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## Book Review of Legislative Journals of the Council of Colonial Virginia and Minutes of the Council and General Court of Colonial Virginia

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## BOOK REVIEW

LEGISLATIVE JOURNALS OF THE COUNCIL OF COLONIAL VIRGINIA. Edited by H.R. McIlwaine, Richmond, Virginia: Virginia State Library, 2d ed. 1979. Pp. xiv, 1646. \$50.00

MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA. Edited by H.R. McIlwaine. Richmond, Virginia: Virginia State Library, 2d ed. 1979. Pp. xviii, 667. \$25.00

WILLIAM F. SWINDLER\*

Since their original publication in 1918-19 and 1924 respectively, *Legislative Journals of the Council of Colonial Virginia*<sup>1</sup> and *Minutes of the Council and General Court of Colonial Virginia*<sup>2</sup> have constituted primary references to the legal and political beginnings of colonial American institutions in general and to Virginia institutions in particular. Publication of the 1979 editions of these books, prepared under the direction of John Kukla of the Virginia State Library, completes the task of reprinting all of McIlwaine's documentary projects, including the legislative journals of the House of Burgesses<sup>3</sup> and the executive journals of the upper chamber.<sup>4</sup> Legal scholars of the coming generation now will have access to primary materials, the use of which will enable them to correct a long-standing deficiency in southern studies of American legal and po-

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1. (H. McIlwaine ed. 1918-19) [hereinafter cited as JOURNALS].

2. (H. McIlwaine ed. 1924) [hereinafter cited as MINUTES].

3. JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1619-1761 (H. McIlwaine ed. 1908-15). These volumes are supplemented by four volumes for the period 1761-76, edited by John P. Kennedy.

4. EXECUTIVE JOURNALS OF THE COUNCIL OF COLONIAL VIRGINIA (H. McIlwaine, W. Hall & B. Hillman eds. 1925-66) [hereinafter cited as EJCCV]. The first three volumes were reprinted in 1976 and the fourth in 1978. They originally had been edited by McIlwaine, while the last two volumes were edited by Wilmer L. Hall and Benjamin J. Hillman, respectively. See also JOURNALS OF THE COUNCIL OF THE STATE OF VIRGINIA (H. McIlwaine, W. Hall & G. Reese eds. 1931-67) (covering the period from 1776 to 1788).

litical history.<sup>5</sup>

As McIlwaine himself wrote in 1924, his works contain "Such remnants of the minutes of the proceedings of the Council and General Court of colonial *Virginia* as are extant and have been found."<sup>6</sup> These volumes bring to light that the Council *was* the General Court, for the membership of the judicial panel was drawn from the appointive upper chamber of the colonial assembly.<sup>7</sup>

Kukla's second edition of the *Journals* is a literal reproduction of the original three volumes, while his second edition of the *Minutes* is a facsimile reproduction, supplemented by five appendices of materials, some of which have appeared in the intervening period. Such additional materials enhance the value of the *Minutes*.

For the period that concludes with 1676, just a century before the Revolution, the first edition of the *Minutes* provided two fragments of records that give a tantalizing glimpse of the elementary judicial process in seventeenth-century Virginia: minutes from a ten-year period beginning with the first legislative-judicial meeting in 1622 and minutes from meetings held between 1670 and 1676. Appendix C of Kukla's revision provides extracts of minutes from 1642-45 as well.

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5. Destruction of most of the colonial records during the Civil War has delayed extensive research with original documents until copies could be found and published. McIlwaine's works, which originally had been housed in the state court building, survived the Richmond fire of 1865.

Since McIlwaine's original works first were published, a series of documentary writings have supplied missing pieces in a jigsaw of unknowns about our beginnings. Perhaps the earliest was RECORDS OF THE VIRGINIA COMPANY OF LONDON (S. Kingsbury ed. 1906-36), a publication which took more than three decades to complete. One of the most recent, also being undertaken by the Virginia State Library, is the ongoing series on the documentary history of the independence movement in Virginia. REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE (R. Scribner & B. Tarter eds. 1973-78) (multivolume work compiled as a project of the Virginia Bicentennial Commission). Complementing these works is the monumental microfilm collection of the Virginia Colonial Records project. Begun in 1956, this collection provides scholars with hundreds of records from British and other depositories, replacing destroyed originals and supplementing our documentary resources in every conceivable dimension. The Virginia Colonial Records project has microfilm depositories in Colonial Williamsburg, the Virginia State Library, the Virginia Historical Society, and the University of Virginia.

