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THE CHARACTER AND SERVICE OF GEORGE WYTHE.

A Paper Read by Mr. Allan D. Jones,
Of Newport News, Virginia,
Before The Virginia State Bar Association, August 6, 1932.

It was thought that the Association, meeting here at Old Point Comfort, in the County of Elizabeth City, the birthplace of George Wythe, might be interested to have reference made to the character and service of that distinguished Virginian. The public service of Wythe is blended with the general history of his time. For more than fifty years he served in positions of honor and trust, always with great fidelity, ability and distinction. His private and domestic affairs he never deemed of sufficient importance to record; for his characteristics we must examine the expressions of his contemporaries.

Wythe was born in 1726, in Elizabeth City County, on his father's plantation called "Chesterville," on Back River. More than twenty years ago the house was burned and nothing remains save old foundations to mark the spot. His father was Thomas Wythe; his mother was the daughter of a Quaker gentleman named Keith, who had migrated from Great Britain to Hampton in 1690. It is stated that this Quaker was a man of good education, who, after a short residence in Virginia, went into the established church and later its ministry. He took care of the education of his daughter, and this was fortunate for his grandson George, for, upon the death of Thomas Wythe, intestate, an elder brother being heir-at-law, this circumstance probably induced the widow to undertake George's education. She instructed him fully in English and the rudiments of Latin, and though she had not studied Greek she undertook with her son a study of this language, and with some success. With this preparation Wythe entered upon the study of law, and it is said that for a time he resided with an uncle-in-law, a Mr. Dewey, a lawyer of distinction of Prince George County. Either

from lack of interest on Wythe's part, or that his preceptor confining Wythe's efforts to the drudgery of the law office, he made little progress. After two years with Mr. Dewey, he returned home and without assistance pursued not only his legal studies, but worked in Latin and Greek literature. His mother died while Wythe was still a minor, and shortly thereafter his brother died, and Wythe became possessed of a sufficient estate to permit him to indulge himself in such pleasures as may have appealed to him. Some of those who have written of this period in his life state that he gave himself up to "a long career of pleasure and dissipation," and assert that he followed this course for ten years. This is negatived by such scant records of our county courts as are now available, to which I refer to refute what I believe to be a charge made without foundation in fact. Recalling that he was born in 1726, we find when he was twenty years old that he entered upon the practice of law. Evidence of this fact is found in common law order book of Elizabeth City County, 1736-1753, where the following entry appears:

> Elizabeth City County, June 18, 1746.
>
> George Wythe & John Wright, Gent. produced a commission to practice as attorneys, whereupon they took the oath appointed by law and also took the usual oaths to her majesty's person and government and subscribed the test and are admitted to plead in this Court.

In the same record is a bill of sale dated May 3, 1746, from George Wythe "of the County of Spotsylvania," Attorney at Law, wherein he sells to George Wray of Elizabeth City County a certain slave. How long Wythe practiced in Spotsylvania I have been unable to learn. He qualified to practice in the County Court of Warwick March 2, 1749, and in the succeeding terms of that court for that year was engaged in the criminal practice and as well chancery litigation. There is but one record in Warwick that survived the Civil War, the Common Law Order Book of the County Court of 1748 to 1762, a very interesting volume. In the case of *William Evans* v. *Angelica Wills, Administratrix of Emanuel Wills, deceased*, Wythe appeared as

attorney for the defendant (page 29 of that record). At the same term of the court, in the case of *John Brown* v. *John Edwards*, Wythe appeared for the plaintiff, and Miles Carey for the defendant. This record also shows that one Andrew Giles was presented by the grand jury "for not frequenting his parish church." George Wythe was his counsel, and asked for a continuance until the next term. At the August term, 1749, Wythe interposed a demurrer to the presentment, and the following entry shows the judgment of the court: "Demurrer of the defendant to the presentment aforesaid was this day argued by his attorney, and by the court adjudged insufficient. Therefore it is considered by the court, etc., that the defendant pay five shillings or fifty pounds of tobacco to the church wardens." In this same year Wythe appeared in other cases, and in the succeeding year at the Warwick County Court he, along with Miles Carey, Robert Carter Nicholas and Peter Lyons, was conducting litigation. All these men attained later great prominence and were associated in patriotic efforts. On January 16, 1748, the records of the county court of York show that Wythe was admitted to practice in that court. He was then twenty-two years of age. His ability must have been recognized by the royal governors, for in the York records, under date of January 21, 1754, appears the following entry: "George Wythe, Esq., his Majesty's Atty. Gen'l. and Judge of the Court of Vice Admiralty of this Colony this day in court took the oath, etc." These fragmentary records are submitted as discrediting the thought that Wythe's life was so dissipated, and that in this period he was more concerned with throwing away his patrimony than in practicing his profession.

