"The Capital Laws of Virginia: An Historical Sketch"

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by

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PREFACE

The information presented in this paper on the subject of the capital laws of Virginia is based upon what the author hopes will be regarded as sound, objective historical research. For that part of the paper covering the first two hundred years of Virginia's history, the author has relied entirely upon his own extensive research in the primary and secondary sources relating to the subject. For that part of the paper dealing with the period since 1800, the author wishes to acknowledge his considerable debt to Kenneth M. Murchison and Arthur J. Schwab, whose article "Capital Punishment in Virginia" appears in Volume 58 (January-May 1972) of the Virginia Law Review, pages 97-142, which is highly recommended to the members of this committee.

It is not an easy task to deal objectively with an issue which has historically been as important and as controversial as that of capital punishment. A great deal has been written on the subject of the death penalty over the years. Some of what has been written could best be classified as propaganda, or polemical literature designed to sway legislatures and public opinion to either one side or the other of the issue; for it is just that, a pro or con issue. There is no in between when the question involves the issue of life or death. Much of what has been written has also been written in legalistic language which many people could not appreciate, or in moralistic language about which men of conviction could conscientiously disagree. However, comparatively little has been written which could be classified as comprehensive, objective historical literature. In its own way, this presentation hopes to help fill that void insofar as the subject of the death penalty in Virginia is concerned.

What follows, therefore, is a survey of the crimes which Virginians have thought serious enough to warrant the death penalty, at one time or another, over the past 366 years down to the present. In the limited time available to me, of course, it will only be possible to deal with the subject in a very broad fashion. For the most part I have been able to do little more than discuss the numerous capital laws which have been enacted. I have not been able to write a complete history of the death penalty explaining how effectively or rigidly the law was actually enforced throughout Virginia over the entire period under consideration. In any event, it is hoped that this all too brief re-examination of our past will help us to understand better how we came to be where we are, and that it may help us to understand better where it is that we want to go from here.

In the interest of expediency, I have eliminated the approximately 200 footnotes which accompany the text material. I have, however, appended at the end of the paper a bibliography of the various sources utilized in preparing this paper for presentation.

"The Capital Laws of Virginia: An Historical Sketch"

The first colonists who settled Virginia's shores arrived at Jamestown armed with a royal charter and with Articles, Instructions, and Orders which prescribed the death penalty for a variety of treasonable offenses ("tumults, rebellion, conspiracies, mutiny and seditions") and for murder, manslaughter, incest, rape, and adultery, all of which were declared to be non-clergyable offenses except for manslaughter, for which benefit of clergy was to be allowed. The local authorities were expressly prohibited from enacting or punishing any other capital crimes.

The local Virginia council was given the authority to hear and determine the cases of capital offenders. A jury of twelve "honest and indifferent" men sworn "upon the Evangelists" was to consider the sworn evidence presented before the court. When an offender was convicted, either on his own confession, by standing mute, or by the verdict of the jury, he could be sentences to death without benefit of clergy, except, as previously noted, in manslaughter cases.

When a crime was excluded from clergy, it meant that the death penalty was mandatory. A criminal who was convicted of a crime which was clergyable was punished corporally and/or with imprisonment and was then released, usually after being branded or otherwise disfigured in such a way as to make it possible to identify him should he ever appear in court again. A second conviction on a capital charge, whether clergyable or not, meant the death penalty.

The practical effect of benefit of clergy was that it gave some capital offenders a second chance when they were convicted of offenses which the statutes prescribed as clergyable. One of the tests of the severity of the law, therefore, is not only the number of capital statutes

themselves, but also the number of offenses which were excluded from clergy and thus carried a mandatory death penalty. What is particularly striking about these first capital provisions, of course, is that they provided for the death penalty for far fewer crimes than were being punished with death in England during the same period.

In 1609 a new charter was issued which transformed the government of the colony. No prohibitions concerning capital laws were contained in the charter, save for the admonition that such laws as the local authorities might enact had to be "as near as conveniently may be" consistent with "the laws, statutes, government, and policy" of England.

Over the next few years, a criminal code was devised by Sir Thomas Gates and Sir Thomas Dale, principally, which was designed to promote order and discipline in a colony which had thus far experienced one crisis after another. That code, which is sometimes incorrectly referred to as the "Dale Code," is properly known as the Laws Divine, Moral and Martial. It was a very severe code, and has long been thought to represent one of the darkest chapters in Virginia's history.

More recent historians have, however, concluded that within the context of the times in which it was enacted the code was appropriate, and even essential, if the troubled colony was to survive at all. While the code itself was quite severe, even by seventeenth-century standards, therefore, what is perhaps most important about the code is that any kind of code at all was adopted.

The Laws Divine, Moral and Martial provided for the death penalty in the case of 54 specific civil, religious, or martial offenses. Included among these were a number of offenses which a modern reader--not understanding just how desperate and precarious the situation in the colony was at the

time--would regard as much too trivial to warrant the death penalty. The fact is, however, that the code was apparently never really very rigidly enforced except during the period 1611-1616, and that it was probably intended more to frighten people into obedience than it was to serve as an actual criminal code. In any event, within a historical context, the short-lived code was merely a temporary aberration.

In 1612 a third charter was issued for Virginia. In the years that followed the fortunes of the colony began to take a turn for the better, and it began to appear that the colony might survive after all. A major re-organization of the government took place in 1619, at which time the House of Burgesses was established under Governor George Yeardley. At the same time, the Laws Divine, Moral and Martial were all presumably suspended. Precisely what laws took their place is not, however, known. In fact, not very much at all is known about the legislation enacted in Virginia during the period between 1619 and 1624. With respect to the capital laws of that period in particular, only a few miscellaneous records survive, including one of 1623 vintage which decreed the death penalty for thieves who stole domestic animals and fowl. To be sure, there were other offenses which were also punishable by death during that period.

In 1624, the Virginia Company collapsed, its charter was vacated, and Virginia became a royal province. Thereafter its status and political structure remained the same down to the time of the Revolution. From 1624 on, more information concerning the laws of Virginia is available.

In 1631 there was a major revision of the laws in Virginia. In this first revision, 61 statutes were enacted, not one of which was a capital statute. A later revision, in 1643, contained only two capital laws among a total of 73 statutes. Another revision in 1658 consisted of 131 enactments, and apparently not a single capital statute. And the final

seventeenth-century revision, that of 1662, included only one capital statute among a total of 142 laws enacted, and that one was a re-enactment of a previous law.

In this period (until 1705) it was customary for each new session of the legislature to repeal all former laws. If a law was to be retained it was merely re-enacted in exactly the same words, or as amended. Some laws were later enacted for a specific number of years, usually not more than three or four. Perpetual legislation was, therefore, the exception, and not the rule.

That is an interesting fact as it relates to the capital laws since there were obviously more capital statutes in force than the revisions previously cited would serve to indicate. The question is, however, what laws were they? On the basis of the evidence, one must conclude that they were the capital laws of England, which technically included all felonies. In other words, the criminal laws of England were in force in Virginia, at least to the extent that they were known in Virginia and enforced by the Virginia courts, and were only occasionally supplemented by special Virginia enactments of a local character. What is most important about all this is, however, the fact that the Virginians obviously never adopted the entire English criminal law as their own, since many crimes which were capital in England were never prosecuted as such in Virginia.

The extent to which English laws were adopted and enforced rested to a large degree upon the Virginians' premise that the body of English law which existed as of 1607 was adopted--at least insofar as they knew and understood it--but that laws enacted by Parliament after 1607 applied in Virginia only if the statute specifically said so, or if the Virginians themselves specifically adopted the law as their own. That, of course, explains how only some of the crimes prosecuted as capital by the courts appear among the statutes enacted locally. Precisely when this constitutional

theory was developed concerning the applicability of English law is not entirely clear, but it was certainly the prevailing theory before the end of the seventeenth century.

In order to determine just how many English capital crimes were punished as such in Virginia, one would have to examine the extent court records, the most important of which would be those of the General Court. The governor and members of the council made up the General Court, which met in the capitol, and which exercised jurisdiction over all capital cases until 1692. After 1692, slaves accused of capital crimes were tried in county courts of Oyer and Terminer, and in the early 1700's a court of Oyer and Terminer was established in the capitol to relieve the criminal case load of the General Court. After the Revolution, a system of District Courts was created and they assumed the jurisdiction over capital cases which had previously been exercised by the General Court.

Unfortunately, however, the records of the General Court which survive are only fragmentary. Most of the records of the court were destroyed in Richmond in 1865. Those records which remain cover only the periods 1624-29, 1670-76, 1699-1701, 1736-39, and 1766-74. Consequently, we are not able to determine with any accuracy at all the conviction rate among capital offenders tried in the General Court.

