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Book Reviews

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CRIME AND PUNISHMENT IN EARLY MARYLAND. By Raphael Semmes. Baltimore. The Johns Hopkins Press, 1938. Pp. 258. $3.00.

The author has made a most valuable contribution to the early legal history of Maryland. Like the volume published ten years ago by Chief Judge Carroll T. Bond of the Court of Appeals, it collects and preserves in printed form much of the early legal history which would otherwise be either inaccessible or lost to posterity. A compilation of historic data of this character is not apt to be rewarded with the returns produced by a "best seller," but the author must content himself with the satisfaction resulting from labor well performed and with the appreciation of students of Maryland legal history. Those who have never attempted research work of this character have no conception of the arduous work and painstaking care required in assembling it in narrative form. The reading of Semmes's book might well be made obligatory in the Maryland law schools. Rich as Maryland is in her legal history, too little of it is known by the hundred or more who annually gain admission to the Maryland Bar.

At the current session the House of Delegates at Annapolis expelled the lobbyists from the floor. On almost the first page, the author emphasizes the respect for dignity which the lower house of burgesses maintained when James Lewis (not "George") spoke disrespectfully of one of its members. He was compelled to go before the House upon his knees and to ask forgiveness of that body in general, and of one of its members in particular. When Edward Husbands, a "horse and buggy doctor" of that period, went so far in his loss of temper as to curse an august member, he was whipped on the bare back with twenty lashes by the common hangman. The Legislature of today has neglected to exercise some of its ancient prerogatives!

Captain Vaughn so far forgot himself as to accuse the then Governor of "partiality" in the administration of justice. Proceedings were instituted against him and only upon his abject apology and promise of reform was he graciously pardoned by the Governor. There is no record of any such proceedings instituted by the later Gov-

ernors of Maryland. Perhaps this is due to the present law of libel under which truth of the charge is a complete defense. The early justices were equally sensitive as to matters affecting the dignity of their tribunals. A man was fined a hundred pounds of tobacco for leaving a court session before it was ended, and a Commissioner of Talbot County was fined five hundred pounds of tobacco for using abusive words in the presence of the Court. Three absentee justices, whose presence was once necessary for a quorum, were fined for not appearing, and the Somerset County court declared that when that body was in session no member of the court could depart without leave of the court, upon penalty of ten pounds of tobacco for every hour that he was absent. Such was the ancient dignity of the early justices, though in some other respects a more careful reading of the book would lead one to infer that they were not greatly superior to the present county justices of the peace.

The name "Alvey" has shed lustre on the judicial history of Maryland, but in those days one bearing the name of Alvey was convicted of killing his maid servant by whipping her to death. He pleaded the ancient prerogative of benefit of clergy to escape capital punishment. Under the statute of Henry VII, this exempted clerics from civil penalties, and turned them over for discipline to the ecclesiastical tribunals. By common practice, those sufficiently literate to be able to read were supposed to be clerics, or ecclesiastics, and entitled to plead "benefit of clergy." But Alvey was later convicted of grand larceny, and pleaded benefit of clergy a second time, whereas in law he was entitled to but one escape on that ground. He was thereupon sentenced to be hanged. The rare Ben Jonson in England once escaped the hangman's rope for a cold blooded murder by pleading "benefit of clergy." In those days all felonies (a hundred or more) were punished capitally.

Service on the jury was compulsory. There were no exemptions for honorary membership in the militia! Failure to serve made one liable to a fine of five hundred pounds of tobacco, with the same penalty for refusing to testify as a witness when summoned. Witnesses and jurors received thirty pounds of tobacco a day for their services, equivalent to five shillings.

Perjury was severely dealt with, the offender being nailed to a stock with three nails through each ear, and he

was then whipped with twenty lashes. Like punishment was inflicted on woman perjurers. But the *Sheriff* of Cecil County, on conviction of perjury, was simply forbidden to hold office in Maryland.

Until 1643, there was no jail or prison built in Maryland, and the proceeds from fines imposed on drunks was set aside as a sinking fund to build a prison. Some ten years later there is a reference to a common gaol at St. Mary's, from which inference may be drawn that the *sobriety* of the early colonists was not their leading characteristic.

In Chapter Three, the author refers to how few instances there were of prosecutions for larceny, the reason being that there was comparatively little of value to be stolen; nor was there any place to hide the plunder. Honesty was induced more by circumstance than because of morality.

