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JUSTICE IN COLONIAL VIRGINIA*

By Oliver Perry Chitwood**

INTRODUCTION

PRELIMINARY STEPS IN THE ORGANIZATION OF THE JUDICIARY
(1607-1619).

When Virginia was settled, English institutions came with the settlers; but these institutions had, in many cases, to undergo changes before they were prepared to enter the new environment into which they were carried by colonization. They had to return to their infancy and in some instances to pass through stages of growth in the new world similar to those through which they had already gone in the old. This second evolution was more rapid than the first; and America in one century reached a stage in institutional progress which it had taken Europe more than a millennium to attain. Only those parts of the old constitution that were suited to the new conditions survived and became a permanent part of the colonial system of government. For the first decade of its existence, Virginia's constitution, therefore, presented few points of similarity to its great prototype, and, in fact, it was not until 1619 that the likeness of the colonial government to that of the mother country became plainly discernible.

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The constitutional history of Virginia begins on April 10, 1606, when King James I. granted to the Virginia Company letters-patent for the establishment of two colonies in America. By this charter, the local government of the southern colony was to be entrusted to a resident council composed of thirteen members.\(^1\) In accordance with the instructions given by the King to the Company, the general council in England (which was to exercise a supervising control over both the southern and northern colonies) appointed seven men to be of the Council of Virginia. Their names were put in a sealed box, which was not opened until April 26, 1607, after their arrival at Cape Henry.\(^2\)

The local council was to govern the colony according to the laws of England, and was not allowed to pass ordinances affecting life or limb. But with the exception of these two restrictions, its powers were almost absolute. In this council were vested all the functions of government, legislative, judicial, and executive. The opinion of the majority was to prevail in all decisions, and the president could cast two votes in case of a tie. The council was a self-perpetuating body; it had power to fill vacancies and remove members for just cause, and also to elect its president, who was to be chosen annually. The crown reserved to itself the power to punish all persons living in the colony who should at any time "rob or spoil, by sea or land, or do any act of unjust and unlawful hostility" to the citizens of friendly states.

But the council, acting in its judicial capacity, was to try all other offenders, except those who should attempt to seduce any of the colonists from their allegiance to the King and the established religion. Such of these as could not be brought to repentance by imprisonment were to be sent to England for trial. By the instructions given by the King, certain offenses, as "tumults, rebellion, conspiracies, mutiny, and seditions in those parts which may be dangerous to the states there, together with murder, manslaughter, incest, rapes, and adulteries," were made punishable by death, and except for manslaughter, the benefit of clergy was not to be allowed for any of them. In every arraignment for these crimes, the accused was to be tried by a jury of twelve men unless he confessed his crime or stood mute, in which case judg-

\(^1\) Stith, History of Virginia, Appendix. 3.
\(^2\) Neill, Virginia Company, 5-6. Brown, Genesis of the United States, 56, 57. Purchas, His Pilgrimes, IV, 1705. The members of the first council were Bartholomew Gosnold, Edward Wingfield, Christopher Newport, John Smith, John Martin, John Ratcliffe, and George Kendall. Why thirteen were not appointed, in accordance with the provisions of the charter, does not appear from the documents.
ment was to be passed by the president and council, or "the major part thereof." For minor breaches of its ordinances, the council, by a majority vote, could, without calling in a jury, inflict such penalties as fines, imprisonment, and reasonable corporal punishment. The judicial proceedings were to be conducted orally; but a record was to be made of all cases decided by the court. Persons convicted of capital charges could be reprieved by the council, but only by the King could they be pardoned.\(^3\)

Thus the government of Virginia began as an oligarchy. Gosnold wielded a great influence in the council, and as long as he lived affairs in the colony moved on with comparative smoothness. But after his death the spirit of strife, no longer controlled by his commanding presence, broke out among the rulers, and Wingfield and Kendall were deposed.\(^4\) The majority of the council were not unmindful of their power to expel offending members from their body, but did not show an equal willingness to comply with that part of their instructions which required them to fill vacancies. Consequently, after the expulsion of Kendall and Wingfield, Newport having returned to England, the number of councillors was reduced to three, Ratcliffe being president.

Inimical relations continued to exist between the councillors, and dissensions never ceased to rise until another form of government had been adopted by the colony. Several other members were added to the council, but, by the spring of 1609, the number had been so reduced by deaths and removals that Smith was left sole councillor.\(^5\)

During the period of Ratcliffe's presidency, judicial decisions were not characterized by the fairness becoming a tribunal of justice. Private spite influenced the councillors to pass unjust sentence against those who had incurred their dislike.\(^6\) However, during Smith's administration, justice seems to have been evenly meted out to all. Offenders were punished, but not undeservedly. Some of the penalties that Smith inflicted for the correction of

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\(^3\) Brown, Genesis of the United States, 67-71, 73, 74; Wingfield, Discourse in Arber, Works of Captain John Smith, p. LXXX.