As for the records of the county courts, those of the seventeenth century are generally in such poor condition that they are useless. The county court records for the eighteenth century are both more numerous and in better condition, generally. They indicate the crimes for which free persons were bound over to the General Court for trial, but do not tell us how the cases were ultimately disposed of. The records of the county courts of Oyer and Terminer do tell us, however, what became of the slaves tried for capital offenses after 1692, since trial at that level constituted the final trial for the slave. In no criminal case was there such a thing

as an appeal; and in fact no record of any appeal in a criminal case appears to exist.

A SUMMARY OF THE CAPITAL LAWS OF VIRGINIA 1606-1796

Adultery

Adultery was made a non-clergyable capital offense in Virginia under the first charter, and was also declared a capital offense under the Laws Divine, Moral and Martial. It would appear, however, that few people were ever prosecuted for fornication or adultery in Virginia. As Arthur P. Scott has said: "There is no evidence that King James's original instruction making adultery a capital offense, without benefit of clergy, was ever taken literally by the colonists, or that the death penalty threatened by Dale's code for this offense was ever inflicted."

In the eighteenth century, adultery was clearly not a capital crime for free whites; however, the law was vague where slaves and servants were concerned. The law was that adultery was not capital for "any person, not being a Servant, or Slave." The implication of that language is that adultery could be a capital offense for slaves and servants if for no one else in the eighteenth century.

Arson

Arson, or burning, does not appear to have been a crime of much concern in the seventeenth century. It was, however, a common law felony. As the colony developed and people acquired more property, arson became a more serious concern. In 1714, the arson of several types of buildings, in addition to houses, was made a capital offense without benefit of clergy. Again, in 1730, the arson of virtually any type of building, by night or day, was made a capital offense without benefit of clergy. In 1789, arson at common law was expressly excluded from clergy, as was the specific arson of courthouses, county jails or the prison, or the offices of court clerks. Under the 1789 law, accessories before the acts of arson stipulated were also excluded from clergy.

The number of persons tried for arson in Virginia does not appear to have been very great, and "on the whole . . . arson does not seem to have been a common crime." Some slaves were tried for arson, "and some were hanged, but not very many." As Hugh F. Rankin has said: "Arson, although it was greatly feared and often suspected, was seldom proved and punished. And, when fitted into the general pattern of crime in colonial Virginia, it occurred infrequently."

Bigamy

Bigamy, or polygamy as it was sometimes called, was a clergyable felony under the English statute of 1 James I, C. 11. According to Scott, the General Assembly adopted that statute in 1658 but this writer has found no evidence to support that claim. In any event, Scott maintains that no record of any convictions appears to exist, and Rankin says that bigamy was "never a great problem."

Richard Starke explains that bigamy and polygamy were not actually

the same thing, but were considered as crimes in one and the same sense. He found no punishment for it except in the ecclesiastical courts, unless it was under 1 James I, C. 11. Writing in 1774, Starke thought that that English statute applied in Virginia, but he was not sure.

In 1788, the General Assembly moved to dispel all doubts on the issue by declaring bigamy to be a capital felony. It was still apparently within clergy then, as it had been under the statute of James I.

Blasphemy

Blasphemy was made a capital offense under the Laws Divine, Moral and Martial. Whether it was a capital offense after 1619, however, appears extremely doubtful. In any event, it certainly was no longer capital after 1699. Prosecutions of any kind for blasphemy seem to have been rare in colonial Virginia. The crime was obviously one committed with some frequency, when construed in its broadest sense; however, it was also just as obviously a crime which Virginia judges had decided by a very early date not to prosecute as a capital offense. By 1699, at the very latest, the General Assembly had come to agree with the justices.

Boat-Stealing

Boat-stealing, which may only have represented a particular kind of larceny or theft, or a kind of piracy in the days before the piracy laws were clearly defined in the late seventeenth century, was made a felony by the first Assembly, at a time when the Virginia colonists were heavily dependent upon only a few boats. Under certain circumstances the loss of a boat could have meant a threat to the survival of the isolated colonists. Piracy was essentially distinct form an act of boat-stealing, of course, in that piracy was a crime committed at sea; whereas, boat-stealing was initially a land crime. "Theoretically," however, the act of the first Assembly "never had the force of law." Later Assemblies failed to make it a capital offense to steal boats from the colony, except perhaps within the provisions of the larceny laws.

Burglary

Burglary was one of a number of kindred crimes which were distinguishable more for the manner in which they were committed than for the value of the goods which were stolen as a result of the crime. Burglary, as opposed to larceny or robbery, for example, has historically been considered as a night-time crime, involving the entry of a dwelling at night to commit a felony. Under the statute of 18 Elizabeth I, C. 6, burglary was a capital offense without benefit of clergy for both principals and accessories before the fact. According to Scott, moreover, that was the basic law on the subject in Virginia, from a very early date, as the Virginia courts saw it, "and the penalties of the English law were regularly inflicted."

In 1732, the General Assembly expressly excluded slaves from benefit of clergy for felonious house-breaking at night. The same law was re-enacted in 1748. While George Webb defined burglary as a night crime in 1736, however, Starke maintained in 1774 that any house breaking was burglary, whether by

day or by night. He seems to have believed that night-time burglary was merely an aggravated form of the same offense of burglary. To complicate matters a bit further, Starke maintained that a forced entry had to be accompanied by felonious intent to constitute burglary, rather than mere trespass; that burglary was also larceny; and, that any forced entry at night was automatically burglary.

While the statute of 18 Elizabeth I, C. 6, excluded accessories before burglary from clergy, moreover, Starke maintained, in 1774, that accessories were to be allowed clergy in Virginia. In 1789, however, the General Assembly excluded both principals and accessories before the fact from clergy.

Burglary, a common crime in colonial Virginia, "seemed to reach its peak in the 1760's." The county court records examined for the purpose of this study reveal, in fact, that burglary (as burglary) was the third most common capital crime committed in colonial Virginia, on the basis of the number of whites bound over and blacks convicted. It was exceeded in frequency only by "unspecified felonies," a number of which may have been burglaries themselves, and murder. Moreover, if one adds to the number of burglars convicted or bound over, as the case may be, those convicted or bound over for breaking into storehouses, shops, warehouses, and smokehouses, and those convicted or bound over for house-breaking, the number of those convicted or bound over on all charges soars, making that type of crime by far and away the most frequently committed and rigorously prosecuted in colonial Virginia.

Counterfeiting

Counterfeiting was a crime which had many different facets and consequently made for many different crimes and punishments. In the first place, counterfeiting the coin of the realm was an act of high treason. Under Queen Elizabeth moreover, the counterfeiting of "other legally current coin" was also made treason. Secondly, counterfeiting was often linked closely to various forgery crimes, and vice-versa. And thirdly, several acts against several forms of currency, each constituting a separate act, might be construed as counterfeiting on the part of principals. Then, when one adds the offenses for which utterers, accessories, aiders, and abettors might be prosecuted, the scope of the offense tends to broaden considerably.

~ For our purposes here, counterfeiting will be considered as a crime which related principally to coin, currency, and commercial paper. Related crimes of counterfeiting or forgery of other papers will be considered under the heading of forgery. Counterfeiting, as defined here, will be discussed here rather than under the heading of high treason.

The Virginia General Assembly first made counterfeiting a capital crime in 1645, when it passed an act designed to protect certain copper coins which were authorized at that time. No real concern over the issue appears to have developed, however, until the eighteenth century, and then, in 1710 and 1727, according to Scott, the Virginia General Assembly adopted the Elizabethan statute on the subject.

As concern for the security of the financial solvency of the colony mounted in the eighteenth century, along with concern for the security of private property, a great number of counterfeiting offenses were created. Up to about 1750, when paper money came to replace coin to some extent, counterfeiting was a rather difficult crime to detect, especially since it involved foreign coin (mostly Spanish) more than English coin (which was scarce) or local coin. In 1757, however, the Assembly made the counterfeiting of Virginia treasury notes a capital offense without benefit of clergy. Substantially the same law was re-enacted in 1762 and 1769. Those who uttered such counterfeit treasury notes were subject to the same penalty.

Between 1776 and 1783, the counterfeiting of several types of currency was made a capital offense without benefit of clergy for principals, aiders, abettors, and utterers alike. The several types of financial paper or currency which were protected were: (a) bills of credit; (b) any paper money of the United Colonies; (c) loan certificates; (d) treasury notes; (e) base coin. In 1778, the Assembly made the mere possession of plates and other items necessary for counterfeiting a capital offense without benefit of clergy.

