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William E. Nelson

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Lectures

LAW AND THE STRUCTURE OF POWER IN COLONIAL VIRGINIA

William E. Nelson*

I. INTRODUCTION

For most of England's North American empire, the restoration of Charles II to the nation's throne in 1660 quickly led to a sharp break in the continuity of the legal system. In New England, the crown began to interfere with local legal ordering in ways unprecedented since Plymouth had been founded in 1620. In the Middle Atlantic, the Restoration led to a new imperialism that replaced Dutch rule and Dutch law with English rule and English common law. In the Carolinas, Charles II's new policies led to the founding of two new colonies.

Such was not the case in Virginia. With the restoration of Charles II to the English throne, the king also restored Sir William Berkeley, a former royal governor, to his post in Virginia, and the law continued to develop largely in directions it had already been moving. A potentially transforming event occurred a decade and a half later, when Nathaniel Bacon, a newcomer from England who had settled on the Virginia frontier, led a rebellion that resulted in a civil war that nearly toppled the colonial regime. Ultimately Bacon's Rebellion was suppressed, and its suppression resulted not in change, but in reinforcement of legal developments that were already occurring.

This Article proceeds in four main parts. Part II focuses on the decade and a half between the Restoration and Bacon's Rebellion and examines Virginia's unstable and somewhat weak legal order in the 1660s and early 1670s.¹ Rapid immigration by whites lay at the root of the instability; Virginia's planters needed laborers—mainly in the form of young, mostly male, indentured servants—for the economy to grow and prosper. However, the colony proved unable to absorb those newcomers into the governing elite after they completed their period of servitude. Instead, the freed laborers grew into a landless, sullen, and

* Edward Weinfeld Professor of Law and Professor of History, New York University. A condensed version of this article was delivered as the Martin Luther King Lecture at Valparaiso University School of Law on January 23, 2014. The author is indebted to the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund of New York University School of Law for research support and to the members of the Legal History Colloquium at New York University for their comments and criticisms.

¹ See *infra* Part II (examining the weak nature of Post-Restoration law in Virginia).

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unruly lot that eventually turned to open rebellion. As noted above, however, their rebellion failed.

In the aftermath of rebellion, Virginia's governing elite solidified its power. In the short term, rebels were punished, compelled to give peace bonds promising obedience, or otherwise coerced into quiescence. In the longer run, except in connection with the somewhat later settlement of the Shenandoah Valley, Virginia became increasingly unwelcoming to white immigrants, at least in comparison with other colonies like Pennsylvania that had been founded in the Post-Restoration era. After the 1670s, whites tended to immigrate to those other colonies, and Virginia was forced to replace its white, indentured servants with black African slaves, who became victims of severe forms of repression that never could have been imposed on voluntary immigrants from Europe. As a result, elites had an easier task of governance in the eighteenth century than they had had in the seventeenth—they only had to control a smaller, stable class of whites positioned midway between themselves and their slaves rather than a growing underclass of whites striving for upward mobility. Part III will examine how the structure and procedures of the legal system enabled elites to exert that control.²

Meanwhile, Virginia's substantive law continued to develop in the directions it had taken since the 1620s. In an effort to attract settlers and capital, Virginia continued to champion private property and facilitate the collection of debts. The law also strove to encourage immigration from Europe by improving the well-being of indentured servants, in part by conferring real rights on those servants but also by distinguishing white servants from black slaves through degradation of the latter. Taken together, the degradation of Africans and their descendants and the replacement of white with black labor, together with the protection of creditors and property owners, set in motion chains of causation that would result in the inhumanity and injustice of nineteenth-century slavery. Part IV will examine these developments.³

By the middle of the eighteenth century, Virginia's provincial elites together with crown officials could look with some satisfaction on the legal order they had created. They governed the colony effectively, with no outward signs of resistance to the powers in authority. Virginians were among the most docile and supportive subjects in Great Britain's colonial American empire. Nonetheless, some fragility remained. In analyzing developments in Virginia law after 1750, Part V will examine

² See *infra* Part III (explaining how Virginia elites strengthened their legal power throughout the 1600s).

³ See *infra* Part IV (examining various substantive law areas in colonial Virginia).

how that fragility was gradually exposed. Ultimately its exposure led to the collapse of Virginia's colonial legal order in 1776.⁴

In addition to providing the first general history of colonial Virginia law, this Article seeks to intervene in two respects in ongoing scholarly debates. First, in respect to the subject of slavery. For almost three-quarters of a century, historians have rightly assumed that colonial Virginia slavery was thoroughly unjust and inhumane, but few have inquired in a systematic fashion about what made it so. This Article urges that historians have used the concept of slavery to describe a wide variety of vastly different socio-economic systems of subordination and also urges that various conditions and circumstances on the ground have made those different systems more and less evil. The Article then offers a specific theory, together with some tentative but by no means full evidentiary support, to suggest what made Virginia slavery more inhumane and unjust than most other systems of servitude.

Second, in respect to the subject of the causes of the American Revolution. For the past half century, most historians have searched for causation in the realm of political and legal ideology. This Article finds that search misguided in Virginia's case. Although Virginia lawyers undoubtedly employed familiar political, constitutional, and legal ideas in challenging Parliamentary policies, this Article suggests that economic considerations combined with ideological and constitutional ones to motivate Virginia planters as they ceased being some of the most docile and supportive of Britain's colonials and instead became almost unanimous defenders of American rights and ultimately of American independence.

II. THE WEAKNESS OF POST-RESTORATION LAW

Historians generally agree that in the 1660s and 1670s the legal system of Virginia—consisting of a colony-wide General Court and local county courts—suffered from instability and weakness despite the broad civil, criminal, equitable, and regulatory jurisdiction that both the General Court and the county courts possessed. The root problem lay in the large number of landless, difficult-to-govern, former indentured servants whom the colony's small governing class lacked sufficient power to coerce. The system had to govern by consent since it was too weak to do otherwise.⁵

⁴ See *infra* Part V (examining the weakening of the Virginia legal order throughout the 1700s).

⁵ See JOHN RUSTON PAGAN, ANNE ORTHWOOD'S BASTARD: SEX AND LAW IN EARLY VIRGINIA 51 (2003) (providing the most recent monograph on the legal system of seventeenth century Virginia). The jurisdiction of the courts is outlined in more detail below. See *infra* Part III.E.1.

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A good deal of evidence of the weakness of post-1660 legal institutions exists. A persistent sign was the difficulty of obtaining the attendance of witnesses,⁶ jurors,⁷ and even justices in court.⁸ There was also “the long & tedious”⁹ nature of sometimes “frivolous”¹⁰ litigation that parties could pursue until they were either satisfied with the result or totally exhausted. If a litigant did not approve of a result in a county court, he could appeal to the General Court,¹¹ even from a second decision in “a vexatious turbulent cause already judged,”¹² and from the

⁶ See, e.g., *R v. Goodrich* (Va. Gen. Ct., Sept. 22, 1674), in *MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA 1622–1632, 1670–1676 WITH NOTES AND EXCERPTS FROM ORIGINAL COUNCIL AND GENERAL COURT RECORDS, INTO 1683, NOW LOST 376* (H.R. McIlwaine ed., 1924) [hereinafter *MINUTES OF THE COUNCIL*] (noting that a witness failed to appear); *R v. Walker* (York Cnty. Ct., Apr. 24, 1662), in *3 YORK COUNTY VIRGINIA DEEDS, ORDERS WILLS & C. 1657–1662, microformed on 1000445991* (Genealogical Soc’y of Utah) [hereinafter *3 YORK 1657–1662*]; see also *R v. Dangerfield* (Va. Gen. Ct., Nov. 20, 1674), in *MINUTES OF THE COUNCIL, supra*, at 397 (explaining that a fine was remitted since the witness “was made incapable by sickness”).

⁷ See, e.g., *R v. Bryan* (Va. Gen. Ct., Mar. 4, 1674/1675), in *MINUTES OF THE COUNCIL, supra* note 6, at 403 (stating the government fined Charles Bryan for failing to appear as a juror); *R v. Davis* (Va. Gen. Ct., Sept. 25, 1674), in *MINUTES OF THE COUNCIL, supra* note 6, at 379 (fining jurors for failing to appear); see also *R v. Lang* (Northampton Cnty. Ct., Dec. 24, 1668), in *9 NORTHAMPTON RECORD BOOK, 1664–1674*, at 176, 178 (Howard Mackey & Marlene A. Groves eds., 2003) [hereinafter *9 NORTHAMPTON 1664–1674*] (requiring jurors show why they failed to appear).

⁸ See, e.g., *R v. Wright* (Northumberland Cnty. Ct., May 20, 1662), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK NORTHUMBERLAND COUNTY, VIRGINIA 1661–1665*, at 26 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter *NORTHUMBERLAND 1661–1665*] (fining justices 499 lb. of tobacco for missing court); cf *Order That Court Be Adjourned* (Northumberland Cnty. Ct., May 20, 1661), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOKS NORTHUMBERLAND COUNTY, VIRGINIA 1657–1661*, at 101 (Sam Sparacio & Ruth Sparacio eds., 1994) [hereinafter *VIRGINIA 1657–1661*] (cancelling a court session since only two justices attended).

⁹ *Gilbert v. Smith* (York Cnty. Ct., Oct. 25, 1675), *microformed on 1000445991* (Genealogical Soc’y of Utah); accord *Bu[s]hrod v. Dixon* (Va. Gen. Ct., Oct. 4, 1672), in *MINUTES OF THE COUNCIL, supra* note 6, at 314; see also *Bridger v. Pitt* (Va. Gen. Ct., May 23, 1673), in *MINUTES OF THE COUNCIL, supra* note 6, at 336–37 (describing the proceeding as a “long dispute”).

¹⁰ *R v. Spencer & Goodale* (Charles City Cnty. Ct., Aug. 3, 1664), in *3 VIRGINIA COLONIAL ABSTRACTS 303–04* (Beverley Fleet ed., 1988) [hereinafter *3 VA. COLONIAL ABSTRACTS*].

¹¹ See, e.g., *Madeson v. Flowers* (Northumberland Cnty. Ct., Oct. 20, 1667), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK NORTHUMBERLAND COUNTY, VIRGINIA 1665–1669*, at 49 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter *NORTHUMBERLAND 1665–1669*] (stating that Bennet Madeson appealed the decision); *Williams v. Christmas* (Northumberland Cnty. Ct., Sept. 6, 1664), in *NORTHUMBERLAND 1661–1665, supra* note 8, at 85–86 (granting Thomas Williams’ request for appeal to the General Court); *Hubard v. Wheeler* (York Cnty. Ct., Oct. 26, 1657), in *3 YORK COUNTY 1657–1662, supra* note 6, *microformed on 1000445991* (Genealogical Soc’y of Utah).

¹² *Salter v. Stinson* (Charles City Cnty. Ct., Apr. 20, 1658), in *3 VA. COLONIAL ABSTRACTS, supra* note 10, at 199.

General Court to the House of Burgesses¹³ or the Privy Council.¹⁴ Courts also reversed their own judgments without appeals when parties brought new matters to their attention.¹⁵ It seems that judges were unwilling or unable to enforce their judgments as final, but were instead engaged in a negotiating process in which the court and the litigants responded to each other's contentions, slowly narrowed their differences, and ultimately came to a result with which all could live.

The case of John Gibson is illustrative.¹⁶ Like many other seventeenth-century Virginians, he decided one day to use someone else's boat, for which he was convicted of theft of the boat. The court levied a stiff fine of 6000 lbs. of tobacco. However, as the court undoubtedly knew, collecting a fine was quite different from imposing one. John Gibson, in fact, did not pay his 6000 lb. fine, and soon the court offered a bargain: it agreed to remit half the fine if Gibson would agree to pay the other half—that is, 3000 lbs. tobacco—within the next two years.¹⁷ He agreed, although it is unclear how much, if anything, he ultimately paid.

¹³ See, e.g., *Carter v. Hatcher* (Va. Gen. Ct., Sept. 29, 1674), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 383 (referring the decision to the Assembly); *West v. Wilson* (Va. Gen. Ct., Sept. 28, 1674), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 382 (allowing Wilson to appeal the decision to the Assembly); *West v. White* (Va. Gen. Ct., Sept. 22, 1674), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 375–76 (referring the entire cause of action to the Assembly); *Lawrence v. Lloyd* (Va. Gen. Ct., Mar. 25, 1672), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 295, 297 (stating that the case would next move to the Assembly).

¹⁴ See, e.g., *Ludwell v. Bland* (Va. Gen. Ct., Nov. 21, 1674), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 398–99 (moving the case from the Assembly to the Council).

¹⁵ See, e.g., *Wyatt v. Ford* (Va. Gen. Ct., Mar. 16, 1675/1676), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 441–43 (voiding its own previous proceedings because a mistake was made); *Taberer v. Hunt* (Va. Gen. Ct., Sept. 29, 1671), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 277 (reversing its previous disposition); *R v. Anderson* (Va. Gen. Ct., Oct. 25, 1670), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 238–39 (reversing the jury decision); *Page v. Estate of Dixon* (Lancaster Cnty. Ct., Mar. 12, 1661/1662), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1656–1661*, at 100 (Ruth Sparacio & Sam Sparacio eds., 1993) [hereinafter *LANCASTER 1656–1661*] (reversing its previous order issued against the estate of Miles Dixon); *R v. Thomas* (Northumberland Cnty. Ct., Aug. 24, 1669), in *NORTHUMBERLAND 1665–1669*, *supra* note 11, at 93–94 (remitting the amount the court original decreed William Thomas to pay). Compare *Madeson v. Flowers* (Northumberland Cnty. Ct., June 20, 1667), *NORTHUMBERLAND 1665–1669*, *supra* note 11, at 46 (allowing the case be presented again to the jury because the original information presented to the jury was imperfect), with *Madeson v. Flowers* (Northumberland Cnty. Ct., Oct. 20, 1667), in *NORTHUMBERLAND 1665–1669*, *supra* note 11, at 49 (granting the request to review the court's previous decision regarding which party owned the servant).

¹⁶ See *Remission of Gibson's Fine* (Northumberland Cnty. Ct., June 20, 1668), in *NORTHUMBERLAND 1665–1669*, *supra* note 11, at 67 (bargaining with John Gibson to reduce his fine if he paid what else he owed within the next two years).

¹⁷ *Id.*

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A series of matters involving Richard Cole, a justice of the Northumberland County Court in the late 1650s, provides another example of the legal system's weakness. Cole's difficulties began when his colleagues filed a petition in February 1658/1659 with the governor requesting that Cole "for his misdemeanor . . . be expelled" from the court.¹⁸ His expulsion, however, marked only the beginning. Thereafter, Cole was a frequent litigant in,¹⁹ among other cases, one in which a female servant accused him of "abus[ing] her by very unlawful & careless beatings."²⁰ At one point, the court put him under a bond for good behavior, from which it released him in October 1662, "he promising conformity for the future in all things touching his civil comportment."²¹ Of course, he did not keep his bargain; and in December 1663, another female servant accused him of beating her cruelly.²² The court, however, either would not or could not coerce Cole into good behavior; all it did was require him to give another bond, from which it released him in March 1663/1664 on his promise "to comport & demean himself civilly toward all people."²³ At its next session, the court directed the sheriff to impanel a jury to inquire into the death of a woman servant belonging to Cole,²⁴ but it did not indict him. Another case highlighted the court's impotence six months later when a fourth female servant complained of Cole's cruelty, Cole failed to appear in response to her complaint, and thus the court adjudged her to have "ma[d]e good her complaint."²⁵ As a result of her success, the man with whom she lived while her suit against Cole was pending received a judgment of 100 lb. of tobacco compensation from Cole; apparently he

¹⁸ Petition to Governor (Northumberland Cnty. Ct., Feb. 24, 1658/1659), in NORTHUMBERLAND 1657-1661, *supra* note 8, at 39.

¹⁹ *E.g.*, Cole v. Smith (Northumberland Cnty. Ct., May 20, 1662), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 25.

²⁰ Earle v. Cole (Northumberland Cnty. Ct., July 21, 1662), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 28-29.

²¹ Application of Cole (Northumberland Cnty. Ct., Nov. 20, 1662), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 34-36.

²² Newman v. Cole (Northumberland Cnty. Ct., Dec. 10, 1663), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 64-65.

²³ Application of Cole (Northumberland Cnty. Ct., Mar. 8, 1663/1664), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 78; *see also* Lewis v. Rothram (Northumberland Cnty. Ct., July 20, 1670), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK NORTHUMBERLAND COUNTY, VIRGINIA 1669-1673, at 20-21 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter NORTHUMBERLAND 1669-1673] (releasing the defendant from punishment on an identical promise).

²⁴ Order to Impanel Jury (Northumberland Cnty. Ct., Apr. 20, 1664), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 80-81.

²⁵ Knight v. Cole (Northumberland Cnty. Ct., Oct. 20, 1664), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 91.

also received the right to bargain with Cole to purchase her future service.²⁶ However Cole, who was a man of some wealth, could not be coerced.

*Ludwell v. Scarborough*²⁷ can be understood as yet more of the same. This October 1670 case between Thomas Ludwell, the secretary of the colony who was representing a deceased London merchant, and Edmund Scarborough, the wealthiest man on the eastern shore, arose out of Scarborough's bond for £1500.²⁸ Scarborough "in his defense having exhibited a bill in equity laying down sundry reasons wherefore the said bond and interest thereupon should not be adjudged against him" offered to pay £743 and 13 shillings immediately and £130 and 13 shillings in two years, and the court did "unanimously adjudge *nemine contra dicente* that it [was] a satisfactory payment."²⁹ Ludwell promptly appealed to the next session of the House of Burgesses, but then in the afternoon withdrew his appeal and interposed a new motion in the form of a demurrer to Scarborough's defense.³⁰ The court then ruled that the "demurrer to the bill exhibited by the said Scarborough is undeniable in regard that many things in the said bill cannot be answered but by" the deceased London merchant himself.³¹

With the case now in an uncertain posture, Ludwell offered to settle for £840, to be paid in two equal installments on March 1, 1671, and March 1, 1672.³² The next morning, Scarborough counteroffered with a proposal to pay £300 immediately, £300 on March 31, 1672, and £240 on March 31, 1673; on this basis, the suit was settled.³³

The legal system also behaved less harshly toward crime in the Post-Restoration Era than it had in the past or would again in the future, thereby implying its weakness. Not surprisingly the criminal law continued to punish murder with death,³⁴ and theft—especially hog

²⁶ *Id.*

²⁷ (Va. Gen. Ct., Oct. 26, 1670), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 239–41.

²⁸ *Id.* at 239.

²⁹ *Id.*

³⁰ *Id.* at 239–40.

³¹ *Id.* at 240.

³² *Id.* at 240–41.

³³ See *Ludwell v. Scarborough* (Va. Gen. Ct., Oct. 27, 1670), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 241 (dropping the appeal once they reached an agreement).

³⁴ See, e.g., *Indian Condemned* (Va. Gen. Ct., Sept. 25, 1674), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 379–80 (ordering death for murder by stabbing); *Sentence of Death* (Va. Gen. Ct., Oct. 24, 1673), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 352–53 (ordering death by hanging); *Sentence of Death* (Va. Gen. Ct., Mar. 15, 1672/1673), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 329 (mentioning Thomas was sentenced to death for murdering Morrice); *Shaw Arraignment* (Va. Gen. Ct., Apr. 7, 1671), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 252 (reporting that the governor consented to Shaw's death penalty sentence for murder); see also *Judgment for Murder* (Va. Gen. Ct., Apr. 23, 1669), in *MINUTES OF THE COUNCIL*, *supra* note 6, at

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stealing—with whippings and heavy fines.³⁵ Perjury was another serious offense for which a convict might be whipped as well as barred from giving any future testimony.³⁶ Other noteworthy cases included prosecutions for sexual assault,³⁷ forgery,³⁸ piracy,³⁹ witchcraft,⁴⁰ drunkenness,⁴¹ unlawful sale of liquor,⁴² not tending corn,⁴³ “making unreasonable hogsheads,”⁴⁴ and trading with servants.⁴⁵

513 (failing to state the penalty for murder); Judgment of Death for Stabbing (Va. Gen. Ct., Oct. 29, 1666), in MINUTES OF THE COUNCIL, *supra* note 6, at 510 (failing to state the penalty for murder); Indictment Against a Man and Woman for Murdering Child (Va. Gen. Ct., Oct. 17, 1665), in MINUTES OF THE COUNCIL, *supra* note 6, at 509 (describing an indictment for the murder of a child where the penalty was unclear); R v. Woollford (Northampton Cnty. Ct., Jan. 29, 1661/1662), in 8 NORTHAMPTON COUNTY VIRGINIA RECORD BOOK COURT CASES 1657–1664, at 215 [hereinafter 8 NORTHAMPTON 1657–1664] (discussing an infanticide defendant held for trial). However, death sentences could still be commuted before the King carried out the capital punishment. See, e.g., Shaw to Be Free (Va. Gen. Ct., Mar. 26, 1672), in MINUTES OF THE COUNCIL, *supra* note 6, at 297–98 (showing Shaw’s pardon for a death sentence from the King).

³⁵ See, e.g., R v. Phillis (Va. Gen. Ct., June 22, 1670), in MINUTES OF GENERAL COURT, *supra* note 6, at 223–24 (describing the penalty for felony larceny, benefit of clergy, was to burn it in the criminal’s hand); R v. Richards (Lancaster Cnty. Ct., Mar. 14, 1665/1666), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1662–1666, at 94 (Ruth Sparacio & Sam Sparacio eds., 1993) [hereinafter LANCASTER 1662–1666] (describing the penalty for killing a hog as a fine of 2000 lb. of tobacco); R v. Hayes (Northampton Cnty. Ct., Jan. 31, 1664/1665), in 8 NORTHAMPTON 1657–1664, *supra* note 34, at 370–73 (punishing petty larceny with thirty-nine lashes); see also R v. Droigt (Lancaster Cnty. Ct., July 9, 1662), in LANCASTER 1662–1666, *supra*, at 5 (explaining that breaking into a house and stealing corn is an offense properly held before the General Court).

³⁶ See, e.g., R v. Stansby (York Cnty. Ct., Aug. 26, 1661), in 3 YORK COUNTY 1657–1662, *supra* note 6, *microformed on* 1000445991 (Genealogical Soc’y of Utah).

³⁷ E.g., R v. Wiltshire (Northampton Cnty. Ct., Aug. 30, 1669), in 9 NORTHAMPTON 1664–1674, *supra* note 7, at 207–09. The defendant sat at a door “showing in a beastly manner his members . . . [a]nd Sarah Gilbert seeing his members flung water out of a porringer at them saying hide your Arse you nasty rogue” and ran into the woods. *Id.* at 208–09. Wiltshire followed her, “took up her coats, & in a most barbarous manner plucked off a tuft of her hair presupposed of her privities.” *Id.* at 209. He received a penalty of thirty-nine lashes. *Id.*

³⁸ See, e.g., R v. Burrell (Northumberland Cnty. Ct., Sept. 20, 1671), in NORTHUMBERLAND 1669–1673, *supra* note 23, at 46 (convicting Burrell of forging a deed of sale); R v. Michaelson (Northampton Cnty. Ct., Feb. 28, 1669), in 9 NORTHAMPTON 1664–1674, *supra* note 7, at 227 (convicting Michaelson for using another’s name).