6. McIlwaine, *Preface to MINUTES*, *supra* note 2, at ix (2d ed. 1979).

7. The legislative session of 1623-24 provided for a system of monthly courts, 1 W. HENNING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619*, 125 (1823), while the Council sat as a quarter sessions court of general jurisdiction.

Adding an even more valuable feature to the revised edition, Appendix E consists of copies of the rules of court from 1691 to 1775. Although some of these rules were covered by earlier statutes,<sup>8</sup> they provide evidence that a more sophisticated procedure was evolving. The first rule, for the October term 1691, provided for default judgments. Judicial business had become sufficiently systematized, and the demands of the colonial economy sufficiently complex, to require prompt attention at the session for which summons might issue. In addition, as the settlements spread over a greater geographic area, the county courts' jurisdiction was enlarged in order to save the time and effort necessary to come to Williamsburg to dispose of certain civil and criminal matters.<sup>9</sup> By comparing these rules with those of the post-Revolutionary period,<sup>10</sup> legal scholars are provided a perspective for the continuity of procedure from colony to Commonwealth.<sup>11</sup>

By far the most enlightening of the new materials in the revised edition of the *Minutes* is the 1663-64 admiralty case of the Dutch ship, *Arms of Amsterdam*.<sup>12</sup> The record was reconstructed from colonial collections of New Netherlands (New York) and certain notes fortuitously made in the early 1840's by court reporter and antiquarian, Conway Robinson. The result is a documentary illustration of a specific General Court proceeding in the mid-seventeenth century.

The *Arms of Amsterdam*, which had been captured by an English privateer under the color of authority, letters of marque issued during a war between Holland and an Anglo-Portuguese alliance, was brought into Jamestown as a prize. According to subsequent allegations by authorities in New Netherlands, the war had ended and a treaty of peace put into effect before the capture. After the colonial adjudication, the General Court ordered the case

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8. *E.g.*, 3 *id.* at 504.

9. 2 *id.* at 65.

10. The Virginia State Library collections include rules of courts for the periods 1784-99 and 1827-29.

11. Summary statements of legal organization in colonial and commonwealth periods will appear in the first volume of the forthcoming three-volume *STUDIES ON THE BICENTENNIAL OF AMERICAN LEGAL EDUCATION*. Written by Charles T. Cullen and this reviewer under the title *Seedtime of American Law: Legal Change in Virginia, 1729-1829*, this first volume is due for publication sometime in 1981.

12. *MINUTES*, *supra* note 2, app., at 657.

transferred to the High Court of Admiralty in London. Because England already was beginning its campaign to seize the Dutch possessions in the New World, the colony's decision was indeterminate. Nonetheless, the reconstruction of this case is extremely valuable. First, it provides one of the rare illustrations of how a suit was litigated in Virginia during this period. Second, it shows the General Court sitting as a court of admiralty—that is, applying imperial rather than common law. A century of colonial wars was beginning. By the next quarter of a century, a member of the Council was designated as judge in admiralty.<sup>13</sup> This case also helps explain the steady pressure from London, reflected in royal governors' instructions from this time forward, to create a permanent admiralty bench in the colony.<sup>14</sup>

Other source materials supplementing the *Minutes* include Jefferson's collection of colonial decisions,<sup>15</sup> itself an extension of a few dozen cases from 1728-29;<sup>16</sup> Lee's manuscript collection of Virginia appeals to the Privy Council in England;<sup>17</sup> and materials from the Virginia Colonial Records survey. The revised edition of the *Minutes* is a *vade mecum* of colonial legal studies. Although agonizingly sparse in detail, this work provides a clearer picture of the colonial legal process, and as such is an essential element of a small library. In contrast with the second edition of the *Minutes*, which contributes substantial source material for an understanding of the judicial process of the seventeenth century, the new edition of the *Journals* covers the entire colonial era, thereby providing a panoramic view of the statutory efforts to establish and perfect the judicial system itself.

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13. 1 EJCCV, *supra* note 4, at 413.

14. *Id.* at 379.

15. T. Jefferson, *Reports of Cases Determined in the General Court of Virginia*, reprinted in VIRGINIA REPORTS ANNOTATED (1903).

