were also held in the intervals between the quarter terms, and at these, as well

---

8 Robinson MSS., 54, 55, 60, 63, 66, 67, 70, 73.
9 See page 38.
10 Virginia Court Book, 1622-1626.
11 Collingwood MSS., I, 238.
as at the quarter sessions, judicial duties were performed. Just how long before the judicial sessions of the council were confined to the quarter terms, cannot be determined, but it was probably not later than 1642. By 1632 the Quarter Court had gone far enough in its development to receive statutory recognition. At that time a law was passed providing that the "foure quarter corts shall be held at James City yearlie, as followeth, vizt., uppon the first day of September, the first day of December, the first of March, and the first day of June."  

After this changes were made from time to time in the dates at which the courts convened. In 1659, the June court was abolished because it was found inconvenient to hold it at that time. The reason given for this inconvenience was that "the shippes are (were) then out of the country, time of payment past, and the crop then chiefly in hand." The sessions of the Quarter Court were by this change reduced to three a year. The term Quarter Court had now become a misnomer, and in a few years that of General Court was substituted for it. It was afterwards considered unnecessary for the court to convene as often as three times a year, and in 1684, the sessions were made semi-annual. From that time on the court met regularly in April and October.  

The act of 1632 made no provision regarding the length of the terms of the court. In the instructions given by the King in 1639 to Governor Wyatt, the Quarter Courts were required to remain in session one week or longer if necessary. About four years later, it was enacted by the assembly that the four courts (which at that time were appointed to be held in March, June, October, and November) should continue, the first and last for eighteen days each, and the second and third, for ten days each. There was also a provision requiring the assignment of a definite number of causes instituted by writs for each day of every term. In imposing these minute regulations on the court, the assem-

---

8 Hening, I, 174.  
9 Ibid., 137, 270, 461, 524; II, 227; III, 239; V, 219, 320.  
10 Hening, I, 524.  
11 Ibid., II, 58.  
13 Sainsbury MSS., 1637-1649, 44.  
14 Hening, I, 276, 271.
bly acted as if the amount of judicial business to be dispatched by the governor and council each year was a constant quantity which could be measured in advance with mathematical accuracy. After this the length of the terms was changed from time to time, but was finally fixed at twenty-four days exclusive of Sundays, though the court was not required to remain in session so long if it could clear its docket in a shorter time than that prescribed.\footnote{Hening, III, 289; Y, 319, 320; VI, 328. Webb's Justice, 106.}

It is not to be supposed that these inelastic regulations of the assembly could be closely fitted to the conditions with which the General Court had to deal. The assembly, of course, could not gauge beforehand the exact volume of the judicial business that would come before the court, and the attempts to limit it as to the number of causes it should try each day, or the number of days it should sit, must have been futile. We are not surprised, therefore, to find that during the periods for which we have a record of its proceedings, the General Court did not conform strictly to the statutory regulations regarding the times for meeting.\footnote{During the years 1674 and 1675, the meetings of the General Court were held on the following dates: 1674—April 2, 3, 4, 6, 7, 8, 9; Sept. 22, 23, 24, 25, 26, 27, 28; Oct. 1, 2, 5, 8; Nov. 16, 17, 19, 20, 21; 1675—March 1, 3, 4, 5, 6; June 15, 16, 17, 18, 19; Oct. 4, 5, 6, 7, 8, 9, 11, 12. At this time the statutes provided that three courts should be held every year. According to laws enacted in 1662 and 1668, the terms of these courts were to begin April 15, September 20, and November 20, unless those dates fall on Saturday or Sunday, in which case they were to begin the following Monday. The length of the first term was to be eighteen days, that of the other two, twelve days each. This contrast between the regularity found in the legal provisions and the irregularity found in the court practice, goes to show that the assembly did not succeed in its efforts to place the General Court in a strait-jacket. Records of the General Court, 1670-1676; see dates given above. Robinson MSS., 65-74. Records of York Co., 1633-1694, 20, 54, 101. Hening, II, 55, 59, 227.\footnote{Records General Court, 1670-1676, 154. Robinson MSS., 51, 59, 69, 74. Hugh Jones, Present State of Virginia, 25. Hening, III, 200.}}

The General Court usually held its sessions at the capital of the colony, that is, at Jamestown during the seventeenth century, and at Williamsburg during the remainder of the colonial period.\footnote{In the early years there seems to have been no state-house in Virginia, and the business of government was transacted at the house of the governor. The governor was also put to great expense in entertaining councillors and Burgesses during the terms of the Quarter Court and the assembly, and he was authorized by the King to recoup himself by appropriating to his own use all the fines imposed by the court. But the incomes from the fines apparently fell far short of the outgo occasioned by the hospitality which was dispensed at public times. For we find}
Governor Harvey writing to England in a despairing tone saying that if some relief were not soon afforded him the expense of council meetings and assemblies would, as he phrased it, cause both his heart and his credit to break, and that he should be called the host, rather than the Governor of Virginia. In 1639, Governor Wyatt was instructed by the King to have a state-house built, but this order was either not carried out, or, if it was, the building erected was destroyed by fire. For in 1663, the sessions of the General Court and the assembly were being held in ale-houses. High rents had to be paid for the use of these places; and, besides, it was considered beneath the dignity of the colony for its laws to be made and its justice administered in houses where drinks were vended. For these reasons, the assembly in this same year passed a law providing for the erection of a building in which the affairs of the colony could be conducted. After Williamsburg became the colonial capital, a costly state-house was built, the finest, it is said, that could then be seen in the British possessions in North America. One side of the capitol was given over to the use of the General Court and its officers, and the other to the assembly and its officers.

As we have already seen, the General Court was composed of the governor and his council. Councillors were appointed by the Company before its charter was annulled and after that time by the King on the recommendation of the intermediary boards. Vacancies in the council were usually filled in the following manner:—the governor would select such men as he deemed suitable for the office and would send in their names, together with an account of their qualifications, to the intermediary board; when the list recommended had received the sanction of this board, it was passed on to the King, whose formal approval was necessary to make the appointments legal. Councillors were not chosen for any definite period, but were commissioned whenever a new governor was sent to the colony.

19 Sainsbury MSS., 1657-8-1649, 46.
20 Hening, I, 425; II, 204.
21 Sainsbury MSS., 1625-1705, 74. Hening, III, 419, 421. Hugh Jones, Present State of Virginia, 25, 29. It took some time to complete the new capitol, and during the period of waiting the assembly, and probably the General Court, held their sessions in the College of William and Mary. Hening, III, 189, 187, 203, 204, 219, 224, 227, 419. Calendar of Virginia State Papers, I, 72, 73.
22 These nominations were sometimes, if not generally, made with the advice and consent of the Council. Sainsbury MSS., 1657-1649, 40. Spottwood's Letters, I, 7.
or a new King came to the throne. The old councillors, however, were usually continued in office by the new commissions, and, in practice, therefore, it resulted that the judges of the General Court held office for life.23

By this method of appointment, the nominations made by the governor could not receive final confirmation until after a considerable period of time had elapsed. But it was important that the vacancies should not remain open during the period of waiting, and so the practice arose of allowing the governors to bridge over these intervals by making temporary appointments. Whenever the membership of the council was reduced by deaths or removals so as to be less than nine, the governor was to name as councillors as many prominent men as would be necessary to bring it back to that number. These temporary appointments became permanent after they had been confirmed by the King. The governor could also suspend councillors for just cause, but whenever he exercised this power, he had to report to England the reasons for his actions and support with proofs his charges against the excluded member.24

One would think that this power to suspend judges was liable to be abused by an unscrupulous governor. It would seem that by temporarily removing from the council those members that opposed his schemes he might frequently procure unjust sentences from the court. But the council was in a position to restrain him from an arbitrary use of this power. The councillors were generally men of means and influence, for none but those who were possessed of con-