³⁹ See, e.g., Case of Piracy (Va. Gen. Ct., Oct. 19, 1665), in MINUTES OF THE COUNCIL, *supra* note 6, at 509 (sending the pirate to England for trial and setting his ship’s captives free).

⁴⁰ See, e.g., Commonwealth v. Stephens (Va. Gen. Ct., Oct. 16, 1665), in MINUTES OF THE COUNCIL, *supra* note 6, at 509 (reporting the witch accusation against Stephens).

⁴¹ See, e.g., R v. Betts (Northampton Cnty. Ct., Aug. 28, 1663), in 8 NORTHAMPTON 1657–1664, *supra* note 34, at 310 (fining the defendant for drunkenness).

⁴² E.g., R v. Allen (Northampton Cnty. Ct., Feb. 28, 1661/1662), in 8 NORTHAMPTON 1657–1664, *supra* note 34, at 216, 219.

⁴³ E.g., R v. Robins (Northampton Cnty. Ct., Dec. 28, 1665), in 9 NORTHAMPTON 1664–1674, *supra* note 7, at 63.

⁴⁴ Complaint of Wraxall (Northampton Cnty. Ct., Feb. 7, 1669/1670), in 9 NORTHAMPTON 1664–1674, *supra* note 7, at 224.

Three other broad categories of offenses—violation of sexual norms, contempt of authority, and sins against the religious establishment—require more extended discussion. The most common offense against sexual morality was bastardy. Prosecutions against parents of illegitimate children, however, were not about morality but rather about the costs of raising the children,⁴⁶ and hence courts dismissed such cases if it became clear that no parish would be chargeable with support of the bastard child.⁴⁷ Almost uniformly, those prosecuted were servant girls whose penalty—in addition to twenty lashes⁴⁸ or payment of a fine⁴⁹—was to serve extra time to compensate their masters for the inconvenience of their pregnancy.⁵⁰ These young female servants, of

⁴⁵ See, e.g., *R v. Ashwign* (Charles City Cnty. Ct., Aug. 4, 1673), in 3 VA. COLONIAL ABSTRACTS, *supra* note 10, at 353 (forcing Ashwign to pay back the value of the coat plus fourfold its value); *R v. Naylor* (Lancaster Cnty. Ct., Jan. 13, 1668/1669), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1666–1669, at 69 (Ruth Sparacio & Sam Sparacio eds., 1993) [hereinafter LANCASTER 1666–1669] (forcing a trader to pay back fourfold the value of traded tobacco plus costs); *Kirton v. Richardson* (Northumberland Cnty. Ct., Dec. 18, 1672), in NORTHUMBERLAND 1669–1673, *supra* note 23, at 76 (stating that bartering with servants is illegal); *Meriweather v. Sorsby* (Surry Cnty. Ct., July 2, 1672), *microformed on* 1000469889 (Library of Va.).

⁴⁶ But see, e.g., *R v. Watson* (Northampton Cnty. Ct., June 28, 1669), in 9 NORTHAMPTON 1664–1674, *supra* note 7, at 203–04 (discussing a possible exception where a couple was prosecuted for premarital intercourse). Since the marriage of a couple made the father liable for support of their children, the usual economic basis for prosecution—the potential liability of the public to support a child—disappeared. However, another economic basis—the loss by masters of their servants’ labor—may have existed and may have motivated prosecutions like that in the *Watson* case. In any event, however, cases such as *Watson* were overruled by *R v. Blackston*. (York Cnty. Ct., Oct. 25, 1671), *microformed on* 1000445991 (Genealogical Soc’y of Utah) (holding that a couple could not be prosecuted for premarital intercourse if they married before return of an indictment).

⁴⁷ See, e.g., *R v. Hughes* (York Cnty. Ct., Oct. 24, 1662), in 3 YORK COUNTY 1657–1662, *supra* note 6, *microformed on* 1000445991 (Genealogical Soc’y of Utah).

⁴⁸ See, e.g., *R v. Tyer* (Northampton Cnty. Ct., Aug. 28, 1663), in 8 NORTHAMPTON 1657–1664, *supra* note 34, at 305–06, 308 (sentencing a servant to a fine and twenty lashes); *R v. Emery* (Northumberland Cnty. Ct., June 20, 1668), in NORTHUMBERLAND 1665–1669, *supra* note 11, at 67 (requiring the woman receive twenty lashes until blood comes out); *R v. Jones* (Northumberland Cnty. Ct., Aug. 20, 1667), in NORTHUMBERLAND 1665–1669, *supra* note 11, at 47 (ordering that young servant woman receive twenty lashes for delivering the “bastard child”); *R v. Miles* (York Cnty. Ct., Mar. 10, 1661/1662), in 3 YORK COUNTY 1657–1662, *supra* note 6, *microformed on* 1000445991 (Genealogical Soc’y of Utah). On very rare occasions, men were also whipped. See, e.g., *R v. Maynard* (York Cnty. Ct., Apr. 26, 1670), *microformed on* 1000445991 (Genealogical Soc’y of Utah).

⁴⁹ See, e.g., *R v. Poore* (Lancaster Cnty. Ct., Oct. 8, 1665), in LANCASTER 1662–1666, *supra* note 35, at 88 (fining the master 500 lb. of tobacco); *R v. Connor* (Norfolk Cnty. Ct., Aug. 17, 1675) *microformed on* R-53 (Library of Va.); *R v. Driggs* (Northampton Cnty. Ct., Oct. 29, 1663), in 8 NORTHAMPTON 1657–1664, *supra* note 34, at 320 (requiring the master to pay 500 lb. of tobacco).

⁵⁰ See, e.g., *R v. Poore* (Lancaster Cnty. Ct., Oct. 8, 1665), in LANCASTER 1662–1666, *supra* note 35, at 88 (extending the servant woman’s service time by two and a half years); *R v. Bell* (York Cnty. Ct., May 25, 1674), *microformed on* 1000445991 (Genealogical Soc’y of Utah). Another form

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course, had no capacity to resist, but in contrast their boyfriends did. Thus, if their boyfriends were prosecuted at all, they would merely have to pay a fine⁵¹ and/or give a bond to compensate the parish for child-rearing costs.⁵² They would suffer no penalty at all if they could prove that they did not have intercourse with the child's mother.⁵³ The father

of compensation was to bind the bastard to the master's service until the age of twenty-one. See, e.g., R v. Ameny (Northumberland Cnty. Ct., Dec. 20, 1669), in NORTHUMBERLAND 1669-1673, *supra* note 23, at 4-5 (ordering the servant's child serve the master until the child turns twenty-one); Petition of Sanders (Northumberland Cnty. Ct., Aug. 22, 1661), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 7-8 (forcing the servant's child be the master's apprentice until the child turns twenty-one). A pregnant female servant was simply worth less than a female without child. See Waters v. Bishopp (Northampton Cnty. Ct., July 28, 1664), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 348-49 (allowing for rescission of a contract for sale of a female servant when the servant turned out to be pregnant). For a book about the servant in question in *Waters v. Bishopp* and her child, see generally PAGAN, *supra* note 5.

⁵¹ See, e.g., R v. Osborne (Lancaster Cnty. Ct., Sept. 9, 1663), in LANCASTER 1662-1666, *supra* note 35, at 25 (fining the man 500 lb. of tobacco for the fornication); R v. Powell (Norfolk Cnty. Ct., Aug. 17, 1675), *microformed on* R-53 (Library of Va.); R v. Wills (Northampton Cnty. Ct., Oct. 29, 1663), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 317, 320 (fining the man 500 lb. of tobacco for the fornication).

⁵² See, e.g., R v. Mongon (Northampton Cnty. Ct., Sept. 1, 1663), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 310-11 (fining the man 500 lb. of tobacco and keeping him in custody until he creates a bond arrangement to pay for child care); R v. Jones (Northumberland Cnty. Ct., Dec. 20, 1666), in NORTHUMBERLAND 1665-1669, *supra* note 11, at 30-31 (forcing the child's father to post a bond to pay for the parish's child-rearing). Note that a bond would be cancelled if the bastard died. See, e.g., R v. Bryan (Northumberland Cnty. Ct., Nov. 18, 1674), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK NORTHUMBERLAND COUNTY, VIRGINIA 1674-1677, at 15 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter NORTHUMBERLAND 1674-1677] (returning the bond to the deceased child's father less costs). Occasionally, a woman also might be asked to give a support bond. See, e.g., R v. Rane (Lancaster Cnty. Ct., Mar. 11, 1673/1674), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1670-1674, at 93 (Ruth Sparacio & Sam Sparacio eds., 1993) [hereinafter LANCASTER 1670-1674] (requiring a woman give 500 lb. of tobacco to the parish as a security for her child's care).

⁵³ See, e.g., R v. Baker (Northampton Cnty. Ct., Nov. 29, 1666), in 9 NORTHAMPTON 1664-1674, *supra* note 7, at 90, 95, 98 (requiring the sheriff forbear collecting a fine from an alleged father who plead "mistake of some of the Jurors by calling common fame certain knowledge"); R v. Kendall (Northampton Cnty. Ct., Aug. 29, 1664), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 353-54 (stating that the court found John Kendall innocent upon the computation of time and regarding his "future reputation," the court put its "calculation upon record"); R v. James (Northumberland Cnty. Ct., Jan. 20, 1661/1662), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 17 (acquitting an alleged father who was out of the county nine months before birth); R v. Dicker (York Cnty. Ct., Feb. 20, 1670/1671), *microformed on* 1000445991 (Genealogical Soc'y of Utah) (holding that a man cannot be held a father if he is not accused by a woman during labor); R v. Heyricke (York Cnty. Ct., Aug. 26, 1661), in 3 YORK COUNTY 1657-1662, *supra* note 6, *microformed on* 1000445991 (Genealogical Soc'y of Utah) (finding that the charge against Heyricke was not supported "by any good evidence"). At least one court adjudged a man the father on conflicting evidence by a divided court. See Pinkethman v. Reason (York Cnty. Ct., Aug. 25, 1662), in 3 YORK COUNTY 1657-1662, *supra* note 6, *microformed on* 1000445991 (Genealogical Soc'y of Utah).

of a bastard child also had the choice of keeping the child and putting it to work,⁵⁴ even if the father's female servant was the child's mother.⁵⁵ A master who impregnated his female servant would nonetheless still be fined,⁵⁶ and the servant also would be found guilty of fornication,⁵⁷ unless she could prove that intercourse had occurred against her will.⁵⁸

Further evidence of the law's inability to act with vigor to protect Virginians' sexual morality lay in its treatment of adultery. Thus, when Susan Powell delivered a bastard child after having "for a long time entertained in her house one John Powell[,] her . . . husband's brother," she received, not the usual twenty lashes, but only a 500 lb. tobacco fine plus a warning that she would receive a further fine if she continued to entertain her brother-in-law.⁵⁹ When June Beadle was accused of adultery, her case was postponed,⁶⁰ it "not appearing to the Court by positive proof . . . that she has a husband that lay claim to her."⁶¹ Even when adultery became scandalous, the law did little about it. The Northumberland County Court did punish as libelous a bogus document

⁵⁴ See, e.g., *Reader v. Whittaker* (Va. Gen. Ct., Sept. 21, 1671), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 265 (requiring the father keep the child and pay only those costs already disbursed); *R v. Arnold* (Northumberland Cnty. Ct., Aug. 22, 1670), in *NORTHUMBERLAND 1669–1673*, *supra* note 23, at 15 (ordering the father keep and take care of the child). The court also could order the child be apprenticed. See, e.g., *R v. Parker* (Northumberland Cnty. Ct., Nov. 18, 1675), in *NORTHUMBERLAND 1674–1677*, *supra* note 52, at 41–42 (requiring the child serve the mother's master until the child reaches age eighteen).

⁵⁵ See *Muirhall v. Clarke* (York Cnty. Ct., Oct. 24, 1662), in *3 YORK COUNTY 1657–1662*, *supra* note 6, *microformed on* 1000445991 (Genealogical Soc'y of Utah) (discussing a master impregnating his servant). For a discussion regarding the issue of masters impregnating their servants and legislative efforts to prevent such issues, see *PAGAN*, *supra* note 5, at 84–85.

⁵⁶ Compare *Donnell v. Green* (Rappahannock Cnty. Ct., May 7, 1690), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK (OLD) RAPPAHANNOCK COUNTY, VIRGINIA 1689–1692*, at 15–16 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter *RAPPAHANNOCK 1689–1692*] (requiring that Green appear before the court for fathering a bastard child), with *R v. Green* (Rappahannock Cnty. Ct., July 2, 1690), in *RAPPAHANNOCK 1689–1692*, *supra*, at 23 (fining Green 500 lb. of tobacco for the fornication).

⁵⁷ See *Commwealth v. Bennett* (Lancaster Cnty. Ct., Nov. 24, 1658), in *LANCASTER 1656–1661*, *supra* note 15, at 40 (issuing corporal punishment for the servant mother for her fornication).

⁵⁸ See, e.g., *Langworth v. Calloway* (Charles City Cnty. Ct., Aug. 3, 1660), in *3 VA. COLONIAL ABSTRACTS*, *supra* note 10, at 232 (finding a servant not liable for fornication against her will while failing to charge the master with any crime). Of course, another option was to deny pregnancy. If this were done, midwives were assembled to inspect the woman. See, e.g., *Petition of Banton* (Lancaster Cnty. Ct., Nov. 8, 1671), in *LANCASTER 1670–1674*, *supra* note 52, at 41 (mandating two skillful and honest citizens search the accused woman).

⁵⁹ *R v. Powell* (Norfolk Cnty. Ct., Aug. 17, 1675), *microformed on* R-53 (Library of Va.).

⁶⁰ See *R v. Beadle* (Northampton Cnty. Ct., Oct. 28, 1663), in *8 NORTHAMPTON 1657–1664*, *supra* note 34, at 319–21 (discussing how the defendant was given two months to prove that she had no husband or she would be forced to leave the county).

⁶¹ *R v. Beadle* (Northampton Cnty. Ct., Apr. 28, 1663), in *8 NORTHAMPTON 1657–1664*, *supra* note 34, at 293–94.

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in the form of a false “contract of marriage . . . between Charles Ashton and the wife of David Lindsay,”⁶² a local minister, and did respond to complaints that Lindsay’s wife was poisoning him⁶³ and that he had “clandestinely (unknown to the clerk) tak[en] away a petition” he had filed, perhaps in connection with his marital difficulties.⁶⁴ However, when, in the end, the court concluded there had “been unlawful familiarity & meetings between” Ashton and Mrs. Lindsay, it only required Ashton give bond to remain away from his lady love.⁶⁵ The court found him, like other adulterers, guilty only of the offense of “disorderly walking.”⁶⁶

The legal order displayed even greater weakness in addressing contempts against authority. On occasion, the General Court strove to be effective, as in a prosecution for “opprobrious words” against “the Queen;”⁶⁷ the records fail to indicate, however, whether the case went to judgment. In another case, the court ordered a man whipped for “irreverent and undecent words” about the king.⁶⁸ Courts also were effective against their own officials, as when Edmund Scarborough was suspended from all offices after being convicted of misdemeanors “touching the complaint of the Indians,”⁶⁹ or when the sheriff of James

⁶² R v. Thompson (Northumberland Cnty. Ct., June 20, 1665), in NORTHUMBERLAND 1665-1669, *supra* note 11, at 2.

⁶³ See *id.* (referring to the appointment of a committee to investigate the poisoning claim).

⁶⁴ R v. Lindsay (Northumberland Cnty. Ct., Sept. 6, 1665), in NORTHUMBERLAND 1665-1669, *supra* note 11, at 3.

⁶⁵ *Id.* at 4-5.

⁶⁶ See, e.g., Hare v. Kindrod (Surry Cnty. Ct., Mar. 3, 1673), *microformed on 1000469889* (Library of Va.) (discussing the bond required of a man “not to come into” a woman’s “company, unless at . . . church or some other meeting”). Some men’s sentences were eliminated if they promised to not keep company with the women. See, e.g., R v. Stott (Lancaster Cnty. Ct., May 8, 1661), in LANCASTER 1656-1661, *supra* note 15, at 87-88 (ordering the sheriff to take security of Stott “for the good behaviours [sic] and promises not to keep company with the said woman”); Genesis v. Lewis (Northumberland Cnty. Ct., July 20, 1670), in NORTHUMBERLAND 1669-1673, *supra* note 23, at 20-21 (allowing the man to be freed on bond if he avoided the woman’s company and behaved civilly in the future); Complaint of Thompson (Surry Cnty. Ct., Sept. 1, 1674) *microformed on 1000469889* (Library of Va.). Compare Groton v. Henricks (Northampton Cnty. Ct., Oct. 29, 1664), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 361-62 (releasing Hendricks on bond with the condition he shun the company of Groton’s wife), with Groton v. Groton (Northampton Cnty. Ct., Oct. 29, 1664), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 361-62 (ordering Groton’s wife receive fifteen lashes because she refused to return to her husband and stated “she would be hanged before she would live with him”).

⁶⁷ (Va. Gen. Ct., Apr. 19, 1661), in MINUTES OF THE COUNCIL, *supra* note 6, at 507.

⁶⁸ R v. Mill (Northampton Cnty. Ct., Apr. 28, 1662), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 221, 223.

⁶⁹ R v. Scarborough (Va. Gen. Ct., Oct. 25, 1670), in MINUTES OF THE COUNCIL, *supra* note 6, at 238.

City County was fined for arresting a member of the General Court.⁷⁰ Moreover, they tried to protect their officials, as when one entered a “severe judgment for taking a prisoner out of [a] sheriff's custody.”⁷¹ Courts also succeeded in enforcing Parliament’s Navigation Acts.⁷²

Judges were far less effective, though, in the ordinary run of contempt cases, where they could not compel the general population to show them respect and, where, when disrespect occurred, they could not impose severe penalties but could only ask defendants to acknowledge their wrongdoing and humbly seek forgiveness. The records are filled with entries about Virginians who were guilty of “uncivil language & deportment to judges”⁷³ and other officials.⁷⁴ Elizabeth Fielding, for one,

⁷⁰ (Va. Gen. Ct., Sept. 30, 1664), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 508.

⁷¹ (Va. Gen. Ct., Oct. 26, 1665), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 509; *cf.* (Va. Gen. Ct., Nov. 25, 1668), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 513 (discussing a party who broke away from prison and was banished to Barbados); *R v. Mill* (Northampton Cnty. Ct., April 28, 1662), in 8 *NORTHAMPTON 1657-1664*, *supra* note 34, at 221, 223 (discussing the abusing of a constable); *R v. Allford* (Northampton Cnty. Ct., Nov. 29, 1661), in 8 *NORTHAMPTON 1657-1664*, *supra* note 34, at 203 (referring to the striking of a sheriff); *R v. Napier* (York Cnty. Ct., June 24, 1668), *microformed on 1000445991* (Genealogical Soc’y of Utah) (retaking property attached by an undersheriff).

⁷² *See, e.g., Bland v. Hansford* (Va. Gen. Ct., Mar. 21, 1675/1676), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 448–49 (discussing the punishment for failure to pay thirty-five hoggheads of tobacco to the King for the transport); *Condemnation of Ship Phoenix* (Va. Gen. Ct., Mar. 17, 1675/1676), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 443–45 (requiring forfeiture of all goods on ship for violating the act of Parliament); *Order Against New England Vessels* (Va. Gen. Ct., Mar. 10, 1675/1676), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 434–35 (holding the ship until payment of sufficient security); *Condemnation of Ship St. George of Galloway* (Va. Gen. Ct., Mar. 16, 1669/1670), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 242–43 (condemning the ship for failure to follow the act of Parliament).

⁷³ *R v. Hale* (Lancaster Cnty. Ct., Jan. 13, 1668/1669), in *LANCASTER 1666-1669*, *supra* note 45, at 69; *accord R v. Roads* (Charles City Cnty. Ct., Sept. 15, 1662) *microformed on 30144006669329* (Library of Va.); *R v. Shappell* (Lancaster Cnty. Ct., Nov. 8, 1671), in *LANCASTER 1670-1674*, *supra* note 52, at 41 (referring to a man sitting in a pew in the church reserved for justices “to the dishonour [sic] of God Almighty [and] the contempt of his Majesty's justices”); *Commonwealth v. Warren* (Northampton Cnty. Ct., May 1, 1660), in 8 *NORTHAMPTON 1657-1664*, *supra* note 34, at 110, 114 (discussing Warren’s misbehavior before the court when it pronounced its judgment); *R v. Moulton* (Northumberland Cnty. Ct., Sept. 8, 1662), in *NORTHUMBERLAND 1661-1665*, *supra* note 8, at 31 (discussing Moulton’s failure to appear before the court); *Commonwealth v. Sanders* (Northumberland Cnty. Ct., Apr. 20, 1660), in *NORTHUMBERLAND 1657-1661*, *supra* note 8, at 68 (committing Warren to the sherriff’s custody for uncivil and unbecoming language before the court); *R v. Lee* (Surry Cnty. Ct., Sept. 1, 1674), *microformed on 1000469889* (Library of Va.) (discharging Lee from the sherriff’s custody for acknowledging his offense).

⁷⁴ *See R v. Bushrod* (York Cnty. Ct., Aug. 26, 1661), in 3 *YORK 1657-1662*, *supra* note 6, *microformed on 1000445991* (Library of Va.); *cf. Order Regarding Sheriff* (Northampton Cnty. Ct., Dec. 13, 1660), in 8 *NORTHAMPTON 1657-1664*, *supra* note 34, at 143 (discussing the authorization for arrest of persons who “disturbed the Sheriff in [the execution] of his office”). *Compare R v. Allford* (Northampton Cnty. Ct., Nov. 29, 1661), in 8 *NORTHAMPTON 1657-1664*, *supra* note 34, at 203 (discussing a couple who refused to obey a sherriff’s arrest), *with R v. Allford*

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“openly did declare that she would not yield obedience to their [the judges’] order,”⁷⁵ while William Hatton committed a “contempt . . . of dangerous consequence,” when, on receiving a summons for his appearance, he announced that “he was not then at leisure but when he was at leisure he would come.”⁷⁶ Philip Mongom, a “Negro,” when accused of stealing hogs, threw “hogs’ ears on the . . . court table.”⁷⁷ A year later Thomas Cheney was accused of “speaking dangerous and unlawful words of the King’s Most Excellent Majesty and his Government” and of refusing to take the oaths of allegiance and supremacy. The court did not punish Cheney because it found him “disturbed in his brain talking wildly and distractedly of such things as are put to him.”⁷⁸

In most other contempt cases, the court merely imposed a slap on the wrist—it threatened severe punishment but then remitted that punishment as long as the defendant acknowledged his wrongdoing and humbly submitted to the court’s authority.⁷⁹ Robert Warren, for example, while drunk, “came into the faces of the Court . . . rudely intruding & . . . interrupting & upbraiding the Commissioners in their Pronouncing of Judgment.”⁸⁰ He was left at “liberty in hopes he would better his behavior,” but he nonetheless confronted one of the Commissioners “in the open yard & hearing of many persons, there affronting & upbraiding him concerning Justice[,] telling him he cared not for him, nor the Court with other words of defiance.”⁸¹ The court then committed him to the sheriff⁸² and fined him 350 lb. tobacco at the next sitting court.⁸³

(Northampton Cnty. Ct., Dec. 30, 1661), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 208-09 (discussing the couple’s “dangerous assa[ul]t” on the sherriff).