In 1783, counterfeiting the pay certificates of soldiers was made a capital offense, and in 1784 the Assembly made the counterfeiting, forgery, and uttering of certificates or warrants issued by the U.S. Congress or the General Assembly "for the payment of money" a capital offense without benefit of clergy, for aiders and abettors as well as principals. And finally, in 1792, the Assembly made the counterfeiting and uttering of counterfeit Virginia bank notes or checks a capital offense without benefit of clergy. On the whole, however, such laws do not appear to have been very successful in halting counterfeiting offenses, and many counterfeiters appear to have gone unpunished. As Scott has said: "Few laws ever passed by the Assembly came farther from accomplishing their purpose than these acts designed to prevent and punish counterfeiting."

From all indications, the evidence would seem to suggest that Virginians of the colonial period did not regard the mere threat of capital punishment as much of a deterrent to counterfeiting. Indeed, most counterfeiters appear to have regarded it as a pretty empty threat, and seem to have been willing to risk their necks on the odds that they would never be apprehended and prosecuted anyway.

Cursing

Cursing, taking God's name in vain, or swearing "unlawful oaths" was made a capital offense, for the third offense, under the Laws Divine, Moral and Martial. The law does not appear to have survived beyond 1619.

Desertion

Under the Laws Divine, Moral and Martial "treacherous flight" or desertion from the colony was punishable by death. This crime, which appears to have been a purely civil crime and distinct from the provisions of the law martial, was probably made a capital offense because it was usually linked to some other crime, such as boat-stealing or the theft of weapons or provisions. The law appears to have been suspended after 1619, as a civil or non-military offense.

Embezzlement and Fraud

Embezzlement and fraud represented a particular kind of larceny because it was usually a crime of larceny committed by persons who held positions of trust in the colony. Under the Laws Divine, Moral and Martial, for example, it was a capital offense for anyone in charge of the storehouse or provisions to steal goods in his charge or to render false accounts concerning such goods. With the passage of tobacco inspection laws in the eighteenth century, the same sort of law was re-written to apply to tobacco inspectors. In 1783, for example, and again in 1792, it was made a capital offense without benefit of clergy for an inspector to give receipts for tobacco he had not received, or for him to give more than one receipt for tobacco he had received. These laws were just a few of the many enacted to protect the colony's most important commodity. Additional offenses involving tobacco will be discussed under the heading of tobacco offenses.

Forgery

Forgery, which was like and akin to counterfeiting in many respects, was apparently an often-committed crime in colonial Virginia. It was certainly one that was much legislated against. Again like counterfeiting, however, forgery appears to have been more an eighteenth-century crime than a seventeenth-century crime.

The forgery of other than commercial paper (the issue of commercial paper, currency, and coin having been discussed under counterfeiting) first appears to have become a subject of legislative concern in Virginia only after about 1730, when the forgery of tobacco certificates was made a felony. In 1765, the same crime was excluded from clergy. The crime of forging and uttering forged (altered, erased) tobacco inspection certificates or stamps continued to be a capital offense without benefit of clergy to beyond 1783. In 1783, procuring, aiding, or abetting in the forgery of tobacco certificates or stamps was made a non-clergyable capital offense too, as was the possession of altered stamps or receipt certificates. Anyone who had come into the possession of forged certificates was obliged to turn them in to two justices of the peace within a matter of days, or else run the risk of being prosecuted as a forger. The uttering of forged tobacco certificates in payment of exchange was likewise made a capital offense without benefit of clergy in 1783.

In 1780, during the Revolutionary War, the Assembly made it a capital offense without benefit of clergy for anyone to forge, counterfeit, or utter receipts for goods and supplies which had been commandeered by the army. The same punishment was meted out to aiders and abettors. In 1782, the forgery or counterfeiting of inspection stamps for flour and hemp, and the uttering of forged certificates for those commodities, were made capital offenses without benefit of clergy. And finally, in 1789, the Assembly made the forgery of a number of legal papers a capital offense without benefit of clergy. The legal papers protected included promissory notes, wills, deeds, and bills of exchange, among others. Aiders and abettors were subject to the same punishment.

High Treason

The basic English law punishing high treason was the statute of 25 Edward III, C. 2, which also seems to have been the basic law in Virginia on that subject. Under the 1606 charter, of course, treason ("tumults, rebellion,

conspiracies, mutiny and seditions") was made a non-clergyable capital offense. The Laws Divine, Moral and Martial made speaking treason against the king or the authorities and "conspiracy" against the governor and public officials treason, and punishable by death. Accessories to treason against the governor and public officials were likewise to be put to death.

From the very first days of the colonial experiment, a number of individual conspirators and traitors were put to death in Virginia. The period from 1607 to about 1619 was one of considerable factionalism, individualism, and turmoil, and during that period the law dealt very severely with persons who precipitated or participated in riots, tumults, conspiracies, and treason.

In 1649, the General Assembly declared it to be high treason to deny that Charles II was King of England, but as the political season changed so did the law. In 1658 it was made high treason to oppose the Protector, Oliver Cromwell.

The first group conspiracy of any significant proportion to threaten the internal security of the colony arose in connection with the so-called "Birkenhead Plot" in 1663, but it really did not amount to much. The conspiracy in that case, which involved some indentured servants who were former Cromwellian soldiers, never really got off the ground; however, four persons were actually tried and executed. Next came the trials arising out of Nathaniel Bacon's Rebellion, in 1676, as a result of which 32 persons were executed and/or attainted following their conviction.

In 1684, the organized destruction of tobacco plants was made treason. Before the actual passage of that bill, at least two persons were hanged for their part in the Tobacco Rebellion of 1682. What may at first appear to involve a case of premature execution and ex post facto legislation in this case was not; since the conspiracy and riotous behavior of the individuals involved was undoubtedly punishable capitally, as treason, in any case. The act of 1684 really only distinguished one particular kind of treason from a number of other kinds of treason.

In 1710, two slaves were sentenced to death for plotting an insurrection, and in 1722 still another slave conspiracy was uncovered. While the latter case did not result in any convictions, it did lead to the passage of a new and more stringent law for the control of slaves, in 1723.

After 1722, there do not appear to have been anymore treason trials in Virginia until the era of the American Revolution. In 1776, moreover, the Virginia General Assembly defined treason, a capital offense without benefit of clergy, as being constituted of the following acts: (a) waging overt war against the state from within; (b) adhering to the enemy within the state; and (c) giving aid and comfort to the enemy either inside or outside the state. The law appears to have been rather narrowly drawn and interpreted.

Two other treason crimes were also punishable during the colonial period in Virginia: counterfeiting the King's money, which was high treason, but which has been discussed here under the heading of counterfeiting; and, petit or petty treason, which will be discussed under that heading. Sedition does not appear to have been a capital offense in Virginia after 1619, and with the exception of the laws relating to slaves and the laws concerning Bacon's Rebellion and the destruction of tobacco plants no other laws appear to have been enacted in colonial Virginia for the punishment of riots, routs, and other "unlawful" assemblies. On the whole, in fact, according to Scott, the

laws which the Virginia General Assembly enacted on the subject of high treason were "relatively unimportant."

The punishment for treason was just as grim in Virginia as it was in England. The actual procedure of execution involved the following steps: (1) drawing the traitor from the prison to the gallows, on a "hurdle," backward, and with his head "downward"; (2) hanging him by the neck; (3) cutting him down alive; (4) cutting off his "Privy Members"; (5) removing his entrails and burning them before him; (6) cutting off his head; (7) quartering his body; and, (8) hanging and displaying his various parts. In addition, the traitor was to suffer attainder and the loss of all his lands, goods, and chattels, and his blood was to be declared corrupted. Women who were convicted of treason (which in most cases meant petty treason) fared a little better under the law. They were simply to be drawn to the gallows and burned, usually alive.

It is very doubtful that such extreme punishments as the law on treason provided for were ever carried out; however, it is known that on a few occasions some blacks were beheaded and quartered, after which some of their parts were put on display. That was standard procedure in England too, of course. The rationale for such grim and gory punishments was that the traitor was a criminal guilty of many crimes, and consequently had to suffer "many deaths" for many crimes. An ignominious death and the public display of a traitor's body or various parts was also designed to have a deterrent effect upon others.

During the era of the American Revolution, a number of people were executed for treason against the Commonwealth. What is perhaps most interesting about that, however, is that more were not executed during that time of divided loyalties and stress. Indeed, in that respect the Virginia courts appear to have exercised a good deal of restraint.

Hog-Stealing

Hog-stealing was first proclaimed to be a capital offense in 1623, when Governor Wyatt made the theft of several kinds of animals and birds valued at 12 shillings or more a felony punishable by death. Technically speaking, of course, in the years that followed, the theft of any animal could constitute a capital offense under the larceny laws; however, only two animals were the subject of capital legislation in those later years, the hog and the horse.

