ALAN F. DAY, "LAWYERS IN COLONIAL MARYLAND, 1660-1715," 17 American Journal of Legal History 145, 145-49, 153-57, 161-64 (1973)*

Colonial historians have virtually accomplished what Dick the Butcher, Jack Cade's henchman, suggested in the fifteenth century: "the first thing we do, let's kill all the lawyers." However, recent activity reveals promise of a revival. To some measure aroused by the inadequacies of Anton H. Chroust's *The Rise of the Legal Profession in America,* scholars have been primarily concerned with lawyers in the context of the development of the legal profession. There are individual biographies, but few monographs exist on lawyers as a social group in any colony. That our knowledge is primitive and impressionistic is even more astonishing when it is considered how much historians aided by the computer and demographic techniques have disrupted previous notions of colonial society. By detailed examination of the types, backgrounds, education, and careers of lawyers in one colony it should be possible to draw some conclusions about the opportunities law offered, how society regarded lawyers, and the process of professionalization. The present paper, dealing with Maryland during the period 1660-1715, attempts to explore the sources that can be utilized in such an analysis and to make some preliminary assessments.

Initially there were no rules or requirements that men had to fulfill before they could practice law in Maryland. Although there was one early claim that attorneys had to be qualified "according to Stat 3^{d} Iames 7 Ch.," it was not until 1674 that an act was passed giving the governor power to admit "a certain number of honest and able Attorneys . . . in the Pro^{all} Court Chancery Court or other Court of Record." However, after the repeal of this act in 1676, the admission of attorneys was seemingly left to the courts' discretion. In 1697 and 1698, in a case concerning James Cranford, the governor's insistence that he reserve the right to disbar any attorney conflicted with the Lower House of Assembly, but no resolution to the problem of control over admissions resulted. It was not until September 1707 that Governor Seymour as part of his general design to reform the legal system stated in council that

> no person whatsoever shall be Admitted to practice in any of her Majestys Courts within this province as Attorneys Except such as have been for some time members of some of the Inns of Court or Chancery of her Majestys Kingdom of England untill they have priviously undergone an Examination of their Capacitys honesty and good behaviour before us and her Majestys honble Councill or her Majestys Governor & Councill for the time being and a Certificate of such Examination and allowance thereon had . . . .

The order of 1707 was supplemented by an act in the following year which gave the Justices of the various courts power to admit and suspend attorneys except where the petitioners had already been refused admission by the Governor and Council.

The lack of admission standards, or enforcement of those that did exist, resulted in a large number of attorneys being admitted to the courts. From the surviving records a total of 207 were found to have practiced between 1660 and 1715. The first recorded admissions are in the Provincial Court proceedings for 1666, but in the county courts it was not until after the passage of the act "to Reforme the Attorneys Councellors & Solicit^{rs} at Law" in June 1674 that the clerks began entering in the minutes the admission and swearing in of attorneys. By investigating extent of practice and subsequent career patterns, the group can be divided into certain definable categories.

First and numerically the largest group of attorneys was the planters. The planter usually practiced in only the county where he resided. Occasionally, he might practice in the neighboring county, but no planter attorney ever operated in more than two courts. The preponderance of planter attorneys was partly caused by the shortage of trained lawyers in the pre-1700 period. The planter was

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likely to have had a smattering of law in his education and so particularly in the county courts could compensate for the scarcity of professional advocates. The paucity of lawyers is evident in the record of admissions to the Baltimore County Court as late as the 1690's. In March 1692/3, Thomas Fulkes asserted that "this Court is destitute of Ann Atturney." The justices granted his petition to practice on condition that Fulkes give bond of one thousand pounds of tobacco to be forfeited if his clients suffered "by any manner of wayes or meanes" through Fulkes's malfeasance of duty.

The local population as well as the would-be attorneys acknowledged the need for practitioners. Daniel Palmer of Baltimore County in his successful petition in 1693 argued that he had been convinced not only by the Justices but "also by many of the inhabitants to offitiate (in the stead of a better) as an Attorney." Similarly, on the Eastern Shore, Robert Pirrie of Somerset County was "very much Solicited by many of his Neighbours and friends to practice as an Attorney at Law." Thus, the planter although short on experience alleviated the dearth of attorneys and at the same time supplemented his plantation income.

The motivation for practicing law of the second group of attorneys — the clerks — was akin to that of the planters. Some professional clerks having lost their positions due to the vicissitudes of politics and patronage used their clerical abilities to replace their lost income. Edmund Beauchamp was the clerk of Somerset County from 1666 until 1688. Then, displaced as clerk, he was admitted as an attorney, but readily gave up his practice when restored to his former position in 1689. William Taylard was clerk of both the Provincial and Anne Arundel County courts before being sworn in as an attorney in them.