It does not appear just when he entered the General Assembly of Virginia, though I find that on May 1, 1755, he had attained such distinction in the Assembly that he was on the committee of privileges and elections, the important committee of propositions and grievance, as well as the committee on courts of justice and that of enrolled bills. In the sessions of '56 and '58 he took an active part. It seems that he had been elected to the General Assembly from his county, along with William Wager. John Tabb, who had been a candidate, contested the seat of Wager,

and the report of the committee of privileges and elections seated Tabb over Wager. Wythe began practice in the general court in 1756, and in a short time became distinguished. Recalling that it was in 1746 that he became of age, that he had been in active practice in the county courts of the Peninsula since 1745, and held the king's commission as attorney general and judge, in 1754, and in 1755 was in the Assembly, and in 1756 was practicing in the general court, it would not be thought that his course of conduct was such that it met with disapprobation of the people. He may not have especially exerted himself up to the time he entered the General Assembly, yet he had not indulged in dissipation and extravagance to a point that he was impoverished in fortune or health. During this period, in addition to general study, he had taken further instruction in law under a Mr. Lewis, whose daughter he married. Wythe doubtless felt, and often expressed, regret that he had lost time from study which would have served to advance him in his profession, and on occasion was known to have warned young men who came under his influence that law was a jealous mistress and that no time might be wasted in dissipation, and suggested that these students profit by his example.

It was in 1760 that Jefferson entered William and Mary College. Jefferson soon formed a friendship with Wythe through the influence of Dr. Small, Professor of Mathematics, and at Dr. Small's solicitation Mr. Wythe undertook the legal instruction of Jefferson. Jefferson himself said that "Dr. Small filled up the measure of his goodness by procuring for me from his most intimate friend, George Wythe, a reception as a student at law under his direction. * * * Mr. Wythe continued to be my faithful and beloved mentor in youth and my most affectionate friend through life. In 1767 he led me into the practice of law, at the bar of the general court, at which I continued until the revolution shut up the courts of justice."

It is interesting to know that Patrick Henry was admitted to practice in Goochland County Court on a license signed by George Wythe and John Randolph.

As the rift between the colonies and the mother country grew and widened, George Wythe fanned the flame of revolutionary

spirit, taking an independent course; though he had an intimate friendship with the royal governors, all except Dunmore. In was in 1764 that Wythe drew up for a committee of the burgesses, of which he was a member, a remonstrance to the House of Commons; but it was thought to be too bold for the times, though after some amendments it was adopted by the house. He opposed as unseasonable the famous resolution of Henry concerning the Stamp Act in May, 1765. His course in this respect was approved by his constituents in the election which took place in Elizabeth City County August 23, 1765. George Wythe, Captain James Wallace and Colonel Wilson Miles Carey were candidates for the house, two to be elected. The poll was taken and is recorded in the clerk's office. Each freeholder approached the polls and his name was written under the name of the candidate for whom he desired to vote. Wythe received 100 votes, Cary 81, and Wallace 69. Wythe voted for Wallace and Cary. This election was important in that there was a division of sentiment on the questions affecting the relation of the colonies to Britain.

In 1768 Mr. Wythe was still a member of the burgesses, and it was then that the house came fully up to the ground taken by Henry in his resolution of 1765, which at that time Mr. Wythe had deemed inexpedient. The resolution of '68 asserted in determined language the exclusive right of the burgesses to tax the colonies, and decried the course of trying in England persons charged with having committed offenses in the colonies, in violation of the British Constitution. Mr. Wythe was clerk of the house at that time, and the royal governor endeavored, unsuccessfully, to secure from him a copy of this resolution, with an idea of dissolving the Assembly and preventing the completion of the passage of the resolution.

In 1769 Jefferson entered the Assembly as a member and he and Wythe stood side by side in defense of the rights and liberties of the colonists. Delegates were being sent to the Constitutional Congress and Jefferson prepared a draft of instructions. It was thought that Jefferson's instructions were too bold for the existing state of things. These resolutions were printed in a pamphlet entitled "A Summary View of the Rights

of British America." Jefferson took the ground, which he regarded as the only tenable one, that the relation between the colonies and Great Britain was exactly the same as that of England and Scotland, after the accession of James, and until the Union; having the same executive chief but no necessary political connection. Jefferson says that in this doctrine he could get no one to agree with him except Mr. Wythe. It may be that Jefferson was but giving expression to a doctrine instilled while under the tutorship of Wythe and found Wythe in full accord with him.