⁷⁵ R v. Fielding (Northumberland Cnty. Ct., July 19, 1671), in NORTHUMBERLAND 1669-1673, *supra* note 23, at 43-44; *see also* Beale v. Wardley (Va. Gen. Ct., Sept. 23, 1671), in MINUTES OF THE COUNCIL, *supra* note 6, at 267 (discussing Wardly’s refusal to obey the court judgment).

⁷⁶ R v. Hatton (York Cnty. Ct., Feb. 26, 1660/1661), in 3 YORK COUNTY 1657-1662, *supra* note 6, *microformed on* 1000445991 (Genealogical Soc’y of Utah).

⁷⁷ Commonwealth v. Mongom, (Northampton Cnty. Ct., May 1, 1660), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 110, 113.

⁷⁸ R v. Cheney (York Cnty. Ct., June 24, 1661), in 3 YORK COUNTY 1657-1662, *supra* note 6, *microformed on* 1000445991 (Genealogical Soc’y of Utah).

⁷⁹ *See, e.g.*, Price v. Ball (Va. Gen. Ct., Mar. 26, 1672), in MINUTES OF THE COUNCIL, *supra* note 6, at 299 (discussing the form of punishment used in contempt cases).

⁸⁰ Commonwealth v. Warren (Northampton Cnty. Ct., May 1, 1660), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 114.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Commonwealth v. Warren (Northampton Cnty. Ct., May 29, 1660), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 115-17.

The courts were equally powerless in dealing with offenses against religion. The most common such offense was missing church or otherwise profaning the Sabbath, which could be prosecuted with some success because punishments were mild.⁸⁴ Sometimes the judiciary also was able to prosecute individuals who defamed clergymen and church leaders. Thomas Bushrod, for one, used “slanderous, rude, contemptible, and mutinous language against the Reverend Clergy” and was held for the General Court; because “the charge against him [was] of so high & dangerous a nature & concernment,” the court found him “no wayailable.”⁸⁵ Another man received thirty lashes “for swearing and using profane words in the pulpit of [the] parish church.”⁸⁶ Similarly, a court fined John Williams for his contempt of “the solemnity of the true orthodox established religion of the Church of England” and his efforts to “stir . . . up the hearts & minds of the people to a hatred & dislike of God’s word preached by the pious & learned ministers of the Gospel” as he sought to convert them “to the . . . proud, vain, formal hypocrisy of the Quaker.”⁸⁷

However, most challenges to religious authority received the same weak response courts gave to contempt against civil power. Thus, when John Stockly, “in a turbulent manner disturbed and abused” a vestry by calling it “an illegal vestry,” the court required only that he “make his public recantation in the church” and give a good behavior bond.⁸⁸

⁸⁴ See, e.g., *R v. Wolmsey* (Charles City Cnty. Ct., Apr. 25, 1663), in 3 VA. COLONIAL ABSTRACTS, *supra* note 10, at 276 (presenting Wolmsey before the grand jury for failing to attend church for nine months); *R v. London* (Northampton Cnty. Ct., Feb. 29, 1663/1664), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 335-37 (fining London for not baptizing his children or coming to church); *R v. Marriott* (Surry Cnty. Ct., Sept. 4, 1672), *microformed on* 1000469889 (Library of Va.); *R v. Wade* (York Cnty. Ct., Jan. 25, 1666/1667), *microformed on* 1000445991 (Genealogical Soc’y of Utah) (“using uncivil language” on the Sabbath); *R v. Tailor* (York Cnty. Ct., Oct. 3, 1665), *microformed on* 1000445991 (Genealogical Soc’y of Utah) (coming to divine service drunk).

⁸⁵ *R v. Bushrod* (York Cnty. Ct., Aug. 26-27, 1661), in 3 YORK COUNTY 1657-1662, *supra* note 6, *microformed on* 000445991 (Genealogical Soc’y of Utah).

⁸⁶ *R v. Stanford* (Charles City Cnty. Ct., Apr. 4, 1673), *microformed on* 1000457503 (Genealogical Soc’y of Utah).

⁸⁷ *King v. Williams* (Isle of Wight Cnty. Ct., Oct. 1694), in 3 COLONIAL FAMILIES OF SURRY AND ISLE OF WIGHT COUNTIES, VIRGINIA: THE COURT ORDERS OF ISLE OF WIGHT COUNTY, VIRGINIA OCTOBER 1693-MAY 1695, at 42-43 (John Anderson Brayton ed., 1999) [hereinafter 3 SURRY & ISLE OF WIGHT COUNTIES 1693-1695]; see also *King v. Williams* (Isle of Wight Cnty. Ct., Dec. 1694), in 3 SURRY & ISLE OF WIGHT COUNTIES 1693-1695, *supra*, at 44 (fining Williams for his contempt).

⁸⁸ *R v. Stockly* (Northampton Cnty. Ct., Apr. 28, 1663), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 295.

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Another court likewise ordered that a man merely give a good behavior bond for his “blasphemous words.”⁸⁹

Another offense connected with religion occurred when a minister, without a license, married two servants.⁹⁰ Perhaps because punishment was severe, few prosecutions were brought. Another lone prosecution, for which the punishment was a severe fine of 1000 lb. of tobacco, was brought against a father for failing to baptize his children.⁹¹ Perhaps the father did not believe in infant baptism, but if so he was not alone, and there is no evidence that co-religionists were prosecuted.

Individual contempts against either lay or religious authority were only a small part of the problem, however; crowds were much more dangerous. On one occasion, “threatening words . . . in contempt of this Court,” uttered by an assemblage of people, led to “so great a confusion” that the “Court thought it not safe to sit any longer, being . . . forced to adjourn.”⁹² On another occasion, three men committed an assault in open court,⁹³ while yet another county court had to deal with an unlawful assembly of malcontents.⁹⁴ Even women created problems: the wives of George Spencer and David Goodale engaged in “scurrilous brawls” and provoked their husbands to file “reciprocal, frivolous[,]

⁸⁹ R v. Rice (Northumberland Cnty. Ct., Aug. 19, 1674), in NORTHUMBERLAND 1674-1677, *supra* note 52, at 7-8.

⁹⁰ See, e.g., (Va. Gen. Ct., Sept. 24, 1668), in MINUTES OF THE COUNCIL, *supra* note 6, at 513 (issuing a judgment against the minister for marrying a servant). Compare Lee v. Lindsay (Northumberland Cnty. Ct., Jan. 20, 1661/1662), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 13 (fining a minister 10,000 lb. tobacco for “his transgression”), with R v. Lindsay (Northumberland Cnty. Ct., Nov. 20, 1662), in NORTHUMBERLAND 1661-1665, *supra* note 8, at 38 (remitting the fine since the minister “did not act the same in contempt against the law and being ignorant what the laws provided”). For a suit against a minister who charged an excessive fee for officiating at a marriage, see Woodson v. Marye (Goochland Cnty. Ct., Jan. 1734[1735]), in 3 GOOCHLAND COUNTY VIRGINIA COURT ORDER BOOK 1731-1735, at 385 (Ann K. Blomquist ed., 2006) [hereinafter 3 GOOCHLAND 1731-1735] (discussing an action against Marye for marrying two individuals for a certain fee).

⁹¹ On remand, the Norfolk County Court upheld the fine. Edwards v. Biggs (Va. Gen. Ct., June 16, 1675), in MINUTES OF THE COUNCIL, *supra* note 6, at 410, *on remand*, (Norfolk Cnty. Ct., Aug. 18, 1675), *microformed on R-53* (Library of Va.).

⁹² R v. East (Lancaster Cnty. Ct., March 14, 1665/1666), in LANCASTER 1662-1666, *supra* note 35, at 95.

⁹³ See R v. Wheeler (Charles City Cnty. Ct., June 4, 1673), in 13 VIRGINIA COLONIAL ABSTRACTS CHARLES CITY COUNTY COURT ORDERS 1664-1665 FRAGMENTS 1650-1696, at 87 (Beverly Fleet ed., 1961) [hereinafter 13 VA. COLONIAL ABSTRACTS] (discussing a ringleader who was fined 1000 lb. of tobacco; a second man upon his humble submission who was required to give bond; and a third man acquitted since he “only endeavored to part the affrayers”).

⁹⁴ See R v. Swann (Surry Cnty. Ct., Jan. 4, 1673/1674), *microformed on 1000469889* (Library of Va.), *aff'd.*, (Va. Gen. Ct., April 6, 1674), in MINUTES OF THE COUNCIL, *supra* note 6, at 366-67 (affirming the Surry Court order that the ringleader be fined 2000 lb. of tobacco).

litigious suits.”⁹⁵ Ultimately, these disorders culminated in Bacon’s Rebellion and in colony-wide civil strife.⁹⁶

In sum, the resulting weakness of the legal order forced those who administered it to select carefully targets for serious prosecution. The law could harshly punish the powerless—female servants who became pregnant, for example—by whipping them and compelling them to serve extra time to compensate their masters. It could also impose severe punishments on heinous criminals, such as murderers and even thieves, whom no one else in society would defend. Perhaps there is a similar explanation for the few harsh penalties meted out for challenges to religious authority. However, the many offenses committed by free men—contempt of authority, religious dissent, bastardy, adultery—met with a feeble judicial response.

This weak legal system had to deal with a colony whose inhabitants during the 1660s and early 1670s, in large part, failed to prosper. By the 1660s most of the best land had already fallen into the hands of great landowners and speculators, with the result that, as servants completed their terms of labor, they found themselves landless or exiled to small tracts on the colony’s margins. Taxes were high, and discontent was rife. People began to confederate in “seditious” meetings declaring “they would not pay their public taxes,”⁹⁷ and only a spark was needed to set the colony ablaze.⁹⁸

Accordingly, when a handful of Native Americans commenced random raids along the frontier, it was easy for a wealthy newcomer from England, Nathaniel Bacon, to assume leadership of discontented frontiersmen eager to take revenge on the Indians. In the spring of 1676, Bacon sought the blessing of Governor Sir William Berkeley, but Berkeley, after promising to give Bacon a commission to lead an expedition against the Indians, refused to honor his promise. When Bacon showed up in Jamestown in June at the head of his army of malcontents, Berkeley fled to the eastern shore and Bacon’s men began plundering the plantations of Berkeley’s supporters. Open rebellion had

⁹⁵ King v. Spencer & Goodale (Charles City Cnty. Ct., Aug. 3, 1664), in 13 VA. COLONIAL ABSTRACTS, *supra* note 93, at 1–2.

⁹⁶ See *infra* notes 393–451 (discussing the status of criminal proceedings following Bacon’s Rebellion).

⁹⁷ Decision of Law (Surry Cnty. Ct., Jan. 3, 1673/1674), in SURREY COUNTY RECORDS SURREY COUNTY, VIRGINIA, 1652–1684, at 87 (Eliza Timberlake Davis ed., 1980) [hereinafter SURREY 1652–1684]; see King v. Chissett (Surry Cnty. Ct., Jan. 3, 1673/1674), in SURREY 1652–1684, *supra*, at 88 (summoning fourteen individuals to account for their “riotous assembling” regarding unreasonable taxes).

⁹⁸ See generally EDMUND S. MORGAN, AMERICAN SLAVERY AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 215–49 (1975) (discussing the political climate of colonial Virginia during this time).

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begun, but it petered out when Bacon died suddenly at the end of October, probably from some form of dysentery.⁹⁹

Once Berkeley recovered power, he began to exact revenge and tried to insure against future rebellions. A few rebel leaders were executed¹⁰⁰ and a few who fled had their property forfeited,¹⁰¹ although most were pardoned after they paid the money that Berkeley charged for a pardon.¹⁰² Many rebels, like Dominick Rice, were required to give bond in the amount of £100 sterling and, on their knees, to “humbly and heartily penitently confess and acknowledge [their] horrid villainious [sic] rebellious and unreasonable practice” and their “horrid treasons and rebellion” and “absolutely resolve . . . never more to commit perpetrate contemptuously or by any . . . means to be assisting or adhering to the like.”¹⁰³ Many cases also were brought to recover properties that had been plundered during the rebellion.¹⁰⁴ Finally, courts made it procedurally easier for magistrates to discipline anyone speaking contemptuous words against them.¹⁰⁵

Order, however, was not easily restored. Six years after Bacon’s Rebellion, malcontents seeking to raise the price of tobacco by reducing its supply began moving around the colony from plantation to plantation and cutting down tobacco plants growing in planters’ fields. A newly arrived governor had to put down this minor rebellion.¹⁰⁶

⁹⁹ For an in-depth discussion of Bacon’s Rebellion, see *id.* at 250–70.

¹⁰⁰ *Id.* at 273.

¹⁰¹ *E.g.*, King v. Lawrence (Rappahannock Cnty. Ct., Mar. 4, 1685/1686), in VIRGINIA COUNTY COURT RECORDS ORDER BOOKS (OLD) RAPPAHANNOCK COUNTY, VIRGINIA 1685–1687, at 35 (Lydia Bontempo & Ruth Sparacio eds., 1990) [hereinafter RAPPANNOCK 1685–1687].

¹⁰² MORGAN, *supra* note 98, at 272–73.

¹⁰³ Comm’rs v. Rice (Northumberland Cnty. Ct., July 18, 1677), in NORTHUMBERLAND 1674–1677, *supra* note 52, at 89–90; accord King v. Thompson (Northumberland Cnty. Ct., Sept. 19, 1677), in NORTHUMBERLAND 1674–1677, *supra* note 52, at 95–96.

¹⁰⁴ See, e.g., Lewis v. Bentley (Middlesex Cnty. Ct., Feb. 4, 1677/1678), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1673–1678, at 89–90 (Ruth Sparacio & Sam Sparacio eds., 1989) [hereinafter MIDDLESEX 1673–1678] (bringing an action after the destruction of Lewis’s hogs and sheep); Codd v. Browne (Northumberland Cnty. Ct., July 18, 1677), in NORTHUMBERLAND 1674–1677, *supra* note 52, at 88 (bringing an action for the recovery of a horse).

¹⁰⁵ See Stith v. Reeve (Charles City Cnty. Ct., Apr. 3, 1690), in CHARLES CITY COUNTY, VIRGINIA COURT ORDERS 1687–1695 WITH A FRAGMENT OF A COURT ORDER BOOK FOR THE YEAR 1680, at 76–77 (Benjamin B. Weisiger III ed., 1980) [hereinafter CHARLES CITY 1687–1695] (referring to a defendant who was not allowed “customary liberty” in a slander case since the plaintiff was a magistrate).

¹⁰⁶ See MORGAN, *supra* note 98, at 286–87 (explaining Governor Chichely’s attempts at extinguishing the rebellion); see also *infra* Part III (discussing how Virginia elites later strengthened the colony’s legal order).

III. STRENGTHENING THE LEGAL ORDER

Order ultimately was restored only as a consequence of more long-term changes in Virginia law that are about to be examined. These changes—some of which had begun before and all of which continued over the course of decades in the aftermath of Bacon’s Rebellion—transformed Virginia, by the mid-eighteenth century, into the most stable of Britain’s North American colonies as well as the colony most willing to serve imperial interests.

No royal or other official intentionally orchestrated the changes. They simply occurred for widely disparate reasons unrelated to each other or to any clear goal of strengthening the legal powers of the regime. Collectively, however, they had that effect.

First, this section discusses the change in Virginia from a predominately white labor force to African slavery.¹⁰⁷ Second, the section explains the role of patronage in controlling lower classes in colonial Virginia.¹⁰⁸ Third, it examines the relationship between law and religion.¹⁰⁹ Fourth, it explains the roles and relationships of both judges and jurors in the legal landscape of Virginia.¹¹⁰ Finally, it discusses the relation of the colony’s central government to local county elites.¹¹¹

A. *The Switch from White to Black Labor*

If Bacon and his followers had prevailed in their rebellion against Governor Berkeley, perhaps Virginia’s land distribution policies would have changed. Maybe land would have been distributed to recently freed indentured servants rather than to established elites that already owned most of the good land. Bacon, however, lost, and existing policies of distributing new land to already established landholders continued and even broadened.¹¹² The result was that colonies other than Virginia, where land was available to indentured servants who completed their term of servitude, became more attractive destinations

¹⁰⁷ See *infra* Part III.A (examining how the move to black slave labor strengthened the power of Virginia’s elites).

¹⁰⁸ See *infra* Part III.B (discussing the duties the poor owed the wealthy and the generosity the wealthy owed the poor).

¹⁰⁹ See *infra* Part III.C (examining the role played by religion in Virginia’s legal system).

¹¹⁰ See *infra* Part III.D (discussing the powers of judges compared to juries in Virginia’s legal system).

¹¹¹ See *infra* Part III.E (examining various facets of Virginia law that added to the strength of the controlling elites).

¹¹² See generally WARREN M. BILLINGS ET AL., *COLONIAL VIRGINIA: A HISTORY* 134, 139, 147, 160-161, 171-72, 209-11 (1986) (explaining political tensions surrounding the Virginia plantation elite following Bacon’s Rebellion).

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than Virginia for young people emigrating from England to America. This slowed the pace of white immigration to Virginia.

Virginia's planters nonetheless needed workers. They took two steps to obtain them. One was to import black slaves to replace white immigrants they could not obtain. Another was to make additional efforts, apart from offering land to freed servants, to make Virginia attractive to white immigrants.

Slavery was economically and culturally unimportant in Virginia before the late seventeenth century. Existing scholarship agrees that Africans and descendants of Africans constituted only some three percent of the population in 1660—fewer than 1000 blacks out of a total population of at least 25,000.¹¹³ Indentured servants, who were mainly young men and teenage boys from the British Isles, performed most drudge work. Although the few blacks present in the mid-seventeenth century on average served longer terms of servitude than whites, including terms for life, many blacks ultimately did become free, and no clear distinctions separated black servants from white ones during the periods of time during which they served. African servants lived with European servants, performed the same work as Europeans, and were subject to the same disciplinary rules and punishments as Europeans. Finally, if they became free, Africans and their descendants could buy and own land, indentured servants, and slaves just as Europeans could.¹¹⁴

Slavery developed as a clear legal category in the decades following 1660. The key to its development was a series of statutes during the 1660s that first differentiated slaves from non-slaves along racial lines. The first, in March 1660/1661, recognized that runaway "Negroes" who already served for life were "incapable of making satisfaction by addition of time" and accordingly required white servants who ran away with them to serve their time.¹¹⁵ Several years later the recognition also led to another act allowing masters to inflict "moderate corporal

¹¹³ See MORGAN, *supra* note 98, at 154, 404 tbl.1; KENNETH MORGAN, SLAVERY AND SERVITUDE IN COLONIAL NORTH AMERICA: A SHORT HISTORY 30 tbl.2.1 (2000).

¹¹⁴ See MORGAN, *supra* note 98, at 154–57 (explaining the property rights of freed African slaves); T.H. Breen, *A Changing Labor Force and Race Relations in Virginia, 1660–1710*, 7 J. SOC. HIST. 6, 7(1973) (referring to the status of black men in the mid-seventeenth century). See generally James H. Brewer, *Negro Property Owners in Seventeenth Century Virginia*, 12 WM. & MARY Q. 575 (1955) (discussing freed African slave property owners in seventeenth-century Virginia). But see Russell R. Menard, *From Servants to Slaves: The Transformation of the Chesapeake Labor System*, 16 S. STUDS. 355 (1977) (explaining the rise in black slavery in the Chesapeake colonies during the 1700s).

¹¹⁵ 2 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 26 (Univ. Press of Va. 1969) (1823).

punishment,” on runaways.¹¹⁶ A year earlier, when doubts had arisen whether baptism made a person now described as a “slave” free, the legislature responded by declaring “the blessed sacrament” did “not alter the condition of [a] person as to his bondage or freedom.”¹¹⁷ The decline into slavery continued in 1669 when a statute provided that a master would not be guilty of murder if a “slave [who] resist[ed] his master . . . by the extremity of the correction should chance to die,” since it could “not be presumed” that anyone would “destroy his own estate.”¹¹⁸ The next year Virginia barred free blacks from “purchasing Christian servants,”¹¹⁹ and a decade later the first “act for preventing Negroes’ insurrections” prohibited blacks from carrying guns or other weapons and from meeting in “considerable numbers . . . under pretence of feasts and burials.”¹²⁰

Even by the 1680s, however, slavery had not replaced indentured servitude as the principal form of plantation labor; planters continued to rely mainly on indentured servants. Only after 1690, for reasons much debated among historians, did Africans and their descendants become the primary providers of plantation labor in the colony of Virginia, although even then it was not clear that all black servants were slaves.¹²¹ Further, as late as the 1740s, a runaway black was dealt with as a servant when he was required to serve extra time for running away—a penalty that made no sense if he was a slave already required to serve for life.¹²²

The evidence is ambiguous and conflicting, but the view of Russell Menard and others seems correct—that until the end of the seventeenth

¹¹⁶ *Id.* at 266.

¹¹⁷ *Id.* at 260.

¹¹⁸ *Id.* at 270.

¹¹⁹ *Id.* at 280.

¹²⁰ *Id.* at 481. For scholarly analysis of the statutory recognition of enslavement, see WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812*, at 71–82 (1968); THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 38–45 (1996); Oscar Handlin & Mary F. Handlin, *Origins of the Southern Labor System*, 7 *WM. & MARY Q.* 199 (1955).

¹²¹ See MORGAN, *supra* note 98, at 306 (discussing the importation of slavery in the later half of the seventeenth century); MORGAN, *supra* note 113, at 26 (explaining how indentured servants and slaves provided most of the labor in the seventeenth century); Menard, *supra* note 114, at 360 (“Probate inventories and tax lists indicate that black slaves came to predominate about 1690.”).

¹²² See Motion of Edwards (Spotsylvania Cnty. Ct., Apr. 6, 1742), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK SPOTSYLVANIA COUNTY, VIRGINIA 1740–1742*, at 63 (Ruth Sparacio & Sam Sparacio eds., 1992) [hereinafter *SPOTSYLVANIA 1740–1742*] (punishing a runaway black servant by extending his service time); *Corbin v. Dolphin* (Spotsylvania Cnty. Ct., Oct. 4, 1738), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK SPOTSYLVANIA COUNTY, VIRGINIA 1738–1740*, at 26 (Ruth Sparacio & Sam Sparacio eds., 1992) [hereinafter *SPOTSYLVANIA 1738–1740*] (requiring a runaway black servant serve his master for an extra five months and two days).

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century Virginia planters preferred to import white, English-speaking indentured servants as their main labor force rather than African slaves who spoke strange languages.¹²³ Only when the availability of indentured servants declined—as newly founded colonies like Pennsylvania became more welcoming to immigrants than Virginia—and whites, as a result, could no longer satisfy the colony's labor needs, did the planters switch to a slave labor force.¹²⁴

Meanwhile, the colony's leaders strove to make Virginia more attractive to potential white immigrants. As a first step, it was essential to draw a sharp distinction between black slavery and white indentured servitude and thereby reassure whites that they would not be treated as badly as blacks. Thus, one court held that a white man could not enter into an agreement to serve a master for life.¹²⁵ In addition, courts took other steps that led, at least marginally, to the uplifting of whites.