The hog was "something of an institution" in colonial Virginia, and as such was the subject of special, protective legislation. Moreover, since hogs were allowed to run free in both town and country throughout most of the colonial period, it was easy for pig-nappers to make off with them. In 1643, it was made a capital offense for anyone to kill a tame hog which was not his own. In 1647, however, the penalty was reduced, and hog-stealing was made a non-capital offense for whites. Apparently, the courts simply did not think that the offense of hog-stealing was serious enough to warrant the death penalty. As a result, there were few prosecutions, and the penalty was reduced out of necessity. Slaves still appear to have been prosecuted as capita offenders for stealing hogs, however, until 1699. In 1699, hog-stealing was made less than a felony for slaves.

In 1705, hog-stealing was again made a capital offense for both whites and blacks, for the third offense. Essentially the same law was re-

enacted in 1748 and 1792. In 1796, of course, the death penalty was abolished for the third offense. In any event, capital prosecutions for the third offense of hog-stealing seem to have been rather infrequent, since, with the exception of slaves, few people seem to have ever committed the crime a third time.

Horse-Stealing

Horse-stealing was first proclaimed to be a capital offense in 1623, by Governor Wyatt. It does not appear to have been a very serious problem in the seventeenth century, however, and while the English statutes which made horse-stealing a capital offense without benefit of clergy for both principals and accessories were applied in Virginia until the 1740's, there were not many prosecutions on that charge in the seventeenth century.

In the eighteenth century, both horse-stealing and prosecutions for it increased. In 1742, 1744, and 1748, the General Assembly made stealing horses, concealing or harboring horse-thieves, and buying or receiving stolen horses knowingly, capital offenses for both principals and accessories. The crime of horse-stealing was excluded form clergy in 1789. As a result of the legislation of the eighteenth century, there were many executions for horse-stealing, and few pardons. Between 1736 and 1739, there were four trials and three convictions; in 1751, one person was tried and acquitted; in 1755, two horse-thieves were outlawed and two were sentenced to die; and, between 1766 and 1774, 32 persons were tried and 23 were condemned to death.

If horse-stealing was a "typical frontier crime," it was also the sort of crime which represented the work of gangs of thieves, and that no doubt made the crime all the more serious. Indeed, nothing more need be said of the seriousness with which this particular offense was viewed by colonial Virginians than to say that horse-stealing had more to do with delaying criminal law reforms in Virginia than any other single crime.

Incest

Incest was first declared to be a capital offense in Virginia under the 1606 charter. It was likewise made a capital crime under the Laws Divine, Moral and Martial. After 1619, however, incest was apparently no longer a capital offense, and no record of any prosecutions for incest appears to exist.

Indian Offenses (by whites)

Throughout the seventeenth century a number of Indian related crimes on the part of whites were made capital offenses. In the main, such laws appear to have been designed to maintain the often precarious and delicate Indian-white relationship in the colony. Fewer such laws were enacted in the eighteenth century.

Under the Laws Divine, Moral and Martial, three separate Indian-related offenses were made capital crimes, including: (1) trading illegally with the Indians; (2) stealing from the Indians "by force or violence"; (3) running away to the Indians. In 1643, servants who ran away to the Indians and left guns, powder, and ammunition among them were declared to be capital offenders.

As a result of the Indian treaty which the Virginians negotiated in 1646, following the Indian uprising of 1644, several more offenses against Indians were made capital. Whites who invaded reserved Indian territory without permission from the chief to perform various temporary tasks there were to be adjudged as capital offenders. In this particular case, the Indian territory in question was principally that area north of the York River. Though the boundaries in question might change, however, the legal principle involved would remain essentially the same.

The provisions of the treaty of 1646 also made it a capital offense without benefit of clergy to harbor or conceal Indians in areas of white habitation from which they had been excluded by the treaty. And lastly, the treaty made it a capital offense for whites to kill Indian messengers (who were supposed to wear badges of identification) who were enroute through white territory to the governor or "Fort Royal."

In 1676, the General Assembly made the treading of arms and ammunition to the Indians a capital offense without benefit of clergy, whether such trade was direct or indirect. After 1676, no specific capital legislation on this subject was enacted in Virginia; however, it seems perfectly reasonable to assume that the prohibition concerning the trading of arms and munitions to the Indians (save for the tributary Indians who were armed or supplied by the colonial government) continued in effect despite the fact that the prohibitory statute does not appear to have been re-enacted after 1676.

Killing Cattle

Under the Laws Divine, Moral and Martial, which were in force between 1609 and 1619, a period during part of which the colony flirted with starvation and disaster, the killing of commonly owned livestock without permission of the authorities was made a capital offense. The law served two purposes. First of all, it was designed to guard against the indiscriminate depletion of food resources. Secondly, it was designed to protect what was clearly communal property against the self-serving designs of enterprising individualists. After 1619, the killing of cattle was apparently construed as being essentially the same as stealing cattle, and was therefore encompassed in the larceny statutes. For example, when Governor Wyatt declared the theft of various kinds of animals valued at more than 12 pence to be a capital offense, in 1623, it undoubtedly made little or no difference whether or not such animals were merely stolen or stolen and killed. In either case the offender could be punished capitally under the larceny laws.

Larceny

Larceny at common law was basically of two sorts. The theft of goods valued at up to 12 pence was petty larceny; the theft of goods valued at 12 pence or more was grand larceny. Grand larceny was a capital offense under English law, but was within clergy. Petty larceny was also considered a felony, inasmuch as conviction meant forfeiture, but it was not a capital offense.

Burglary, which was a particular form of larceny has already been discussed. Robbery, which was still another particular kind of larceny,

will be discussed under the heading of robbery. Any such attempt to categorically segregate the crimes of larceny, robbery, and burglary, is of course somewhat risky, in view of the fact that all of the offenses in those three categories were quite similar or were related to one another; however, with that word of caution to the reader, the writer will nevertheless attempt to delineate the legal distinctions which characterized those various categories of larceny as carefully as possible. All that the reader needs to keep in mind for our purposes here is that all burglaries and robberies were also larcenies, but that all larcenies were not necessarily either burglaries or robberies.

Originally, under English law, breaking into a house by day and stealing goods valued at less than five shillings, or breaking and entering a building other than a house and stealing from therein, were considered to be simple or petty acts of larceny. Under the statute of 39 Elizabeth I, C. 15, however, the breaking of a house by day and the theft of goods valued at more than five shillings from therein was made a capital offense without benefit of clergy. The Virginia courts appear to have applied these same definitions from a very early date, and seem to have inflicted the penalties which the English law provided for on a regular basis.

Just as many kinds of larceny came to be excluded from benefit of clergy under English law, the same trend was also evident in Virginia, especially as the interest of the colonists in the accumulation and protection of personal property heightened. The result was that over a period of years the original definitions of petty and grand larceny were modified a good deal, and a considerable number of larcenies were made capital offenses.

The Laws Divine, Moral and Martial made several larceny offenses capital, including: (1) the theft of virtually any goods from the storehouse or from a neighbor; (2) larceny or theft from a dead man; and (3) the larceny of corn from private or public gardens, the larceny of grapes from a vineyard, and the larceny of flowers from gardens, among other things. The harshness with which some of these patently petty thefts were punished serves as stark evidence of the fact that in the early days in Virginia theft was simply not to be tolerated. Obviously, the intent of the law was to discourage the thought more than it was to punish the dead.

In 1623, Governor Wyatt proclaimed the theft of livestock and birds valued at 12 pence or more to be a capital offense. The law protected a wide variety of animals and fowl, some of which, according to Wyatt, were valued at more in Virginia than they would have been in England due to their scarcity in the colony. After Governor Wyatt's tenure, however, only the hog and the horse were specifically protected by laws which made their theft capital. As for other cattle and livestock, including sheep, their theft remained a matter of larceny, of course, and was punished capitally as larceny, rather than as a specific act of cattle theft.

Scott says that "except as it might constitute a second offense of grand larceny, the stealing of sheep or cattle was not capital in Virginia." But of course the first offense of grand larceny was still a capital offense, even though it was within clergy, and even though that meant that cattle thieves were not generally executed for their first offense.

No further legislation on the subject of larceny was enacted in Virginia until 1730, by which time most crimes of theft were being blamed on convict servants who had been transported to the colony from Britain and Ireland. In 1730, the General Assembly enacted part of the statute of 3 William and Mary, C. 9, and made larceny from warehouses and storehouses a capital offense without benefit of clergy, for aiders and abettors as well as principals, if the goods stolen were valued at 20 shillings or more. The Virginia law was ostensibly more liberal than the English law on the same subject, since the English statute made the theft of goods valued at five shillings or more capital; however, English money was worth more (but probably not four times as much) than Virginia money at that time.