According to accounts of Virginia written by Beverley and by Hartwell, Blair, and Chilton (published in 1705 and 1727, respectively), the power to suspend councillors was not conferred on the governors until after Bacon's Rebellion. As a reason for thus increasing the authority of the governor, it was contended that this power would enable him the better to put down an incipient rebellion. The rebellion of 1676, it was claimed, could have been quelled in the bud if Governor Berkeley had had the authority to suspend Bacon from the council. But instances are recorded in which councillors were suspended before Bacon's rebellion. Even Governor Berkeley himself exercised this power, for we find that in May, 1676, he issued a proclamation suspending Bacon from the council. Sainsbury MSS., 1624-1691, 111, 112, 216; ibid., 1650-1726, 244; ibid., 1677-1679, 19. Hartwell, Blair, and Chilton, 23-56. Beverley, Hist. of Va., Book IV, Chap. I. p. 2.

siderable estates were eligible to this high office. One of their number, usually the oldest in commission, succeeded temporarily to the governor’s chair when it became vacant by the death or removal of the governor. Many of them, therefore, must have had considerable influence with the governing authorities in England. An unjust removal was always liable to bring on a quarrel between the injured party and the governor, and in disputes of this kind the governor was not always sustained by the King. Besides, the council, owing to the prominence of its members and their family connections with other prominent men, had great influence in the colony and was able to make its power felt in the government. Nor were the councillors slow in asserting their rights. Their cavalier sentiments did not prevent their antagonizing the King’s representative when they considered that their privileges had been infringed. Consequently, they often took an attitude of strenuous opposition to the measures proposed by the governor. Indeed, in the contests between the Virginia council and the King’s representative, the history of the struggles of the ancient English kings with their barons was, in a small way, repeating itself. Sometimes these barons of Virginia and their allies carried their opposition to the governor to the point of procuring his dismissal. We can, therefore, readily see that the governor, even though he were unscrupulous, would, as far as he could, avoid every occasion to arouse the opposition of his council and would be very

25 Sainsbury MSS., 1624-1631, 166, 216; ibid., 1637-1649, 38; ibid., 1691-1697, 161; ibid., 1720-1730, 212. Randolph MSS., 413, 518.
27 Sainsbury MSS., 1716-1720, 709.
28 In the quarrel between Governor Harvey and his council, the opposition verged upon rebellion. This dispute seems to have arisen out of a false conception on the part of the governor as to the relative powers of the chief executive officer and his cabinet, though Matthews, one of the opposing party, represents him as a tyrant who tried to lord it over the council. It is not unlikely that Harvey’s support of the claims of the Maryland colony to Kent Island against those of Clayborne was also one of the causes of the rupture between him and his council. According to Matthews, Harvey claimed that the council had only the power to advise the governor, who could accept or reject its counsel as he saw fit. Harvey, on the other hand, declared that the council wanted to deprive him of his right to vote in the council except in case of a tie. There was no attorney-general in Virginia to decide the disputed question, and Harvey wrote to England for a legal opinion regarding the respective powers of the governor and council. The councillors believed their quarrel just, and, being supported by the Burgesses, deposed the governor and sent him to England to answer certain charges which they had brought against him. The King, of course, did not countenance such an attack, though indirect, on his royal prerogative, and sent Harvey back to Virginia as a prisoner and prominent one of the councillors who had the opposition to England to “answer an information at the King’s suit” in the Court of Star Chamber. No record has been found of any sentence being pronounced against them by this court, but two of them were detained in England a long time and were thus put to great inconvenience. Sainsbury MSS., 1661-1697, 1, 2, 111-116, 122-124, 126-130, 207, 210; ibid., 1640-1691, 2.
chary in the exercise of his power to suspend judges of the General Court.

During the Commonwealth period the method of choosing councillors was different from that employed at other times. While the colony was under the rule of Cromwell, the members of the council were appointed by the Burgesses, the representatives of the people. As the governor was also elected by the lower house, the Quarter Court enjoyed complete independence of the mother country during this time. The effect of this change was to give to the people, indirectly through the House of Burgesses, power over the Quarter Court. It was a step towards democracy. The reforms in Virginia which gave the people a stronger voice in their government was a faint echo of the Puritan Revolution. But this impress of democracy which was dimly stamped on the Virginia judiciary was soon effaced by the royalist reaction. With the Restoration there came a return to the old régime, and from that time until our own Revolution the people took no part either directly or indirectly in the appointment of the judges of their most important court.

A full council was usually composed of twelve or thirteen members, though the number was sometimes greater and sometimes less than this. During the early years, there seems to have been no minimum limit below which the number could not be reduced by deaths and removals. But later there was a provision that the governor was to keep the council up to nine by making temporary appointments. The attendance of the judges at the meetings of the General Court was usually poor, considering their number, and during the periods for which we have no records of its proceedings, the court was generally attended only by about one-half of the councillors. But a certain number of judges had to be present at every court before any case could be tried. No council could transact any business unless at least three of its members were present, and except on extraordinary occasions, no court could be held with a

\[\text{Footnotes:}\]

smaller quorum than five. The failure on the part of the judges to attend the court sessions regularly was doubtless due mainly to the distance at which they lived from the seat of government and to the lack of travelling facilities. In the early years the Quarter Court tried to coerce its judges into a better attendance by imposing fines on absentees, but apparently with little success.

The councillors at first received no allowance for looking after the affairs of the colony, and, as we have seen, this was, according to Governor Yeardley, partly the cause of the poor attendance at the council meetings complained of by him. The Company must have acted favorably on Yeardley's hint, for in 1625 we find the councillors receiving pay for their services. A little later (1640) each one was granted exemption for himself and ten servants from all general taxes except ministers' dues and contributions for building churches or towns and for carrying on defensive wars. To this privilege was afterwards added a salary of 250 pounds sterling, which was to be apportioned among the councillors according to their attendance at Quarter Courts and assemblies. By Bacon's laws the exemption from taxation was done away with, and one hundred pounds was added to the allowance that had hitherto been made to them. Other increases in salary were afterwards made, and in 1775, the services of the

---

23 The only records now extant of the proceedings of the General Court, except occasional notices, are the following: (1) A manuscript now in the Congregational Library, known as the "Virginia Court Book." It covers the period from March, 1629, to 1630 (I), but only the first part of it is at present in a condition to be used. (2) The General Court Records, (1670-1676) in the library of the Virginia Historical Society, Richmond. (3) The Robinson MSS. (1626-1670), also in the library of the Virginia Historical Society. These consist of notes made by Mr. Conway Robinson from the original records of the council, probably from the MSS. now in the Congressional Library. In addition to these there is given in one volume of the Ludwell MSS. (in the library of the Virginia Historical Society), a list of the cases tried in the General Court during a brief period (1724-1728). From these records, I find that the average attendance of councillors at courts, not including the governor, who was usually present, was about six for the year beginning with May, 1624, and ending with May, 1625, and a little below six for the period extending from October, 1672, to March, 1676. Robinson MSS., 51-74. General Court Records, 1670-1676, 154-251. Virginia Court Book, 1629-1626, 20-95.


25 Collingwood MSS., I, 286.

26 On one occasion the court was anxious that all the judges should be present at the next session, as an important case would then come up for trial, and in order to insure a full attendance, it ordered that every one that should be absent without a lawful excuse, should pay a fine of £40. Robinson MSS., 76, 186.