\(^5\) Arber, Works of Smith, 95, 404, 432, 435, 466.

\(^6\) A blacksmith by the name of Reads was sentenced to death for "giving bad language" to President Ratcliffe and threatening to strike him with some of his tools. Reads bought his pardon by betraying a conspiracy hatched by Kendall, who was tried and shot.

When Smith returned from his Indian captivity, some of his enemies united with Ratcliffe in an attempt to have him put to death. They charged him with complicity in the murder of his two companions, who had been killed by the Indians, and claimed that according to the Mosaic law he was responsible for their death. But Captain Newport arrived from England just at this time and kept them from carrying out their murderous designs. Arber, Works of Smith, 12, 13, 22, 23, 401.
evil-doers were whipping and "laying by the heels." He made threats of hanging, sent some offenders to England, and ordered certain men to slay the treacherous Dutchmen who were plotting against his life with the Powhatan. As a remedy for the sin of swearing, he employed the water cure in a unique way.\(^7\)

A very important change was made in the government of the colony by the second charter, which was granted to the Company in 1609. A governor was appointed by the Company to supersede the local council and was given almost absolute power in the government of the colony.\(^8\) Lord De La Warr, who was chosen for this responsible place, did not go to Virginia until next year; but in the meantime Sir Thomas Gates had been sent over with a commission to act as governor. He was shipwrecked off the coast of the Bermudas and detained on those islands for nine months, and therefore, did not reach Virginia until the spring of 1610, just in time to drop the curtain on the closing scene of the "Starving time." The council, into whose hands the reins of government had fallen on Smith's departure, now surrendered their authority to Gates, the lieutenant-governor. Prior to this time, a few provisions in the King's instructions were the only rules that had been given to the councillors to guide them in the performance of their judicial duties. But Gates now initiated a system of justice by which judicial decisions were to be rendered in accordance with laws made to suit the peculiar conditions that then obtained in the colony. He wrote out certain rules and ordinances by which the settlers were to be governed during his short rule in the colony and posted them in the church at Jamestown. He thus proclaimed the first legal code ever put in practice in English-speaking America.\(^9\)

In June, Gates was superseded by Lord De La Warr, who, on his arrival in Virginia, selected six men to constitute his council. They were to act only as an advisory body, and did not in any way limit his authority. He had power to remove any of them whenever he saw cause for so doing. Just what part the council played in the administration of justice for the next nine years cannot be determined; but it may be safely inferred from Lord De La Warr's commission and other documents, that during

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\(^7\) Every oath that the men uttered during the day was registered, and at night a can of cold water for each was poured down the sleeve of the blasphemer to wash away his sin. Arber, Works of Smith, 128, 158, 159, 201, 475, 480, 481, 483.

\(^8\) Brown, Genesis of the United States, 203, 223, 234, 375-380.

\(^9\) Strachey, A True Repertory of the Wracke and Redemption of Sir Thomas Gates, Knight, printed by Purchas, 1748-1749.

The laws proclaimed by Gates were "approved and exemplified" by Lord De La Warr. They were afterwards enlarged by Sir Thomas Dale by the addition of certain articles taken from the martial code of Holland. In this amended form they were sent to Sir Thomas Smith, the Treasurer of the Company, who approved of them and had them printed for the use of the colony.\footnote{Proceedings of Virginia Company, II, 187. Colonial Records of Va., 74.}

From 1611 until 1619, the colony was governed according to these stern and cruel laws (though the severity of them was afterward toned down considerably), which were known as "Articles, Lawes and Orders, Divine, Politique, Martiall." These laws (which Dale perhaps considered divine in their purpose) made stealing grapes or ears of corn from the public or private gardens an offense punishable by death. Soldiers who should cowardly run away from battle without attempting to fight, and all persons giving to masters of ships commodities to be taken out of the country for their own private use, were to receive the death penalty. Blasphemy, for the second offense, was to be punished by having the offending tongue thrust through with a bodkin. Absence for the third time from any one of the two Sunday church services was a capital crime. Some other punishments mentioned were whipping, cutting off ears, and tying neck and heels together. Sometimes the unfortunate culprit had to lie in this position for forty-eight hours. Any one who violated a certain article of these laws had to lie feet and head together every night for a month.