In 1732, slaves were denied benefit of clergy if they broke into a house by day and stole goods valued at five shillings or more. Substantially the same law was re-enacted in 1748 but at that time the 20 shilling limit on the value of the goods stolen was restored. No new legislation on the subject of larceny was then enacted until after the Revolution.

In 1789, the felonious theft of goods and chattels from a church, chapel, or church meetinghouse was excluded from benefit of clergy. Also excluded from clergy in 1789 was the crime of breaking into a house by day and stealing goods from therein while putting anyone within the house in fear. Accessories before the fact in the latter instance were also excluded from benefit of clergy in 1789.

On the whole, larceny crimes in Virginia were committed more frequently in the eighteenth century than they were in the seventeenth, but of course the population was also increasing during that period. Whether or not the incidence of such crimes "was out of proportion to the larger population" in the eighteenth century, however, is something that would be very difficult to determine. All that can be said for sure is that crimes of larceny, and related crimes of burglary and robbery, were often committed in colonial Virginia, especially in the eighteenth century.

Manslaughter

Manslaughter, the crime of homicide "without malice," involved killing a person unlawfully but without premeditation or intent to do so, and was a common law felony within clergy. The 1606 charter expressly declared manslaughter to be a capital offense within benefit of clergy.

In 1669 the Virginia General Assembly passed a law which exempted a slave owner from capital prosecution if he happened to kill a slave in the process of correcting him. The law was testimony to the expanding slave culture of Virginia, and was predicated upon the assumption that a man would not destroy one of his own slaves, since a slave represented a financial investment, unless by accident. The law was essentially the same in 1705. That is not to say, however, that a master could not be found guilty of murdering a slave, because he could, But a conviction for the mere manslaughter of a slave carried no penalty at all as of 1723. The reason for that is apparent when one recalls that 1723 was a year in which the laws for the control of slaves were made more stringent, in the aftermath of the slave conspiracies of 1710 and 1722. A white man who was convicted of the manslaughter of another white man, however, was still guilty of a clergyable felony.

In 1748, the Assembly reiterated that a master who killed his slave while correcting him was guilty only of manslaughter. In 1788, however, the law was changed and no longer assumed that a master who killed his slave was only to be tried for manslaughter. The implication of the 1788 law was that a master could be tried for the graver offense of murder, and that the facts would speak for themselves. The significance of this lies in the fact that murder was a non-clergyable capital offense. Exempting slave owners from trial on that charge, assuring them that the worst crime they could be charged with was clergyable manslaughter, obviously strengthened the hands of slave owners in dealing with their slaves. The law of 1788, on the other hand, was designed to discourage whites from brutalizing their slaves, by threatening them with a possible trial for murder if they were excessively zealous in correcting their slaves, or the slaves of others.

Slaves, for their part, did not fare as well under the law. In 1732, slaves were excluded from clergy for the crime of manslaughter. The same exclusion provision was re-enacted in 1748. Apparently, the law as it applied to slaves was designed to serve two purposes. First, it was designed to protect whites from blacks, by making it clear to blacks that the law did not recognize the possibility that slaves might kill whites unintentionally. Secondly, the law was designed to discourage slaves from killing other slaves, who were someone's property, in fights or brawls.

The county court records examined for the purpose of this study do not reveal a single case of a white man being bound over or a slave being convicted on a capital charge of manslaughter. Indeed, as shall be explained shortly, it seems that in the counties examined here virtually all homicides were tried as murder. On occasion, of course, a court hearing a murder charge might find the defendant to be guilty of only manslaughter, or even find the defendant innocent of the charge on the grounds that the death in the case had resulted from "misadventure" or "chance-medley," but even so it would appear that murder cases were far more common than manslaughter cases per se.

Man-Stealing

In 1705, the Virginia General Assembly made slaves real property as opposed to personal property. In 1732, the General Assembly made it a capital offense without benefit of clergy for anyone to steal Negro, mulatto, or Indian slaves. The law was the same in 1748.

Usually, when slaves were stolen they were spirited away to some other place, where they were sold by people in confederation with the slave-stealers in Virginia. As a consequence, few man-stealers were ever apprehended, and even fewer were ever tried and convicted, despite the alleged frequency of the crime of man-stealing in the eighteenth century. As Rankin has said, slave-stealing was more or less an "occupational hazard" which Virginians, as masters of a slave society, had to learn to live with.

If the statements which have been made concerning the frequency of the crime of man-stealing are true, then it must certainly have been one of the easiest crimes to get away with in colonial Virginia. Scott says, in fact, that the records show only two convictions for man-stealing.

Mayhem

Mayhem, or maimimg, was a felony under the early common law, but the punishment for it was predicated upon the lex talionis in that the offender only lost what he had taken (an ear for an ear, for example). Under a statute adopted in England during the reign of Charles II, however, mayhem was made a capital offense without benefit of clergy. In 1752, the General Assembly of Virginia adopted the English statute of 22 and 23 Charles II, C. 1, almost literally, which made some acts of mayhem felonies. All acts of mayhem were not subsequently considered felonies, however, as evidenced by the fact that in 1772 some acts of mayhem were punishable by no more than 39 lashes, which might be administered if civil damages were not paid to the victim by the maimer. The more serious types of mayhem (for example the biting off of a man's ear or nose) were apparently still considered felonies after 1772, however.

Misappropriation

Misappropriation is the name which this writer, for lack of a better term, has assigned to the crime of selling commodities of the country to mariners who then took those commodities out of the colony for their own use. Under the Laws Divine, Moral and Martial, and during the period of company control in Virginia, this particular offense was a capital crime. The law does not appear, however, to have survived beyond 1616 or 1619.

Murder

Murder, or premeditated homicide with malice, was a common law felony punishable by death and forfeiture. It was excluded from clergy by the statute of 23 Henry VIII, C. 1. In Virginia, both the first charter, which excluded it from clergy, and the Laws Divine, Moral and Martial made murder a capital offense.

In 1710, the General Assembly enacted a law which made it murder for a free woman to conceal the death of her bastard child, assuming that under such circumstances the odds were that the mother had actually slain the child. The law was an almost verbatim re-enactment of the English statute of 21 James I, C. 27. Prosecutions under this particular statute were, however, "never very frequent, and convictions were rare."

In 1788, the law with respect to manslaughter was changed to the effect that a master who killed his slave while in the process of correcting him could no longer assume that he was only triable for manslaughter. The new law implied that a master could, under such circumstances, be held accountable for murder. The following year, however, the Assembly made it quite clear that non-felonious homicide was no crime, and that people could not be adjudged capital offenders for homicides committed accidently, or in self-defense, and so on.

Murderers were again expressly excluded from clergy in 1789, however, as were accessories before the fact. As for the liability of infants, it would appear that throughout most of the colonial period in Virginia the same rules applied that applied in England. George Webb, writing in 1736, clearly stated that a child of eight could be hanged for murder in Virginia if he knew right from wrong.

According to Scott, "the number of trials for homicide in Virginia was never large, and even allowing for a certain number of cases which did not come to trial, it is evident that even under frontier conditions murder was comparatively rare." But that statement simply is not true. On the contrary, what is evident is that murder was one of the most frequently committed and prosecuted crimes in colonial Virginia.

Rankin says that "the Virginians had their share of murders among them, and their only recourse in the way of a deterrent was an appeal to Mosaic law." It is perfectly clear that murder was a crime of significant frequency in colonial Virginia, and that it was vigorously prosecuted. Of course, some murder trials might result in the accused being found guilty only of clergyable manslaughter, or might even result in the accused being found innocent of murder on the grounds that the homicide in the case had resulted "misadventure" or "chance-medley."

Petit Treason

Petit or petty treason was at one and the same time a crime of homicide and a crime of treason. The treason was against family government rather than the King's government; the homicide was that committed by a wife against her husband, or by a servant or slave against his master. The crime of petit treason by a slave against his master was one which the slave society of colonial Virginia was particularly sensitive to.

Under English law, petit treason was a crime which was considered only slightly less heinous than high treason, and consequently it was disignated as a crime which deserved greater punishment than mere murder. The Virginia courts adopted both that concept and the English law itself.