27 Proceedings of Virginia Company, I, 126.

28 Virginia Court Book, 1628-1628, 77.

councillors were rewarded with more than twelve hundred pounds a year.38

In addition to the salary, there were other emoluments that went with the place of councillor. The councillors had almost an entire monopoly of the principal places of honor and profit in the colony. They usually commanded the militia of their respective counties with the rank of colonel.40 According to Hartwell, Blair and Chilton, another source of profit to the members of the council was the privilege—shared also by the governor and the auditor—of buying at a low price all the quit-rents due to the King, which were paid in tobacco. The whole colony was divided among them, each commissioner taking the county or counties most convenient to him.41

The governor presided over the General Court and passed sentence on convicted criminals.42 Causes were decided by a majority vote of the judges present, and when the councillors were equally divided, the deciding vote was cast by the governor.43 There were also certain judicial duties that the governor could perform out of court. He could remit fines and forfeitures and grant pardons for all offenses except wilful murder and treason. Persons convicted of these crimes could be pardoned only by the King, but could be reprieved by the governor.44 But these, as well as other judicial acts, seem usually to have been done with the advice of the council. Another power exercised by the governor was that of signing orders for the admin-

---


40 Windser MSS., I, 206. Hartwell, Blair, and Chilton, 32, 33, 63.

41 The quit-rents were an annual tax of one shilling on every fifty acres of land that had been patented. Hartwell, Blair, and Chilton, 33, 55, 57. Sainsbury MSS., 1624-1627, 342.


44 It is true that Governor Pott pardoned wilful murder, but in doing so he exceeded his authority. In 1690 Governor Lord Howard was ordered not to remit fines above the amount of £10 without special permission from the King. Sainsbury MSS., 1624-1631, 216, 224, 225; ibid., 1640-1691, 820; ibid., 1652-1686, 3; ibid., 1720-1730, 347, 392, 418, 465. Dinwiddie Papers, I, 384, 385. Randolph MSS., 338, 408, 416, 464. Council Journal, 1721-1734, 220, 221, 251, 267, 280, 283, 841, 412, 413, 494, 495.
istration of estates and the execution of wills.\textsuperscript{45} By an abuse of this privilege, Governor Howard was able to extort a tax from the people for his own private use. A high fee was charged every time the seal was affixed to letters of administration and probates of wills. He claimed that the fees complained of were charged in all the colonies and that the revenue accruing from them was one of the perquisites of his office. The tax was such a burden that the Virginians sent Philip Ludwell to England to make complaints against the governor, but he did not succeed in procuring his dismissal.\textsuperscript{46}

The Quarter or General Court took cognizance of both civil and criminal causes, and its jurisdiction was both original and appellate. At first the governor and council decided causes of all kinds, but they were relieved of much of the judicial business of the colony after the county courts had grown into importance. It was some years, however, after the formation of the lower courts before we find any provisions restricting either the original or appellate jurisdiction of the Quarter Court with respect to suits of minor importance. But the judicial work to be performed could not be properly apportioned between the higher and lower tribunals without narrowing the jurisdiction of the former. So, before the middle of the century was reached, the original jurisdiction of the Quarter Court began to be restricted so as to exclude all unimportant civil causes. The laws imposing this limitation varied from time to time, but always provided that only suits involving certain amounts could originate in the higher court. The civil causes which these regulations allowed to be brought directly into the General Court were those in which the amounts involved equalled or exceeded ten, fifteen, sixteen, or twenty pounds sterling—these were the different limits at different times.\textsuperscript{47}
When the monthly courts were first organized there were no restrictions on appeals from them to the Quarter Court, and any one who was not satisfied with the award of the monthly court could bring his case by appeal before the governor and council for a hearing. It was not many years, however, before the appellate, like the original, jurisdiction of the Quarter Court began to be narrowed down to the more important cases. By a law of 1647, the appellate jurisdiction of the governor and council was limited to controversies involving amounts not less than sixteen hundred pounds of tobacco, or ten pounds sterling, but appeals from Northampton, a county east of Chesapeake Bay, were not to be allowed on account of its remoteness from James City, except in cases of double that amount. But this restriction was found impracticable, and some years later it was repealed, except that part of it that applied to Northampton county. One of the reforms instituted by the legislature of 1676 was the removal of this discrimination against the trans-Chesapeake counties. In the eighteenth century appeals to the Quarter Court were again limited so as to exclude unimportant cases, and this restriction continued in force until the end of the colonial period.

The appellate jurisdiction of the General Court was also limited in another way. The appellant always had to pay heavy damages when the governor and council affirmed the decision of the lower court. At first the law provided that all persons appealing from the monthly courts to the governor and council should pay double damages when cast in their suits. But a proper administration of justice demanded that the principal tribunal should not be walled in too closely against suits originating in the lower courts, and so it was afterwards found necessary to lower the barriers by which they were kept out. By a statute of 1647, the burdens borne by appeals to the Quarter Court were re-

48 Hening, I, 125.
49 So far as I have been able to find, there was no law thus restricting appeals before 1647; but a limitation had existed in the practice of the courts for a few years prior to this time. In 1642, Governor Berkeley, in his commission to the justices of Lower Norfolk County, instructed them to allow no appeals to the governor and council for amounts not exceeding 600 pounds of tobacco or ten pounds sterling. Lower Norfolk County Records, 1637–1643, 160. Hening I, 345, 398, 850.
51 Hening, II, 385, 397. The legislature that met in June, 1676, was under the influence of Bacon, and the laws passed by it are known as Bacon’s Laws. All these were vacated the next year, but many of them were re-enacted. Hening, II, 241.
53 Hening I, 125.
duced to fifty per cent additional damages. But even this law left the General Court too much hampered in the exercise of its appellate jurisdiction, and before the end of the century, the damages on appeals had become fixed at fifteen per cent of the amount originally awarded by the lower court.

There were never any separate chancery courts in Virginia during the colonial period, but both the General Court and the lower tribunals sat on chancery cases. If any one were wronged by a decision at common law, he could be granted a new hearing in chancery; but his cause would be tried by the same judges sitting as a court of chancery. This was the usual practice, but when Lord Howard was governor an attempt was made to introduce a more imposing method of deciding chancery suits. It was his aim to establish an independent court for the trial of chancery cases, over which the governor was to preside as Lord Chancellor. The councillors sat with him, but were expected to give advice only as the governor reserved to himself the sole power of rendering decisions. In order that this chancery court might appear the more independent of the General Court, the governor convened it, not in the state-house where the sessions of the latter were held, but in the dining-room of a private house. But this high court of chancery was short-lived. After Lord Howard ceased to be governor, the General Court resumed its old practice of deciding chancery causes.

During the greater part of the seventeenth century, the General Court and the assembly were the only courts in the colony that could punish important criminal offenses, those affecting life or member. The criminal jurisdiction of the Quarter Court also extended to minor offenses, though these

\[\text{Chitwood: Justice in Colonial Virginia}\]

---

\[\text{WEST VIRGINIA LAW QUARTERLY}\]

---

\[\text{204}\]

---

\[\text{Ibid., I, 345.}\]

---

\[\text{\textit{From this time on the damages to be paid by the defendant when an appeal was decided against him was fifteen per cent of the amount first awarded in all personal and mixed actions. In the early part of the eighteenth century, the damages in real actions were fixed at 2000 pounds of tobacco for every case appealed. During the last years of the colonial period, a difference as to the amount of damages charged was made between the appeals of the plaintiff and those of the defendant. The former had to pay fifty shillings, or 500 pounds of tobacco, whenever the appellate decision was against him. Hening, III, 143, 301, 614; V, 480; VI, 340. Mercer, \textit{Virginia Laws}, 10.}\}

---


---


---

\[\text{\textit{The county courts were for a while permitted to try important criminal cases, but they were deprived of this power in 1666. Hening, I, 897, 898.}}\]
were also cognizable in the county courts. Indeed, neither law nor custom recognized any sharp dividing line between the jurisdiction of the higher and lower tribunals in criminal cases. In the early records of the Quarter Court, we meet with many of the same class of law-breakers that appear in the order-books of the county courts.\footnote{3}