Virginia's law of servitude had long combined rule-of-law features contrived to induce Europeans to immigrate with harsh mechanisms of coercion intended to insure that, once present in Virginia, indentured servants would work. Over the course of the late seventeenth and early eighteenth centuries, however, the law became less harsh.

Of course, much of the old harshness remained. Thus, minors, typically orphans who were unable to support themselves, continued to be bound into servitude,¹²⁶ and judges routinely determined the age of servants and thus the length of time they were required to serve.¹²⁷

¹²³ ALLAN KULIKOFF, *TOBACCO AND SLAVES: THE DEVELOPMENT OF SOUTHERN CULTURES IN THE CHESAPEAKE, 1680-1800*, at 40 (1986).

¹²⁴ See Menard, *supra* note 114, at 362 (explaining evidence shows that as supply of servants decreased the price of indentured labor and supply of slaves increased).

¹²⁵ See Groton v. Stringer (Northampton Cnty. Ct., Oct. 29, 1678), in 10 NORTHAMPTON COUNTY VIRGINIA RECORD BOOK DEEDS, WILLS & C 1674-1678, at 297-98 (Howard Mackey & Candy McMahan Perry eds., 2003) [hereinafter 10 NORTHAMPTON 1674-1678] (invalidating an agreement to serve the master for life).

¹²⁶ See, e.g., Binding of Martin (King George Cnty. Ct., Mar. 1, 1727), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK KING GEORGE COUNTY, VIRGINIA 1725-1728, at 74 (Ruth Sparacio & Sam Sparacio eds., 1992) [hereinafter KING GEORGE 1725-1728] (ordering a child serve until he reaches the age of majority); Binding of Bruce (Lancaster Cnty. Ct., Nov. 12, 1729), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1729-1732, at 1 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter LANCASTER 1729-1732] (forcing the child remain a servant until he reaches age twenty-one).

¹²⁷ See, e.g., Matter of Gallion (Stafford Cnty. Ct., Aug. 30, 1665), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK STAFFORD COUNTY, VIRGINIA 1664-1668, 1689-1690, at 13 (Ruth Sparacio & Sam Sparacio eds., 1987) [hereinafter STAFFORD 1664-1668, 1689-1690] (adjudging a servant to be fifteen years of age); see also Matter of Dianah (Spotsylvania Cnty. Ct., Aug. 5, 1729), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK SPOTSYLVANIA COUNTY, VIRGINIA 1724-1730 (PART III), at 105-06 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter SPOTSYLVANIA 1724-1730 (PART III)] (determining the age of a "Negro girl... towards payment of levys"); cf. Certificate of Boyd (King George Cnty. Ct., Feb. 2, 1721/1722), in VIRGINIA COUNTY COURT

Courts also imposed punishment on runaway servants,¹²⁸ with the standard penalty being extension of the period of service by twice the amount of time that a runaway had been absent.¹²⁹ Another disability imposed on servants prohibited them from engaging in trade without their masters' approval, although enforcement fell mainly on those who bought goods from or sold goods to servants rather than on the servants themselves.¹³⁰

RECORDS ORDER BOOK KING GEORGE COUNTY, VIRGINIA 1721-1723, at 30 (Ruth Sparacio & Sam Sparacio eds., 1992) [hereinafter KING GEORGE 1721-1723] (referring to the certificate of a ship captain specifying the amount of time some twenty-one English convicts were required to serve).

¹²⁸ See e.g., *Williams v. Pooly* (Stafford Cnty. Ct. Nov. 15, 1664), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 6 (ordering a runaway servant to serve extra time); see also *Gill v. Willis* (Middlesex Cnty. Ct., Sept. 2, 1700), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1700-1702, at 18, 20-21 (Ruth Sparacio & Sam Sparacio eds., 1996) [hereinafter MIDDLESEX 1700-1702] (upholding, pursuant to a statute, a servant's agreement made in open court to serve the master for additional time); cf. *Order re Parsons* (Northumberland Cnty. Ct., Mar. 15, 1675/1676), in NORTHUMBERLAND 1674-1677, *supra* note 52, at 57-58 (ordering thirty lashes for runaways from Maryland plus return to provincial secretary of Maryland); *Order re Wilson* (Richmond Cnty. Ct., June 4, 1729), in VIRGINIA COUNTY COURT RECORDS RICHMOND COUNTY, VIRGINIA ORDERS 1727-1729, at 105 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter RICHMOND 1727-1729] (ordering placement of an iron collar on the neck of a persistent runaway); *Order re Moore* (Westmoreland Cnty. Ct., Aug. 27, 1713), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK WESTMORELAND COUNTY, VIRGINIA 1712-1714, at 66 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter WESTMORELAND 1712-1714] (ordering return of a runaway servant to his master). Anyone entertaining a servant without the owner's consent was liable for statutory penalties. See, e.g., *Rice v. Adams* (Rappahannock Cnty. Ct., Jan. 6, 1686/1687), in RAPPAHANNOCK 1685-1687, *supra* note 101, at 68-69 (referring to a lawsuit by a servant owner against a man who entertained the servant without the owner's consent).

¹²⁹ See, e.g., *Clarke v. Wright* (Charles City Cnty. Ct., Oct. 3, 1673), *microformed on 1000457503* (Genealogical Soc'y of Utah) (convicting a servant of running away and extending his service time as punishment); *Order re Dew* (Surry Cnty. Ct., Sept. 7, 1675), *microformed on 1000469889* (Library of Va.) (extending a servant's servive by 132 days for his sixty-six day absence); *Order re George* (York Cnty. Ct., Apr. 27, 1672), *microformed on 1000445991* (Genealogical Soc'y of Utah) (fining a runaway 5 lb. of tobacco and extending his service time). *But see Bridges v. Barnes* (Va. Gen. Ct., Sept. 27, 1671), in MINUTES OF THE COUNCIL, *supra* note 6, at 274 (holding that a servant who returns voluntarily must serve only the time he was absent).

¹³⁰ See 3 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 451-52 (Univ. Press of Va. 1969) (1823) (requiring anyone who trades with a slave be thrown in jail for one month and remain there until that person posts sufficient bond); see also *Hobson v. Watkins* (Northumberland Cnty. Ct., Aug. 16, 1700), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK NORTHUMBERLAND COUNTY, VIRGINIA 1700-1702, at 14, 18-19 (Ruth Sparacio & Sam Sparacio eds., 2003) [hereinafter NORTHUMBERLAND 1700-1702] (imposing fourfold penalty on a person who bought corn from a servant); *Vaughan v. Chisnall* (Westmoreland Cnty. Ct., Apr. 27, 1709), VIRGINIA COUNTY COURT RECORDS ORDER BOOK WESTMORELAND COUNTY, VIRGINIA 1707-1709, at 85-86 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter WESTMORELAND 1707-1709] (imposing one month imprisonment and fourfold damages on a person who sold a hat to a servant); cf. *In re Sheppard* (Middlesex Cnty. Ct., Apr. 10, 1676), in

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Judges were especially harsh on servants who spread “scandalous[,] false[,] and abusive language against [their] master[s].”¹³¹ The General Court ordered one such servant to receive thirty-nine lashes and apologize in open court.¹³² Likewise, servants who behaved violently toward their masters faced a broad range of penalties, including whipping and extra years of service,¹³³ as did servants who, after claiming that their masters abused them, failed to prove their claims.¹³⁴ For example, two female servants who accused their master of rape had to serve extra time when a grand jury refused to indict him.¹³⁵ The same was true when parents sued on behalf of an indentured daughter; after they failed to prove their claim, the court would not permit them even to visit with their child.¹³⁶ This was also true for at least some servants who claimed freedom but failed to establish it. For example, the court required Christopher Charlton to make up time for his absence from his master during the course of his unsuccessful suit for freedom.¹³⁷ People assisting servants in bringing wrongful complaints also might be

MIDDLESEX 1673–1678, *supra* note 104, at 53 (holding attempt of a servant to assign the right of executorship void).

¹³¹ *Wormely v. Morris* (Va. Gen. Ct., Mar. 17, 1672/1673), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 330.

¹³² *Id.*

¹³³ See, e.g., *Ballard v. Servants* (Va. Gen. Ct., Apr. 4, 1671), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 245 (ordering thirty-nine lashes to one servant and twenty to the another plus extra service for assaulting overseer and running away); *In re. Sanders* (Northumberland Cnty. Ct., Nov. 11, 1670), in *NORTHUMBERLAND 1669–1673*, *supra* note 23, at 25 (requiring extra service for striking a master); *In re. Sanders* (Northumberland Cnty. Ct., May 9, 1670), in *NORTHUMBERLAND 1669–1673*, *supra* note 23, at 16 (ordering twenty lashes plus one year extra service for rude demeanor); cf. *Lewis v. Morris* (Northumberland Cnty. Ct., Jan. 21, 1679/1680), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK NORTHUMBERLAND COUNTY, VIRGINIA 1677–1679*, at 95–96 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter *NORTHUMBERLAND 1677–1679*] (providing that the servant was liable at end of term for injuries to a third party); *Dodman v. Duke* (Stafford Cnty. Ct., Oct. 12, 1664), in *STAFFORD 1664–1668, 1689–1690*, *supra* note 127, at 5 (ordering two extra years of service for killing the horse of a third person). *But see* *Lucy v. Stamp* (Charles City Cnty. Ct., Apr. 3, 1673), *microformed on 1000457503* (Genealogical Soc’y of Utah) (holding punishment remitted at request of master).

¹³⁴ See, e.g., *Cumberford v. Whitaker* (Middlesex Cnty. Ct., Apr. 5, 1680), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1677–1680*, at 94–95 (Ruth Sparacio & Sam Sparacio eds., 1989) [hereinafter *MIDDLESEX 1677–1680*] (ordering the servant whipped for failing to prove his claim against his master).

¹³⁵ *Smith v. Servants* (Va. Gen. Ct., Apr. 21, 1670), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 212.

¹³⁶ *Medley v. Douglas* (York Cnty. Ct., Mar. 10, 1668/1669), *microformed on 1000445991* (Genealogical Soc’y of Utah). *But see* *Complaint Against Stevens* (Northampton Cnty. Ct., Aug. 29, 1664), in *8 NORTHAMPTON 1657–1664*, *supra* note 34, at 351 (holding a child restored to the parent who proved “harsh usage” by master).

¹³⁷ *Pate v. Charlton* (Va. Gen. Ct., Oct. 23, 1673), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 351–52.

summoned to appear in court to answer questions concerning their role.¹³⁸

On the other hand, the courts did deal fairly with servants who proved their claims. In some cases they recognized the freedom of servants who were manumitted by will,¹³⁹ who obtained freedom by marrying the widow of their master,¹⁴⁰ or who entered into agreements with their masters to work as wage laborers rather than as servants¹⁴¹ or to shorten their terms if they did not run away.¹⁴² In other cases courts freed apprentices, the death of whose masters prevented their learning the trade for which they had been apprenticed.¹⁴³ More often courts awarded freedom to servants when judges concluded that the servants had completed their term of service.¹⁴⁴ In one case, for example, a

¹³⁸ See, e.g., *R v. Jones* (Westmoreland Cnty. Ct., Aug. 29, 1716), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK WESTMORELAND COUNTY, VIRGINIA 1714-1716*, at 96-97 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter *WESTMORELAND 1714-1716*] (holding those who petitioned in slaves' honor must appear in court on the slaves' behalf).

¹³⁹ See, e.g., *Hunt v. Monger* (Va. Gen. Ct., Oct. 26, 1670), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 240 (holding servant set free by the owner's will); see also *Agreement of Eskridge* (King George Cnty. Ct., Jan. 5, 1721/1722), in *KING GEORGE 1721-1723*, *supra* note 127, at 28 (providing that the master agreed to free the servant from a six-year term if the servant faithfully served him for three years).

¹⁴⁰ E.g., *Clark v. Ashburne* (Va. Gen. Ct., April 7, 1671), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 253.

¹⁴¹ E.g., *In re. Beverley* (Spotsylvania Cnty. Ct., Aug. 5, 1729), in *SPOTSYLVANIA 1724-1730 (PART III)*, *supra* note 127, at 105-06.

¹⁴² E.g., *Agreement of Home & Patterson* (Spotsylvania Cnty. Ct., Aug. 3, 1736), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK SPOTSYLVANIA COUNTY, VIRGINIA 1735-1738*, at 39 (Ruth Sparacio & Sam Sparacio eds., 1991) [hereinafter *SPOTSYLVANIA 1735-1738*]. Legislation required agreements between masters and servants be made in open court. 6 WILLIAM WALLER HENING, *THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619*, at 358 (Univ. Press of Va. 1969) (1819).

¹⁴³ E.g., *Order re: Venna* (Northumberland Cnty. Ct., July 19, 1676), in *NORTHUMBERLAND 1674-1677*, *supra* note 52, at 75.

¹⁴⁴ See, e.g., *Rayner v. Benford* (Va. Gen. Ct., Oct. 22, 1673), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 349 (freeing a servant by court order); *Mozingo v. Stone* (Va. Gen. Ct., Oct. 5, 1672), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 315-16 (giving an African-American his freedom after his twenty-eight years of service); see also *Flynt v. Towers* (Northampton Cnty. Ct., Aug. 17, 1682), *microformed on 00327495162125* (Genealogical Soc'y of Utah) (holding a master, who sells a servant for a longer term than the servant was required to serve, was liable in damages to buyer when the servant was freed before the time for which the buyer paid for him); cf. *Roades v. Heale* (Lancaster Cnty. Ct., July 14, 1680), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1678-1681*, at 64 (Ruth Sparacio & Sam Sparacio eds., 1993) [hereinafter *LANCASTER 1678-1681*] (reporting a jury verdict that set a servant free). *But see* *Latham v. Shumate* (Fauquier Cnty. Ct., June 25, 1762), in *VIRGINIA COUNTY COURT RECORDS MINUTE BOOK FAUQUIER COUNTY, VIRGINIA 1761-1762*, at 65-66 (Ruth Sparacio & Sam Sparacio eds., 1993) [hereinafter *FAUQUIER 1761-1762*] (holding a seller not liable if he or she warned a buyer at the time of sale of disputes regarding title to a servant or slave). Of course, there were also numerous suits for fraudulent sales of physically unsound slaves. See,

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mother had bound her son to servitude until he was twenty-four years old.¹⁴⁵ The son, when he attained the age of twenty-one, successfully appealed to the court that parents had no control over their children beyond age twenty-one and thereby obtained his freedom.¹⁴⁶ Other courts freed servants who had been unlawfully bound.¹⁴⁷ In one such case,¹⁴⁸ the court explained its reasoning, noting that, even though a woman named Williams was on a list of indentured servants, “there appear[ed] no manner of consideration whatsoever” for her being there.¹⁴⁹ It continued that “the said Williams or any other poor person might be forced into the list . . . by hard usage, good words, or the like dealings, for prevention of which . . . like wrongdoing for the future, this Court does declare the said Williams to be free from the said indenture.”¹⁵⁰ In all, courts freed numerous indentured servants held unlawfully,¹⁵¹ and in some cases even ordered the payment of wages for

e.g., *Waddill v. Chamberlayne* (Va. Gen. Ct., Apr. 1735), in 2 JOHN RANDOLPH & EDWARD BARRADALL, VIRGINIA COLONIAL DECISIONS: THE REPORTS OF DECISIONS OF THE GENERAL COURT OF VIRGINIA 1728–1741, at B45–46 (R.T. Barton ed., Lawbook Exchange, Ltd. 2005) (1909) (ruling for plaintiff when defendant sold a slave with an incurable disease); *Hill v. Young* (Lancaster Cnty. Ct., Jan. 11, 1698/1699), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1695–1699, at 85 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter LANCASTER 1695–1699] (proclaiming it fraudulent to sell a servant who is not of sound body); *Beverley v. Willis* (Middlesex Cnty. Ct., Sept. 2, 1700), in MIDDLESEX 1700–1702, *supra* note 128, at 18, 20 (discussing a suit brought against the seller of a slave claimed to be perfect when the slave was “full of pain”). Suits for breaches of warranties in the sale of servants could be brought before the end of the period of servitude. Compare *Davis v. Carlyle* (Loudoun Cnty. Ct., May 13, 1763), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LOUDOUN COUNTY, VIRGINIA 1762–1763, at 71–72 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter LOUDOUN 1762–1763] (awarding a special verdict of £15 for damages before the end of the servitude period), with *Davis v. Carlyle* (Loudoun Cnty. Ct., Apr. 11, 1764), in LOUDOUN 1763–1764, *supra*, at 100 (enforcing the previous special verdict).

¹⁴⁵ *In re. Bengee* (Rappahannock Cnty. Ct., May 2, 1688), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK (OLD) RAPPAHANNOCK COUNTY, VIRGINIA 1687–1689, at 26 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter RAPPAHANNOCK 1687–1689].

¹⁴⁶ *Id.*

¹⁴⁷ See, *e.g.*, *Gowen v. Lucas* (Va. Gen. Ct., June 16, 1675), in MINUTES OF THE COUNCIL, *supra* note 6, at 409, 411 (ordering the servant free from unlawful service); *Letherbury v. Carter* (Va. Gen. Ct., Oct. 4, 1672), in MINUTES OF THE COUNCIL, *supra* note 6, at 313–14 (freeing the child of a servant when the owner had unlawful ownership); *cf.* *Chavis v. Barber* (Va. Gen. Ct., Oct. 3, 1672), in MINUTES OF THE COUNCIL, *supra* note 6, at 312 (mandating that a boy unlawfully bound as an apprentice be returned to his mother).

¹⁴⁸ *Williams v. Nash* (Lancaster Cnty. Ct., Nov. 1, 1663), microformed on 1000549062 (Library of Va.).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See, *e.g.*, *In re. Letty* (Essex Cnty. Ct., Aug. 20, 1728), in VIRGINIA COUNTY COURT RECORDS ESSEX COUNTY, VIRGINIA ORDER BOOK 1727–1729, at 50 (Ruth Sparacio & Sam Sparacio eds., 2002) [hereinafter ESSEX 1727–1729] (reporting jury verdict that a Native American was “a free woman”); *Roades v. Heale* (Lancaster Cnty. Ct., July 14, 1680), in LANCASTER 1678–1681, *supra*

time worked following the end of the period of servitude.¹⁵² On occasion, the judiciary also had to protect servants who were bringing suits for freedom from intimidation and threats.¹⁵³

In other cases, judges required masters to treat servants properly during the course of their servitude. Thus, in one case the General Court freed an apprentice when his master failed to perform his part of the agreement,¹⁵⁴ while in another an apprentice was freed when his master assigned him to tasks other than those for which he had been apprenticed.¹⁵⁵ The courts also strove to prevent masters from unduly disciplining servants,¹⁵⁶ treating them “barbarously,” or “neglect[ing]”

note 144, at 64 (reporting jury verdict that the servant was free); *Indian Nan v. Holt* (Louisa Cnty. Ct., Apr. 9, 1771), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK LOUISA COUNTY, VIRGINIA 1770-1772*, at 42-43 (Lydia Sparacio Bontempo ed., 2001) [hereinafter *LOUISA 1770-1772*] (reporting jury verdict freeing plaintiff); *Cross v. Tarpley* (Richmond Cnty. Ct., Apr. 3, 1739), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1738-1740*, at 23-24 (Ruth Sparacio & Sam Sparacio eds., 2000) [hereinafter *RICHMOND 1738-1740*] (ordering the plaintiff be declared free after she was unlawfully detained as a servant); *In re. Whickers* (Stafford Cnty. Ct., Dec. 12, 1689), in *STAFFORD 1664-1668, 1689-1690*, *supra* note 127, at 56 (holding an indentured servant released from service); *cf. In re. Brown* (Richmond Cnty. Ct., Aug. 6, 1718), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1718-1719*, at 76-77 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter *RICHMOND 1718-1719*] (ordering a ship captain return a captive and his family to their home). *But see In re. Bess* (Richmond Cnty. Ct., Oct. 7, 1694), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1694-1697*, at 12 (Ruth Sparacio & Sam Sparacio eds., 1991) [hereinafter *RICHMOND 1694-1697*] (requiring a Native American captured in late war be a servant until age thirty).

¹⁵² See, e.g., *Moore v. Light* (Va. Gen. Ct., Oct. 27, 1673), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 353-54 (holding a servant be paid corn, clothes, and 400 lb. tobacco for extra time worked after the end of the period of servitude); *Marshall v. Baker* (Va. Gen. Ct., Apr. 22, 1670), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 213-14 (holding an owner to pay the servant corn, clothes, and tobacco for his extra time served).

¹⁵³ See, e.g., *Mann v. Sutton* (Caroline Cnty. Ct., July 15, 1768), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK CAROLINE COUNTY, VIRGINIA 1767-1768*, at 81 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter *CAROLINE 1767-1768*] (ordering the servant freed even after she initially disclaimed suit for freedom out of fear for herself and her children).

¹⁵⁴ *Hicelde v. Reade* (Va. Gen. Ct., Oct. 31, 1673), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 358.

¹⁵⁵ *Rawlins v. Cassinett* (Va. Gen. Ct., Mar. 6, 1674/1675), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 406-07; see *Sancebury v. Bayly* (Rappahannock Cnty. Ct., July 3, 1689), in *RAPPAHANNOCK 1687-1689*, *supra* note 145, at 76-77 (holding the servant be freed after working on tasks not assigned throughout the length of service). *But see In re. Molton* (Northumberland Cnty. Ct., Feb. 21, 1671/1672), in *NORTHUMBERLAND 1669-1673*, *supra* note 23, at 56-57 (reading the indenture of a sailor and ruling that “when his master has no employment for him at that said trade, he [may] set him to work in any lawful & necessary work he thinks fit to employ him about”).

¹⁵⁶ See, e.g., *Duggins v. Ward* (Goochland Cnty. Ct., July 1732), in 3 *GOOCHLAND 1731-1735*, *supra* note 90, at 103-04 (requiring the master pay the servant forty shillings for beating him); *In re. Thomas* (Lancaster Cnty. Ct., Feb. 13, 1677/1678), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1674-1678*, at 90 (Ruth Sparacio & Sam Sparacio

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their “education and trade.”¹⁵⁷ One court, for example, ordered a man who had married a child’s mother to free the child from “very hard labor” and to permit him to choose a new guardian.¹⁵⁸

Judges also came to the aid of servants whose masters failed to provide adequate food or medical assistance.¹⁵⁹ Servants such as these usually would not be freed, but their masters might be placed under court orders in regard to their treatment or they might be sold to new masters, who hopefully would treat them better.¹⁶⁰ Finally, masters were required to give former servants their freedom dues upon the expiration

eds., 1993) [hereinafter LANCASTER 1674–1678] (requiring bond not to correct servants except in presence of neighbors).

¹⁵⁷ Read v. James, (Prince William County. Ct., Sept. 7, 1762), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK PRINCE WILLIAM COUNTY, VIRGINIA 1762, at 57–58 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter PRINCE WILLIAM 1762].