On the other hand, clerks who had recently arrived in the colony were not always able to find positions directly suited to their talents. They turned to the law to establish themselves and as a means of support. Christopher Gregory arrived in Maryland in the early 1690's but could not find even an assistant clerk's post until 1696 and so practiced in two county courts. William Cooper, a contemporary of Gregory's, did not gain an appointment as clerk until 1695 and consequently practiced briefly in the Provincial Court.

A third smaller group of attorneys was composed of merchant-planters. This type of attorney was invariably an immigrant who had had business connections with the colony before emigrating. He often had partners in England and entered the law to guard his business interests. He quickly became established and usually attained a position of social, political, and economic prominence in the county in which he settled. Thomas Jones, operating from Bristol, was involved in the Maryland and Virginia trade. Having married his partner's daughter, he emigrated to the colony in about 1670. He practiced in the Provincial Court before moving to Somerset County where he was successively sheriff, collector, justice, and militia officer as well as acquiring extensive landholdings. Likewise, George Robins emigrated from Buckinghamshire in 1671, settled in Talbot where he practiced and maintained his mercantile liasons with the mother country. As with Jones, Robins held office as a county justice and purchased additional land beyond his original investment of 500 acres.

A fourth type of attorney was the man who may be loosely classified as an entrepreneur. Occupationally and geographically mobile, his activities as a lawyer constituted only a fragment of his interests. Operating normally in the county courts his practice, like that of the planter, spotlights the absence of skilled professionals in the first three generations of the colony's existence. Michael Judd's occupations included those of shipwright, carpenter, inn-holder, planter, and lawyer before he left the colony in the late 1690's. Henry Smith had moved

from Virginia to Somerset County by 1669/70. Not content with being a Justice, planter, and later a burgess, Smith also participated in the community as a chirurgeon, merchant, and building contractor. It was only after his retirement from the bench that he became one of the leading attorneys of the county court.

The entrepreneur was frequently the most volatile of practitioners. Judd was persistently in trouble with the Baltimore justices for swearing and was accused of both perjury and forgery. Henry Smith, not to be outdone, was accused of murder and the lesser offences of ill-treating his wife and servants.

All of the above types of attorney — the planter, clerk, merchant-planter, and entrepreneur — shared one characteristic. They predominately operated before 1700. It was during the generation after the Revolution of 1689 that the last and most important category of lawyer — the professional — came to hold a pre-eminent position in the practice of law. "Professional" is here used to describe someone who maintained a regular and extensive practice and whose primary source of income was from the law although that income could be supplemented by and invested in other enterprises. . . .

The increasing education of lawyers in the eighteenth century is reflected by the increasing number of law books found in inventories. Before 1690, there were hardly any law libraries in Maryland. Of the 98 inventories of all types of lawyer which listed books even if they were not individually itemized, only 19 (19.5 per cent) were found before 1690. John Jones' inventory of 1678, the first to record law books, listed only 3 titles. Thomas Burford had 21 law books at his death in 1686, while John Rousby who also died in 1686 had "a Library of Bookes" valued at £20 sterling. It was only in the generation after the revolution that libraries are a regularly found part of the professional lawyers' equipment. Thus Joshua Cecil, William Bladen, Thomas Macnamara, and Thomas Bordley, all contemporary practitioners in the early eighteenth century, had 25, 48, 83, and 184 law titles in their inventories respectively.

The law books that were most popular were the first and third parts of Sir Edward Coke's *Institutes of the Laws of England.* Other widely used treatises were those on property — Godolphin's *Orphan's Legacy,* Bridgeman's *Conveyances,* Wentworth's *Office and Duty of Executors,* West's *Symboleography* — and maritime law where Molloy's *De Jure Maritimo et Navali* was the usual source. In addition, most of the professional lawyers of the eighteenth century possessed compilations of cases in King's Bench, Common Pleas, and Chancery as well as various collections of statutes. Handbooks of procedure like the *Complete Attorney* and *Compleat Solicitor* with the dictionaries of Rastell —*Les Termes de la ley* — and Cowell — *The Interpreter* — further supplemented the law libraries.