If anyone intended to leave the colony, he was required by the law of 1666 to give notice of his intention by setting up his name at the office of the Colonial Secretary three months before the date of his intended departure. Now we have a statute requiring a declaration of intention, a year ahead, if one proposes to become a resident and a registered voter in our midst.

Lack of prosecution for crime may also be attributable to the fact that the one instigating the proceedings had to appear in a central place at St. Mary's and there bring his witnesses and proof. As many lived at a distance, the expense and inconvenience overcame the hurt that honor felt.

Horse racing is first mentioned as being held in Talbot County in 1672, with betting of a thousand pounds of tobacco on a race, (equivalent to about $40.00). On page 72, the author records a sale of a race horse by Mistress Margaret Brent, with a warranty of the mare's pedigree.

In Chapter Five, the author discusses the "indenture system" of early Maryland colonists, by which men and maids in England secured passage to this country. Such persons sold their services for a given period, in consideration of the passage money and maintenance on this side of the water. The passage money was six pounds sterling, and the estimated cost of one person's keep for a year was fourteen pounds or twenty pounds for passage and one year's keep. It was estimated that a year's labor would yield a profit of about fifty pounds, so that there would

be a profit of thirty pounds at the end of the first year, after deducting the passage money. The customary contracts for service were for a period of five years. The more intelligent and skilled the employee, the greater the profit. It is difficult at this period, therefore, to determine what *type* of individuals indentured themselves in order to find opportunities in the New World. Some of the colonists were very unfortunate in the selection of their indentured servants. Many came from Newgate and other London prisons, including Bridewell, which was a low order of House of Correction. So it was that many of the indentured servants were notorious felons and malefactors. In many respects the indenture system degenerated into a form of contractual slavery, and some of the masters and mistresses treated their indentured servants with great harshness, and not infrequently with brutality. Severe whipping was the customary form of punishment, and many trials resulted from wanton abuse of the rod. No gentleman could be made the subject of corporal punishment, which was reserved for the indentured servant class.

Chapter Five forms a rather dark chapter in the book. On page 93 is recorded an instance of a servant who ran away and joined the savages, "rather than to be starved for want of food, clothing, and have his brains beaten out." Some of the masters were convicted and hanged for the deaths resulting from brutal punishments.

Chapter Seven deals with drunkenness, profanity and witchcraft. Where did the early settler get his liquor? Advices sent to England were that "a gentleman" should supply himself from the other side with wine and liquor. When asked what would be a proper *allowance* for an intended colonist to bring over, the judges of the provincial court answered, "The amount that a gentleman would consume in one year." This is worked out (on page 150) as 52 gallons of hard liquor, exclusive of spirits, or the equivalent of a pint a day. After that, they depended either upon the local grapevines, or upon further importation, with cider as a substitute, if the supply ran low.

In the chapter dealing with witchcraft, we shudder to read that Rebecca Fowler was solemnly sentenced by the judges of that day to be hanged for witchcraft in 1685, though it is some relief to know that she is the only woman ever executed in Maryland for that offense. However, Mary Lee and Elizabeth Richardson, who embarked on separate ships for St. Mary's settlement were hanged on their boats on the way over for the crime of witchcraft, which

as a crime was not abolished in England, until 1747. Even then this legislative reform of the 18th century was strenuously opposed by so learned a judge and so facile a writer as Sir William Blackstone. He considered the reform legislation opposed to Biblical authority, as found both in the Old and New Testaments.

In Chapter Eight of Mr. Semmes's book, he deals at length with the severe treatment of the early Maryland colonists when found guilty of such sex crimes as adultery, fornication or bastardy. In adultery cases when the man was punished at all, it was generally by a fine of a hundred to five hundred pounds of tobacco, or from $3 to $15. Today the maximum penalty for adultery is $10. But the woman always paid the more severe penalty by being publicly whipped on her bare back with lashes ranging in number from 12 to 30, and the same was true if she later gave birth to an illegitimate child.

In this 17th century period of the Maryland colony, marriage might be performed either by a civil or religious ceremony. They had not then the 48-hour "stop, look and listen" law of recent enactment, but they were required to make application to a court at the time when it was in session, or to a congregation when it was assembled, and license to marry had to be obtained, or banns read every Sunday for three weeks. There is only one recorded instance where any one was known to protest, and all the others forever held their peace.

Maryland was then a Gretna Green much frequented by the swains from Virginia. Only this year is Maryland extending belated reciprocity to the Old Dominion by frequenting its shrines at Alexandria.