16. Sir John Randolph, an early student at the College of William and Mary (1705 - ca. 1713), who later studied and was called to the bar at Gray's Inn (1715-17), began a manuscript collection of General Court cases in 1728-29. After his death, Edward Barradall continued this collection to 1742. From this series Jefferson selected "every case of domestic character" to include in his own reports. The original Randolph-Barradall manuscript was edited by Ralph Barton and published under the title VIRGINIA COLONIAL DECISIONS (1909).

17. The Lee compilation is in the special law collections of the Library of Congress. Several of the Virginia cases are cited in J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (1950).

There had been a tacit assumption from the beginning that the colonists were generally familiar with English law, both substantive and adjective.<sup>18</sup> No formally trained attorneys practiced in Virginia until the end of the seventeenth century,<sup>19</sup> and the assembly occasionally felt the lack of law books acutely enough to place orders for particular volumes from the mother country.<sup>20</sup> Indeed, not until 1662 did the first printed collection of colonial statutes 'appear.'<sup>21</sup>

As revealed by the *Journals*, the kind of justice administered during these early decades was pragmatically simple. In the relatively simple economy of the colony, the subject matter of litigation was fairly limited. Actions for debt and slander and, toward the end of this period, a few admiralty cases predominated. A regular docket of criminal prosecutions was maintained as well.<sup>22</sup> Single instances of actions in covenant, on wills, to quiet title, and to foreclose mortgages also were found.

These fragments of judicial proceedings in the *Journals* are supplemented by references to legislative work on the court system,<sup>23</sup> the full texts of which are contained in the House of Burgesses' journals<sup>24</sup> or in the appropriate volumes of William Waller Hening's *Statutes at Large*.<sup>25</sup> Thus, by coordination of the legislative

18. Three acts of Parliament were enacted by reference by the colonial assembly in 1631-32. See, e.g., 1 W. HENING, *supra* note 7, at 167. See also *id.* at 336 (incorporation of certain acts of Parliament in 1646).

19. Attorneys were first recognized, and their fees stringently regulated, in a statute in 1642-43. *Id.* at 275-76. Prohibition of practice by attorneys was provided by the assembly in 1645-46. *Id.* at 313. The statute was repealed in 1656, *id.* at 419, but revived the following year, *id.* at 482. The constitutionality of this denial of practice seems to have been disposed of *sub silentio*. *Id.* at 523. By 1680, attorneys were in general practice. See 2 *id.* at 478. See also 4 *id.* at 360. For an interesting study on colonial barristers, see A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965).

20. See 2 W. HENING, *supra* note 7, at 246. See also W. BRYSON, *A CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA* (1978).

21. See note 25 *infra*.

22. The reviewer wishes to acknowledge the original research of Jeffrey Schreiber, who compiled a checklist of subjects in litigation noted in the first edition of the *Minutes*, as an independent legal writing.

23. See, e.g., *LEGISLATIVE JOURNALS OF THE COUNCIL OF COLONIAL VIRGINIA* 196, 201, 1043 (H. McIlwaine ed. 1918-19).

24. See note 3 *supra*.

25. Periodic "revisals" or codifications of assembly enactments were made by the assembly itself in 1632 and 1642-43. 1 W. HENING, *supra* note 7, at 179, 239. The First Restoration revisal of 1661-62, 2 *id.* at 41, was subsequently printed in London under the title *THE LAWS OF VIRGINIA NOW IN FORCE* (1662). In 1684 *A COMPLETE COLLECTION OF THE LAWS OF*

and executive journals of the upper chamber of the assembly and reference to the final statutory product in Hening, the outlines of the colonial legal system now can be filled in. The new edition of the *Journals* will enable researchers to analyze the changing needs of the judicial system as perceived by men who served a threefold function in the Council—as lawmakers, as judges, and as a kind of cabinet for the gubernatorial representative of the Crown in Parliament. The *Minutes* supplement the *Journals* by giving a glimpse of the judicial business with which these men dealt.

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VIRGINIA NOW IN FORCE (1684), credited to John Purvis, appeared. Another collection, authorized by the assembly in 1727, was first published in the colony under the title of A COLLECTION OF ALL ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA (1733). Revised versions were printed in Williamsburg in 1736, 1752, and 1769. The 1733 Code was reprinted by the Virginia Bar Association in 1976.