The colony being under martial law, the captains and lieutenants had the power to punish the soldiers of their companies for certain misdeeds. The officers subordinate to them reported disorders to their superiors, and in their absence punished minor offenses. But the most important cases, both civil and military, were referred to the court martial for trial. In this tribunal sat the captains of the companies, and when any of them were absent, their places in the court were filled by their lieutenants. Offenders who were to be arraigned for trial were kept in the custody of the provost marshal.\footnote{Articles, Lawes, and Orders, Divine, etc., printed in Force's Tracts, Vol. III, 10, 14, 16-18, 21-26, 38, 40, 46-48, 52, 56. Works of John Smith, ed. by Arber, 507, 608.}
It is difficult to say how much severity Dale and his successors put into their execution of these laws. If we are to trust entirely an account of their rule which was given by the party of opposition in Virginia in a memorial sent to England in 1624, we cannot but believe that the rigor of these laws was increased rather than diminished in the execution. According to the statement of the "ancient planters"—as the authors of this document styled themselves—the colonists were kept in a state of "slavery" by their rulers. Cruel and inhuman punishments were inflicted without trial by jury and sometimes for trivial offenses. Among the penalties to which the settlers were subjected, they mentioned hanging, burning, and breaking on the wheel. Some of the colonists were hanged for "stealing to satisfy their hunger." One case is given in which a lawbreaker "had a bodkin thrust through his tongue and was chained to a tree until he perished." Many of the settlers, they said, found the government intolerable; some of them committed suicide, while others hid themselves away in holes dug in the ground in order to escape its horrors.\(^\text{13}\)

However, it would not be just to Dale and the court party in the Company to accept without question this severe indictment brought against their colonial policy by their enemies. Sir Thomas Smith said that some of these laws were promulgated with no intention of being carried out, but only for the purpose of terrorizing the settlers into obedience to the government regulations. Furthermore, the Rev. Alexander Whittaker, one of the ministers who lived in the colony during this period, did not consider that Dale's rule was unjustly harsh. In speaking of it, he said: "I marvel much that any men of honest life should fear the sword of the magistrate which is unsheathed only in their defence."\(^\text{14}\) Another prominent settler, Ralph Hamor, declared that such severity as that practiced by Dale was at that time necessary to keep the colony from ruin.\(^\text{15}\)

We must also not forget that many of the settlers that Dale and his successors had to deal with were a class of men who would not work except when driven to it by the taskmaster. This was proved by the fact that when the pressure on them was somewhat relieved they relapsed into habits of idleness. When Dale first came to Virginia shortly after Lord De La Warr's departure, he found the colonists playing at bowls in the streets of James-

\(^{13}\) Colonial Records of Virginia 74 et seq. Stith, History of Va., 305.
\(^{14}\) Purchas, IV, 1771.
\(^{15}\) Smith's Works (Arber ed.), 508.
town to the utter neglect of their crops. So we see that the ills of the colony were such as could not be remedied except by heroic treatment. But even after discounting fully the ex parte evidence against Dale and his successors and making due allowance for the character of the settlers under their control, we are bound to admit that they erred greatly on the side of severity in subjecting the settlers to such a merciless system of government.

The first twelve years of the colony's history was a period of discipline and suspension of constitutional rights. This abridgement of the personal rights of the colonists was due partly to the character of the settlers and the difficulties which a parent state always encounters in founding distant colonies, and partly to the mistaken policy of the faction controlling the London Company. But by 1619, when Yeardley became governor, the colony was established on so firm a basis that the need for military rule ceased, and the Virginians began to enjoy the rights of other Englishmen. When, however, the old military tyranny gave place to the new regime, after the victory of the Sandys party in the government of the Company, some of the old governmental machinery remained to be employed by Yeardley and his successors. Thus we find that the provost marshal continued for some time to perform a part at least of his old duties, and that the commander of the hundred was, in his judicial capacity, transferred from the court martial to the monthly court.

In 1619, the Virginia constitution began to crystallize into its permanent form. Soon the executive, legislative and judicial functions of government began to be distinguished and assigned to three departments, though the separation in the beginning was only partial and never approached completeness during the entire colonial period. The institutional growth of the colony had not gone far before three channels of administration were found for justice, the assembly, the Quarter Court, and the monthly courts. For a good many years, these were the only courts of justice in Virginia.

The assembly was the supreme court in the colony until about 1682, at which time it was deprived of its authority to try appeals. Its jurisdiction was both original and appellate and extended to both civil and criminal causes. Next to the assembly in the order