Under the Catholic Proprietors there is no recorded case of the granting of absolute divorce, but many instances of legal separation were sanctioned by law. Even in the 18th century in England there was no divorce court. Ecclesiastical courts granted annulments and legal separations, but only the almighty Parliament could grant a divorce. It was therefore a rich man's luxury, and the seeming necessity of the poor man was ignored.

Semmes's reference to the bachelor's protest can hardly be passed unnoticed. When Robert Bryan brought an action of defamation against Teressa Arnald for spreading the report that he had been "intimate" with her, he protested that his credit and good name had become impaired, as it injuriously affected his chances of obtaining a wife. At this date, it might be regarded as a certificate

of efficiency, but Bryan disproved the truth of the charge (at least as applied to Teressa), and for this false accusation she was given 15 lashes on the bare back for unduly complimenting herself (or the Bachelor Bryan!)

It is impossible in this sketchy review to attempt to do full credit to the author for his painstaking research and splendid collection of early Maryland penal provisions, customs and practices, but I can highly commend this book to the students of Maryland history, and to all aspiring legal practitioners.

EUGENE O'DUNNE.*

WAITE ON SALES, Second Edition. By John Barker Waite. Chicago. Callaghan and Company, 1938. Pp. xvi, 464.

Professor Waite in the second edition of his work on Sales has given us a book which, because of its arrangement, obviously is intended to be used primarily by the practicing lawyer. In the first three chapters the author considers the subject from the standpoint of the seller's actions for breach of contract and for the price, and the actions based on the seller's right to possession. The following four chapters treat of the buyer's action for breach of contract to sell, the action based on the buyer's right to possession, his action for breach of warranty, and finally his action to recover money paid. Chapter Eight considers the place of title; and the final chapter in the book is devoted to the Statute of Frauds. This is a variation in the arrangement followed by Professor Waite in his first edition and it, of course, makes no pretext of generally following the order of topics of the Uniform Sales Act, which order is the basis of Mr. Williston's arrangement in his treatise on Sales. The approach of Professor Waite's book will make it of particular use to the practitioner who is immediately concerned with the approach to, and solution of, the particular situation which confronts his client. To the student who is seeking to get a general understanding of the law of Sales and its various concepts, the book will probably be of less value because the approach to the subject adopted by the author, of necessity, tends to break up the various concepts and places upon the student the necessity of searching in different parts of the book to put the parts of the pertinent concept together.

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Citation and discussion of some of the old landmarks in sales law, such as *Lickbarrow v. Mason, Jones v. Just,* and *Lorymer v. Smith,* are completely missing. This possibly may be a welcome relief to some.

Considering its limited size, the book is particularly full in its discussion of damages, a subject sometimes slighted or not sufficiently treated by writers on Sales.

For a book that is nation-wide in its appeal, it will be gratifying to local members of the bar to know that, considering the limitations of space, the volume has a very large number of Maryland citations.

The statement in a note on page 5, to the effect that Section 8 (1) is the only section of the Sales Act bearing upon the problem of the conditional vendor's right to further performance by the buyer when goods sold under a contract of conditional sale are destroyed while in the buyer's possession, will probably not be generally conceded. Section 22 (a) of the Sales Act seems definitely to be applicable to this situation by declaring that the goods are at the buyer's risk from the time of delivery. The Commissioners' Note to Section 22 as well as their Note to Section 27 of The Uniform Conditional Sales Act clearly indicates their opinion that Section 22 is applicable, as also do decisions of courts construing this section.[1]

It is the reviewer's opinion that the book would have gained if more attention had been devoted to the Uniform Sales Act and its effect on the current law of sales. For example, the author in his discussion[2] of the question of when a vendor may sue for the purchase price, even though the property in the goods has not passed, fails to make any reference either in the text or the footnotes to Section 63 (3) of the Uniform Sales Act, which worked an innovation on the common law rules of many states. In view of the fact that this act has been adopted in two-thirds of the states it would seem desirable that it be emphasized.

But, all in all, the book should be of considerable value to any reader who already has a fair understanding of the law of sales and desires to deal with a particular problem primarily from the remedial approach.

BRIDGEWATER M. ARNOLD.*

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[1] Collerd v. Tully, et al., 78 N. J. E. 557, 80 A. 491. O'Neil-Adams Co. v. Eklund, et al., 89 Conn. 432, 93 A. 524.

[2] Pp. 43-53.

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