Lawyers' libraries were overwhelmingly law collections. Non-legal works — chiefly history and religion — formed only a minor portion of their books. Bordley's non-law titles were worth less than a fifth of the total value of his library in Maryland. William Bladen's law books were priced at £20 16s 8d out of a total library value of £22 12s 8d current money. Thomas Macnamara had stronger literary interests including six volumes of Shakespeare and eight volumes of the Spectator, but even his non-law books were worth only £11 2s 6d, while his law library was appraised at £85 16s 9d current money.

Coupled with the beginnings of extensive private libraries were the professional lawyers' endeavors to improve the learning of the bench. In 1678, the county justices were ordered to purchase Keble's *Statutes at Large* and Dalton's *Countrey Justice* but the bench came to depend heavily on attorneys procuring books for the court's use. This practice continued into the later

eighteenth century. As well as supplying the justices with English treatises, the lawyers were instrumental in putting into print collections of Maryland law and procedure. In September 1698, William Hemsley asked the governor to print his "manuscript containing useful remarks as to the Proceedings in the provincial and county courts . . ." The fate of Hemsley's manuscript was oblivion, but William Bladen was able to have printed in 1700, with the concurrence of the assembly, the first known compilations of Maryland statutes.

Despite acquisitions of books, the low standard of the bench, especially in the counties, remained a grievance. In the seventeenth century, there are examples of illiterates acting as local magistrates. Governor Seymour accused even the Provincial Court justices in June 1707 of "not knowing any rules to guide their judgements." The attorneys echoed the complaints against the county justices, speaking in 1714 of their "erroneous Judgements." They were aware that an able bench facilitated their own practice. In May 1702, they petitioned the Governor and Council for the retention of Colonel Smithson as Chief Justice of the Provincial Court. They lauded his knowledge of the law noting "how easy . . . /it/ had made the Business of that Court."

While motivated to raise the level of learning of the bench, the attorneys' preoccupation was earning their livelihood from the law. Until the 1670's, fees had been agreed between a lawyer and his client on an individual basis. In April 1669, John Morecroft argued that

> before the Settlement of the Court & Since all persons did & were left to agree with their Attornys at what Rates they could. . . .

However, after 1674 lawyers' fees were regulated both by Acts of Assembly and the courts. In that year the assembly legislated that henceforth attorneys could collect a maximum of 800 pounds of tobacco in the Chancery Court, 400 in the Provincial Court, and 200 in the county courts. In February 1674/5, the fee allowed in the county courts was reduced to 60 pounds of tobacco. Both these acts were repealed in 1676 and it was then left to the courts to establish their own schedules of fees.

In 1678/9, Charles County ordered that attorneys were to collect 100 pounds of tobacco a case, a ruling which was in effect until 1690 when lawyers were permitted to charge up to 300 pounds depending on the amount involved in the particular suit. Somerset County set a ceiling of 100 pounds in 1687/8 but Prince George's justices in 1699 followed Charles County in imposing a sliding scale of 100 to 400 pounds of tobacco a case.

The discrepancies between various courts were eventually removed in 1708 by the assembly's reinstitution of standardized fees. Seemingly, the courts could still change the fees for in Prince George's County the attorney's oath was modified in 1710 to stipulate that he would take no other fees than those laid down by the act "except where my Clyents are Willing to give me more."

Compared to the sum he could expect to receive, the charges the attorney had to pay were minimal. There was a small cost for being admitted to a court plus an annual levy of 1,200 pounds of tobacco if he practised in the provincial Court and, after 1695, 200 pounds of tobacco if he belonged to any county court. The major deduction from the lawyer's income was the ten per cent commission payable to the sheriff for collecting his fees.

Ironically, the knowledge of fees a lawyer was entitled to charge does not allow accurate estimates of income from the law. Fees for appearances in court cases represented only one form of compensation for a lawyer's services. For example, we know attorneys were paid retaining fees, particularly by English merchants,

but few of these arrangements survive. In 1709, the Committee of Grievances protested the practice of hiring "any lawyers practicing the Law in any Courts within this Province for any certain Sum p. Ann," but retaining fees continued. Moreover, a lawyer did not collect from every client he represented. Many clients could not or refused to pay, left the colony, or died before settling with their lawyers. Frequently, nonpayment obliged the attorney to enter the court as a plaintiff in an action of debt against his former client.

By ignoring the hidden sources of legal income, some estimates of how much a professional lawyer could anticipate from his court practice have been made. William Stone appeared in 84 cases in Prince George's County between November 1696 and November 1697 from which his potential earnings were 9,600 pounds of tobacco or about £40 sterling. He had a similar practice in two other counties as well as the Provincial Court so that his gross income would probably have ranged between £150 and £200 a year. Wornell Hunt's income from his practice was larger. In his first year in Anne Arundel County Court he should have collected over £100. Like Stone, Hunt operated extensively in at least one other county court plus the Provincial and Chancery Courts. At the start of his career, Daniel Dulany's annual yield from his county court practice alone was over £100 and he was receiving higher fees from his appearances in the Provincial and Chancery Courts and the Court of Appeals. . . .