Prosecutions for petit treason in Virginia do not appear to have been very numerous, but there were some. In the eighteenth century, moreover, "all the recorded cases of petit treason involved slaves." The customary punishment for women who committed petit treason, both in England and Virginia, was burning. Thus we find that in 1736 in Nansemond County one Negro woman was burned for killing her mistress, while in 1746 another Negro woman was burned in Orange County for poisoning her master. Male offenders who were convicted of petit treason, a crime which a free male could not commit (since murder was murder for a free male), could be punished in much the same way that they would have been for high treason, by being beheaded, quartered, and gibbeted (displayed). In the particular counties examined for the purposes of this study, only a few cases of petit treason, all of which involved slaves, were recorded. For example, in Richmond County, in 1730, a slave who had died in prison was nevertheless beheaded, quartered, and displayed for the murder of his master's daughter, and in Norfolk County, in 1778, two slaves were hanged and then displayed (in one piece) for their crimes of murder and treason.

Probably the only case in which a white man or woman was burned in Virginia was in the famous case of the man who had killed and eaten his wife at Jamestown during the "starving time" between 1609 1611.

Piracy

Piracy was not a common law offense, but was rather a civil law offense which was punishable by death. Furthermore, it was generally recognized as a crime over which the ordinary land courts had no jurisdiction, since the crime itself consisted of murder, robbery, or felony committed on the high seas, which were outside the jurisdiction of the regular common law courts. Consequently, crimes of piracy were tried, under English law, in special Courts of Admiralty. By the same token, in Virginia all crimes constituting piracy were tried, in the period up to about 1696-1699, by specially commissioned Courts of Admiralty in Virginia. After 1700, however, Vice-Admiralty jurisdiction passed into the hands of royally-appointed Admiralty judges, and was not reclaimed by the Virginians until the era of the American Revolution.

Under the Laws Divine, Moral and Martial, a mariner who stole a boat or vessel from the colony was subject to prosecution as a capital offender. That particular law seems, however, to have expired with the Laws Divine, Moral, and Martial in 1619. Then, in 1619, the General Assembly enacted a new law (discussed earlier under the heading of boat-stealing) concerning the theft of boats and making that crime a capital offense. Whether that 1619 law was a piracy law or merely a special larceny law, however, is not quite clear. In any case, that 1619 law was of questionable legality, and was never re-enacted.

In 1621, the instructions issued to Governor Wyatt authorized him to punish crimes of piracy, presumably with death. The piracy laws in England and Virginia really did not begin to take on definite shape, however, until after 1696. In 1699, the General Assembly enacted a law providing for the trial of pirates in special Courts of Oyer and Terminer (the Virginia equivalent of Courts of Admiralty, commissioned for the specific purpose, in this case, of hearing Admiralty cases) and making it a capital offense without clergy for pirates and their accessories to resist arrest forcibly. In that same year, 1699, Parliament enacted a piracy statute which was subsequently continued or re-enacted several times through the reign of George I. The statute of 8 George I, C. 24, finally made that law perpetual, "fully settled and declared" the law "as to pirates," and ended any further need for Virginia statutes on the subject of piracy. In short, as of the reign of George I, Virginia law clearly yielded to English law on the issue of piracy.

The period between 1699 and 1730 was one which saw a good deal of pirate activity off Virginia. In that period the coastal region of the colony was frequently harassed by brigands of all sorts, including the notorious Captain Kidd. After 1730, however, few pirates were to be found in Virginia waters.

In 1718, the General Assembly enacted a law which was designed to aid in the apprehension and destruction of pirates, but that law did not challenge the British piracy statute in any sense at all. By at least 1736, moreover, the Virginia courts were punishing the arson of ships (whether as piracy or arson) by death without benefit of clergy. And finally, during the Revolution, in 1782, the General Assembly enacted a piracy law of its own, which made contributing to the loss of ships and stealing pumps and other materials from ships, capital offenses without benefit of clergy.

Generally speaking, piracy appears to have been punishable as a capital offense without benefit of clergy throughout the entire colonial era. The punishment for piracy also apparently involved forfeiture of lands, goods, and chattels, too, but did not cause any corruption of blood. The records examined for the purposes of this study reveal that piracy was indeed a frequently committed crime in the coastal counties of Virginia. It was likewise vigorously prosecuted.

Pocket-Picking

Pocket-picking was merely a particular form of larceny, but it was a special kind of larceny in that it involved theft from a person, but without violence. It was made a capital offense without benefit of clergy under the statute of 8 Elizabeth I, C. 4. The same law was apparently in force in Virginia, but throughout the seventeenth century, at least, prosecutions for pocket-picking seem to have been rare. In the eighteenth century the law was applied, and the crime prosecuted, with much "greater rigor."

As a general rule, pocket-picking was automatically a capital offense without benefit of clergy if it involved grand larceny (the theft of goods valued at more than 12 pence). Whether the offense was capital when it merely involved petty larceny, however, seems doubtful. In any event, pocket-picking, unlike other crimes of larceny, does not appear to have been a crime of high incidence in colonial Virginia.

Price-Gouging

Sailors and mariners who charged the colonists exorbitant prices for goods were, under the Laws Divine, Moral and Martial, subject to prosecution as capital offenders. The law was occasioned by virtue of the fact that during the early years of starvation and crisis in the colony some unscrupulous seamen price-gouged the desperate colonists. The law does not appear to have survived beyond 1619.

Prison-Breaking

Prison-breaking, a common law felony within clergy, was made a felony by the English statute of 1 Edward II, C. 2, only if the prison-breaker was in custody for a felony. In Virginia, however, in 1647, the General Assembly made prison-breaking a felony even if the prison-breaker was only in jail for debt. The reason for the severity of the Virginia law was simple; it was designed to intimidate all jail-mates, because Virginia jails were so easy to escape from. When the Virginia law of 1647 was repealed, in 1684, that left only the Edwardian statute in force in Virginia.

By 1736, at least, helping a felon escape from jail, or allowing a felon to escape, was certainly a felony, and was presumably punishable as a capital offense. In 1774, moreover, capital offenders who escaped from prison were clearly subject to capital punishment, under the statute 1 Edward II, C. 2, whether they were guilty or not, if they were under indictment for treason or felony at the time of their escape. Thus we

see that prison-breaking was, in itself, a capital offense, whether or not the prison-breaker was actually guilty of some other felony.

Thomas Jefferson later argued that prison-breaking should not be considered a crime at all since it only expressed man's natural longing to be free. That was an opinion, however, which was probably not shared by many people.

Rape

Rape was a felony without benefit of clergy under the statute of 18 Elizabeth I, C. 7. In Virginia, rape was made a capital offense without benefit of clergy under the first charter and again under the Laws Divine, Moral and Martial, the latter of which expressly extended the law to protect Indian women.

Slaves who even attempted to rape white women were, throughout most of the eighteenth century, liable to be punished with castration. On the whole, however, rape was "not a prevalent crime in colonial Virginia," and prosecutions were rare. Even when there were prosecutions moreover, juries seem to have been very reluctant to find rapists guilty. As one late eighteenth-century official in Virginia wrote: "It seemed as if something more than usual tenderness for life, operated with the juries on these occasions; and they appeared to lay aside their natural abhorrence of the act, to seize the smallest symptons of innocence!"

The only law which the Virginia General Assembly appears to have enacted on the subject of rape was a 1789 statute which made the sexual abuse of a girl under ten years of age statutory rape. It seems, however, that that had been understood to be the law on the subject for some time, under English statute law, and that the Virginia law of 1789 was merely designed to clarify the issue and resolve any questions concerning the applicability of the law.

Resisting Authority

Under the Laws Divine, Moral and Martial, the third offense of resisting the commands of the governor, marshall, council, and other officials of the colony was made a capital offense. This offense, which probably represented one aspect of sedition, was apparently no longer capital after 1619.

Returning from Banishment

Presumably when banished felons, such as those banished following Bacon's Rebellion, returned to the colony they could be executed as capital offenders. Certainly when some of the Bacon rebels were banished they were warned that if they returned they would be put to death. Apparently, too, the same thing applied to felons whom the Virginia governors might pardon and sentence to transportation to the West Indies or elsewhere. It seems very doubtful, however, that anyone was ever prosecuted in Virginia for returning either from transportation or banishment.

Only two specific acts appear to have ever been enacted by the

General Assembly concerning persons returning from banishment. The first, which was enacted in 1660, provided for the death penalty for Quakers who returned to the colony a third time, after being twice-banished. Despite the fact that the English Toleration Act was adopted in Virginia in 1699, moreover, this particular law remained on the books until at least the 1750's. For all of that, however, no one ever seems to have been executed for this particular crime.

The other act concerning banished persons was passed in 1781, during the Revolution. That law made it a capital offense without benefit of clergy for anyone to refuse banishment to the enemy lines (for sympathizing with the enemy), or for anyone to return from behind the enemy lines after being banished thence.