¹⁵⁸ *In re. Price* (Stafford Cnty. Ct., Mar. 8, 1692/1693), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK STAFFORD COUNTY, VIRGINIA 1692–1693, at 75 (Ruth Sparacio & Sam Sparacio eds., 1988) [hereinafter STAFFORD 1692–1693].

¹⁵⁹ See, e.g., *Grimes v. Wright* (Rappahannock Cnty. Ct., July 1, 1685), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK (OLD) RAPPAHANNOCK COUNTY, VIRGINIA 1683–1685, at 92–93 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter RAPPAHANNOCK 1683–1685] (requiring the master to allow his servants sufficient food in the amount typically given servants in the colony); *Evins v. Morgan* (Richmond Cnty. Ct., Aug. 7, 1723), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1722–1724, at 35 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter RICHMOND 1722–1724] (ordering the master to provide the servant with medical assistance).

¹⁶⁰ See, e.g., *In re. Heap* (Richmond Cnty. Ct., Apr. 8, 1708), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1707–1708, at 80 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter RICHMOND 1707–1708] (holding “barbarous usage” of a servant resulted in the servant being sold at an outcry); *In re. Welch* (Spotsylvania Cnty. Ct., Mar. 6, 1743/1744), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK SPOTSYLVANIA COUNTY, VIRGINIA 1742–1744, at 54–55 (Ruth Sparacio & Sam Sparacio eds., 1996) [hereinafter SPOTSYLVANIA 1742–1744] (ordering a servant abused by the owner to receive a good diet and clothing and not be disciplined without court order); *Spencer v. Thorn* (Westmoreland Cnty. Ct., Nov. 25, 1714), in WESTMORELAND 1714–1716, *supra* note 138, at 23 (directing sale of a servant), *rev’g Thorn v. Spencer* (Westmoreland Cnty. Ct., Nov. 24, 1714), in WESTMORELAND 1714–1716, *supra* note 138, at 22–23 (ordering freedom for the servant). The servant in *Thorn*, however, also received money damages from her master who had stripped her naked before beating her. *Thorn v. Spencer*, (Westmoreland Cnty. Ct., Nov. 25, 1714), in WESTMORELAND 1714–1716, *supra* note 138, at 23–24, *rev’g Spencer v. Thorn* (Westmoreland Cnty. Ct., Nov. 24, 1714), in WESTMORELAND 1714–1716, *supra* note 138, at 22–23. *But see In re. Flowers* (Fauquier Cnty. Ct., Apr. 23, 1765), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK FAUQUIER COUNTY, VIRGINIA 1764–1766, at 43 (Ruth Sparacio & Sam Sparacio eds., 1994) [hereinafter FAUQUIER 1764–1766] (ordering an apprentice bound to another master after complaining “of ill-usage”); *In re. Byrn* (Spotsylvania Cnty. Ct., Oct. 3, 1733), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK SPOTSYLVANIA COUNTY, VIRGINIA 1732–1734, at 96–97 (Ruth Sparacio & Sam Sparacio eds., 1991) [hereinafter SPOTSYLVANIA 1732–1734] (freeing a servant who received insufficient lodging and clothing).

of their terms.¹⁶¹ Other judges ordered masters to abide by the terms of the agreements by which they had obtained servants.¹⁶²

The legal system dealt even more generously with wage laborers. Unlike runaway servants, for example, wage laborers who did not work during part of the period of their contract lost wages only for the time they had missed without any additional penalty.¹⁶³ Similarly, sailors were able to obtain special writs from the governor directing county courts to adjudicate their wage claims against their vessels.¹⁶⁴ Wage laborers who failed to perform in accordance with the terms of their contracts might find their wages judicially reduced, however.¹⁶⁵

Efforts to uplift white servants and workers did not inopportunely have the desired effect of increasing white immigration. After the 1670s, European immigrants continued to migrate mainly to destinations other than Virginia, with the result by the early eighteenth century that Virginia's plantation labor force consisted mainly of Africans and their descendants rather than white indentured servants.¹⁶⁶

¹⁶¹ See, e.g., *Mitchell v. Dromond* (Va. Gen. Ct. Mar. 9, 1675/1676), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 432 (requiring the owner pay his servant corn and clothing upon release); *Hoskins v. Spratt* (Norfolk Cnty. Ct., June 28, 1675), *microformed on R-53* (Library of Va.) (order apparently not entered in local records until after affirmance by the General Court), *aff'd* (Va. Gen. Ct., June 17, 1675), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 411-12 (ordering the owner to pay his freed servant 500 lb. of tobacco and barrel).

¹⁶² See e.g., *In re. Read* (Prince William Cnty. Ct., Sept. 7, 1762), in *PRINCE WILLIAM 1762*, *supra* note 157, at 57-58 (placing the servant with a new master in light of mistreatment by existing one); *Bankes v. Gibson* (Stafford Cnty. Ct., Mar. 10, 1689/1690), in *STAFFORD 1664-1668, 1689-1690*, *supra* note 127, at 64 (ordering the master to teach his servant to read and write). Courts almost invariably decided issues of servant status without the aid of juries, but occasionally juries were used. See, e.g., *Talbort v. Willis* (Middlesex Cnty. Ct., Dec. 15, 1692), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1690-1694*, at 65 (Ruth Sparacio & Sam Sparacio eds., 1994) [hereinafter *MIDDLESEX 1690-1694*] (confirming jury verdict that the servant be freed); cf. *Webb v. Hughlett* (Northumberland Cnty. Ct., May 19, 1680), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK NORTHUMBERLAND COUNTY, VIRGINIA 1680-1683*, at 4 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter *NORTHUMBERLAND 1680-1683*] (addressing an issue of status that arose collaterally in a suit between non-servants).

¹⁶³ See, e.g., *Turner v. Ashby* (Middlesex Cnty. Ct., Jan. 2, 1692/1693), in *MIDDLESEX 1690-1694*, *supra* note 162, at 57 (holding a wage laborer lost his wages for work missed during part of his contract period); *Banister v. Fielding's Estate* (Northumberland Cnty. Ct., Jan. 20, 1675/1676), in *NORTHUMBERLAND 1674-1677*, *supra* note 52, at 55 (granting pervious years' wages at the master's death minus wages for one month of absence).

¹⁶⁴ See, e.g., *Barrett v. Barque Mary of Carolina* (Northumberland County Ct., Feb. 19, 1679/1680), in *NORTHUMBERLAND 1677-1679*, *supra* note 133, at 98 (requiring payment of £20 and 13 shillings).

¹⁶⁵ See, e.g., *Grame v. Peirse* (Spotsylvania Cnty. Ct., June 7, 1727), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK ABSTRACTS SPOTSYLVANIA COUNTY, VIRGINIA 1724-1730 (PART II)*, at 60-61 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter *SPOTSYLVANIA 1724-1730 (PART II)*] (reducing servant's wages for failing to perform in accordance with the contract).

¹⁶⁶ *KULIKOFF*, *supra* note 123, at 38-41.

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The change in the demographics of the labor force did, however, make Virginia easier to govern. The first generation of Virginia slaves came from widely divergent African cultures and spoke different languages;¹⁶⁷ and their diversity likely impeded their ability to organize resistance to planters' impositions.¹⁶⁸ In addition, planters could deal with black slaves more harshly than with white servants, who might report cruelty back to England and thereby discourage others from following in their footsteps.¹⁶⁹ Thus, it was easier to govern blacks repressively than it had been to govern whites.

The switch to black labor also changed the nature of the remaining white community. Most significantly, the poor white community that elites had to govern was smaller, and therefore easier to control, than it would have been if indentured servants had continued to provide most of Virginia's labor. Over time the young, rowdy men who had followed Nathaniel Bacon into rebellion grew older, obtained families, and became more accepting of their position in life—and less willing to turn to violence and rebellion to better it. Finally, the potential for black resistance arguably threatened poor whites as well as elite ones and thereby gave elites an argument for uniting the white underclass with them in their practices of repressing blacks.¹⁷⁰

B. *Patronage and Noblesse Oblige*

Elites, however, needed more than a threat of black rebellion to persuade lower class whites to accept their leadership as part of a coherent, peaceful community. They had to adopt the gentlemanly code

¹⁶⁷ See BILLINGS ET AL., *supra* note 112, at 205 (describing the incoming African slaves as an “array of tribal customs” with a “babel of languages”).

¹⁶⁸ See WOODY HOLTON, *FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES, AND THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA* xvi (1999) (attributing the Virginia gentry's success to slavery).

¹⁶⁹ See, e.g., *In re. Kemp* (Middlesex Cnty. Ct. Oct. 5, 1736), in *VIRGINIA COUNTY COURT RECORDS MIDDLESEX COUNTY, VIRGINIA ORDER BOOK ABSTRACT 1735-1737*, at 82 (Ruth Sparacio & Sam Sparacio eds., 2002) [hereinafter *MIDDLESEX 1735-1737*] (giving a master leave to castrate a runaway slave); *Robinson v. Duncum* (Middlesex Cnty. Ct., July 8, 1707), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1707-1708*, at 23-24 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter *MIDDLESEX 1707-1708*] (ordering “a Negro slave” be castrated for “running away, lying out and destroying people's stocks”); *King v. Sawney* (Westmoreland Cnty. Ct., Aug. 27, 1718), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK WESTMORELAND COUNTY, VIRGINIA 1718-1721*, at 19-20 (Ruth Sparacio & Sam Sparacio eds., 2003) [hereinafter *WESTMORELAND 1718-1721*] (allowing a master to cut off a runaway's “two great toes”).

¹⁷⁰ For a brief discussion of the dynamics of the white community in Virginia in the late 1600s, see MORGAN, *supra* note 98, at 343-44 (explaining how there were fewer poorer whites and those who remained feared an insurrection).

of *noblesse oblige* and recognize their duty to care economically for whites who were poorer or otherwise less fortunate than themselves. In particular, leading planters had to use their economic power to reward people beneath them who became upstanding, constructive contributors to their communities.¹⁷¹

Individual planters, as owners of vast land estates, wielded considerable power over the lives and economic opportunities of everyone except the few other great planters with whom they typically sat in consensus on the county bench. Small landowners needed the assistance of great planters in marketing tobacco and obtaining credit. Those who did not own land had to turn to great landowners to find land they could rent. Others who did not own land might just want employment as overseers or field hands, or in service occupations such as blacksmiths, coopers, etc.; but again, wealthy landowners would prove key to providing those jobs.¹⁷²

In short, as a result of a continued policy of granting new land mainly to great planters, nearly everyone else became dependent on those planters. In a world where behavior was publicly known and could not be hidden in the anonymity of large cities, planters became responsible for improving the well-being of their dependents; and dependents, in return, had little choice but to improve their lives and behave, whether as jurors, minor officials, or ordinary members of the community, as their betters expected them to behave.¹⁷³ They could no

¹⁷¹ See BILLINGS ET AL., *supra* note 112, at 101 (discussing large planters' accommodations for small planters to avoid rebellion).

¹⁷² See RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA 1740-1790*, at 133, 136-37 (1982) (discussing the relationship between wealthy landowners and the poorer classes). Isaac notes, however, that the mid-eighteenth century of Glasgow merchant houses in tobacco marketing undermined the economic power of Virginia elites. *Id.* at 137. The most recent analysis of the Scottish merchants' role is consistent with that of Isaac. See ALBERT H. TILLSON, JR., *ACCOMMODATING REVOLUTIONS: VIRGINIA'S NORTHERN NECK IN AN ERA OF TRANSFORMATIONS, 1760-1810*, at 154-55, 166-67 (2010).

¹⁷³ As Virginia developed toward the west, beyond the tobacco-producing Piedmont and into the Shenandoah Valley, patterns of governance changed only slightly. ALBERT H. TILLSON, JR., *ENTRY AND COMMON FOLK: POLITICAL CULTURE ON A VIRGINIA FRONTIER 1740-1789*, at 20 (1991). The Shenandoah was not settled by English stock from the east, as all of Virginia up to the Piedmont had been; instead, settlers came mainly from Pennsylvania or from Scottish sections of North Britain or Northern Ireland. *Id.* at 8. Thus, the population of the Shenandoah tended to be Presbyterian rather than Anglican, and leaders and other residents typically did not have kinship ties with Virginians from the east. *Id.* at 20. However, they did have close ties with each other and important political and economic ties with colonial leaders in Williamsburg. *Id.* at 20-22. Those ties enabled a small group of leaders to dominate landholding and, hence, the economy. For example, in the early years of settlement of Augusta County, which initially covered most of the Shenandoah Valley, thirteen men patented 86.6% of all patented land; and as late as 1769, a total of forty-one men still owned 52.1% of all freehold acreage under private control. Turk McCleskey, *Rich Land, Poor Prospects: Real Estate*

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longer remain the rowdy, independent, potential rebels they once had been. Only those who owned significant quantities of land could be independent, precisely because they could be relied upon to behave as gentlemen in a civilized community.¹⁷⁴

C. *Law and Religion*

Many late seventeenth-century Virginians found Christianity an important force in creating a civilized community. A main argument for enslaving blacks, especially in the seventeenth and early eighteenth century, was that whites were Christian and thus civilized, whereas almost all blacks before the Great Awakening were not and thus, it was said, had to be controlled by force.¹⁷⁵

In fact, many whites in the seventeenth century had not been practicing Christians. Virginia then had only half the number of clergy it needed to fill its pulpits, and living conditions in many parishes were so bad that the ministers who served them were unsuitable.¹⁷⁶ Before Bacon's Rebellion, as shown above, religious norms were irregularly enforced.¹⁷⁷ Transforming Virginians into true Christians thus required both that church institutions be created for them and that, once brought into churches, parishioners abide by the norms of those churches.

Reverend James Blair, who arrived in Virginia in 1685 and was named the commissary or personal representative of the bishop of London in 1689, set about the task of reforming the church and thereby strengthening the legal order of the colony by persuading the Governor's

and the Formation of a Social Elite in Augusta County, Virginia, 1738-1770, 98 VA. MAG. HIST. & BIOGRAPHY 449, 466 (1990). As in the east, the great landowners used their economic power to control local government. As county courts were established, governors in Williamsburg appointed wealthy men to the bench, and those men then became a self-perpetuating oligarchy that recommended their own reappointment and nominated others to fill vacancies. See TILLSON, *supra*, at 17, 22-23 (providing examples of specific positions filled by the wealthy). That oligarchy, in turn, used its control over the economic prospects of its underlings to secure their obedience. See McCleskey, *supra*, at 459-60, 477-86 (explaining this concept and also providing examples). The most recent book on the Shenandoah uses McCleskey's and Tillson's findings in its larger project of describing the Shenandoah Valley's early history. See generally, WARREN R. HOFSTRA, *THE PLANTING OF NEW VIRGINIA: SETTLEMENT AND LANDSCAPE IN THE SHENANDOAH VALLEY* (2004).

¹⁷⁴ See McCleskey, *supra* note 173, at 460 (describing how limited land ownership reduced democracy).

¹⁷⁵ See BILLINGS ET AL., *supra* note 112, at 206 (describing the white interpretation of religion among slaves). For legislation defining non-Christians brought into Virginia as slaves, see 3 HENING, *supra* note 130, at 447-48.

¹⁷⁶ BILLINGS ET AL., *supra* note 112, at 140.

¹⁷⁷ See *id.* (explaining the religious setup in late seventeenth century England and how some hoped this religious experience would spread to Virginia).

Council in July 1690 to call for stricter enforcement of religious laws.¹⁷⁸ He remained a significant force in Virginia government into the 1730s, when he was still a member of the Council.¹⁷⁹ By then, Blair's efforts had led to the formation of a close alliance between local courts and local churches, with the same gentry families who controlled the county bench also controlling local vestries—vestries that possessed substantial governmental powers and typically levied the highest taxes that eighteenth-century Virginians paid.¹⁸⁰

Throughout the eighteenth century, church and state remained closely intertwined. Thus, the General Court asserted its jurisdiction over religion, when, for example, it disciplined a minister “of evil fame and profligate manners . . . much addicted to drunkenness . . . [who] officiated in ridiculous apparel unbecoming a priest[,] . . . exposed his private parts to view in public companies, and solicited negro and other women to fornication and adultery with him.”¹⁸¹ Likewise at the county level, the late seventeenth and early eighteenth century witnessed a revival of prosecutions for morals offenses, which had largely disappeared from court dockets in the post-1660 era. Indeed, by the early eighteenth century, grand juries had developed the habit of presenting and having prosecuted as criminal virtually any conduct on which local elites frowned.

Thus, Virginia courts again began routinely to punish what one court described as “the several sins and offenses of swearing,¹⁸² cursing by profaning God's Holy Name,¹⁸³ Sabbath abusing,¹⁸⁴ drunkenness,¹⁸⁵

¹⁷⁸ *Id.* at 140.

¹⁷⁹ *Id.* at 141, 234.

¹⁸⁰ JOHN A. RAGOSTA, *WELLSPRINGS OF LIBERTY: HOW VIRGINIA'S RELIGIOUS DISSENTERS HELPED WIN THE AMERICAN REVOLUTION AND SECURED RELIGIOUS LIBERTY*, 16–17, 37 (2010).

¹⁸¹ *Godwin v. Lunan* (Va. Gen. Ct., Oct. 1771), in THOMAS JEFFERSON, *REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1730, TO 1740; AND FROM 1768, TO 1772*, at 96 (Charlottesville, F. Carr and Co. 1829).

¹⁸² *See, e.g., King v. Clifton* (Stafford Cnty. Ct., Apr. 5, 1665), in *STAFFORD 1664–1668, 1689–1690*, *supra* note 127, at 9 (ordering Clifton pay a fine for “proclaiming [the] name of God”).

¹⁸³ *Cf., e.g., King v. Dickins* (Goochland Cnty. Ct., July 1731), in 1 & 2 *GOOCHLAND COUNTY VIRGINIA COURT ORDER BOOKS 1728–1731*, at 358–59 (Ann K. Blomquist ed., 2007) [hereinafter 1 & 2 *GOOCHLAND 1728–1731*] (presenting to the court a man who taught his slave “to profane the Lord's Prayer”). *But see King v. Dickins* (Goochland Cnty. Ct. July 1731), in 1 & 2 *GOOCHLAND 1728–1731*, *supra*, at 392–93 (dismissing the complaint against Dickins).

¹⁸⁴ The most basic Sabbath violation was not attending church on Sunday. *See, e.g., King v. Gooding* (Henrico Cnty. Ct., May 2, 1758), *microformed on* 00317735162121 (Genealogical Soc'y of Utah) (issuing criminal charges against someone “for not going to [c]hurch”); *King v. Falkner* (Middlesex Cnty. Ct., Aug. 5, 1718), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1716–1719*, at 79–80 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter *MIDDLESEX 1716–1719*] (fining a woman for missing church for three years). Everyone, except those whose status as dissenters had been officially recognized, was deemed to be a member of the Church of England and required to attend services at least once every

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fornication and adultery.”¹⁸⁶ Other morals offenses, which had been largely ignored in the middle of the seventeenth century, included baptizing a child without authority,¹⁸⁷ blasphemy,¹⁸⁸ buggery,¹⁸⁹ “living a

four weeks. ISAAC, *supra* note 172, at 58. Other offenses included disturbing church services, e.g., King v. Thornbury (Richmond Cnty. Ct., Nov. 2, 1692), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1692-1694, at 34 (Ruth Sparacio & Sam Sparacio eds., 1991) [hereinafter RICHMOND 1692-1694]; “rude and disorderly behavior” in church, e.g., King v. Davis (Richmond Cnty. Ct., Dec. 2, 1724), in VIRGINIA COUNTY COURT RECORDS RICHMOND COUNTY, VIRGINIA ORDERS 1724-1725, at 6-7 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter RICHMOND 1724-1725]; leaving church during service, see, e.g., Churchwardens v. Wooden (Lancaster County Ct., May 10, 1732), in LANCASTER 1729-1732, *supra* note 126, at 87-88 (fining a man five shillings or 50 lb. of tobacco for leaving church early); working on the Sabbath, see, e.g., King v. Rowland (Stafford County Ct., Mar. 9, 1691/1692), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK STAFFORD COUNTY, VIRGINIA 1691-1692, at 96 (Ruth Sparacio & Sam Sparacio eds., 1987) [hereinafter STAFFORD 1691-1692] (fining a man for cutting tobacco on Sunday); travelling on the Sabbath, e.g., King v. Crosswell (Richmond Cnty. Ct., Dec. 6, 1704), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1704-1705, at 13 (Ruth Sparacio & Sam Sparacio eds., 1996) [hereinafter RICHMOND 1704-1705]; driving a wagon on the Sabbath, see, e.g., King v. Lewis (Augusta County Ct., June 22, 1764), *microformed on* 00303765162115 (Genealogical Soc’y of Utah) (fining a man five shillings); hunting on the Sabbath, e.g., King v. Blackly (Spotsylvania Cnty. Ct., Nov. 2, 1725), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK ABSTRACTS SPOTSYLVANIA COUNTY, VIRGINIA 1724-1730 (PART I), at 78 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter SPOTSYLVANIA 1724-1730 (PART I)]; or putting slaves to work on the Sabbath, see, e.g., King v. Gibson (Richmond Cnty. Ct., June 3, 1719), in RICHMOND 1718-1719, *supra* note 151, at 81 (summoning a man before a grand jury for forcing his slaves to work in the field on the Sabbath). *Cf.* Beverley v. Beach (Middlesex Cnty. Ct., Sept. 5, 1681), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1680-1686, at 12-13 (Ruth Sparacio & Sam Sparacio eds., 1994) [hereinafter MIDDLESEX 1680-1686] (voiding an attachment signed on a Sunday).

¹⁸⁵ See, e.g., Taverner v. Jacobus (Richmond Cnty. Ct., Mar. 6, 1694/1695), in RICHMOND 1694-1697, *supra* note 151, at 31 (listing “drunkenness” as one of the “several sins and offences”).

¹⁸⁶ See, e.g., *id.* (ordering a fine of 2000 lb. of tobacco for fornicating on Sunday). For examples of adultery prosecutions, see King v. Barras (Henrico Cnty. Ct., Feb. 8, 1757), *microformed on* 00317735162121 (Genealogical Soc’y of Utah); King v. Davis (Lancaster Cnty. Ct., Dec. 10, 1687), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1687-1691, at 21 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter LANCASTER 1687-1691]. The nature of the crime of adultery is made somewhat unclear by the case of *King v. Philips*, in which a couple accused of “living in adultery” was found not guilty because they had recently married—an impossibility if one or both of them had been married already. (Spotsylvania Cnty. Ct., Aug. 5, 1730), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK SPOTSYLVANIA COUNTY, VIRGINIA 1724-1730 (PART IV), at 73-74 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter SPOTSYLVANIA 1724-1730 (PART IV)]. Thus, living in adultery might have consisted of nothing more than a couple’s living together and engaging in sexual intercourse.

¹⁸⁷ See, e.g., King v. Thackston (Middlesex Cnty. Ct., Sept. 3, 1677), in MIDDLESEX 1673-1678, *supra* note 104, at 74-75 (ordering the arrest of Richard Thackston for illegally performing a baptism).