In the Quarter Court, even at an early period, persons charged with grave offenses were tried by a petit jury after they had been indicted by a grand jury.\footnote{4} It could not be expected, however, that information of all the crimes committed in the colony would reach the grand jury without the aid of some intermediary agency. Besides, it was impossible for the sheriff that attended the General Court to make arrests in the distant counties. Therefore, the judicial machinery of the counties had to be employed in bringing criminals before the governor and council for trial. Arrests for crimes were made by the sheriffs of the counties in which they were committed, and criminal offenses were first inquired into by the justices of the peace, who decided which cases should be tried by the county courts, and which ones should have a hearing before the governor and council.\footnote{5}

In the early years, certain offenses, chiefly breaches of the moral code, could also be brought before the governor and council by the churchwardens. These officers were to report all those who had been guilty during the year, of drunkenness, adultery, swearing, absence from church, Sabbath-breaking, and other sins of like character, as well as ministers who had failed to preach one sermon every Sunday, and "such maysters and mistresses as had been (shall be) delinquent in the catechising the youth and ignorant persons." But the practice of receiving presentsments made by churchwardens seems to have been discontinued by the court before the middle of the seventeenth century.\footnote{6}

The Virginia courts were governed in their decisions by the common law of England and by the Parliamentary

\footnotesize{\begin{itemize}
\item[\footnote{3}]{General Court Records, 1609-1676, 155, 156, 187, 211, 222. Records of Lower Norfolk County, 1657-1643, 2, 5, 56, 58, 62, 103, 177, 215. Records of Accomac County, 1640-1645, 49, 69, 50, 87, 168, 200. Robinson MSS., 8, 11, 30, 76, 78. Records of Rappahannock County 1686-1692, 55, 111, 114, 147, 158.}
\item[\footnote{4}]{Robinson MSS., 75, 76, 89. For an account of jury trials in the General Court and the oyer and terminer courts, see pp. 64-68.}
\item[\footnote{5}]{Records of Accomac County, 1632-1640, 45, 47; ibid., 1640-1645, 270. Hening, I, 304; III, 225, 389-391. Records of Rappahannock County, 1686-1692, 162, 163. See p. 96.}
\item[\footnote{6}]{Hening, I, 125, 155, 156, 180. Robinson MSS., 220.}
\end{itemize}}
statutes that were enacted before the colony was settled, but not by any that were enacted after that event except those that made mention of the plantations. The first act of assembly that has been found in which the common law of England is recognized as being in force in Virginia was passed in 1662; but in all probability the common law was to some extent observed by the courts during the entire colonial period with the exception of the time during which the colony was under military rule. One would naturally expect the early judges to decide cases according to the laws under which they had lived in England, in so far as they knew them, even if they were not required to do so. Besides, prior to 1662 orders were issued from England from time to time directing the authorities in Virginia to follow the laws of England, as far as was practicable, in their government of the colony. Such an instruction was given to the King’s council of Virginia in 1606, and a similar provision is found in commissions to governors that were issued before 1662. As early as 1621, Governor Wyatt was instructed to “do justice after form of the laws of England.” The benefit of the writ of habeas corpus was not formally extended to Virginia until 1710, when this privilege was brought over to the colonists by Lieutenant-Governor Spottswood. But this privilege was enjoyed in Virginia before this formal recognition of it was made by the crown; for a writ of habeas corpus was granted to Major Robert Beverley in 1682.

While the General Court doubtless tried to conform its decisions to the laws of England, yet it was impossible to fit the judicial business of the colony into exactly the same mold into which that of the mother country had been cast. A certain amount of elasticity had to be given to the laws of England before they could be adapted to the differing

---

63 Byrd MSS., ed. 1866, II, 237. Records Lower Norfolk County, 1637-1643, 100. Accomac County Records, 1640-1645, 149.

In 1711, a woman was brought before the General Court for violating a penal law passed by Parliament in the twenty-first year of the reign of James I. The case was dismissed on the ground that the law did not apply to Virginia, as it was passed after the colony was settled and the plantations were not mentioned in it. Spottswood’s Letters, II, 57, 58.

64 Hening, II, 43.

65 Brown, Genesis of the United States, 65. McDonald Papers, I, 376. Sainsbury MSS., 1637-1649, 44. Hening, I, 44.


67 Hening, III, 547. Campbell says that his privilege had been denied the Virginians prior to this time. He probably overlooked the case cited above. Campbell, History of Virginia, 373.
conditions in Virginia.\(^8\) Besides, a legal education was not a requisite qualification for membership in the council, and so cases must sometimes have arisen in which the judges did not know how to apply the common law. Then, too, during the greater part of the seventeenth century, the legal profession maintained with difficulty its existence in the face of the opposition which it encountered from the assembly, and, therefore, the judges for most of this time were without legal advice from professional attorneys as to the proper interpretation of laws and precedents.\(^9\) The Virginia statutes did not, of course, cover all the offenses of which the court took cognizance, consequently, and especially in the early years, it had to rely mainly on its own originality in rendering decisions.

The Quarter Court did not believe in half measures when it came to dealing out punishment to those who had incurred its censure, and the severity of some of its early sentences leaves the impression that the spirit of Dale was at that time still lingering in the Virginia judiciary. Some of the inhuman penalties inflicted by the High Marshal are recorded in the early proceedings of the Quarter Court. Offenders were made to lie neck and heels together,\(^70\) or were made to stand in the pillory, sometimes with their ears nailed to it.\(^71\) The death penalty usually took the form of hanging, but one case is mentioned in which the criminal was ordered to be drawn and hanged.\(^72\) One way in which fornication had to be atoned for was for the sinner to do penance in church during divine worship by standing before the congregation wrapped in a white sheet.\(^73\) Particularly severe

\(^8\) Hening, II, 43.

\(^9\) See pp. 116-118. However, the court was not entirely without legal advice, for there was an attorney-general in the colony as early as 1643. Virginia Magazine of History and Biography, VIII, 70.

\(^70\) One case is recorded in which the culprit had to lie in this position for twelve hours. Robinson MSS., 65, 76.

\(^71\) This ignominious punishment was not confined to servants and criminals of the lower sort, but those that were high in authority might be subjected to it. In 1624, we find the governor and council prescribing this penalty for their secretary, who had violated the oath of secrecy that had to be taken by all who attended the council meetings by giving the King copies of their proceedings. As a punishment for this betrayal of their secrets, the governor and council ordered that the secretary should stand in the pillory at James City with both his ears nailed to it, and then have them cut off. The rigor of this sentence, however, was somewhat abated in the execution, and the offending clerk escaped by losing only a piece of one of his ears. Sainsbury MSS., 1624-1631, 112. Virginia Court Book, 1629-1625, May, 1624. Robinson MSS., 28, 61.

\(^72\) Robinson MSS., 75, 76.

\(^73\) The Quarter Court, as well as the county courts, sometimes employed criminal methods of punishment. On one occasion a woman was sentenced to be dragged at the stern of a boat to the Margaret and John, a vessel anchored in James River. Another woman was to be towed around the same vessel and then ducked three times. Robinson MSS., 30, 59, 62, 66.
was the punishment inflicted on those who spoke disrespectfully of the government authorities. That the early councillors were not inclined to tolerate seditious utterances on the part of the people and were not troubled with nice scruples regarding the freedom of speech, can be seen from the manner in which they disposed of the following case, which came before them in 1624. A man who had used abusive language in speaking about Governor Wyatt was arraigned before the council in the absence of the governor, who refrained from taking part in the proceedings. In punishing this insult to its president the court ordered that the tongue of the offender should be bored through with an awl, and that he should also “pass through a guard of forty men, should (shall) be butted by every one of them, at the head of the troop kicked and footed out of the fort; that he shall be banished out of James City and the Plantation, that he shall not be capable of any priviledge or freedom of the country,” &c. 74

There were certain inherent weaknesses in the constitution of the General Court which were liable to breed abuse. Its close connection with the legislature and the executive was not favorable to an impartial administration of justice. The councillors, as members of the upper house of the assembly, took part in the enactment of the laws; as judges of the General Court they interpreted them; and as advisers of the governor assisted in the execution of them. Such a union of separate and distinct powers in one body of men deprived the judiciary of that independence which, according to modern views, is so essential to good government. Moreover, the executive and legislative duties of the councillors, together with those of the many offices held by them, must have consumed a good deal of their time and left them without sufficient leisure to acquire that legal knowledge which they needed in the discharge of their judicial duties.