There are signs that law itself was becoming an acceptable occupation in the colony. William Dent began describing himself as Att:'y at Law" from 1685 on and similar spasmodic references suggest that law was assuming a precarious respectability. But no individual described himself as a lawyer in his will until 1731, revealing society's resistance to full recognition of the profession.

A better indicator of the gradual acceptance of lawyers is that eleven of the first generation attorney's sons followed their fathers into the profession. Law did provide an avenue of upward social mobility affording an opportunity both to the tutored immigrant and to those prepared to endure the tedium of apprenticeship. Francis Cooke perceived these possibilities. He arrived in the colony in 1713, was admitted to three county courts in the next two years, but then unfortunately died in 1716. His inventory reflects his frustrated expectations of a legal career: his sole possessions, totaling £9 15s 0d sterling, consisted of his clothes, a parcel of law books, and a horse. The nature of opportunity was not open-ended. The shortage of attorneys existed only until the 1690's. From that date on, with the monopoly of practice, opportunity for the fledgling apprentice depended in large measure upon the longevity of his established predecessors.

The limited degree of opportunity effected by a small cluster of able, educated lawyers' dominance of the court system incidentally illustrates the professionalization of the practice of law. Although the term "profession" has been used in this paper for convenience, it is almost an anachronistic designation for lawyers as a group in Maryland between 1660 and 1715. They lacked certain essential attributes of a profession. For example, there was no widespread community approval or a professional culture sustained by professional associations. But what remains true is that professionalization was occurring, stimulated by the increase in education and competence of the practitioners already discussed, by the reform and regulation of lawyers, by the beginnings of a hierarchy within the occupation, and by social development.

First, a legislative enactment, and executive and court order, achieved a tightening of controls over admissions and practice. But external regulation while aimed partly at preventing abuses also encouraged professionalization. The courts by instituting the procedure of formally allowing the attorneys to practice

bestowed on them some professional status as officers of the court. More importantly, in May 1679, the Proprietor was explicit in his desire to facilitate lawyers' business. In granting a patent of one acre to three lawyers

> for them to Build and Erect Chambers on for their more easy Commodious and private negotiating and dispatching their Clyents Business and affaires . . .

he stated that he was "willing to Encourage all persons in their honest and lawfull Vocations."

Secondly, the trend of professionalization can be seen in the emergence of a hierarchy of lawyers. The stratification was simple: by the early eighteenth century, the lawyers residing in and operating from the capital believed that they were superior by education and ability to the county court attorneys. Wornell Hunt enunciated his expertise in a petition to the Council in December 1708. He hoped they

> would consider him with some distinction separate from the rest of the Attornys he having been called to the Barr being of the society of Gray's Inn . . . .

Charles Carroll and Thomas Bordley rephrased Hunt's plea in 1714 arguing that "the Attornys practicing in the County Courts are not to be depended upon." However, the hierarchy was informal, rarely articulated, with no official sanction.

Thirdly, the economic development of the society was a further impetus to professionalization. Maryland, following Virginia's example, had soon established a single staple economy. The population which quadrupled between 1660 and 1700 was overwhelmingly engaged in the production and marketing of tobacco. Specie of any kind was scarce and tobacco became the currency and the cash crop of the province. Consequently, the Maryland economy operated on a network of credit relationships both within and without the province. One result of the workings of the economy was that the courts were kept busy arbitrating the performance of these arrangements. The commission to the Talbot County justices in 1679 recognized that the dependence of the province on trade "Causeth many Suits Att Lawe." The officers of the courts had the problem of determining not only simple actions of debt but also of unravelling the more intricate commercial litigation. The functioning of the economy stimulated and partially created the need for skilled interpreters of the labyrinth of legislation governing economic relationships.

Although the Charles County attorneys had referred to themselves as a profession in 1690, they were premature. The process was not complete by 1715. Lawyers still maintained an uneasy alliance with Maryland society. The preceding fifty years had seen a mosaic of practitioners being replaced by a relatively small, educated, and ambitious group of professional advocates. Lacking a formal or sustained sense of group cohesion, they were able, however, not only to secure their own position in society as individuals but also to initiate at least a measure of respectability for the practice of law.