¹⁸⁸ See, e.g., King v. Graham (Augusta Cnty. Ct., Nov. 25, 1766), *microformed on* 00303775162116 (Genealogical Soc’y of Utah) (reporting that Graham was the subject of a grand jury hearing regarding allegations of blasphemy); see also King v. Giles (Lancaster Cnty. Ct., Oct. 13, 1697), in LANCASTER 1695-1699, *supra* note 144, at 51 (ordering punishment of three days in pillory and twenty-five lashes for calling Christ “a Son of a Whore”); *cf.* King v. Furrill

lewd and vicious loose life,"¹⁹⁰ allowing "unmarried persons to bed together,"¹⁹¹ "cohabiting with a Negro,"¹⁹² and selling liquor without a license.¹⁹³

Changes in prosecutions for fornication best revealed the emerging concern in the aftermath of Bacon's Rebellion with prosecuting offenses against morality. In the middle of the seventeenth century, the concern with fornication had been economic rather than moral—almost no prosecutions were brought for sexual activity unless it resulted in the birth of an illegitimate child with whose support the public might be charged. By the early eighteenth century, in contrast, couples were presented for "living in that notorious sin of fornication"¹⁹⁴ or "for being reputed to live in fornication,"¹⁹⁵ even when no evidence was brought forward of birth of an illegitimate child. However, charges of fornication still would be dismissed if a couple married, even if they married after the charges had been presented,¹⁹⁶ thereby suggesting that the

(Middlesex County Ct., Oct. 1, 1677), in MIDDLESEX 1673–1678, *supra* note 104, at 79 (ordering punishment for "condemning... the holy institutions & ceremonies of the Church of England").

¹⁸⁹ See, e.g., King v. Blaney (Rappahannock Cnty. Ct., Sept. 7, 1687), in RAPPAHANNOCK 1685–1687, *supra* note 101, at 91–92 (ordering a fine upon conviction for bugging a cow).

¹⁹⁰ King v. Fletcher (Stafford Cnty. Ct., Aug. 12, 1691), in STAFFORD 1691–1692, *supra* note 184, at 31; accord King v. Vanlandegham (Northumberland Cnty. Ct., July 17, 1700), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK NORTHUMBERLAND COUNTY, VIRGINIA 1699–1700, at 104, 106 (Lydia Bontempo ed., 2003) [hereinafter NORTHUMBERLAND 1699–1700] (reporting Vanlandegham was ordered to remain in sherriff's custody for keeping another man's wife in his custody).

¹⁹¹ King v. Bell (Augusta Cnty. Ct., Sept. 26, 1763), *microformed on* 00303765162115 (Genealogical Soc'y of Utah).

¹⁹² King v. Moore (Augusta Cnty. Ct., June 22, 1764), *microformed on* 00303765162115 (Genealogical Soc'y of Utah).

¹⁹³ See, e.g., King v. Wood (Richmond Cnty. Ct., June 3, 1719), in RICHMOND 1718–1719, *supra* note 151, at 81 (ordering Wood answer for selling liquor without a license); cf. King v. Spiering (Middlesex Cnty. Ct., Feb. 3, 1695/1696), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1694–1697, at 59–60 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter MIDDLESEX 1694–1697] (fining a man 1000 lb. tobacco for maintaining an unlicensed tipling house). The usual penalty for liquor offenses was a fine, but one defendant who was jailed because he was unable to pay requested corporal punishment instead. *In re*. Matthews (Augusta Cnty. Ct., Nov. 17, 1773), *microformed on* 00303785162117 (Genealogical Soc'y of Utah). The court obliged with twenty-one lashes. *Id.*

¹⁹⁴ Washington Parish v. Buss (Westmoreland Cnty. Ct., June 24, 1713), in WESTMORELAND 1712–1714, *supra* note 128, at 58.

¹⁹⁵ King v. Dye (Richmond Cnty. Ct., July 4, 1728), in RICHMOND 1727–1729, *supra* note 128, at 51.

¹⁹⁶ See, e.g., King v. Gressam (King George Cnty. Ct., Jan. 5, 1721/1722), in KING GEORGE 1721–1723, *supra* note 127, at 26 (dismissing a presentment for "living together in fornication" because the couple later married). *But see* King v. Boy (Spotsylvania Cnty. Ct., May 7, 1740), in SPOTSYLVANIA 1738–1740, *supra* note 122, at 93–94 (punishing a woman for having an illegitimate child even though she had since married).

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immorality of a couple's premarital sex still may not have been the law's primary concern.

The increase in prosecutions for immorality also can be observed statistically in two counties—Lancaster and Middlesex—for which court records are readily available throughout the late seventeenth and early eighteenth century. In both counties, prosecutions for religious offenses such as missing church, profaning the Sabbath, swearing, and contemptuous behavior toward clergy rose significantly in the eighteenth century. Between 1671 and 1675, there was one such prosecution in Lancaster County, while there were two in Middlesex between 1674 and 1678, both occurring after the suppression of Bacon's Rebellion. Lancaster witnessed four such prosecutions between 1701 and 1705 and forty between 1731 and 1735. There were twelve prosecutions in Middlesex between 1703 and 1707 and fifteen between 1733 and 1737.¹⁹⁷ Similarly, as Peter Hoffer has shown, prosecutions for sexual immorality peaked in Richmond County in the 1720s, while prosecutions for regulatory and other morals offenses in general were at their height in the 1710s, 1720s, and 1730s.¹⁹⁸

In other ways as well, the justices of the county courts became dedicated to maintaining the hegemony of the established Church of England. According to the most recent scholar of religion in pre-Revolutionary Virginia, "no British colony was more protective of its established church, nor more abusive of its religious dissenters, than Virginia."¹⁹⁹ As late as the 1740s, a main threat to that hegemony came from Roman Catholics rather than dissenting Protestants,²⁰⁰ and the defense of Anglicanism began with the oath taken by the justices, who swore their belief "that there is not any transubstantiation in the Sacrament of the Lord's Supper or in the elements of bread and wine" and that "adoration of the Virgin Mary or any other saint and the sacrifice of the mass as . . . used in the Church of Rome are superstitious and idolatrous."²⁰¹ Catholics faced other forms of discrimination as well.

¹⁹⁷ All figures referenced in this section were derived from court records from Lancaster and Middlesex counties published by the Antient Press.

¹⁹⁸ CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA: [RECORDS OF] FINES, EXAMINATION OF CRIMINALS, TRIALS OF SLAVES, ETC., FROM MARCH 1710 [1711] TO [1754] [RICHMOND COUNTY, VIRGINIA] xxviii fig.1, lvi tbl.5 (Peter Charles Hoffer & William B. Scott eds., 1984) [hereinafter CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA].

¹⁹⁹ RAGOSTA, *supra* note 180, at 3.

²⁰⁰ See e.g., King v. Matthews (Frederick Cnty. Ct., Nov. 10 1744), FREDERICK COUNTY VIRGINIA MINUTES OF COURT RECORDS 1743-1745, at 110-11 (John David Davis ed., 2001) [hereinafter FREDERICK 1743-1745] (charging Matthews with "propagating the Romish Doctrine").

²⁰¹ Oath of Spicer (King George Cnty. Ct., May 19, 1721), in KING GEORGE 1721-1723, *supra* note 127, at 1.

In one case, for example, the Stafford County Court ordered a Roman Catholic who was caring for several orphans to deliver the children to specified Protestants to be bound as apprentices.²⁰² Although the same court would not dismiss cases brought by a lawyer thought to be a Roman Catholic²⁰³—and thereby deny a litigant the right to be represented by a lawyer of his choice—the court, over the dissent of three justices, did order the lawyer to take oaths mandated by Parliament that were inconsistent with his Catholic beliefs, from which order he appealed to the General Court.²⁰⁴ Further, as late as 1756, legislation was enacted to disarm Catholics.²⁰⁵

When it came to dissenting Protestants, the courts were required to dismiss charges of not attending church on Sunday if a defendant showed that he or she was a member of a dissenting Protestant communion.²⁰⁶ They were also under a duty to protect dissenting congregations from insult and abuse,²⁰⁷ although dissenters, in fact, frequently faced discrimination and even physical violence.²⁰⁸

In any event, the courts did not make it easy for Protestant dissenters to establish separate congregations. Dissenting congregations were not permitted to build places of worship without prior judicial authorization,

²⁰² *In re. Barton* (Stafford Cnty. Ct., Dec. 12, 1689), in STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 54–55.

²⁰³ *Gibson v. Richee* (Stafford Cnty. Ct., Apr. 6, 1693), in STAFFORD 1692–1693, *supra* note 158, at 89–90; *cf. Churchill v. Smith* (Middlesex Cnty. Ct., Dec. 7, 1702), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1702–1704, at 3 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter MIDDLESEX 1702–1704] (permitting a lawyer to plead even though he had not taken the oaths mandated by Parliament). *But see Brent v. Edmunds* (Stafford Cnty. Ct., Dec. 11, 1667), in STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 50 (preventing an attorney from practicing before the court for failure to take the requisite oaths).

²⁰⁴ *Gibson v. Brent* (Stafford Cnty. Ct., May 18, 1693), in STAFFORD 1692–1693, *supra* note 158, at 95–97.

²⁰⁵ See 7 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 35–39 (Univ. Press of Va. 1969) (1820) (reporting an “[a]ct for disarming [p]apists, and reputed [p]apists, refusing to take the oaths to the government”).

²⁰⁶ *E.g., King v. Reading* (King George Cnty. Ct., Jan. 5, 1721/1722), in KING GEORGE 1721–1723, *supra* note 127, at 25. Charges also would be dismissed for defendants who attended Anglican services in a parish other than their own. *E.g., Regina v. Williams* (Westmoreland Cnty. Ct., June 28, 1710), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK WESTMORELAND COUNTY, VIRGINIA 1709–1712, at 23–24 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter WESTMORELAND 1709–1712].

²⁰⁷ See, *e.g., King v. Moyer* (Orange Cnty. Ct., Nov. 18, 1735), in ORANGE COUNTY, VIRGINIA ORDER BOOK ONE 1734–1739 PART ONE 1734–1736, at 38 (Barbara Vines Little ed., 1990) [hereinafter ORANGE 1734–1736] (presenting a man who “insulted and abused” an assembly of worshippers).

²⁰⁸ See RAGOSTA, *supra* note 180, at 28–36 (discussing the fate of religious dissenters in the eighteenth century just before the Revolutionary War).

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which even at the end of the colonial period was not readily granted.²⁰⁹ In addition, dissenting preachers could not preach without licenses,²¹⁰ which were difficult to obtain,²¹¹ and would be prosecuted if they did.²¹² It appears, indeed, that no dissenting clergymen were licensed until the 1730s and 1740s.²¹³ Another obstacle to dissent was the requirement that county courts report to the governor on meetings of dissenters within their jurisdiction.²¹⁴ Therefore, it is not surprising that the Middlesex County Court reported in 1703 that no dissenting congregations existed in the county.²¹⁵

At the same time that the courts created obstacles to dissenting congregations, they set up rules to further the effective functioning of Anglican parishes. County officials under judicial supervision paid the salaries of the Anglican clergy.²¹⁶ Judges specified the locations where

²⁰⁹ See, e.g., *In re. Faulkner* (Caroline Cnty. Ct., Sept. 12, 1771), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK CAROLINE COUNTY, VIRGINIA 1771-1772, at 39 (Ruth Sparacio & Sam Sparacio eds., 1992) [hereinafter CAROLINE 1771-1772] (rejecting a petition to build a house for worship because “the court are of opinion they have not jurisdiction of the matter”); cf. *In re: Holt* (Spotsylvania Cnty. Ct., Sept. 3, 1734), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK SPOTSYLVANIA COUNTY, VIRGINIA 1734-1735, at 51-52 (Ruth Sparacio & Sam Sparacio eds., 1991) [hereinafter SPOTSYLVANIA 1734-1735] (granting petition for certificate of governor concerning raising money in Germany to build a church).

²¹⁰ See, e.g., *Swearing of Dalgleish* (Richmond Cnty. Ct., Apr. 2, 1729), in RICHMOND 1727-1729, *supra* note 128, at 85 (swearing in a Presbyterian minister required to take oaths in open court); cf. *Orders of Council* (Lancaster Cnty. Ct., June 21, 1699), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1699-1701, at 20-21 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter LANCASTER 1699-1701] (requiring licensing of schoolmasters).

²¹¹ See, e.g., *In re. Magil* (Westmoreland Cnty. Ct., Nov. 25, 1719), in WESTMORELAND 1718-1721, *supra* note 169, at 67, 69 (rejecting a petition for license “to preach the Gospel” pursuant to acts of Parliament because it did “not properly [i]e before” the court).

²¹² See, e.g., *R v. Organ* (Westmoreland Cnty. Ct., Aug. 28, 1717), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK WESTMORELAND COUNTY, VIRGINIA 1716-1718, at 59 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter WESTMORELAND 1716-1718] (convicting defendants for “concerning themselves under the pretense of religious worship”); see also RAGOSTA, *supra* note 180, at 18-19, 23 (discussing impediments to dissenting preachers).

²¹³ See RAGOSTA, *supra* note 180, at 40-41 (discussing examples of such licensure).

²¹⁴ See *Orders of Council* (Lancaster Cnty. Ct., June 21, 1699), in LANCASTER 1699-1701, *supra* note 210, at 21 (requiring county courts to report on meetings of religious dissenters in their counties).

²¹⁵ *Return of Court* (Middlesex Cnty. Ct., Nov. 1, 1703), in MIDDLESEX 1702-1704, *supra* note 203, at 41. For a fuller description of the discrimination and other obstacles faced by dissenters in colonial Virginia, see RAGOSTA, *supra* note 180, at 15-42.

²¹⁶ See, e.g., *Farnefold v. Mottrom* (Northumberland Cnty. Ct., Nov. 17, 1680), in NORTHUMBERLAND 1680-1683, *supra* note 162, at 14 (reporting a minister’s complaint for two years salary not paid by the sheriff).

Anglican clergy were required to preach²¹⁷ and supervised vestry elections to insure that the clergy had adequate lay support.²¹⁸ In case such encouragement did not suffice, the courts prosecuted parishes that did not provide a minister or reader or failed to keep their church in repair.²¹⁹

In sum, by the early decades of the eighteenth century, Virginia's county courts were in the business of insuring that their people—lower as well as upper class—lived in moral communities, as judges intrusively regulated sexuality, religious belief, and ecclesiastical government and structure. The most important matter of morality they regulated, however, was family life.

Thus, the courts acted intrusively in protecting innocent wives from errant husbands. For example, in one important case the Governor and Council directed a county court to hear the case of an eleven-year-old girl who claimed that she had been married at the age of nine without her consent.²²⁰ The court ordered the girl to state, on her twelfth birthday, whether she wished to affirm or disaffirm the marriage.²²¹ When she disaffirmed the marriage, the court declared it null and void.²²² County courts also had power to grant wives separate maintenance when husbands did not adequately provide for them,²²³ whereas courts required men who beat their wives to enter into peace bonds as well as to provide separate maintenance.²²⁴ Occasional cases even authorized spouses to live separately, with the husband providing for the wife according to his “estate, condition and quality.”²²⁵ One

²¹⁷ See, e.g., Order re Location of Preaching (Stafford Cnty. Ct., Apr. 3, 1667), in STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 43 (ordering a minister to preach in three particular places until further order).

²¹⁸ See, e.g., Vestry of North Farnham (Rappahannock Cnty. Ct., Nov. 7, 1684), in RAPPAHANNOCK 1683–1685, *supra* note 159, at 53 (ordering that half of the lay persons for election be chosen from the upper parts of the parish and the other half from the lower part).

²¹⁹ E.g., King v. Parish of Sittenburne (Rappahannock Cnty. Ct., Jan., 7, 1690/1691), in RAPPAHANNOCK 1689–1692, *supra* note 56, at 43–44.

²²⁰ *In re. Hathaway* (Stafford Cnty. Ct., Dec. 9, 1691), in STAFFORD 1691–1692, *supra* note 184, at 62–63.

²²¹ *Id.* at 63.

²²² *In re. Hathaway* (Stafford Cnty. Ct., Dec. 28, 1691), in STAFFORD 1691–1692, *supra* note 184, at 68–69.

²²³ See, e.g., *In re. Hanslip* (Rappahannock Cnty. Ct., Mar. 5, 1684/1685), in RAPPAHANNOCK 1683–1685, *supra* note 159, at 73 (ordering all of the husband's estate as alimony towards the wife's future support and maintenance). *But see* James v. James (King George Cnty. Ct., Oct. 6, 1721), in KING GEORGE 1721–1723, *supra* note 127, at 13 (denying separate maintenance and granting a peace bond in lieu thereof).

²²⁴ E.g., *In re. Harwood* (Rappahannock Cnty. Ct., Mar. 6, 1688), in RAPPAHANNOCK 1687–1689, *supra* note 145, at 68–69.

²²⁵ E.g., *In re. Martin* (Lancaster Cnty. Ct., Sept. 12, 1688), in LANCASTER 1687–1691, *supra* note 186, at 41; *accord In re. Grey* (Charles City Cnty. Ct., Aug. 3, 1665), in 13 VA. COLONIAL

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court, in addition, ordered a husband not to cohabit with a specified woman who was not his wife.²²⁶

The courts also supervised parental upbringing of children. Although courts recognized the right of parents to custody, even of illegitimate children,²²⁷ they were more concerned with issues of proper moral training and support. Thus, James and Elizabeth Lee were summoned to appear in court to respond to accusations that they brought up their children to pilfer and steal,²²⁸ while another court required Adam Hubbard to show why he “[did] not . . . keep his children as he ought . . . or suffer them to be christened or brought to church.”²²⁹ When Hubbard failed to appear, the court ordered the churchwardens to bind out his two eldest children.²³⁰ Other children were similarly bound out when courts found their parents too poor to support and educate them in a proper Christian manner.²³¹ In a final case, the court granted a

ABSTRACTS, *supra* note 93, at 42, 45 (allowing the wife to live separate from her abusive husband and ordering the husband to pay the wife’s accommodations); *see also In re. Wardens of Hungers Parish* (Northampton Cnty. Ct., Feb. 18, 1712/1713 & Mar. 17, 1712/1713), *in* 15 NORTHAMPTON COUNTY VIRGINIA RECORD BOOK COURT CASES & C, 1710–1717, at 86, 90–91 (Howard Mackey & Marlene Groves eds., 2003) [hereinafter 15 NORTHAMPTON 1710–1717] (releasing the husband from the sheriff’s custody for fulfilling a prior bond to indemnify the church for any charges incurred for maintaining his wife); *Wharton v. Wharton* (Westmoreland Cnty. Ct., Nov. 1, 1705), *in* VIRGINIA COUNTY COURT RECORDS ORDER BOOK WESTMORELAND COUNTY, VIRGINIA 1705–1707, at 4 (Ruth Sparacio & Sam Sparacio eds., 1988) [hereinafter WESTMORELAND 1705–1707] (ordering equal division of the husband’s estate upon willingness to separate from his wife). However, a wife who left her husband could not take any of her property without an order from the court. *See, e.g., Turner v. Thompson* (Stafford Cnty. Ct., June 12, 1690), *in* STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 98 (requiring a wife who left her husband without a court order return all property taken from the house).

²²⁶ *King v. Grant* (King George Cnty. Ct., Aug. 6, 1725), *in* VIRGINIA COUNTY COURT RECORDS KING GEORGE COUNTY, VIRGINIA ORDER BOOK ABSTRACT 1723–1725, at 87–88 (Ruth Sparacio & Sam Sparacio eds., 1992) [hereinafter KING GEORGE 1723–1725]. A defendant accused of breaching a peace bond was entitled to a jury trial to determine whether a breach had, in fact, occurred. *E.g., King v. Monteith* (King George Cnty. Ct., Sept. 4, 1725), *in* KING GEORGE 1723–1725, *supra*, at 96–97.

²²⁷ *See In re. Hanks* (Rappahannock Cnty. Ct., Oct. 1, 1690), *in* RAPPAHANNOCK 1689–1692, *supra* note 56, at 38 (granting a mother’s request for custody of her natural son); *see also Kirtley v. Hartley* (Westmoreland Cnty. Ct., Feb. 28, 1705/1706), *in* WESTMORELAND 1705–1707, *supra* note 225, at 12–13 (recognizing a father’s right to custody of his legitimate children following his wife’s death).

²²⁸ *King v. Lee* (King George Cnty. Ct., May 6, 1726), *in* KING GEORGE 1725–1728, *supra* note 126, at 19–20.

²²⁹ *Summons of Hubbard* (Spotsylvania Cnty. Ct., Oct. 7, 1735), *in* SPOTSYLVANIA 1735–1738, *supra* note 142, at 6.

²³⁰ *Summons of Hubbard* (Spotsylvania Cnty. Ct., Dec. 1735), *in* SPOTSYLVANIA 1735–1738, *supra* note 142, at 9.

²³¹ *See, e.g., In re. Jackson* (Botetourt Cnty. Ct., Mar. 14, 1771), *microformed on* 00307225162119 (Genealogical Soc’y of Utah) (reporting a complaint made against a father for “not educating his children in a Christian like manner”); *In re. Rose* (Northumberland Cnty. Ct., Nov. 18, 1675),

mother's second husband control of the children's estates following her death upon his promise to care for them until adulthood.²³²

Both the power of county courts over families, and the limits on that power, emerged most clearly in a proceeding brought by a widow, Hanna Grey Jacob.²³³ When several of her slaves became infected with smallpox, she petitioned the county court to have her family inoculated against the disease.²³⁴ The court granted her petition but refused to allow inoculation of the county at large—something it deemed too dangerous.²³⁵ Accordingly, the court exercised its power to prohibit other inoculations, although it did declare that other families that wanted inoculations could seek permission to receive them.²³⁶

In sum, the mid-eighteenth-century legal order of Virginia was substantially stronger than the legal system that Bacon's Rebellion had challenged. The mid-eighteenth-century labor force of African and African-American slaves was under far more repressive control than the older force of white indentured servants had been. Meanwhile, the white underclass was no longer composed mainly of rowdy, single young men but of families. Those families, in turn, had developed ties of dependency and deference to elites and, whether by coercion or conviction, had become part of well-regulated Christian communities adhering to high standards of morality. The communities of mid-eighteenth-century Virginia had been compelled to accept traditional norms and thus were far easier to govern than their seventeenth-century predecessors had been.

D. Judge and Jury

A further window through which to envision the relationship between elites and the middling and even lower classes is the jury system. Juries, the most important institution of the common law, were central to the functioning of Virginia's legal system in the seventeenth

in NORTHUMBERLAND 1674–1677, *supra* note 52, at 42 (ordering an indigent's child work under an apprentice until the age of eighteen); *In re. Pickett* (Rappahannock Cnty. Ct., July 7, 1686), *in* RAPPAHANNOCK 1685–1687, *supra* note 101, at 51 (ordering a neglected child to be placed in the care and custody of the petitioner); *see also* 6 HENING, *supra* note 142, at 32 (authorizing the binding out of such children).

²³² *In re. Lyser* (Northumberland Cnty. Ct., Sept. 17, 1685), *in* VIRGINIA COUNTY COURT RECORDS ORDER BOOK NORTHUMBERLAND COUNTY, VIRGINIA 1683–1686, at 79 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter NORTHUMBERLAND 1683–1686].