There was also the danger that the councillors might in certain contingencies be brought into an injudicial frame of


In thus giving examples of penalties prescribed by the Quarter Court, no attempt is made to enumerate all the methods of punishment used by it. One other mode of correction employed by it might be mentioned; namely, that of binding offenders to service for certain lengths of time. The court in the early years could order a freeman to serve the colony for a term of years for violating certain regulations of the government. A runaway servant could be punished by lengthening his term of service and branding him with the letter “R.” Robinson MSS., 11, 12, 76.
mind by the performance of their military duties. Immediately after Bacon's rebellion, this potential evil developed into an abuse in actual practice. Some of the councillors, if not most of them, were opposed to the insurrectionary movement led by Bacon, and one of them, Ludwell, took the leading part in the war against the rebels. After the rebellion was over, some of Bacon's followers were brought before the councillors, their enemies, for trial. The judges, or some of them at least, went into court with their war-spirit unabated, and were, therefore, not in a humor to deal fairly by their antagonists.

And yet Bacon's followers would have fared much better than they did if all of them had been tried by the General Court, although its judges were their enemies. For if justice had been allowed to take its ordinary course, no death sentences would have been passed until after a jury had decided as to the guilt or innocence of the accused. But it was not the intention of the governor to allow juries to come between him and his revenge, and so he ordered the rebels to be tried by court martial without a jury. By this means he was able to get many sentences of death against those who had taken part in the rebellion. According to the report of the King's commissioners, all who were tried by the court martial were sentenced to death and hanged, and so the accused were willing to accept any compromise rather than go to trial. When a person was brought before the court martial, he was asked whether he wished to be tried or to be fined at the discretion of the court without a trial, and the latter alternative was always preferred. A fine was then imposed upon him without the aid of a jury. Berkeley's high-handed tyranny was not checked until the three commissioners appointed by the King to investigate conditions in the colony arrived in Virginia. On the arrival of these commissioners, trials by court martial ceased, and the General Court resumed its jurisdiction over criminal cases. After this no sentences

---


77 The commissioners sent over by the King to investigate conditions in Virginia reported that when they sat with the council on the trial of rebels, some of the loyalist party who sat with them were so unmindful of their position as judges that they railed at the prisoners from the bar as if they were the chief witnesses for the prosecution. Randolph MSS., 365. General Court Records, 1670-1676, 284-286.


79 Randolph MSS., 366.
of death were given against the rebels until after they had been indicted by a grand jury and tried by a petit jury.\(^7\)

These acts of injustice committed against Bacon's followers were the greatest series of wrongs ever perpetrated in the name of the Virginia judiciary since the colony was freed from the military rule of Dale and Argoll. But the acquiescence of the court martial in the blood-thirsty demands of Berkeley is not to be taken as a proof that the governor's power was usually supreme in the administration of justice. Berkeley was, by a combination of unfortunate circumstances, raised to an eminence of power that the average governor never attained. The party of opposition had just been crushed, and was not able to make an effective protest against the arbitrary acts of the victor. Besides, many of the councillors were also opposed to the insurgent movement, and so there was in effect a union between the aristocracy and the King's representative against the conquered rebels. If the council, on this occasion, had stood out in manly opposition to the governor, as it frequently did at other times, this great stain on the ermine of Virginia would never have been made. We are glad to know, however, that the voice of protest was raised by the assembly against the atrocities practiced by the governor.\(^8\)

Another flaw in the judicial system of Virginia was the entire exemption of the General Court from both direct and indirect responsibility to the people. As we have already seen, the people were not given a voice in the appointment or removal of councillors, and so to a greater extent than was proper, the judges were relieved of the fear that they would lose their places if they gave decisions that the people considered unjust. But the absence of this restraint on the court left a dangerous power in the hands of the judges, which they could employ towards the furtherance of their own private ends. There must ever have been before them the temptation to give unfair decisions in those suits in

---

\(^7\) Randolph MSS., 365. General Court Records, 1670-76, 266, 267. In justice to Governor Berkeley, it ought to be said that an apologist for him claims that the death sentences passed by the court martial were all given in the heat of the rebellion at a time when he had no secure place in which to confine prisoners and no safe guard to keep them. Ibid., 372.

\(^8\) Randolph MSS., 366.
which they themselves or their friends were interested.\textsuperscript{81} Nor were the councillors always strong enough to withstand this temptation. In the last quarter of the seventeenth century, the General Court fell into a practice by which each judge was practically exempted from liability to all actions except those that were brought with his own consent. This abuse was revealed to the Commissioners for Trade and Plantations by an investigation which came in response to complaints of certain English creditors made against the General Court for withholding justice from them. It was charged in these complaints that a debt due them in Virginia could not be collected owing to the failure of the General Court to decide suits brought against councillors.\textsuperscript{82}

When the Commissioners inquired (1696) into the alleged grievances, it discovered, to its great astonishment, that the General Court had a rule according to which an action could not be brought against any councillor without his consent. The practice of the court which had been in vogue for about sixteen years, was as follows:—When a suit was brought against a councillor, a notice of it was sent to him with the request that he appear before the court. If he failed to do so, the request was repeated, but no attachment was issued against his person or property to compel his attendance. By ignoring these notices, a councillor could postpone indefinitely the hearing of any suit against him. This indefinite postponement of cases was more unjust to the complainants than unfair decisions would have been because it deprived them of the privilege of appealing to the King. It was, therefore, left entirely optional with the councillors whether an action should ever be brought against them in the General Court.\textsuperscript{83} This

\textsuperscript{81} It seems to have been the usual custom for a judge to leave the bench whenever a suit to which he or his relatives were parties came before the court for a hearing. But still it was to the interest of the judges to render a decision favorable to an absent colleague, as they might want him to return the favor when they were placed in the same situation. Spotswood's Letters, II, 60.

\textsuperscript{82} However, these acts of injustice to foreigners did not of themselves mean necessarily that the court had fallen into extremely corrupt practices. The sense of public honor was not so high among the Virginians of the seventeenth century as it is at present. This is shown by the fact that during a considerable part of the seventeenth century the laws provided that the debts due to foreigners by Virginians, except those contracted for imported goods, were not recoverable in the Virginia courts. Nor was Virginia the only colony that held lax views regarding obligations to foreigners. For in 1681 we find British merchants making complaints against other English colonies, saying that debts could not be collected in them. We must, therefore, use the moral standards of the time in gauging the degree of corruption involved in this discrimination against foreigners. Hening, II, 189. Sainsbury MSS., 1695-1740, 105, 113, 115, 116; ibid., 1691-1697, 250.

\textsuperscript{83} Sainsbury MSS., 1691-1697, 258, 269, 288, 331.
grievance, however, could be easily remedied, since all that was needed was a law providing that attachments be issued against the property of a councillor when he refused to appear in court to answer suits brought against him. Such a law was passed in 1705, and after this no mention of the abuse is found.\footnote{Hening, III, 291, 292.}

It must not be inferred from this discussion of its weaknesses that the General Court was generally given to corrupt practices. In the documents that have been examined, only a few abuses are recorded, and this negative evidence goes far to show that the court usually gave the people a fair administration of justice.