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18 Smith's Works, 507.
20 Yeardley was commissioned governor in 1618, but he did not arrive in Virginia until the spring of 1619. Hening, I, 3. Colonial Records of Virginia, 81.
of jurisdiction came the Quarter or General Court, which was composed of the governor and his council. It, too, had jurisdiction in both civil and criminal cases; but, as a rule, the causes of which it took cognizance were more important than those that were usually determined by the lower courts. It was the most important criminal court in Virginia, and for about three decades after appeals to the assembly were discontinued, it was the only regular tribunal that could try freemen charged with offenses punishable by loss of life or member. In the first quarter of the eighteenth century, a regular court of oyer and terminer was established, and from that time until the Revolution it shared with the General Court the authority to try the more important criminal offenses. These were the only superior courts in the colony. The monthly or county court was the most important inferior court, and during the greater part of the seventeenth century it was the only one in Virginia. The first monthly courts were organized as early as 1624; and when the colony was divided into shires, a separate court was appointed for each. In 1643, the name county court was substituted for that of monthly court. In 1662, circuit courts were established, which were to try appeals from the county courts. But these courts were expensive, and for this reason were abolished by an act of assembly passed in December of this same year. Out of the county court there had developed in each county, probably by the end of the seventeenth century, and certainly by the beginning of the eighteenth century (1705), a special court for the examination of criminals charged with grave offenses. In 1692, provision was made for the organization in each county of a special court for the trial of slaves accused of capital crimes. Two courts of Hustings were established in the first half of the eighteenth century, one at Williamsburg in 1722, and the other at Norfolk in 1736. Courts martial were held once a year or oftener in each county, by which militiamen were tried for delinquencies and insubordination at musters. These were the inferior courts. Appeals were allowed from the inferior courts to the General Court and from it to the assembly. Appeals were also allowed to England, even from a very early period. In addition to the courts already mentioned, there was a court of Vice-Admiralty, which was established in 1698, and the Court of the Commissary of the Bishop of London. Strictly speaking, the last two should not be classed either with the superior or inferior courts; but for the sake of convenience, they are treated in the chapter on superior courts.
These classes of courts will now be treated in the order of their jurisdiction.

CHAPTER I.
JUDICIAL POWERS OF THE ASSEMBLY.

On July 30th, 1619, there assembled in the church at Jamestown the first representative legislative body that ever convened in English America. This assembly was composed of two representatives from each of the eleven plantations in the colony, who had been chosen in obedience to an order of Governor Yeardley. The governor, sitting in the midst of his council, who were ranged on his right and left, welcomed the Burgesses, as the deputies were called, in the choir of the church. After the opening prayer, the Burgesses went to the body of the church, and the meeting entered upon its work. The assembly thus organized developed into a bicameral legislature like the English Parliament, the governor and council were the upper house, and the Burgesses, corresponding to the Commons in England, constituted the lower house.2

Though the duties of the assembly were mainly legislative, yet from the beginning until the latter part of the seventeenth century, it also acted as a court of justice, being the highest judicial tribunal in the colony. It was not, however, the intention of the legislature to compete with the courts for an equal share in the administration of justice. Even at their first session, the Burgesses, by referring two cases to the governor and council for trial, showed a disposition to leave the settling of disputes to a tribunal better qualified to decide suits than a parliamentary body.3 They must have realized that they could not weigh evidence so carefully or mete out justice so evenly as a smaller court composed of experienced judges. Besides, as the country developed, the legislative demands on the assembly grew apace, and left it less and less time for other business. Then, too, as the court system grew in efficiency, the need for calling on the legislature to decide causes correspondingly diminished.4

1 The two delegates representing Captain Martin's plantation were not allowed to take their seats because Captain Martin would not surrender the rights of his patent, by which it seems that he was freed from the authority of the Virginia government. This left only twenty representatives, and in a few days one of the deputies died, which reduced the number to nineteen. Colonial Records of Virginia, 9-12, 18, 20 et seq.
2 Hartwell, Blair, and Chilton, 32.
3 Colonial Records of Virginia, 24, 25.
The assembly was the fountain head of justice, and exercised a supervisory control over the courts. By a statute of 1662, the first day of every session of the assembly was to be set aside for hearing indictments made by grand juries and for inquiring into the methods employed by courts and abuses practiced by judges and juries. The legislature never conceded to the judiciary the right to pass upon the constitutionality of any of its laws, but plainly declared by enactments made at different times that no order of court should contravene an act of assembly.

The assembly, like the Parliament of England, had authority to pass bills of attainder against notorious offenders, and this privilege was not abrogated by the King’s order which deprived it of authority to try appeals. But this power was not the source of any great and lasting injustice to the people, as it was very rarely called into use. Only two instances have been found in which bills of attainder were passed. The assembly that convened in February, 1677, immediately after Bacon’s Rebellion, declared Nathaniel Bacon and certain of his followers to be guilty of treason and ordered their goods to be forfeited to the crown. This act of attainder was in large measure reversed in June, 1680, when a bill of pardon covering the offenses of most of those included in the first act was brought over by Governor Culpeper and unanimously agreed to by the assembly.

In 1701 the occasion for another act of attainder arose, the victim this time being, not a political offender, but an outlying slave. A certain negro had for several years been “lying out and lurking in obscure places,” during which time he had been destroying crops, robbing houses and committing other injuries to the people. To put a stop to these annoyances, the assembly voted a sentence of death against him and offered a reward of one thousand pounds to any one who would apprehend or kill him.