²³³ *In re. Jacob* (Northampton Cnty. Ct., Dec. 14, 1774), *microformed on* 00327485162124 (Library of Va).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

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and eighteenth centuries. Litigants had a right to trial by jury if they demanded it, and thousands of jury trials occurred in the decades after 1660.²³⁷ Even after default judgments, juries of enquiry were used to determine damages not fixed by law.²³⁸ However, juries were not always used. Courts, for example, typically tried actions to balance accounts,²³⁹ as well as suits commenced by petition rather than by writ²⁴⁰ and suits in which one party demanded that the other prove his or her case by oath.²⁴¹ Occasionally, other cases, even those involving rights in land,²⁴² for no apparent reason were tried to the court as well.²⁴³ Of course, if both parties agreed, they could waive jury trial and submit a case for decision by the court²⁴⁴ or referees,²⁴⁵ especially in cases where

²³⁷ E.g., Walker v. Blaxly (Stafford Cnty. Ct., June 6, 1665), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 10. Compare Gubton v. McDannell (Richmond Cnty. Ct., Aug. 7, 1706), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1705-1706, at 53-54 (Ruth Sparacio & Sam Sparacio eds., 1996) [hereinafter RICHMOND 1705-1706] (reporting defendant's motion to overturn his conviction due to lack of jury trial), with Gubton v. McDannell (Richmond Cnty. Ct., Nov. 6, 1706), in RICHMOND 1705-1706, *supra*, at 64 (reversing the judgment against the defendant).

²³⁸ E.g., Carter v. Hedgman (Lancaster Cnty. Ct., Dec. 14, 1705), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1703-1706, at 85-86 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter LANCASTER 1703-1706]. In *Robinson v. Humphrys*, a writ of enquiry was used in an action of debt. (Spotsylvania Cnty. Ct., Sept. 5, 1728), in SPOTSYLVANIA 1724-1730 (PART III), *supra* note 127, at 40-41. However, the need for a jury of enquiry was obviated when the plaintiff produced the defendant's obligation. *Robinson v. Humphrys* (Spotsylvania Cnty. Ct., Apr. 1, 1729), in SPOTSYLVANIA 1724-1730 (PART III), *supra* note 127, at 74-75; see also Ovi v. Ramsay (Augusta Cnty. Ct., May 20, 1754), *microformed on* 00303755162114 (Genealogical Soc'y of Utah) (summoning a jury of enquiry in a writ of debt to calculate the value of Virginia money into a certain sum of Pennsylvania money).

²³⁹ E.g., Pratt v. Brock (King George Cnty. Ct., Sept. 1, 1721), in KING GEORGE 1721-1723, *supra* note 127, at 10-11.

²⁴⁰ See, e.g., Beven v. McCarty (Westmoreland Cnty. Ct., Feb. 28, 1705/1706), in WESTMORELAND 1705-1707, *supra* note 225, at 12 (refusing to allow the parties to admit the petition to a jury).

²⁴¹ See, e.g., Grymes v. Wadding (Middlesex Cnty. Ct., Sept. 2, 1700), in MIDDLESEX 1700-1702, *supra* note 128, at 18, 24 (granting judgment for the plaintiff upon his oath); cf. Thompson v. Smith (Northumberland Cnty. Ct., Apr. 21, 1681), in NORTHUMBERLAND 1680-1683, *supra* note 162, at 29-30 (granting judgment for the plaintiff on contract unless the defendant takes an oath that he never promised to pay).

²⁴² See, e.g., Gwin v. Ridley (Richmond Cnty. Ct., Feb. 7, 1694/1695), in RICHMOND 1694-1697, *supra* note 151, at 24-25 (trying an action in which the plaintiff accused the defendant of trespassing and removing timber from land).

²⁴³ See, e.g., Bankes v. Myers (Northumberland Cnty. Ct., May 22, 1701), in NORTHUMBERLAND 1700-1702, *supra* note 130, at 66-67 (rendering a verdict regarding a dispute over cattle).

²⁴⁴ E.g., Maning v. Carroll (King George Cnty. Ct., Aug. 2, 1723), in KING GEORGE 1721-1723, *supra* note 127, at 97-98; Collier v. Fabian (Northampton Cnty. Ct., Sept. 29, 1702), *microformed on* 00327505162126 (Library of Va.) (reporting an action in which a defendant refused his right to a jury trial and consented to leave the issue to the judgment of the court).

factual issues were “long & tedious”²⁴⁶ or in cases where the parties had submitted an agreed statement of facts.²⁴⁷

²⁴⁵ See *Davis v. Skrine* (King George Cnty. Ct., Dec. 8, 1722), in *KING GEORGE 1721-1723*, *supra* note 127, at 57 (referring an action to referees to audit, state, and settle all accounts between the plaintiff and the defendant). Reports of referees were subject to challenge in a county court, however, and to appeal to the General Court. See *Taliaferro v. Grymes* (Middlesex Cnty. Ct., July 7, 1707), in *MIDDLESEX 1707-1708*, *supra* note 169, at 17 (reviewing referees’ decision and acknowledging the defendant’s appeal from the court’s judgment). Compare *Barbour v. Sandys* (Orange Cnty. Ct., June 27, 1755), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK ORANGE COUNTY, VIRGINIA 1755-1756*, at 54 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter *ORANGE 1755-1756*] (awarding damages to both the plaintiff and defendant upon accounting by referees), with *Barbour v. Sandys* (Orange Cnty. Ct., Aug. 29, 1755), in *ORANGE 1755-1756*, *supra*, at 82 (finding wholly for defendant after reviewing the final verdict).

²⁴⁶ *George v. Churchhill* (Middlesex Cnty. Ct., Apr. 3, 1682), in *MIDDLESEX 1680-1686*, *supra* note 184, at 32.

²⁴⁷ E.g., *Mitchell v. Lockart* (Augusta Cnty. Ct., Feb. 22, 1762) *microformed on* 00303765162115 (Genealogical Soc’y of Utah). In cases tried to the court, there were numerous rules about burden of proof, such as a rule that “one evidence [was] not sufficient to prove [an] assumpsit.” *Beck v. Triplett* (Rappahannock Cnty. Ct., Sept. 4, 1685), in *RAPPAHANNOCK 1685-1687*, *supra* note 101, at 14; cf. *Miller v. Kelly* (Lancaster Cnty. Ct., Jan. 13, 1702/1703), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1701-1703*, at 62-63 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter *LANCASTER 1701-1703*] (dismissing the information for killing a sow since proof was “by Commissioners only”). Normally a litigant could not testify on his or her own behalf. Compare *Champe v. Russell* (Orange Cnty. Ct., Mar. 24, 1749/1750), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK ORANGE COUNTY, VIRGINIA 1749-1752*, at 2 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter *ORANGE 1749-1752*] (refusing to allow defendant to take an oath because “better proof” was available), with *Champe v. Russell* (Orange Cnty. Ct., June 28, 1750), in *ORANGE 1749-1752*, *supra*, at 19 (rendering judgment for the plaintiff in light of the defendant’s plea being overruled). But see *Ward v. Bingley* (Goochland Cnty. Ct., Sept. 1735), in 3 *GOOCHLAND 1731-1735*, *supra* note 90, at 466 (finding for the defendant based only on his motion); *Hill v. Wilke* (Lancaster Cnty. Ct., July 14, 1686), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1682-1687*, at 87 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter *LANCASTER 1682-1687*] (allowing the plaintiff who lost a bill to recover on his oath that no part of it was paid); *Shropshire v. Pratt* (Westmoreland Cnty. Ct., June 1, 1710), in *WESTMORELAND 1709-1712*, *supra* note 206, at 18-19 (allowing a minister who preached a sermon at a funeral to recover on his oath that the defendant had agreed to pay him). See generally *Coats v. Rayburne* (Botetourt Cnty. Ct., July 14, 1773), *microformed on* 00307225162119 (Genealogical Soc’y of Utah) (permitting probate upon a witness’s oath); *Revet v. Sertain* (Stafford Cnty. Ct., Feb. 12, 1691/1692), in *STAFFORD 1691-1692*, *supra* note 184, at 92 (allowing the plaintiff to recover on an account when two witnesses gave proof of the debt). Compare *Rostis and Watson v. Hopkins* (Henrico County Ct., Feb. 7, 1757), *microformed on* 00317735162121 (Genealogical Soc’y of Utah) (admitting an account book into evidence), with *Rostis and Watson v. Hopkins* (Henrico Cnty. Ct., Mar. 7, 1757), *microformed on* 00317735162121 (holding the account book was properly admitted in evidence). On the other hand, actions against estates could be proved by the plaintiff’s oath to a debt if the debt was less than one year old and no other evidence was available. E.g., *Hill v. Meriwether* (Essex Cnty. Ct., Sept. 11, 1700), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK ESSEX COUNTY, VIRGINIA 1699-1702*, at 53 (Ruth Sparacio & Sam Sparacio eds., 1991) [hereinafter *ESSEX 1699-1702*]; *Belote v. Marshall* (Northampton Cnty. Ct., Oct. 14, 1735), *microformed on* 0032751562127 (Library of Va.); *Waters v. Wilton* (Rappahannock Cnty. Ct., Dec. 5, 1688), in *RAPPAHANNOCK 1687-1689*, *supra* note 145, at 57-58; cf. *McNeil v.*

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In cases tried to a jury, the plaintiff had the burden of proof. Thus, when one jury returned a verdict that it could “find no matter of fact for want of evidence,” a suit was dismissed.²⁴⁸ Likewise, a plaintiff would lose if he or she did not present enough evidence.²⁴⁹ One piece of evidence was always key; in a suit on an obligation, the written obligation had to be put into evidence.²⁵⁰

When litigants chose to try a case by jury, the court and the jury typically functioned harmoniously. But on rare occasions conflict between court and jury emerged. One early case of conflict was *Saffin v. Watson*,²⁵¹ a 1668 matter in which a “verdict . . . appear[ed] to th[e] court to be grounded upon the insufficiency of the evidence,” and another evidence being produced to the court,²⁵² it was the opinion of the court

Churchill's Executors (Fauquier Cnty. Ct., Nov. 25, 1766), in VIRGINIA COUNTY COURT RECORDS MINUTE BOOK FAUQUIER COUNTY, VIRGINIA 1766-1767, at 39-40 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter FAUQUIER 1766-1767] (holding the plaintiff's oath was sufficient to authenticate even accounts older than one year). *But see* Ball v. Ball (Lancaster Cnty. Ct., Nov. 10, 1698), in LANCASTER 1695-1699, *supra* note 144, at 77 (requiring one witness in addition to the plaintiff to prove an account against decedent's estate); *cf.* Ellis v. Edmondson (Essex Cnty. Ct., June 11, 1702), in ESSEX 1699-1702, *supra*, at 119-20 (holding certification on account of Lord Mayor of London was sufficient proof of account without further evidence). More generally, a court would decide in favor of a party who gave evidence under oath when the opposing party offered “nothing material in bar.” Almond v. Macarty (Rappahannock Cnty. Ct., Mar. 5, 1690/1691), in RAPPAHANNOCK 1689-1692, *supra* note 56, at 57; *accord* Martin v. Woodson (Goochland Cnty. Ct., Feb. 1729/1730), in 1 & 2 GOOCHLAND 1728-1731, *supra* note 183, at 185-86 (rendering judgment for the plaintiff upon his oath and where the defendant failed to appear). But in another case, in which a plaintiff had been permitted to swear that no suit had been brought previously upon his claim, judgment went against him when pleadings from such a suit were produced in court. Gibson v. Peale (Stafford Cnty. Ct., July 13, 1693), in STAFFORD 1692-1693, *supra* note 158, at 114-15.

²⁴⁸ Lee v. Jenkins (Northumberland Cnty. Ct., July 15, 1685), in NORTHUMBERLAND 1683-1686, *supra* note 232, at 66. For another example of an early, irregular jury verdict, compare Potter v. Robinson (Middlesex Cnty. Ct., Dec. 5, 1681), in MIDDLESEX 1680-1686, *supra* note 184, at 24 (reporting jury verdict that could “not find any such tract of land” ever possessed by the plaintiff), *with* Potter v. Robinson (Middlesex Cnty. Ct., Feb. 6, 1681/1682), in MIDDLESEX 1680-1686, *supra* note 184, at 28 (reporting a third person's claim to title and appeal to the General Court).

²⁴⁹ *See, e.g.*, Thacker v. Devolve (Middlesex Cnty. Ct., July 4, 1709), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1708-1710, at 21 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter MIDDLESEX 1708-1710] (finding one piece of evidence not enough).

²⁵⁰ *See, e.g.*, *In re* Smith (Essex Cnty. Ct., Sept. 20, 1727), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK ESSEX COUNTY, VIRGINIA 1725-1729 (PART I), at 100 (Ruth Sparacio & Sam Sparacio eds., 1989) [hereinafter ESSEX 1725-1729 (PART I)] (rejecting the petition because the written obligation was not presented); Powell v. Doniphan (Richmond Cnty. Ct., Jan. 4, 1692), in RICHMOND 1692-1694, *supra* note 184, at 38 (dismissing a suit when the plaintiff did not produce the written agreement).

²⁵¹ (Lancaster Cnty. Ct., May 13, 1668), in LANCASTER 1666-1669, *supra* note 45, at 47.

²⁵² *Id.*

“that that jury should yet again to enquire further of the . . . said evidence[,] whereupon” six named members “of the said jury did dissent, for which their contempt the court . . . impose[d] a fine of 400 lb. of tobacco to be paid by each of the said dissenters.”²⁵³ When three of the jurors then appealed, the General Court confronted essentially the same issue of jury law-finding power that the Court of Common Pleas in England would face two years later in *Bushell’s Case*.²⁵⁴

Unfortunately, we do not know what the General Court decided, and the issue of the power of juries to determine law does not appear to have arisen again before the end of the century. Accordingly, the issue needs to be regarded as unresolved. In the years following the turn of the century, however, judges developed several mechanisms by which to control the power of juries.

One mechanism was to direct juries to return special verdicts, which they did with some frequency.²⁵⁵ Once a jury had been “directed by the court to find the special facts proved and leave the law to the court,” a general verdict could be set aside and a retrial granted if the jurors did not obey.²⁵⁶ Another device was the grant of a new trial when a judge concluded that a jury had returned a general verdict contrary to the evidence; such grants occurred with some frequency.²⁵⁷ On at least one

²⁵³ *Id.*

²⁵⁴ See generally (1670) 124 Eng. Rep. 1006 (C.P.), in VAUGHAN’S REPORTS 135 (1669) (discussing the court’s powers where a jury acts contrary to the court’s direction).

²⁵⁵ E.g., *Stepo v. Hattaway* (Lancaster Cnty. Ct., July 10, 1734), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1732–1736, at 62–63 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter LANCASTER 1732–1736].

²⁵⁶ *Holt v. Custis* (Northampton Cnty. Ct., Dec. 9, 1730), microformed on 00327515162127 (Library of Va.); see also *Holt v. Custis* (Northampton Cnty. Ct., Feb. 10, 1730/1731), microformed on 00327515162127 (Library of Va.) (setting aside the jury verdict where jurors disobeyed the court’s direction).

²⁵⁷ E.g., *Darnall v. Morgan* (Fauquier Cnty. Ct., Oct. 26, 1764), in FAUQUIER 1764–1766, *supra* note 160, at 6; *Batson v. Batson*, (Northampton Cnty. Ct., July 11, 1732), microformed on 00327515162127 (Library of Va.); *Stubblefield v. Moore* (Spotsylvania Cnty. Ct., July 1, 1740), in SPOTSYLVANIA 1738–1740, *supra* note 122, at 104; cf. *Drummon v. Hauxford* (Richmond Cnty. Ct., June 2, 1709), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1708–1709, at 58 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter RICHMOND 1708–1709] (granting the defendant leave to appeal based on a claim that the jury verdict was against the evidence). But compare *Garner v. Darnall* (Fauquier Cnty. Ct., Mar. 28, 1761), in VIRGINIA COUNTY COURT RECORDS MINUTE BOOK FAUQUIER COUNTY, VIRGINIA 1759–1761, at 93 (Ruth Sparacio & Sam Sparacio eds., 1993) [hereinafter FAUQUIER 1759–1761] (reporting defendant’s motion for new trial on the ground that the jury rendered a verdict for the wrong party), with *Garner v. Darnall* (Fauquier Cnty. Ct., Aug. 29, 1761), in FAUQUIER 1761–1762, *supra* note 144, at 19–20 (denying defendant’s motion for new trial). Even when a jury found contrary to evidence, a court had discretion to accept its verdict. See *Henslee v. Tutt* (Spotsylvania Cnty. Ct., Mar. 1, 1742/1743), in SPOTSYLVANIA 1742–1744, *supra* note 160, at 3–4 (reserving ruling on grant of a new trial upon jury finding against the evidence). In *Henslee v.*

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occasion, a court penetrated beyond the rubric that a verdict was contrary to the evidence, which often meant not that a jury had misconstrued the evidence but that it had rejected the judges' view of the law, and explicitly set aside a verdict as contrary to law.²⁵⁸ In that case, the jury had returned a verdict for the defendant, but the court, "conceiving the matter as confessed both of fact and law," directed the defendant to make a further plea, and when the defendant refused, it entered judgment for the plaintiff.²⁵⁹ Courts also set aside verdicts when juries found incorrect issues, as in a case of trespass, where the jury mistakenly found the defendant committed waste.²⁶⁰

Finally, jury verdicts were set aside when they were improper as to form or otherwise insufficient as a basis for judgment.²⁶¹ Judges also

Tutt, the court ultimately did, in fact, grant a new trial. (Spotsylvania County Ct., Apr. 5, 1743), in *SPOTSYLVANIA 1742-1744*, *supra* note 160, at 7-8.

²⁵⁸ *Bertrand v. Fox* (Lancaster Cnty. Ct., Sept. 8-9, 1703), in *LANCASTER 1701-1703*, *supra* note 247, at 92-93.

²⁵⁹ *Id.* at 93.

²⁶⁰ *Hobson v. Occany* (Westmoreland Cnty. Ct., Apr. 27, 1715), in *WESTMORELAND 1714-1716*, *supra* note 138, at 37-38; *accord Warren v. Warren* (Northampton Cnty. Ct., Oct. 9, 1745), *microformed on* 00327525162128 (Genealogical Soc'y of Utah) (finding the verdict "so contradictory and imperfect that the court [could] not render their judgment thereupon"). *But see Watts v. Field* (King George Cnty. Ct., Mar. 2, 1721/1722), in *KING GEORGE 1721-1723*, *supra* note 127, at 34-35 (rendering judgment for the plaintiff even though the jury failed to identify who should pay).

²⁶¹ *See, e.g., Doe v. Smith* (Middlesex Cnty. Ct., Mar. 6, 1743/1744), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK ABSTRACTS OF MIDDLESEX COUNTY, VIRGINIA 1740-1745*, at 93-94 (Lydia Sparacio Bontempo ed., 2002) [hereinafter *MIDDLESEX 1740-1745*] (setting aside a verdict for insufficiency). *Compare Weekes v. Clarke* (Middlesex Cnty. Ct., July 3, 1711), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1710-1712*, at 35-36 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter *MIDDLESEX 1710-1712*] (finding by the jury, at the initial trial, £5 damages for the plaintiff if "the law be with him"), *with Weekes v. Clarke* (Middlesex Cnty. Ct., Aug. 7, 1711), in *MIDDLESEX 1710-1712*, *supra*, at 40 (considering parties' motion for new trial based on an imperfect jury verdict), *and Weekes v. Clarke* (Middlesex Cnty. Ct., Jan. 1, 1711/1712), *supra*, at 58 (granting motion for new trial because the former verdict was imperfectly found); *compare Houison v. Elly* (Orange Cnty. Ct., Sept. 29, 1749), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK ORANGE COUNTY, VIRGINIA 1748-1749*, at 93-94 (Sam Sparacio & Ruth Sparacio eds., 1997) [hereinafter *ORANGE 1748-1749*] (reporting the plaintiff's motion to set aside the jury verdict as contrary to law), *with Houison v. Elly* (Orange Cnty. Ct., May 24, 1750), in *ORANGE 1749-1752*, *supra* note 247, at 9-10 (ordering a new trial based on an imperfect verdict); *compare Clay v. Alloway* (Richmond Cnty. Ct., Nov. 3, 1709), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1709-1710*, at 8-9 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter *RICHMOND 1709-1710*] (reporting the initial verdict in an action relating to property ownership), *and Clay v. Alloway* (Richmond Cnty. Ct., Feb. 1, 1709/1710), in *RICHMOND 1709-1710*, *supra*, at 21 (finding the previous verdict to be insufficient), *with Clay v. Alloway* (Richmond Cnty. Ct., July 6, 1710), in *RICHMOND 1709-1710*, *supra*, at 73-75 (reporting the second impanelled jury verdict upon reconsideration of the action). If imperfections in the verdict were intentional, jurors might also be fined. *See, e.g., Pope v. Miller* (Richmond Cnty. Ct., Oct. 4, 1704), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1702-1704*, at 128 (Ruth Sparacio & Sam Sparacio eds.,

tightly policed the processes of jury selection²⁶² and deliberation.²⁶³ A jury verdict would be set aside, for example, if some of the jurors “appear[ed] to be in drink, and not fully agreed in their verdict.”²⁶⁴ Cases of hung juries that could not agree on a verdict were exceedingly rare, however.²⁶⁵

An even more effective form of jury control than the motion for a new trial, and one used more frequently in the early eighteenth century, was a chancery decree enjoining execution of judgment on a jury verdict.²⁶⁶ It is noteworthy that a litigant could turn to chancery for injunctive relief even after denial of a post-verdict motion, although a county court sitting in chancery would not grant an injunction when it did “not see[] any cause therefor.”²⁶⁷

1991) [hereinafter RICHMOND 1702-1704] (fining jurors for contempt when they failed to return a perfect verdict upon court order).

²⁶² See, e.g., *Coleman v. Hawly* (Isle of Wight Cnty. Ct., Oct. 1694), in 3 SURREY & ISLE OF WRIGHT COUNTIES 1693-1695, *supra* note 87, at 37-38 (setting aside the verdict because jurors were not all freeholders); *Jones v. Samford* (Middlesex Cnty. Ct., Mar. 6, 1710/1711), in MIDDLESEX 1710-1712, *supra* note 261, at 2 (rejecting several veniremen who were unable to read and write for jury service).