COURTS OF OYER AND TERMINER

After the sessions of the General Court were reduced to two a year, criminals were sometimes necessarily kept in prison six months before they could be tried. It was not long before the need for a more speedy administration of justice began to be felt, and this need led to the formation of a new criminal tribunal, the Court of Oyer andTerminer. The permanent establishment of this new court dates from the first quarter of the eighteenth century, but before this time special courts of oyer and terminer were occasionally held in the colony. In the latter part of the seventeenth century we find that the King sometimes sent over special
commissioners of oyer and terminer in which certain persons were named as judges for the trial of particular cases. But the King's order for convening these courts was not often given, and therefore, they were not an effective remedy against the delays in criminal trials. In 1692, an attempt was made to shorten the long intervals that came between the courts at which criminals could be tried. We find an order bearing date of that year which authorized the governor to grant special commissions of oyer and terminer at any time during the sessions of the General Court or assembly for the trial of capital offenses which could not be reported to the General Court on the day usually set for the hearing of criminal cases.

Naturally, the next step to be taken in the development of the oyer and terminer courts was to introduce into these supplemental courts regularity as to the times of meeting. This step was attempted in 1710 when Lieutenant-Governor Spotswood was instructed by the Queen to require courts of oyer and terminer to be held twice a year. Soon after his arrival, the governor called together his council and made known to them this order of the Queen. The councillors considered the innovation unnecessary, and replied that, in their opinion, criminal trials were already

---

63 Salisbury MSS., 1686-1688, 12; ibid., 1691-1697, 260; ibid., 1715-1730, 698. Calendar of Virginia State Papers, I, 192.

64 Calendar Virginia State Papers, I, 85, 86.
adequately provided for. There was, however, no important reason why they should object to the change, and when the governor again advised with them soon afterwards, they agreed to the new plan and recommended that the assembly provide for the expenses for carrying it out. The time set for the first meeting of the court was in December, 1710.87

The lieutenant-governor had thus succeeded in establishing regular courts of oyer and terminer without arousing the dangerous opposition of his council. If he had been satisfied to stop here, it would have fared much better with him than it did. If he had not tried to use the new courts as a means of enlarging his own powers, this expansion of the judiciary could have taken place without occasioning any dispute over the new acquisition. But, unfortunately for him, he claimed, and two years later exercised the right of naming in his commission of oyer and terminer persons other than councillors, which stirred up opposition against him in the council. The councillors regarded this as an attempt on the part of the new governor to deprive them of their rights in the courts newly annexed to the judiciary. They did not, however, refuse to sit in the court of oyer and terminer the first time outsiders sat on the bench with them. Their reasons for yielding thus far in the beginning were that no criminal cases were tried at that particular court, and besides, they did not want their protests against the governor's action to take the form of a public affront. However, they asserted their right to act as sole judges in criminal trials, and the governor was soon convinced that they would not part with any of their judicial power without a struggle.88

The opposition of the council to this innovation led the governor to refer the question to the Lords of Trade for an opinion. The Lords of Trade decided that the governor did not have to confine himself entirely to councillors in choosing judges for the courts of oyer and terminer, unless such a limitation were imposed upon him by an act of the assembly.89 Spottswood thought that his opponents would acquiesce in this decision, and in 1717 he named as judges of a court of oyer and terminer five councillors and four

87 Letters of Governor Spottswood, I, 8, 24.
89 Sainsbury MSS., 1715-1720, 521, 522.
other prominent men. These outsiders were added, according to his own statement, to show the people that the power of the crown over the judiciary was the same in Virginia as it was in England. Some of the councillors were still unwilling to concede the governor's right to create judges in this way, and so refused to sit in this court. Eight members of the council declared that they would not act as judges in these courts if any persons other than councillors were appointed to sit with them. The dispute, therefore, continued open, and much bitterness of feeling was engendered before a final settlement was reached.

Prominent among the leaders of the opposition were Commissary Blair, Philip Ludwell, and William Byrd, all men of great influence in the colony. Byrd sent a remonstrance to the Lords Commissioners of Trade and Plantations, in which he brought forth able arguments to show that the governor could not go outside of the council in selecting judges. The innovation, he said, was a violation of the laws and chartered privileges of the colony. Besides, it gave the governor an undue influence over these courts, and, therefore, left the lives and fortunes of the people too much at his mercy. For the judges of the oyer and terminer courts were appointed, not for life or for a certain number of years, but for one term of the court. If the governor, therefore, wished to punish any one, he could at each term of the court appoint as judges such men as would vote for the sentence he desired. Spottswood replied to these objections, and pointed out that there were precedents in favor of the practice inaugurated by him. The King, he said, had sometimes joined others with councillors in his special commissions of oyer and terminer, and in the slave courts justices of the peace gave the death sentence. He also declared that the judges whom he had appointed to sit with the councillors in these courts were as well qualified to try criminals as the councillors themselves.

But before the governor sent in his reply to Byrd, the contest had reached a stage in which an important constitutional question was involved. In order that the mooted point might be settled once for all, the Lords of Trade

---

91 Sainsbury MSS., 1715-1720, 578.
93 Sainsbury MSS., 1715-1720, 698, 701.
94 Sainsbury MSS., 1715-1720, 669, 675, 676, 686.
appealed to the attorney-general of England for his opinion on them. The attorney-general decided that the governor had not infringed any legal provision by the exercise of the disputed power, but recommended that he be restrained from convening these courts except on "extraordinary emergencies." In January, 1718, the Lords of Trade sent this opinion to the governor and intimated that he was expected to act in accordance with the recommendation coupled with it.  

The assembly now came forward to champion the cause of the council. In May, 1718, it sent a petition to the King asking that the councillors might be the sole judges of the courts of oyer and terminer, or that His Majesty would in some other way restrain this dangerous power of the governor. But the Lords of Trade refused to grant this request, and the council gave up its attempt to exclude outsiders from the bench of the oyer and terminer courts.  

In the settlement of the dispute neither the governor nor the council could claim a complete victory. The governor had gained his point in so far as his power to appoint other judges to sit with the councillors in the oyer and terminer courts had been upheld; but the Lords of Trade had to forego most of the fruits of the victory as they receded from their first position. According to the instructions first given to Spottswood, these courts were to be held regularly twice a year, but he was now advised to convene them only on very important occasions.  

The failure of the council to obtain from the Board a theoretical recognition of their right to act as sole judges in the courts of oyer and terminer seems to have been only a nominal defeat. For in the first court of oyer and terminer that was held after the councillors yielded, no outsiders were appointed to sit with them as judges. Then, too, the immediate successor of Spottswood, Hugh Drysdale, seems to have profited by Spottswood's experience and to have prudently abstained from antagonizing his council by exercising the disputed power. Before the end of the first year of his administration the council had unanimously agreed that the courts of oyer and terminer should be regularly held according to

---

97 Spottswood's Letters, II, 321.
the King's instructions. Now we can hardly believe that those men who had contended so strenuously for their rights during Spottwood's administration would now consent to the formation of a regular tribunal unless they felt assured that they would always be chosen as its sole judges. At any rate, there is no doubt that by the middle of the eighteenth century (1755), it was customary for the oyer and terminer courts to be composed exclusively of councillors. We may, therefore, safely say that the councillors eventually won all that they were contending for, and that the victory of the governor and Lords of Trade was an empty one, which barely enabled them to come out of the contest with their dignity unimpaired.