The jurisdiction of the assembly was, for some years at least, both original and appellate and extended to both civil and criminal

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5 Hening, Statutes at Large, II, 108.
6 Ibid., I, 204, 447; II, 108.
7 Another act of 1677 prescribed penalties to be inflicted on those that had played a minor part in the rebellion. Some of these were ordered to appear before the governor and council and afterwards before their respective county courts and there to acknowledge their fault with ropes around their necks. The justices of Rappahannock seem to have been unwilling to subject the offenders of their county to such a degradation and allowed certain ones to appear in court with tape-lines, instead of ropes, about their necks. This failure to execute properly the orders of the assembly was deemed an act of contempt too flagrant to be passed over unnoticed, and so the General Court ordered the offending magistrates to appear before the assembly to answer for this high contempt of its authority. Hening, Statutes at Large, II, 370-380, 458-464, 557.
8 Hening, Statutes at Large, III, 210.
cases. From certain statutes enacted in the latter part of the Commonwealth period, we learn that its criminal jurisdiction at that time was concurrent with that of the Quarter Court. Criminal causes which were punishable by loss of life or member were tried in the assembly, or Quarter Court, whichever should first convene after the offender had been apprehended. Just how long criminal causes were determined originally by the assembly does not appear from the records. Its civil jurisdiction was, as early as 1641, limited mainly to appellate cases, as is shown by an order of the Quarter Court made in that year. At that time many petty suits were coming before the legislature to the exclusion of more important business. In order to relieve this state of congestion, the governor and council issued a proclamation declaring that for the future no private causes "should be admitted to the court [assembly] except such as are at this [Quarter] court referred to a fixed day or such as should [shall] concern as a party some member of this grand assembly." While it is probable that the judicial activity of the assembly in civil cases was from this time on generally limited to the determination of causes coming up by appeal from the Quarter Court, still its doors were not completely closed against all other suits. A few years later a law was passed which recognized the right of the county commissioners to refer to the assembly any case in which there was no known law or precedent to guide them in their decisions. Besides, there was to be admitted to the assembly for trial any cause that had had a hearing in any court, provided an act of injustice had been committed by the award of the lower tribunal.

For some years there were no minimum restrictions on appeals with respect to the amount involved, and the most trivial suits could be brought before the Quarter Court or the assembly for trial. But these bodies did not mean to consume the greater part of their time in considering unimportant causes, and so threw very effective barriers against the stream of judicial business which would otherwise have flowed into them. These obstructions took the form of heavy damages to be paid by the appellant when the higher court affirmed the decision of the lower one. By a statute of 1643, which confirmed a law made the previous year, it was ordered that appellants from the Quarter Court to the assembly

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9 Ibid., I, 388, 476.  
10 Robinson MS., 236.  
should pay treble damages when cast in their suits. But these regulations made the way to the Supreme Court too narrow, and it was deemed expedient, some years later, to lighten the burdens borne by appeals to the assembly, and the damages attached to them were reduced to fifty per cent of the original award of the court.\textsuperscript{12}

It was not until near the end of the Commonwealth period that an attempt was made to limit appeals from the Quarter Court to the assembly so as to exclude causes in which small amounts were involved. The heavy damages with which appeals were weighted did not prevent "many litigious suits of inconsiderable values" from leaving the Quarter Court and going into the assembly. In this way other important business was crowded out of the legislature "to the hindrance of publique affairs." The assembly, therefore (1659), deemed it necessary to limit appeals to it from the governor and council to suits in which the amounts in controversy exceeded 2500 pounds of tobacco. But this discrimination against suits of minor importance proved inconvenient, and next year it was enacted that appeals should thereafter be allowed in all cases from the county courts (the court of Northampton excepted) to the Quarter Court and from there to the assembly.\textsuperscript{1a}

The assembly transacted its judicial business through a committee of justice composed of members of both houses of the legislature. Causes that were brought before the assembly for trial were referred to this committee, which investigated them and decided what action should be taken regarding them. The decisions of the committee were not binding until they had been confirmed by the whole assembly. In 1682, three-fourths of those who sat in this joint committee were Burgesses. This, of course, gave the lower house a preponderating influence in the committee and, consequently, a controlling voice in the determination of all causes referred to the assembly for trial. As the Burgesses were chosen by the people, in practice, therefore, it resulted that the highest court of

\textsuperscript{12} The assembly restricted its judicial authority still farther by ordering in 1647 that the decisions of the Quarter Court were to be final for all causes coming up to it by appeal from the county courts. However, this restriction was afterwards set aside. Hening, Statutes at Large, I, 272, 324, 346, 395, 541; II, 66, 68, 296.