When one considers the frontier nature of a large part of Virginia it is easy to see how banished felons might well have been able to return to Virginia, if they had been inclined to do so, without ever being apprehended. All one really had to do was relocate elsewhere in the colony, and perhaps change one's name.

Robbery

Robbery was a particular kind of larceny, which involved the theft of money or goods from a person while employing violence or putting the victim in fear. Up to about 1690, robbery was a capital offense without benefit of clergy in England if it was committed in a house or on a highway; however, the statute of 3 and 4 William and Mary, C. 9, made robbery a felony regardless of where it was committed. While the major part of these English statutes appears to have been applied in Virginia, however, the statute of William and Mary was not adopted in its entirety, or with respect to that part of it which made robbery a felony regardless of where it was committed.

As of 1736, in Virginia, robbery was punishable by death without benefit of clergy no matter what the value of the goods robbed was. In 1774, robbery was a capital offense without benefit of clergy if it was committed in a house, on a highway, or in booths and tents (market places). And, in 1789, both principals and accessories before the fact were excluded from benefit of clergy for highway robbery, as were persons who robbed houses and put the people in them in fear.

Robbery was apparently a common crime in colonial Virginia, as were the related offenses of larceny and burglary. Moreover, robbery was, again like larceny and burglary, a crime which seems to have been particularly favored by the lower classes (or have-nots) and especially by runaway slaves and servants or transported felons who were serving time in Virginia as convict-servants.

A large percentage of those persons who were convicted of robbery were executed; however, despite the reported high incidence of crimes of robbery in Virginia the fact is that few robbers appear to have ever been apprehended and prosecuted.

Sabbath-Breaking

Under the Laws Divine, Moral and Martial, the third offense of Sabbath-

breaking was made a capital offense, as was the related offense of failing to attend divine services for the third time. After 1619, however, neither offense seems to have been punishable capitally.

Sacrilege

The Laws Divine, Moral and Martial declared the act of stealing from the church to be a crime of sacrilege, and a capital offense. That law does not appear to have survived, as far as any punishment for sacrilege was concerned, beyond 1619. After 1619, such thefts appear to have been punished as larcenies rather than as religious crimes. In 1789, for example, the felonious theft of goods or chattels from churches, chapels, or church meeting houses was expressly excluded from clergy, but the crime in that case was no doubt considered one of larceny rather than one of sacrilege. At the same time, however, it is clear that sacrilege itself was a capital offense, inasmuch as it was excluded from benefit of clergy at common law, according to Starke.

Sinking Buoys

In 1772, the Virginia General Assembly made the sinking or removing of buoys in the area around the Cape Henry lighthouse a capital offense without benefit of clergy. The law was designed to prevent losses of shipping and commerce which might be sustained as a result of vessels straying (by accident or by design) from the deep water channels.

Slandering the Authorities

Under the Laws Divine, Moral and Martial, the third offense of slandering the colonial authorities, including the council resident in England, the Adventurers, or public books published for the good of the colony, was made a capital offense. This particular law does not appear to have been an anti-sedition law as much as it was an anti-propaganda law. The authorities in Virginia and in England simply did not want people bad-mouthing the colony and discouraging investors and settlers. If anyone was unhappy about his circumstances in Virginia to complain about the authorities a third time, he would have been better off to have left the colony. The law expired in 1619.

Sodomy

Sodomy, or buggery as it was sometimes called, was made a capital offense without benefit of clergy under the English statutes of 25 Henry VIII, C. 6, and 5 Elizabeth I, C. 17. The Laws Divine, Moral and Martial made sodomy a capital offense in Virginia. After 1619, however, no laws were enacted in Virginia on the subject of sodomy or buggery. Nor, for that matter, was any Virginia law enacted on the subject of bestiality, another unnatural sexual act which was almost certainly considered a capital crime in colonial Virginia. The obvious explanation for the lack of any Virginia laws punishing such unnatural sexual acts is the fact that the Virginians simply adopted the English statutes on these subjects.

According to Scott, a few people were examined in court on allegations of sodomy prior to 1625, "but the available records show no trials after 1625." He adds further that "very rarely someone would be examined by a

justice on this charge." While the crime of sodomy indeed appears to have been committed only rarely in colonial Virginia, however, it was not unheard of after 1625. The case of Edward Shirley of Norfolk County, who was bound over in 1742 for "the Detestable Sin of Buggery," serves as a case in point, albeit an isolated one.

In 1736, George Webb explained for the benefit of Virginia justices of the peace that the age of consent for males was 14, and the age of consent for girls was 12, in sodomy cases. Persons younger than that could not be guilty of the crime, but males and females over the age of consent who willingly participated in acts of sodomy, even if only passively, were as guilty of the crime as the active participant in the crime.

Richard Starke, writing for the benefit of Virginia justices of the peace in 1774, remarked of sodomy that it was "happily indeed but little known heretofore in this colony." He thought that the practice of sodomy was introduced into England by the Lombards of Italy. According to Starke, moreover, while principals in sodomy cases were excluded from benefit of clergy, accessories were nevertheless entitled to clergy.

Speaking Against the Trinity

Impious speech, or speaking against the Holy Trinity, or any member thereof, or against the "known Articles of the Christian Faith" was a capital offense, apparently distinct from blasphemy, under the Laws Divine, Moral and Martial. The offense does not appear to have survived beyond 1619, however, unless perhaps as sacrilege at common law.

Speaking Against the Bible

Under the Laws Divine, Moral and Martial, speaking against the Bible was a capital offense. Again, however, the offense does not appear to have been punishable capitally after 1619, unless perhaps as sacrilege at common law.

Swearing a False Oath

Swearing a false oath, or giving false testimony under oath, was a capital offense under the Laws Divine, Moral and Martial. It does not appear to have been a capital offense after 1619. While some cases of perjury were apparently adjudged to be felonies it does not appear that they were adjudged capital felonies, since they only resulted in some form of corporal punishment and/or forfeiture. In any event, perjury trials were rare in colonial Virginia.

Theft of Official Records

In 1789, the General Assembly made the theft of official records, meaning mostly court and legal records, a felony. Presumably, as a felony, the crime of stealing such records was a capital offense, although that is not absolutely certain in this particular case.

Tobacco Offenses

In the interest of clarity, a number of tobacco-related offenses will be discussed together here, even though technically all of the offenses mentioned fall into one or another of the categories of crime mentioned above. As such, of course, there were no such things as tobacco offenses.

In 1684, the destruction of tobacco plants and crops was declared to be the equivalent of high treason, and was made a capital offense punishable by death and attainder. That particular law was passed by the General Assembly in response to a specific outbreak of riotous assemblies and crop burnings in 1682. It was not until the era of the American Revolution, however, that the Virginians really began to enact capital legislation to protect their most important source of revenue. Before then, of course, tobacco had been the subject of numerous royal proclamations and several imperial trade and navigation acts, as well as of numerous local quality and production control acts.

Under the provisions of a law enacted by the General Assembly in 1778, three separate tobacco offenses were made felonies punishable by death: (1) trifling with the contents of tobacco casks; (2) landing tobacco at some place other than the proper warehouses; and (3) exporting tobacco under forged or counterfeited inspection stamps or certificates. Other crimes related to the forgery of tobacco certificates have already been discussed under the heading of forgery.

In 1783, these particular offenses were elaborated further, and the law declared it to be a capital offense without benefit of clergy to: (1) export tobacco under forged inspection stamps or certificates; (2) put tobacco in a cask that had already been inspected; (3) remove tobacco from a cask that had already been inspected; and (4) demand tobacco from an inspector or warehouse by wittingly using forged or counterfeit receipts. The law in 1783 also made it a felony, but not one expressly excluded from clergy, for a ship captain to: (1) trifle with the contents of tobacco casks whether before or after they were inspected;and (2) land tobacco at some place other than a public warehouse. The last two offenses were again re-enacted in 1792. For the tobacco-related offenses which tobacco inspectors might be held accountable for, see the crimes mentioned under the category of embezzlement and fraud.

Witchcraft

Witchcraft was a capital offense, the punishment for which was burning, under the provisions of the statute of 1 James I, C. 12. Despite the fact, however, that most people in the colonial era, in both Europe and America, believed in the existence of real witches, warlocks, and demons, at least throughout the seventeenth century and well into the eighteenth, the fact remains that the Virginia General Assembly never appears to have enacted a witchcraft law. What the Virginia courts did, very simply, was apply the English law on that subject, as they did in numerous other instances.