Wythe entered the field as a soldier in one of the earliest volunteer companies, but was persuaded he might render more valuable service in the civil sphere. In 1775 Wythe was appointed a delegate to the Continental Congress, and in the following year joined actively in the debates on the resolutions offered in pursuance of Virginia's instructions, declaring the colonies free and independent, and signed the great Declaration penned by his pupil.

In 1776 he was appointed, with Mr. Jefferson and others, to revise the entire jurisprudence of the State, and to adapt it to her independent position and the republican principles embodied in the new government. Mr. Wythe undertook to revise the British statutes from the fourth year of James I, including the statutes of descents, and of religious freedom, crimes and punishments, Mr. Pendleton, the Virginia laws; all, however, revised the work of each. The report was made in '79, but the body of the report was not acted upon until 1785. The code was termed the "Chancellor's Revisal." For the two sessions of the Assembly in 1777, after Wythe returned from Congress, and before his appointment as Chancellor, he was Speaker of the House. Towards the close of the same year he was appointed one of the three judges of the High Court of Chancery, and on the reorganization of that court in 1788 became sole Chancellor.

We come now to a consideration of one of the most beneficial activities of this industrious patriot. Jefferson, along with others, had read law with Wythe. During the revolution the courts were practically closed. Wythe was in the Continental Congress and the Virginia Assembly, but found time to fill the

chair of law at William and Mary. The faculty of that institution in 1779 was composed of James Madison, D. D., President and Professor of Natural Philosophy and Mathematics; George Wythe, Professor of Law and Police; James McClurg, Professor of Anatomy and Medicine, and Robert Andrews, A. M., Professor of Moral Philosophy, the Law of Nations, and of Fine Arts; and Charles Bellini, Professor of Modern Languages. Wythe filled this chair for twelve years and thereby became "the first university law professor in the United States, and the second in the English-speaking world—Sir William Blackstone, who filled the Vinerian chair of law at Oxford in 1758, being the first." Mr. Jefferson in speaking of Wythe's connection with William and Mary called him "the pride of the institution" and "one of the greatest men of the age, always distinguished by the most spotless virtue." Mr. Wythe lectured regularly on municipal and constitutional law, and in 1780 instituted a system of moot courts and moot legislatures, by which he trained the forty young men under his care in public speaking and parliamentary procedure. He made use of the deserted capitol, at the east end of Williamsburg, for this purpose, and he and other professors would sit as judges. He was of the faculty until 1791; as he had become sole chancellor, he removed to Richmond, being succeeded by St. George Tucker, a judge of the general court.

It would be interesting to call the roll of men, later of great distinction, who attended Wythe's lectures. There came among others John Marshall, on leave from the army in which he was an officer. Marshall had begun the study of law at eighteen, for a year or two, in a country office. In 1779 he entered William and Mary, attended law lectures and a course in Natural Philosophy, the latter by the learned and accomplished Madison. The campaign of 1780 recalled him to the field, but in 1781 he returned to college and resumed his study.

It was under Wythe that Jefferson and Marshall were grounded in the municipal law of Virginia, but more important the law of nature and of nations. This is demonstrated by consideration of Marshall's opinion in *Marbury* v. *Madison*, founded on a principle that Chancellor Wythe announced ten years before.

In his opinion in *Marbury* v. *Madison*, Marshall, C. J., said:

"The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

"That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

"This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

"The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.

"It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

"Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with or-

dinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

"Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?"

At the outset of this pronouncement it will be observed that Marshall said, "It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it."

Beveridge, in his life cf Marshall, suggests that Marshall was without legal precedent for his conclusions in *Marbury* v. *Madison,* and states that if there were any such precedents, "it is probable that Marshall had not heard of many of them." None of us will agree with Beveridge when we consider the distinguished position that Marshall had occupied at the bar of Virginia, being advised of, if not engaged in, the more important cases in the general court and court of appeals. When the Chief Justice speaks of "certain principles, well established," he had in mind not only the lectures of his instructor, but also most certainly two Virginia cases, both cases of general and compelling interest, the one, *Commonwealth* v. *Caton,* in the Court of Appeals in 1782, the other *Page, Exec. of Cary* v. *Pendleton and Lyons.*

As Chancellor, Mr. Wythe was one of the judges of the first Court of Appeals; the quality of his mind and his intrepid judicial temper will appear from his opinion in the case of *Commonwealth* v. *Caton, et als.* (4 Call, p. 5). The case came to the Court of Appeals from the General Court by adjournment by reason of the novelty and difficulty of the questions presented. Caton and two others were condemned in the General Court for treason, under act of Assembly of 1776 concerning that offense. By the same act the executive was denied pardoning power. The house of delegates by resolution granted the prisoners pardon,

the Senate refused to concur. The attorney general moved in the general court that execution of the judgment might be awarded, the prisoners pleaded the pardon of the House of Delegates.