\textsuperscript{1a} This exception against Northampton County was afterwards repealed. Hening, Statutes at Large, I, 519, 520, 541, 675; II, 66, 302, 397. Virginia Magazine of History and Biography, VIII, 395.
appeal in the colony was an elective body, directly responsible to
the people.\textsuperscript{14}

The character of the justice meted out by the assembly seems to
have been in keeping with the spirit of the times. Apparently it
was neither milder nor severer than that administered by the
courts. The penalties inflicted for criminal offenses were similar
to those prescribed by the Quarter and county courts. Fines were
imposed and resort was had to the lash. Offenders were also pun-
ished by suspension from office and disqualification for places of
profit or honor. The assembly, like the courts, sometimes tried to
coerce transgressors into repentence by requiring them to ask for-
giveness of the persons injured by them.\textsuperscript{15}

Appeals to the assembly continued to be allowed until about
1682, when they were stopped by order of the King. At that time
a dispute arose in the committee of justice between those of its
members who were Burgesses and those that were councillors, the
Burgesses contending that the councillors having already given
their decisions in the General Court, should not again sit on the
same cases in the committee of the assembly. It was very unfortu-
nate that the legislature was divided at a time when the executive
was anxious to enlarge its authority. Lord Culpepper, who was then
governor of the colony, welcomed this opportunity to enhance his
own power at the expense of the assembly. He, accordingly, report-
ed the disagreement to England and procured an order abolishing
appeals to the assembly.\textsuperscript{16} The records that have been examined
do not state whether this act discontinuing appeals to the assembly
also deprived this body of its power to determine causes originally.
But there is evidence of a negative character which goes to show
that the assembly ceased to be a court of justice after this event.

\textsuperscript{14} By the term "people," is not meant the whole adult male population, but
only the voters. As a rule, the right to vote was allowed to all freemen before 1670
and to freeholders only after that time. But there were two exceptions to this rule:
from 1655 to 1656 only "housekeepers" were allowed to vote, and during Bacon's
rebellion this privilege was allowed to all freemen. Chandler, Hist. of Suffrage in
Va., J. H. U. Studies, XIX, 279-283. Hartwell, Blair, and Chilton, Present State of

\textsuperscript{15} One case is reported (1662) which affords an instance of a disregard on the
part of the assembly of the rules of evidence which would now be considered quite
reprehensible. It seems that one Anne Price had been tried in the county court of
Elizabeth City, and that a new hearing before the assembly had been granted. The
committee of justice in their report on the case declared that there was not sufficent
evidence to warrant a conviction according to law. Nevertheless, the assembly order-
ed the court of Elizabeth City to "rehear the case and according as the presump-
tions of the offence shall appear determine some means of punishment" not exceed-
ing two years of service. The reason given for this decision was that the assembly
considered that an example ought to be made of the accused and feared that an
acquittal might encourage some insolence. Hening, I, 157; II, 15, 33, 156-157, 162,
468-463. Sainsbury MSS., 1660-1676, 196, 197. Ibid., 1677-1679, 106. Randolph
MSS., 252.

\textsuperscript{16} Hartwell, Blair, and Chilton, Present State of Virginia, 25, 26. Sainsbury
MSS., 1679-1682, 161.
With the possible exception of one act of attainder, no mention has been found of the assembly's trying cases after this time. In an account of the judiciary given in Beverley's history of Virginia, published in 1705, all the courts of justice in the colony are alluded to; but nothing is said of the judicial powers of the assembly, which leads us to infer that it had no such powers at that time.17 Indeed, it is not improbable that prior to 1682, the assembly had in practice limited its judicial activity to appellate causes; and in that case, the stoppage of appeals, of course, deprived it entirely of its privilege to act as a court of justice.

The assembly was loath to part with its judicial authority, and in 1691 wrote to the agent of the colony in England urging him to use his endeavors towards gaining the King's consent to a renewal of appeals.18 This attempt to regain a lost privilege was apparently unsuccessful, and from this time on the judicial activity of the assembly seems to have been confined mainly to docking entails and granting permissions to alienate entailed estates, if indeed even these may be termed judicial functions.19

The royal order that discontinued appeals to the assembly eliminated the only element of democracy that had lingered in the judiciary since the Restoration. Henceforth the people were to exercise no influence, except an indirect and moral one, on the decisions of the courts. It is true that prior to this time the people had had no voice (except in the Commonwealth period) either directly or indirectly in the choice of the judges of the county and General courts; but if an act of injustice were committed in the lower courts, it could be corrected by an appeal to the assembly. As the latter was the highest court of appeal in the colony, and could set aside the decisions of the other tribunals, it was natural that the courts would try to conform to the precedents set by the assembly in the determination of the causes brought before them. For this reason, the influence exerted on the judiciary by the assembly, was in all probability out of all proportion to the amount of judicial business transacted by it. Of the two branches of the legislature, the lower house, the representatives of the people, was much stronger numerically than the upper,20 and, as we have already seen, took the leading part in the trial of appeals. Up until 1682, therefore, the Virginia judiciary was aristocratic at

18 Sainsbury MSS., 1640-1691, 397.
20 Hening, I, 288, 289.
the bottom and democratic at the top; but the element of democracy introduced at the top must have found its way, as an influence, into all the branches of the judicial system. But now the only link that connected the judiciary with direct responsibility to the people was severed, and the judiciary was from this time on thoroughly aristocratic in all its branches.