The records reveal that in the 1650's two women who were enroute to Virginia were executed for witchcraft while still at sea; however, there do not appear to have actually been any executions in Virginia itself for that particular crime. To be sure, there were several prosecutions for witchcraft, but convictions were rare, and no one seems to have been put

to death, Even the famous Grace Sherwood, whose name appears in the records of Princess Anne County around 1705, does not appear to have been executed, although some Princess Anne County people appear to be convinced that she was drowned for witchcraft.

The records examined for the purposes of this study reveal only one prosecution for witchcraft. In that case, which involved a female servant named Mary, in Richmond County, in 1730, the defendant was convicted but was sentenced only to receive 39 lashes. Apparently the justices who heard her case were not at all sure that she ought to be bound over for further trial even if she was guilty, so they merely sentenced her to be whipped. We know nothing, of course, about the particulars of the case.

Unspecified Felony

The term "unspecified felony" has been created for the purposes of this study in order to make it possible to account for a large number of unnamed, or unspecified, crimes for which individuals were either bound over or convicted in Virginia. In many cases, the county courts simply bound someone over or convicted someone for a "felony" without ever stipulating the crime involved. Since the records do not reveal what the crimes in such cases were, they can only be classified as "unspecified" under a separate category.

The records examined for the purposes of this study reveal that more people were bound over or convicted for having committed unspecified felonies than for any other single, specific offense. As stated, it is not known what those crimes were, but an educated guess would be that most of them were larcenies of one sort or another. Larcenies were, after all, common. Less common crimes would, more than likely, have been specified in most cases, if only because they were less common.

It may also very well be possible that by using only the term "felony", the county courts were trying to avoid the danger of prosecuting cases improperly. Perhaps, in fact, the popularity of the "felony" charge reveals that the courts may frequently have been in doubt as to exactly what the charge ought to be according to the law.

SLAVES AND THE CAPITAL LAWS OF THE PRE-REVOLUTIONARY ERA

With respect to slaves, it should be noted that by the 1690's a dual legal system--which would be expanded and elaborated further--had clearly begun to emerge in Virginia. As early as 1690, runaway slaves could be killed outright if they failed to return after being ordered by proclamation to do so. In 1691, the first offense of hogstealing was made a capital offense for slaves; although the act was repealed as "inconvenient" in 1699. In 1692, the law governing the trial of slaves for capital offenses was changed. Up until that time all capital offenders were tried in the capitol before the General Court. After that date, however, slaves were all tried locally, by county courts of Oyer and Terminer, and without the benefit of a jury trial. Free blacks continued to be tried in the General Court.

In 1705, a new law for the "speedy and easy prosecution of slaves" marked a dramatic turning point in the legal status of slaves. This statute went a long way toward settling the definition of what a slave was (real estate). Among other things the act also provided that slave owners were to be compensated by the Assembly for the loss of their executed slaves.

In 1723, a statute was enacted which provided that more than five slaves planning an insurrection or murder together were guilty of conspiracy. The offense was made capital without benefit of clergy.

The law with respect to benefit of clergy was entended in 1732 to include slaves, but expressly excluded them from clergy if they had already had it once, and for the first offense of either manslaughter, felonious house-breaking at night, and house-breaking by day and stealing goods valued at more than 5 (later 20) shillings. These were offenses for which slaves were specifically excluded from clergy, in addition to other offenses which were excluded from clergy for everyone. This was the

first statute clearly extending clergy to slaves, but in all probability they could plead clergy before 1732.

In 1748 the conspiracy law was amended to provide that fewer than 5 slaves could engage in a conspiracy. In the same year, it was made a capital offense without benefit of clergy for a slave to prepare and administer medicine without the taker's consent. The offense was clergyable if no harm resulted and if the court believed the slave innocent of felonious intent.

In 1765, manslaughter was made a clergyable offense for slaves when another slave was the victim. Another "liberal" provision of the same year provided that a slave could only be castrated for the attempted rape of a white woman.

And in 1772, the last enactment dealing specifically with slaves in this period provided that henceforth only burglary (as opposed to breaking and entering at night) or what would constitute burglary if committed by a free man, was to be excluded from clergy for slaves. Otherwise the offense was to be clergyable.

REFORM

Turning now to the subject of reform it should be noted that by 1776 Thomas Jefferson was leading an effort to abolish the death penalty in Virginia for all crimes except murder and treason excluding consideration of offenses against the law martial. The debate on that issue was, however, to extend over the next twenty years. During that time some of the judges of the General Court themselves condemned the capital laws as too severe in many instances. Legislative resistance to reform was, however, substantial. In 1786 the reform bill was defeated by a single vote. It did not come up again until 1796.

In 1796, when consideration of the reform bill was resumed, the bill passed the House by a substantial majority (95-66) and the Senate by a narrower majority. As a consequence, the death penalty was abolished for all crimes save for murder in the first degree. Benefit of clergy was abolished.

One factor which made the passage of the bill possible was the construction of the new penetentiary. In 1785, Jefferson was just planning such an institution. It opened its doors in 1800. Consequently, the imprisonment of criminals was held out as a reasonable alternative to what some legislators had termed a code of blood and carnage. In addition, a majority of legislators had by 1796 simply ceased to believe what they had been told for so long - that the death penalty was an effective deterrent to crime.

What is perhaps even more important about the reform of 1796, however, is that many legislators knew it would not be popular with everyone, and that they would have to lead the way in gaining acceptance for it. As George Keith Taylor, the chief patron of the bill, wrote to St. George Tucker within hours of the bill's passage:

I have great pleasure in announcing to you that the bill to amend the penal laws of this Commonwealth, passed the house of Delegates yesterday, by a majority of twenty nine votes. This is a consolatory proof that deep-rooted prejudices may be eradicated by reason and truth; and it affords a pleasing hope that when the discussion which was submitted to the legislature shall have been generally perused and understood, it will produce its proper effects.

1800 - PRESENT

Within ten years of the reform of 1796, the crimes of treason and arson were restored as capital offenses. Murchison and Schwab suggest that the restoration appears to be a mere "refinement" of the original proposal, but the mere proximity of time between the original proposal and that of the additions to it hardly qualifies the re-expansion of the code as a refinement. Moreover, the factors they mention as explanations for the restoration, in terms of the "social setting in that era" were certainly factors present in the earlier period as well and were known to the reformers of 1796. In any event, no further capital offenses were restored in the period down to the Civil War.

In the case of slaves, however, as of 1848 a slave could receive the death penalty for any offense for which a free man could be sentenced to three or more years in prison - burglary, armed robbery, kidnapping, and a number of other offenses, in addition to murder, arson, and treason.

If a Negro, whether slave or free, raped a white woman he could be sentenced to twenty years (if a free Negro), transported (if a slave), or executed at the discretion of the jury, under an 1849 law. The attempted rape of a white woman by a Negro was also punishable by death, until 1866. A white man who raped a black woman, however, could only be sentenced to a ten to twenty year prison term - and Negroes could not testify against whites.

In 1865, after the Civil War, the death penalty was restored for burglary, armed robbery, and rape. The distinction between blacks and whites had theoretically been eliminated by the 13th Amendment. So the crimes restored as capital applied to all free men. The penalties in these cases were, however, discretionary. That meant that judges and juries could execute some people for the same crimes for which they imprisoned others. The death penalty was still mandatory, however, for murder

treason, and arson.

In 1894, attempted rape was made a capital offense - discretionary. The rationale for this particular law was that it would discourage people from lynching the offender.

In 1904, kidnapping was made a capital offense. This statute was broadened considerably in 1960.

In 1922, entering a bank with a dangerous weapon with the intent to commit larceny was made a capital offense.

In 1934, the possession or use of a machine gun in the commission of a crime of violence was made a capital offense.

In 1960 the definition of arson was modified to include only the burning of an occupied dwelling house at night.

In 1968, it was made a capital offense to use a sawed-off shotgun in the commission of any crime of violence.

And finally, the most recent addition to the list of Virginia capital crimes provides for a mandatory death penalty in cases involving the murder of a prison guard or official by an inmate. The only other mandatory death sentence, at present, is for treason. In all of the other cases mentioned the death penalty is discretionary.

Executions, 1908 - Present

Since 1908 executions have been held at the state penetentiary, and the records of those executions have been centralized. During the period from 1908 to the present 236 persons have been executed in Virginia. Of those persons, 235 have been men; 176 were executed for murder; 55 were executed for rape offenses; and, 5 were executed for robbery. Of those 236 persons, moreover, 202 were black, and 34 were whites. All of the whites were executed for murder. There have been no executions in Virginia since March 2, 1962.

As of this writing, there are eight men on death row in the state penetentiary. Five of those men are black, 3 are white. Six of those men are "awaiting execution" for murder, while 2 are convicted rapists.

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