The fact that the council was able to push its opposition to such a successful issue argues much for the influence wielded by it in the colony. The power possessed by the councillors at this particular period was greater than that usually enjoyed by them, and Spottwood ought to have seen that during his administration the time was most inopportune for a governor to measure lances with them. Seven of them, more than a majority, were related, and it was, therefore, easy for them to combine against the crown representative. Besides, the family to which most of the councillors belonged had already procured the removal of two governors, which emboldened them against Spottwood and made them popular with the people. On the other hand, Spottwood's power was weakened by the opposition which the assembly was waging against him. The council's success in this quarrel was also doubtless due, in large measure, to the able leadership of Commissary Blair and Colonel William Byrd.

This dispute was a struggle directly between the council and the King's representative, but indirectly a contest between the colonial government and the crown. The council was supported by the representatives of the people, and the governor, by the Lords of Trade, for this board saw in the council's objections to the innovation only

---

93 Sainsbury MSS., 1720-1730, 74, 76.
94 Spottwood's council was passed on to Drysdale with few, if any, changes in its personnel. Ibid., 1715-1720, 578, 593. Council Journal, 1721-1734, 3, 11, 16, 27, 32-34.
95 Dinwiddie Papers, I, 584.
96 Sainsbury MSS., 1715-1720, 60.
97 Sainsbury MSS., 1715-1720, 709.
98 Ibid., 740. Southern Literary Messenger, XVII, 690-692.
99 Sainsbury MSS., 1715-1720, 740.
a desire to conserve its own authority at the expense of the King’s power.\(^{105}\)

It is difficult to determine what support the people gave the aristocracy in their brave struggle with the King’s representative. It would seem that they were not indifferent to this increase of the governor’s authority, as their representatives, the Burgesses, expressed their disapproval of it. But Spottswood says that the Burgesses at this time were much in disfavor with the people;\(^{106}\) and if this be true, their address in support of the council cannot be taken as an expression of popular opinion. He also claimed that the people refused to concern themselves with the council’s quarrel. According to his account, a paper was drawn up in the form of a grievance against the oyer and terminer courts, and was sent out to the counties to be signed by the citizens. But despite this attempt to work up sentiment against the governor’s action, only two counties sent in grievances against these courts, and one of these remonstrances had only eighteen signatures and the other only eleven.\(^{107}\)

It might at first thought appear that this protest of the councillors was only an expression of that factious spirit which they too often betrayed during this period.\(^{108}\) But if the innovation attempted by the governor had been carried out without opposition, it would in all probability have materially altered the relation of the colony to the mother country. The proposed change would have meant a transfer of a certain amount of power from the Virginia aristocracy to the King’s representative, and through him to the King himself, and, therefore, the colony would to that extent have been deprived of its local autonomy. Besides, this transfer of power could not have been effected without giving the governor a dangerous influence over the judiciary. This new privilege of the executive was, as Colonel Byrd pointed out, liable to great abuse. It is true that Spottswood did not use the new courts as a means of procuring unjust sentences against his enemies, for he did not require any criminals to be tried in them who desired to

\(^{105}\) Ibid., 691.
\(^{106}\) Ibid., 779.
\(^{107}\) Ibid., 706. Spottswood’s Letters, II, 276.
\(^{108}\) Campbell, History of Virginia, 898.
wait for the regular sessions of the General Court. But the opposition of the council was aimed not so much at Spottswood's policy as at the principle underlying that policy. If no voice of protest had been raised at this time against executive aggression, the new power would have been confirmed to the King's representative by precedent. There would always have been the danger that an able and unscrupulous governor would use his influence over the judiciary as a means of gratifying his private spite. The council, therefore, did the colony a great service by thus resisting this encroachment upon its privileges. It may be true that the councillors, as was charged by the Lords of Trade, made the fight to protect their own interests rather than to protect the rights of the people. But their service to Virginia was none the less valuable because it was not performed entirely for altruistic reasons. For it seems that colonial Virginia owes the absence of this element of despotism from her constitution to the stand which the council at this time made against the governor's attempted aggression.

However, the strife over the oyer and terminer court ceased in a few years and the new tribunal became a permanent part of the Virginia judiciary. After the court had become established, its sessions were held twice a year, in June and December, and the intervals between the terms of the General Court were thus equally divided.

In both the General Court and the oyer and terminer courts, important criminal offenses were tried by a petit jury after indictments had been made by the grand jury.

It has already been shown that the right to be tried by a jury of compeers was one of the privileges that the first settlers brought with them from England. This right was called into exercise for the first time in 1607 in the trial of two suits for slander brought by John Smith and John Robinson against Edward Maria Wingfield, the first

100 Sainsbury MSS., 1715-1720, 706.
101 Ibid., 69. Spottswood's Letters, II, 26, 222.
102 Sainsbury MSS., 1715-1720, 691.
103 Spottswood's Letters, II, 341.
106 See page 11.
president of the local council. Juries were several times called on to decide causes during the few years in which Virginia was under the first charter that was granted to the Company. In Dale's scheme of military government there was no provision for juries, and they probably had no place in the martial courts that dealt out summary punishment to offenders. But after this military tyranny had given place to the regime of freedom inaugurated by Yeardley, the people began again to enjoy the right of trial by jury, and as early as 1625 we find the governor and council making use of this privilege.

According to the usual custom the grand jury of the General Court was selected from the freeholders who happened to be at the capital while the court was in session. For the grand jury of the oyer and terminer court, the sheriffs of James City and York Counties each had to summon twelve men to come before the court. A grand jury of not less than fifteen was to be sworn out of those that obeyed the summons.

The petit jury in both courts was usually composed of twelve men, though in the early records of the General Court, panels of thirteen, fourteen, and twenty-four are mentioned. The English custom of trying criminals by juries of the vicinage could not be followed by the General Court without great inconvenience and expense. But in 1662, a law was passed providing for the partial adoption of this practice by the General Court. According to this statute, every crime punishable by loss of life or member was to be tried by a jury of twelve men, six of whom were to be selected from bystanders and six were to be summoned from the vicinity in which the crime was committed. This method of choosing jurors was employed by the General Court for nearly three-quarters of a century.

---

116 Wingfield's True Discourse, published in Arber's Works of Smith, LXXXIII.
117 In Winzer's Narrative and Critical History of America (Vol. III, p. 146) it is erroneously stated that the first trial by jury in Virginia was in 1650, when ex-Governor Pott was arraigned before the Quarter Court for cattle stealing.
118 Arber, Works of Smith, 12, 18.
119 Virginia Court Book, 1629-1630, August, 1629.
121 Williamsburg, the capital, was on the border of these two countries, being partly in both.
123 Robinson MSS., 56. Hening, I, 146, 146.
124 Hening, II, 63, 64.
When the court of oyer and terminer was established, criminals brought before it were tried by a jury of twelve men from the county in which the crime had been committed, according to the common law of England. In 1784 the practice in both courts was made uniform by a law which provided that twelve men of the vicinage should be summoned whenever an important criminal case was to be tried by either court. The places of those who were challenged or who failed to appear were to be filled with bystanders.  

But this method was found inconvenient and expensive. Besides, it was noticed that most of the sentences given for capital offenses were against those persons who had been convicted of crimes in Great Britain or Ireland before they were brought to Virginia. It was held that no advantage could come to such persons from being tried by a jury of the vicinage, as they were generally not known even in the county in which they lived. It was, therefore, enacted in 1738, that in trials for capital crimes, juries should be made up of bystanders in all cases in which the accused was still serving a term for a crime committed in Great Britain or Ireland.  

Juries of bystanders were also usually employed by the General Court in the determination of civil causes and in the trial of minor criminal offenses. The property qualification for jury service in the General Court and the courts of oyer and terminer was fixed by laws of the eighteenth century at one hundred pounds sterling.  