This curtailment of the power of the assembly made it possible for the governor to exert an undue influence on the judges of the General Court in their administration of justice. The General Court, which was composed of the governor and his council, was now the highest judicial authority in the colony. The councillors were appointed by the King, and were in no sense responsible to the people. Besides it was to their interest to render such decisions as would be acceptable to the governor. There were a good many important offices at his disposal, and practically all of these were held by members of the council. These places could easily be distributed in such a way as to reward his friends and punish his enemies. Therefore, dissent from the opinion of the governor might entail self-denial, while conformity with his views might mean reward. But the power of the governor to influence judicial decisions could be curbed so long as appeals were allowed to the assembly. For if the governor by corrupt means should procure an unjust order from the General Court, it could be set aside by the assembly. But this check was removed when the judicial powers of the assembly were destroyed, and as a premium was put upon subservience to the wishes of the governor, it could hardly be expected that the Supreme Court would be entirely free from abuses.

According to an account of Virginia written about the end of the seventeenth century, the General Court fell into abuses immediately after appeals to the assembly were stopped. The authors of this account, Messrs. Hartwell, Blair, and Chilton, say that after appeals to the assembly were discontinued, the governor was usually able to get from the General Court such decisions as he desired, and that the people were, in consequence, sorely oppressed. But this book betrays strong prejudices and decided hostility to the governor, and, therefore, it is quite likely that what is said about the despotism of the governor is an exaggerated statement,

21 It is true that in important cases, appeals to the King were still allowed, but the inconvenience of prosecuting suits in England rendered this privilege of no great practical value.

22 Hartwell, Blair, and Chilton, 22-24.
to say the least. But even if it is a correct representation of conditions as they were at that time, it does not follow that the General Court, from this time on, usually obeyed the dictates of the governor in its administration of justice. While it must be admitted that the stoppage of appeals to the assembly left unchecked a dangerous power in the hands of the governor, yet this power could not avail him much so long as a majority of the councillors were men of integrity and stamina. That the council was frequently, if not generally, composed principally of such men, we have every reason to believe. It cannot be said that their attitude towards the governor was, as a rule, one of tame acquiescence in the policies advocated by him; for we sometimes find them vigorously resisting the measures proposed by him. It may, therefore, be safely inferred that the picture of the General Court that was drawn at the end of the seventeenth century was not a true likeness of this tribunal as it generally appeared in the eighteenth century.

Still, this does not alter the fact that there was always present in the judicial system a latent weakness which might develop into a dangerous abuse whenever the conditions were favorable. If a strong and unprincipled governor should at any time be joined with a weak or dishonest council, the General Court would be liable to develop symptoms of corruption. That the people suffered no greater injustice than they did is to be ascribed to the circumstance that this unfortunate union did not often take place, rather than to be attributed to any safeguards with which the Virginia constitution was provided.

**APPEALS TO ENGLAND.**

The assembly, even prior to 1682, was not the highest court to which the Virginians had access. The right to appeal to England in important cases was one of the privileges enjoyed by them from the earliest period. Problems of justice sometimes arose in the colony for which the home judiciary offered no satisfactory solution, and so from time to time the mother country was called upon to assist in the administration of justice in Virginia. Before the Company was deprived of its governmental rights, it sometimes took part in the administration of justice in the colony. The

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23 Hartwell, Blair, and Chilton, 26. We know, however, from other sources that abuses crept into the General Court about this time, but it does not appear that they were in any way connected with the influence wielded by the governor over the court. See p. 56.