If this was not the first case in which the question of the nullity of a law conflicting with the Constitution was raised, it was among the first. The opinion of Wythe, at that early date, held it to be the duty of the courts to restrain the General Assembly within constitutional bounds. It may be said that it was only necessary to the decision for the court to have said no more than that the resolution of the one branch without the concurrence of the other was not legislation and was wholly ineffective. Chancellor Wythe held the Constitution paramount, saying in his opinion:

> "Among all the advantages which have arisen to mankind, from the study of letters, and the universal diffusion of knowledge, there is none of more importance than the tendency they have had to produce discussions upon the respective rights of the sovereign and the subject; and, upon the powers which the different branches of government may exercise. For, by this means, tyranny has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty prompted. But this beneficial result attains to higher perfection, when those, who hold the purse and the sword, differing as to the powers, which each may exercise, the tribunals, who hold neither are called upon to declare the law impartially between them. For thus the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established. Under these impressions I approach the question which has been submitted to us; and, although it was said the other day by one of the judges that imitating that great and good man Lord Hale, he would sooner quit the bench than determine it, I feel no alarm; but will meet the crisis as I ought; and, in the language of my oath of office will decide it according to the best of my skill and judgment.

"I have heard of an English chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject against the encroachments of the crown; and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely it is equally mine to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other; and, whenever the proper occasion occurs, I shall feel the duty; and, fearlessly perform it. Whenever traitors shall be fairly convicted, by the verdict of their peers, before the competent tribunal, if one branch of the legislature, without the concurrence of the other, shall attempt to rescue the offenders from the sentence of the law, I shall not hesitate, sitting in this place, to say to the general court, *fiat justitia, ruat coelum;* and, to the usurping branch of the legislature, you attempt worse than a vain thing; for, although you cannot succeed, you set an example which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the Constitution, will say to them, here is the limit of your authority, and hither shall you go, but no further."

Note reference of the Chancellor to his oath of office, and like reference by the Chief Justice in his opinion. In both cases it has been said it was not necessary to the decision to have reached the conclusions that an act repugnant to the Constitution was void. That such was understood to be the law Wythe announced as early as 1782, when Caton's case was before the court.

Another case may be referred to which will illustrate the strength of character of Chancellor Wythe and the utter failure of popular clamor to influence his decision of a case.

In 1777 the General Assembly of Virginia had passed an act, entitled "An act for the sequestration of British property";

he spent his time and energy in the faithful discharge of the duties of his office. Yet he found time for many years to keep a private school for instruction of a few young men, demanding little compensation. He had been twice married, first to Miss Lewis, and after her death he married Miss Taliaferro, a member of a wealthy and influential family. Their only child died in infancy and for several years before his death he was a widower.

He died in his eighty-first year, June 8, 1806. It may be said that his compassionate spirit hastened his death. By his will Wythe liberated three slaves, a man, a woman, and boy, making suitable provision for their support. The greater portion of his estate he left to his great-nephew, George Wythe Sweney. In event the slave boy died under age, the grand-nephew's share of the estate would be increased. The boy died suddenly, and Wythe must have thought that he was poisoned by Sweney, for he immediately cut him off by a codicil to his will. A few days thereafter Wythe died. The circumstances of the death of the Chancellor and the colored boy exerted strong suspicion of poisoning, and Sweney was indicted in September, 1806. No conviction was had, the accused drifted into the West, and it is said met a miserable end.

William Munford, who had studied law under the Chancellor, was selected to deliver the funeral oration, which service was held in the Capitol, in the hall of the House of Delegates. Thus came to a close a long and useful life.

We may turn again to his pupil and friend, Jefferson, and accept his tribute to his instructor:

> "His virtue was of the purest kind; his integrity inflexible, and his justice exact; of warm patriotism, and devoted as he was to liberty and the natural and equal rights of men, he might truly be called the Cato of his country, without the avarice of the Roman, for a more disinterested person never lived. Temperance and regularity in all his habits gave him general good health and his unaffected modesty and suavity of manners endeared him to every one. He was of easy elocution, his language chaste, methodical in arrangement of his matter, learned and logical in the use of it, and

of great urbanity in debate. Not quick in apprehension, but with a little time, profound in penetration, and sound in conclusion. His stature was of the middle size, well formed and proportioned, and the features of his face manly, comely, and enjoying. Such was George Wythe, the honor of his own and the model of future times."

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