During the colonial period, the severity of the laws was mitigated by the custom of allowing the benefit of clergy to criminals. According to the ancient practice in England, those who were entitled to this privilege could claim it in all cases of petit treason and in most cases of capital felonies. Before Virginia was settled, English statutes had added certain other offenses to this list of exceptions. This raised the question as to whether the class of criminals thus excepted by Parliament were to be excluded from the benefit of clergy in Virginia. The opinion generally held was that clergy should not be allowed in Virginia in those

---

cases in which it had been taken away by these English statutes; but as doubt might arise on this point, the assembly in 1782 reviewed the question and declared in favor of the commonly accepted view.

For a long time the benefit of clergy was not granted in England to laymen under the rank of peers unless they could read, but in the fifth year of Queen Anne's reign a law was passed by Parliament which did away with this unjust discrimination against laymen. In 1732, the Virginia assembly, following this precedent, extended the benefit of clergy to negroes, Indians, and mulattoes, and ordered that the reading test should thereafter never be required of anyone who should claim this privilege.\(^{129}\)

In the list of crimes which were placed without the benefit of clergy by the statutes were murder, burglary, burning of houses, horse stealing, and manslaughter when committed by a negro, Indian or mulatto. Also if a negro, Indian, or mulatto was convicted of breaking into a house in the daytime and stealing as much as five (afterwards twenty) shillings, he was to be punished without benefit of clergy. Clergy was allowed to a criminal only once during his lifetime.\(^{130}\)

When the court granted the benefit of clergy to an offender, it substituted burning in the hand for the death penalty.\(^{131}\) According to Starke, the old English custom required that the letter "M" be branded in the hand of murderers and "T" in that of other felons. This imprint was burnt into the hand not merely to punish the criminal, but also to put a mark on him which would show that he had received the benefit of clergy and thus keep him from deceiving the court into granting the privilege a second time.\(^{132}\) But in the eighteenth century branding seems to have been regarded as a mere act of form in Virginia, for it could be done with a cold iron.\(^{133}\) When a person was admitted to clergy, he forfeited all his goods, but when he was burnt in the hand, he was reinstated in the possession of his lands. By the act of branding, his credit was

---

\(^{129}\) Hening, IV, 325, 326. Mercer, 54. One case is given in which the General Court of Virginia required reading before allowing clergy. General Court Records, 1670-1676, 63. Blackstone's Commentaries, IV, 295, 299.


also restored, and his disability for acting as a witness was removed. Indians, negroes, and mulattoes, who were given the benefit of clergy, besides being burnt in the hand, could be punished by whipping.

ECCLERISTICAL AND ADIMIRALTY COURTS.

There was one independent ecclesiastical court in the colony, which was held by the Commissary of the Bishop of London, though it was not a court in the true sense of the term. The immoralities of the clergy were the only offenses of which it took cognizance and deprivation of, and suspension from, office were the only punishments which it could impose. From this court appeals could be taken to the Court of Delegates in England. This was a narrower jurisdiction than that exercised by the ecclesiastical courts of England during the colonial period. The other spiritual causes which were cognizable in the English ecclesiastical courts were determined in Virginia by the regular common law courts. In England matrimonial and testamentary causes were tried by the spiritual courts; while in Virginia, they were heard by the regular common law courts. As has already been shown, the General Court and the county courts examined wills and gave certificates thereon, and the governor signed the orders for executing them. No record of absolute divorces has been found and apparently they were not often given during the colonial period. However, divorces a mensa et thoro were granted by both the General Court and the county courts, and a marriage could be annulled ab initio by the General Court if the contracting parties were within "the Levitical degrees prohibited by the laws of England."

125 Mercer, 54.
126 Dinwiddie Papers, I, 384.
According to the Rev. Hugh Jones, the ecclesiastical courts of Virginia were in his day very unpopular with the people and their very name was hateful to them. But it must be borne in mind that Hugh Jones's views were narrow and biased, and it is, therefore, not improbable that he construed the opposition of a certain faction of the clergy to the Commissary's reforms into a general discontent of the people with the practices of the spiritual courts. Hugh Jones, Present State of Virginia, 66.
During the greater part of the seventeenth century, there was no need of a separate court of admiralty in Virginia. In a report sent to England in 1671, Governor Berkeley said that it had been twenty-eight years since a prize had been brought into the colony.\textsuperscript{140} The few maritime causes that came up for a hearing were determined by the regular courts, which could employ juries to assist them in rendering decisions.\textsuperscript{141} This method of trial must have been unfavorable to a strict enforcement of the navigation laws, for both judges and juries would naturally be disinclined to give severe sentences for violations of laws that they considered unjust to the colony. The theory that the courts dealt leniently with smugglers is supported by the fact that the home government at the end of the century felt called upon to establish a court of vice-admiralty in the colony. An order for erecting a court of admiralty in Virginia appears in the instruction given to Lord Howard in 1690.\textsuperscript{142} But this order seems not to have been complied with by him, and it was renewed to Governor Andros in 1697. The council had already expressed its approval of the plan, and next year Andros established a court of vice-admiralty, whose territorial jurisdiction was to embrace Virginia and North Carolina.\textsuperscript{143}

The establishment of the colonial courts of vice-admiralty was, in a sense, an extension of the jurisdiction of the High Court of Admiralty to the colonies.\textsuperscript{144} At first the judge was appointed by the governor, but later the judge was commissioned by the High Court of Admiralty of Great Britain, and the other officers—the advocate, the marshal, and the register—were chosen by the governor.\textsuperscript{145} The court took cognizance of violations of the trade and quarantine laws and other maritime causes, except that it did not have jurisdiction over offenses committed on the King’s ships of war. Appeals from decisions given by this court

\textsuperscript{140} Chalmers, Political Annals, 326.
\textsuperscript{142} Salwine MSS., 1640-1691, 334.
\textsuperscript{143} Salwine MSS., 1691-1697, 292, 315. Ibid., 1705-1714, 323. William and Mary College Quarterly, V, 129.
\textsuperscript{144} Just how long this court continued to hear maritime causes coming up from North Carolina, I am unable to say.
\textsuperscript{145} Blackstone, III, 69.
\textsuperscript{146} Dinwiddie Papers, I, 384. William and Mary College Quarterly, V, 129.
could be made to the High Court of Admiralty in England or to the King in council.\(^{146}\)

The governor took a prominent part in admiralty proceedings. He was vice-admiral of the colony, and had power to appoint masters of vessels and grant them commissions to execute martial law.\(^{147}\) The courts of vice-admiralty were not convened at regular intervals but were called only when there were cases to be tried.\(^{148}\) The court as constituted in 1736 was composed of not less than seven judges, one of whom was always either the governor, or the lieutenant-governor, or a councillor. Merchants, planters, factors and officers of ships were also eligible to a seat on the bench of this court.\(^{149}\)

The methods employed in dealing out punishment for piracy were not uniform. In 1687, the King appointed a special commissioner to supervise the trial of pirates in Virginia.\(^{150}\) Ten years later the English method of inquiring into and punishing offenses committed at sea was adopted in the colony. According to a law enacted in 1699, all piracies, treasons, felonies and other crimes committed on the high seas, or in the bays, harbors or rivers under the jurisdiction of the admiralty were to be tried by a special court of oyer and terminer called for that purpose. The judge of the court of vice-admiralty and "such other substantial persons" as the governor should see fit were to be the judges of this court.\(^{152}\) In the early part of the eighteenth century, commissioners were appointed by the Queen to try pirates in Virginia and North Carolina. According to Webb, whose work was published in 1786, it was the custom in his day for the commissioners appointed by the King, or some of them at least, to sit in the court of vice-admiralty, before which persons charged with piracy were brought for trial.\(^{153}\)


\(^{148}\) Dinwiddie Papers, I, 384. Blackstone, III, 63.


\(^{150}\) Sainsbury MSS., 1686-1698, 85, 144; ibid., 1625-1715, 142.

\(^{151}\) The term admirals was used here to designate the governor, who was vice-admiral of the colony.