24 See pp. 40, 60-62.
appeals to the Company were usually in the form of complaints made by the colonists against acts of alleged injustice on the part of the governor, or of petitions from persons living in England, who claimed to have been wronged in their possessions in Virginia. The Company could set aside a decision given in Virginia if it were unjust and had not been rendered in accordance with their general instructions. It also sometimes ordered the governor and council to inquire into the alleged grievances of petitioners and to right the wrongs complained of.25

It is hardly safe to make any generalization regarding the methods employed by the Company in the performance of its judicial duties, owing to the fact that not many trials are recorded in its proceedings. It seems, however, from the few cases that are given, that the complaints of petitioners were referred to the Council of the Company for a preliminary hearing or for final determination. One instance is given in which the whole Company, assembled in a great Quarter Court, was called upon to decide an important case which had been brought up by appeal from Virginia. The Council brought in a report favoring a reversal of the decision given in Virginia, which was adopted by the Company almost unanimously.26

The Company had no authority to try criminals that escaped from Virginia and returned to England.27 But if any persons that had been sent from Virginia for criminal offenses or had come away by stealth, should circulate slanderous reports about the colony with the intent to bring it into disrepute, or should show any insolence to the Council, any two of the Council (the treasurer to be one) could have such evil-doers apprehended and brought before them for examination. If it should be proved that they were guilty of these misdemeanors, these Councillors could require them to give security for their good behavior, or could

26 This case is of interest not only because it gives us an insight into the methods employed by the Company in the transaction of its judicial business, but also because it shows what was, at that time, the Company's opinion regarding the constitutionality of the military rule of Dale and Argoll.

The history of the case begins in October, 1618, when a certain settler was sentenced to death in Virginia by court martial. Governor Argoll was persuaded by some of the court not to execute the death sentence, and the accused was released on condition that he would leave the colony never to return, and would never speak disparingly of Lord De La Warr, Argoll, or the plantation. An appeal was taken from this decision to the Council and Company in England. The Council (of the Company) sent to Yeardley (who was then governor of the colony) and the Virginia council this appeal and Argoll's answer, together with a letter from the Company, and ordered them to investigate the case and report their findings back to England. Finally (1620), the whole question was brought before the Company assembled in a Quarter Court. The Company, in giving its decision, declared that a trial by court martial was illegal. Records of Virginia Company, I, 48; II, 29, 30, 39-44, 45.

27 Ibid., II, 169.
send them back to Virginia for trial. The power to punish the colonial governors for malfeasance in office was not one of the privileges granted to the Company. Removal from office was the greatest penalty that it could inflict for the misrule of these governors. In 1621, John Smith favored inserting in a new patent for which the Company was going to ask a clause empowering the Company to punish the Virginia governors for their acts of injustice. This proposal was objected to on the ground that it would cause the new patent to be defeated in Parliament.

In 1624, the charter of the Company was annulled, and Virginia was brought under the authority of the crown. The King, the same year, appointed fifty-five commissioners and turned over to them the general management of the colony. This board was probably too large for the proper supervision of colonial affairs, and in 1634, a smaller one, composed of thirteen members, was entrusted with the governmental control of the English colonies. This committee of thirteen was given power to remove governors, appoint judges, and establish courts, and was instructed to "hear and determine all manner of complaints from the colonies." It was one of several intermediary boards which in turn looked after the affairs of the colonies. The most important of these intermediary bodies was the Board of Trade, which was organized in 1696.

After 1624, appeals to England were made to the King and the Privy Council; but appeals as well as petitions and complaints, were, in the seventeenth century at least, frequently, if not generally, referred to the intermediary boards, which examined them and advised the action that should be taken on them by the King and the Privy Council. Appeals to the Privy Council were allowed in both civil and criminal cases, and complaints were sometimes made by citizens of England against acts of alleged injustice which had not been inquired into by the colonial courts.

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5 Sainsbury MSS., 1631-1637, 85.


It will be noticed that these references are mostly to the seventeenth century records. It was the custom for appeals to England to be tried by a committee of the Privy Council, known as the Lords of Appeals. Whether this committee in the eighteenth century gave its own decisions or only confirmed the decisions that had already been recommended by the intermediary board, I am unable to say; but it seems to have continued the old practice of requiring the opinion of the intermediary board on complaints coming before it from the colonies. Beverley, History of Va., Book IV, p. 21. Calendar Va. State Papers, I, 195.
However, it seems that appeals to the Privy Council were not often allowed in criminal cases, as few of them are mentioned in the documents that have been examined. Beverley, the historian, whose work was published in 1705, said that he was not sure that appeals in criminal cases were ever allowed to the King and the Privy Council; but the records show that persons charged with penal offenses were sometimes sent to England for trial. It was not intended that the intermediary boards should erect themselves into courts of justice for the trial of unimportant causes. They were to exercise only a general supervision over the administration of justice in the colonies. Besides, the best interests of the colonists demanded that disputes arising among themselves should be settled by the home judiciary, as suits could not be prosecuted in England except at considerable expense and inconvenience. But these natural restrictions were not the only limitations on appeals to the King. Before the end of the seventeenth century, appeals in civil cases had become limited to those suits in which the amounts involved exceeded three hundred pounds sterling.

(Continued in next issue)

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35 Chalmers, Political Annals, 356. Dinwiddie Papers, I, 383, 384. In 1682, the limit was one hundred instead of three hundred pounds sterling. Sainsbury MSS., 1679-1682, 161.