²⁶³ See, e.g., *Flower v. Blanch* (Lancaster Cnty. Ct., Oct. 10, 1695), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1691-1695, at 102 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter LANCASTER 1691-1695] (ordering the jury to be kept “together without meat, drink or candle until they have agreed on their verdict,” which is to be returned to a specified justice); *Day v. Wilton* (Richmond Cnty. Ct., Aug. 2, 1711), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1710-1711, at 79 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter RICHMOND 1710-1711] (separating the jury before giving its verdict); *Chilton v. Redman* (Westmoreland Cnty. Ct., Aug. 27, 1707), in WESTMORELAND 1707-1709, *supra* note 130, at 7-8 (finding a verdict signed only by foreman rather than the entire jury erroneous). Compare *Pigg v. Pain* (Spotsylvania Cnty. Ct., Mar. 2, 1724/1725), in SPOTSYLVANIA 1724-1730 (PART I), *supra* note 184, at 34 (summoning the jury to court to deliver their verdict the following day due to absence of two jurors), and *Pigg v. Pain* (Spotsylvania Cnty. Ct., May 4, 1725), in SPOTSYLVANIA 1724-1730 (PART I), *supra* note 184, at 42 (staying the judgment because of errors), with *Pigg v. Pain* (Spotsylvania Cnty. Ct., June 3, 1725), in SPOTSYLVANIA 1724-1730 (PART I), *supra* note 184, at 54 (finding that the entire jury must appear in court to present a verdict). But see *Dalton v. Lynch* (Richmond Cnty. Ct., Feb. 5, 1706/1707), in RICHMOND 1705-1706, *supra* note 237, at 90 (holding the verdict will not be invalidated when a juror is called as a witness if a timely objection is made and the juror does not testify).

²⁶⁴ *Spotswood v. Harrison* (Spotsylvania Cnty. Ct., Aug. 5, 1729), in SPOTSYLVANIA 1724-1730 (PART III), *supra* note 127, at 106-07.

²⁶⁵ For an example of such a rare case, see *Smyth v. Richardson* (Richmond Cnty. Ct., June 4, 1696), in RICHMOND 1694-1697, *supra* note 151, at 91.

²⁶⁶ See, e.g., *Baker v. Minton* (King George Cnty. Ct., July 6, 1722), in KING GEORGE 1721-1723, *supra* note 127, at 37 (relieving the defendant from judgment rendered against him).

²⁶⁷ *Whitton v. Burgoyne* (Essex Cnty. Ct., Aug. 10, 1696), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK ESSEX COUNTY, VIRGINIA 1695-1699, at 21-22 (Ruth Sparacio & Sam Sparacio eds., 1991) [hereinafter ESSEX 1695-1699]; accord *Macon v. Wharton*, (Goochland Cnty. Ct., July 1731), in 1 & 2 GOOCHLAND 1728-1731, *supra* note 183, at 378 (enjoining the verdict).

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In addition to setting jury verdicts aside, judges controlled the evidence they permitted juries to hear. On many occasions, they concluded that proffered evidence did not support parties' legal contentions and accordingly declined to admit it.²⁶⁸ The procedure available to a party against whom evidence was offered was to make and preserve an objection by a demurrer to the evidence and a bill of exceptions.²⁶⁹ Objections also could be interposed to the competence or interest of witnesses as well as to the substance or weight of what they had to say.²⁷⁰

Despite all these available tools, courts nonetheless at times stayed their hand and declined to interfere intrusively in the trial process. Thus in one case, in which the defendant relied on a 1663 statute concerning entertainment of strangers, the court ruled that the statute was no longer in force, but the jury nonetheless returned a verdict for the defendant, and the court upheld the verdict.²⁷¹ In another case, in which the court had directed the jury to find a special rather than general verdict, the court, after a debate in which one justice changed his vote, accepted the

²⁶⁸ See, e.g., *Corbin v. Beverich* (Middlesex Cnty. Ct., Mar. 7, 1709/1710), in MIDDLESEX 1708-1710, *supra* note 249, at 66-67 (permitting the plaintiff to swear to tobacco weights rather than admit a list of weights into evidence). On other occasions, of course, they admitted material into evidence. See, e.g., *Meaver v. Hewitt* (York Cnty. Ct., Jan. 20, 1734), in YORK COUNTY, VIRGINIA WILLS, INVENTORIES AND COURT ORDERS 1732-1737, at 93, 95 (Mary Marshall Brewer ed., 2005) [hereinafter YORK 1732-1737] (admitting an account book into evidence).

²⁶⁹ See, e.g., *Stretton v. Martin*, (Va. Gen. Ct., Oct. 1736), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B52, B55-56 (admitting a certificate into evidence to which the plaintiff tendered a bill of exceptions and appealed); *Jameson v. Vawter*, (Va. Gen. Ct., Apr. 1736), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B51-52 (reversing the judgment where the defendant demurred to the plaintiff's evidence but the court did not force plaintiff to join); *Campbell v. Sayers* (Augusta Cnty. Ct., Feb. 18, 1763), *microformed on* 00303765162115 (Genealogical Soc'y of Utah) (admitting the plaintiff's evidence, to which the defendant demurred); *Jett v. Barrow* (Richmond Cnty. Ct., Feb. 6, 1706/1707), in RICHMOND 1705-1706, *supra* note 237, at 94-95 (admitting a will entered by the plaintiff, to which the defendant demurred). Of course, if the demurrer was sustained, the challenged evidence would not be given to the jury. For an early example of an apparent bill of exceptions, see *Spotswood v. Smith* (Essex Cnty. Ct., Sept. 20, 1721), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK ESSEX COUNTY, VIRGINIA 1716-1723 (PART III), at 118 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter ESSEX 1716-1723 (PART III)].

²⁷⁰ See, e.g., *Morris v. Chamberlayne* (Va. Gen. Ct., Oct. 1735), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B50-51 (refusing to admit an interested witness). A claim of interest or lack of competence would require a witness to undergo a voir dire. See, e.g., *Edmondson v. Robinson* (Essex Cnty. Ct., June 19, 1728), in ESSEX 1727-1729, *supra* note 151, at 32-33 (refusing to allow a witness to testify because the witness refused to undergo a voir dire). For an example of a voir dire, see *Samford v. Suggitt* (Richmond Cnty. Ct., Sept. 2, 1719), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1719-1721, at 3-4 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter RICHMOND 1719-1721].

²⁷¹ *Churchhill v. Lomax* (Middlesex Cnty. Ct., May 5, 1707), in MIDDLESEX 1707-1708, *supra* note 169, at 5-6.

general verdict that the jury returned.²⁷² Of course, there were many cases in which a losing party sought relief from a jury verdict and the court, without giving reasons, simply denied the request.²⁷³

The declining power of juries confirms, in short, what other facts suggest—that the legal system of Virginia and especially the judges thereof gained effective power to enforce their commands in the seventy-five years following Bacon’s Rebellion. Whereas a rowdy lower class guided by a few elite leaders had come close in the 1670s to overthrowing the colony’s government and driving established elites from power, those elites had more than recovered their power by the mid-eighteenth century. By the mid-eighteenth century, Virginia’s legal system, and in particular its judiciary, clearly possessed sufficient power to govern the colony effectively.

E. Center and Periphery

But how was that power divided among the judges? Could the General Court, sitting first in Jamestown and later in Williamsburg, control the work of county courts? How much power did the General Court’s appellate jurisdiction,²⁷⁴ its exclusive jurisdiction over felony trials, and its concurrent jurisdiction over major civil litigation give it? The evidence suggests that the General Court’s power was somewhat limited and that predominant power in colonial Virginia rested in the hands of county courts, which had jurisdiction over civil and most criminal cases, a wide variety of regulatory matters, and even chancery litigation.

This section first explicates the jurisdiction of Virginia’s county courts.²⁷⁵ Second, it describes the structure of the colony’s political power.²⁷⁶ Third, it details the structure of the legal knowledge in Virginia.²⁷⁷ Finally, it explains county court independence.²⁷⁸

²⁷² *Weekes v. Mountague* (Middlesex Cnty. Ct., Apr. 4, 1710), in *MIDDLESEX 1708–1710*, *supra* note 249, at 73–74.

²⁷³ Compare *Bruce v. Dowdy* (Orange Cnty. Ct. May 19, 1736), in *ORANGE 1734–1736*, *supra* note 207, at 77 (reporting a jury verdict against the defendant, to which the defendant filed errors), with *Bruce v. Dowdy* (Orange Cnty. Ct., July 21, 1736), in *ORANGE 1734–1736*, *supra* note 207, at 94–95 (upholding the verdict against the defendant).

²⁷⁴ Before the 1680s, appeals also were taken on occasion to the General Assembly, but after the 1680s the Assembly’s appellate jurisdiction disappeared. Warren M. Billings, *Temple v. Gerard, 1667–1668: An Example of Appellate Practices in Colonial Virginia*, 94 *VA. MAG. HIST. & BIOGRAPHY* 88, 89 (1986); Warren M. Billings, *The Law of Servants and Slaves in Seventeenth-Century Virginia*, 99 *VA. MAG. HIST. & BIOGRAPHY* 45, 56 n.37 (1991).

²⁷⁵ See *infra* Part III.E.1 (examining what matters came before county courts).

²⁷⁶ See *infra* Part III.E.2 (discussing political power in colonial Virginia).

²⁷⁷ See *infra* Part III.E.3 (examining the sources and extent of legal knowledge in colonial Virginia).

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1. The Jurisdiction of County Courts

In the decades following Bacon's Rebellion, Virginians, in the words of one grand jury, continued to consider themselves entitled to "the benefit of the laws of England,"²⁷⁹ and courts frequently proclaimed their adherence to English law. They ruled, for example, that criminal prosecutions could be instituted only "according to the laws of England and this country;"²⁸⁰ that "the law of England require[d] two witnesses" for resolving any dispute in court;²⁸¹ that guardians had to be appointed for minors "by the law of England;"²⁸² and that a sheriff could not retain fees "exact[ed] . . . contrary to equity & law."²⁸³

They also turned continually to the procedures and vocabulary of the common law. Young people, for example, were apprenticed "according to custom in England."²⁸⁴ Other common-law words of art similarly appeared, such as "bills of exchange,"²⁸⁵ "escheat,"²⁸⁶ "fee tail,"²⁸⁷ "curtesy of England,"²⁸⁸ "*quietas est*,"²⁸⁹ "in trust,"²⁹⁰ "joint

²⁷⁸ See *infra* Part III.E.4 (examining the lower courts' independence from the General Court).

²⁷⁹ Information Against Robins (Northampton Cnty. Ct., Aug. 30, 1687), *microformed on* 00327495162125 (Genealogical Soc'y of Utah).

²⁸⁰ Order Against Quakers (Va. Gen. Ct., June 16, 1675), in MINUTES OF THE COUNCIL, *supra* note 6, at 409-10.

²⁸¹ *In re. Gale* (York Cnty. Ct., Apr. 24, 1676), *microformed on* 1000445991 (Genealogical Soc'y of Utah).

²⁸² *In re. Bowler* (Va. Gen. Ct., Mar. 21, 1675/1676), in MINUTES OF THE COUNCIL, *supra* note 6, at 450.

²⁸³ *In re. Page* (York Cnty. Ct., Apr. 24, 1671), *microformed on* 1000445991 (Genealogical Soc'y of Utah).

²⁸⁴ *In re. Executors of Flynt* (Northumberland Cnty. Ct., Jan. 25, 1670/71), in NORTHUMBERLAND 1669-1673, *supra* note 23, at 31-32.

²⁸⁵ Foxcraft v. Newell (Va. Gen. Ct., May 24, 1673), in MINUTES OF THE COUNCIL, *supra* note 6, at 338. Bills of exchange were widely used from an early date. *E.g.*, Spencer v. Austen (Northumberland Cnty. Ct., Mar. 17, 1674/5), in NORTHUMBERLAND 1674-1677, *supra* note 52, at 25-26. Suit did not lie on a bill of exchange that had not been the subject of a legal protest. See Whitticer v. Atkins (Lancaster Cnty. Ct., Apr. 11, 1683), in LANCASTER 1682-1687, *supra* note 247, at 16 (dismissing an action based on a bill of exchange where no legal protest was made). Further, the drawer of a bill of exchange was not liable thereon once the bill was accepted by the drawee. *E.g.*, Whetstone v. Laight (Middlesex Cnty. Ct., July 1, 1678), in Middlesex 1677-1680, *supra* note 134, at 25; Bayley & Co. v. Gwin (Richmond Cnty. Ct., Mar. 8, 1699/1700), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1699-1701, at 10 (Ruth Sparacio & Sam Sparacio eds., 1991) [hereinafter RICHMOND 1699-1701].

²⁸⁶ Bridger v. Pitt (Va. Gen. Ct., May 23, 1673), in MINUTES OF THE COUNCIL, *supra* note 6, at 337; accord *In re. Bowler* (Va. Gen. Ct., Mar. 21, 1675/1676), in MINUTES OF THE COUNCIL, *supra* note 6, at 450; Starkey v. Vauson (Va. Gen. Ct., Apr. 9, 1674), in MINUTES OF THE COUNCIL, *supra* note 6, at 372.

²⁸⁷ *Duncan v. Remy* (Westmoreland Cnty. Ct., Sept. 30, 1714), in WESTMORELAND 1714-1716, *supra* note 138, at 19.

tenancy,"²⁹¹ "consideration,"²⁹² "demurrer,"²⁹³ "*dedimus potem*,"²⁹⁴ "dower,"²⁹⁵ "executor,"²⁹⁶ "administrator,"²⁹⁷ "adm. cum testamento annexo,"²⁹⁸ and "*non est inventus*."²⁹⁹ Finally, judges and the lawyers appearing before the courts routinely cited both English statutes adopted before the settlement of Virginia and other English authorities as bases for decision.³⁰⁰

Doctrines that are recognizably common-law rules of law also were adopted in Virginia, although they did not always have the same social

²⁸⁸ *Smith v. Cheesman* (Va. Gen. Ct., Oct. 25, 1673), in MINUTES OF THE COUNCIL, *supra* note 6, at 353; *accord In re. Bowler* (Va. Gen. Ct., Mar. 21, 1675/1676), in MINUTES OF THE COUNCIL, *supra* note 6, at 448, 450 (following the "curtesy of Virginia").

²⁸⁹ *Reeves v. Reeves* (Va. Gen. Ct., Apr. 9, 1674), in MINUTES OF THE COUNCIL, *supra* note 6, at 371-72.

²⁹⁰ *West v. Wilson* (Va. Gen. Ct., Apr. 9, 1674), in MINUTES OF THE COUNCIL, *supra* note 6, at 371-72.

²⁹¹ *Beverly v. Pate* (Va. Gen. Ct., Oct. 1, 1674), in MINUTES OF THE COUNCIL, *supra* note 6, at 385-86.

²⁹² *Waggaman v. Anderson* (Va. Gen. Ct., Mar. 22, 1675/1676), in MINUTES OF THE COUNCIL, *supra* note 6, at 451-52.

²⁹³ *Ludwell v. Scarborough* (Va. Gen. Ct., Oct. 26, 1670), in MINUTES OF THE COUNCIL, *supra* note 6, at 239-40.

²⁹⁴ *Chicheley v. Potter* (Va. Gen. Ct., Apr. 6, 1671), in MINUTES OF THE COUNCIL, *supra* note 6, at 250-51.

²⁹⁵ *Hansford v. Seawell* (Va. Gen. Ct., Sept. 22, 1671), in MINUTES OF THE COUNCIL, *supra* note 6, at 266. A widow was entitled to dower even in land in which her husband's fee simple failed if he died without heirs. *See, e.g., Sheares v. Courtnall* (Northumberland Cnty. Ct., Oct. 18, 1682), in NORTHUMBERLAND 1680-1683, *supra* note 162, at 76 (granting the widow one third of her deceased husband's estate).

²⁹⁶ *Bacon v. Swan* (Va. Gen. Ct., Sept. 29, 1671), in MINUTES OF THE COUNCIL, *supra* note 6, at 276-77; *accord In re Executors of Flynt* (Northumberland Cnty. Ct., Jan. 25, 1670/1671), in NORTHUMBERLAND 1669-1673, *supra* note 23, at 31-32 (reporting a motion brought by "executors" of Flynt's estate).

²⁹⁷ *Estate of Vassall* (Va. Gen. Ct., April 19, 1670), in MINUTES OF THE COUNCIL, *supra* note 6, at 207-08; *accord In re. Langley* (Norfolk Cnty. Ct., Oct. 16, 1675), *microformed on R-53* (Library of Va.). In the absence of a close relative, the "greatest creditor" of the estate would be appointed administrator. *Estate of Ralph* (Northumberland Cnty. Ct., Nov. 20, 1669), in NORTHUMBERLAND 1665-1669, *supra* note 11, at 99-100.

²⁹⁸ *Estate of Gregory* (York Cnty. Ct., Feb. 24, 1669/1670), *microformed on 1000445991* (Genealogical Soc'y of Utah).

²⁹⁹ *Abrahall v. Payne* (Va. Gen. Ct., Mar. 22, 1671/1672), in MINUTES OF THE COUNCIL, *supra* note 6, at 293-94; *accord Lee v. Elmey* (Charles City Cnty. Ct., 1672/1673), in 13 VA. COLONIAL ABSTRACTS, *supra* note 93, at 78.

³⁰⁰ *See, e.g., Fitzhugh v. Dade* (Stafford Cnty. Ct., July 9, 1690), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 106-08 (citing a statute of King Henry VI); *Brent v. Dunne* (Stafford Cnty. Ct., Apr. 7, 1690), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 84 (citing a statute of Queen Elizabeth). Virginia courts held, however, that statutes enacted subsequent to the colony's settlement that did not expressly state they were applicable, such as the 1677 Statute of Frauds, were not of force in Virginia. *See, e.g., Hayberd v. Hawksford* (Richmond Cnty. Ct., Mar. 6, 1700/1701), in RICHMOND 1699-1701, *supra* note 285, at 55-56 (holding a statute of King Charles II inapplicable).

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and economic effects that they had in England. For example, Virginia courts held that a tenant in less than fee simple could “have the use of the land not committing any waste thereupon and not to dispose of the same.”³⁰¹ Lawyers also knew how to engage in a “privy examination of a *feme covert*” to convey real property without subjecting it to dower.³⁰²

Above all, the county courts continued to exercise plenary common-law jurisdiction grounded in the use of the common-law forms of action. Among the common-law writs filed were account,³⁰³ *audita querela*,³⁰⁴ case,³⁰⁵ covenant,³⁰⁶ debt,³⁰⁷ deceit,³⁰⁸ detinue,³⁰⁹ *elegit*,³¹⁰ *replevin*,³¹¹ *scire facias*,³¹² trespass,³¹³ and trover.³¹⁴ Two suits—one grounded on a statute

³⁰¹ *Appleton v. Waugh* (Va. Gen. Ct., Sept. 29, 1674), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 384. A lessee who failed to maintain land as required by the lease would be subject to liability but could set off improvements he had made to the land against any damages. *See, e.g., Towers v. Bryan* (Northumberland Cnty. Ct., Feb. 3, 1674/1675), in *NORTHUMBERLAND 1674-1677*, *supra* note 52, at 17-18 (taking into account work done on the land when determining damages).

³⁰² (Va. Gen. Ct., Oct. 28, 1669), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 513; *e.g., Examination of Micham* (Middlesex Cnty. Ct., Apr. 6, 1702), in *MIDDLESEX 1700-1702*, *supra* note 128, at 86-87. As Linda Sturtz has shown, however, the adoption of common law rules of coverture did not subordinate women to men in Virginia as much as they did in England. *See LINDA L. STURTZ, WITHIN HER POWER: PROPRIETED WOMEN IN COLONIAL VIRGINIA 20-21* (2002) (discussing successful and powerful women in Virginia).

³⁰³ *E.g., Callahan v. Phillips* (Lancaster Cnty. Ct., Oct. 13, 1703), in *LANCASTER 1701-1703*, *supra* note 247, at 97; *Estate of Traverse* (Lancaster Cnty. Ct., Mar. 12, 1672/1673), in *LANCASTER 1670-1674*, *supra* note 52, at 76; *Solo v. Pinton* (Lancaster Cnty. Ct., Mar. 12, 1672/1673), *microformed on 1000549064* (Library of Va.).

³⁰⁴ *E.g., Bowme v. Gibson* (Stafford Cnty. Ct., June 12, 1690), in *STAFFORD 1664-1668, 1689-1690*, *supra* note 127, at 100.

³⁰⁵ *E.g., Mingo v. Poole* (Charles City Cnty. Ct., Aug. 4, 1673), *microformed on 1000457503* (Genealogical Soc’y of Utah); *Foxhall v. Jones* (King George Cnty. Ct., Aug. 4, 1721), in *KING GEORGE 1721-1723*, *supra* note 127, at 7-8.

³⁰⁶ *E.g., Brent v. Dunne* (Stafford Cnty. Ct., July 9, 1690), in *STAFFORD 1664-1668, 1689-1690*, *supra* note 127, at 106.

³⁰⁷ *E.g., Lewis v. Henley* (Norfolk Cnty. Ct., Oct. 18, 1675), *microformed on R-53* (Library of Va.); *Gibson v. Richee* (Stafford Cnty. Ct. Mar. 10, 1689/1690), in *STAFFORD 1664-1668, 1689-1690*, *supra* note 127, at 63.

³⁰⁸ *E.g., Digges v. Lilly* (Va. Gen. Ct., Oct. 1729), in 1 *JOHN RANDOLPH & EDWARD BARRADALL, VIRGINIA COLONIAL DECISIONS: THE REPORTS OF DECISIONS OF THE GENERAL COURT OF VIRGINIA 1728-1741*, at R1, R7 (R.T. Barton ed., 2005) (1909).

³⁰⁹ *E.g., Bowme v. Gibson* (Stafford Cnty. Ct., Mar. 14, 1689/1690), in *STAFFORD 1664-1668, 1689-1690*, *supra* note 127, at 77.

³¹⁰ *See, e.g., Taylor & Co. v. Jones* (Middlesex Cnty. Ct., Sept. 4, 1704), in *MIDDLESEX 1702-1704*, *supra* note 203, at 77.

³¹¹ *E.g., Whitty v. Aldridge* (Va. Gen. Ct., Apr. 17, 1671), in *MINUTES OF THE COUNCIL*, *supra* note 6, at 252-53.

³¹² *E.g., Parker v. Genesis* (Northumberland Cnty. Ct., Feb. 4, 1674/1675), in *NORTHUMBERLAND 1674-1677*, *supra* note 52, at 22-23. It was decided early that courts processing writs of *scire facias* would not entertain defenses available in the original, underlying suit and not therein raised. *See Briscoe v. Tignor* (Middlesex Cnty. Ct., Nov. 11, 1689), in

of Henry VIII providing that tenants in common were entitled to partition their land,³¹⁵ and the other on a suit for “negligence” in letting a horse lent by one person to another die³¹⁶ – made the growing breadth of jurisdiction clear.

Along with the growth of common-law jurisdiction came an increasing use of common-law defenses. Defendants learned, for example, how to interpose proper pleas of the general issue to different writs, such as pleading not guilty to a writ of trespass,³¹⁷ and pleading

VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1686–1690, at 85–86 (Ruth Sparacio & Sam Sparacio eds., 1994) [hereinafter MIDDLESEX 1686–1690] (confirming the judgment against the defendant where he failed to raise an available defense in the original suit).

³¹³ *E.g.*, Page v. Marshall (King George Cnty. Ct., Oct. 3, 1724), in KING GEORGE 1721–1723, *supra* note 127, at 53–54; Bayley v. Pritchett (Lancaster Cnty. Ct., June 10, 1668), in LANCASTER 1666–1669, *supra* note 45, at 50.

³¹⁴ *E.g.*, Poole v. Huxford (Middlesex Cnty. Ct., May 7, 1677), in Middlesex 1673–1678, *supra* note 104, at 60–61. By the end of the seventeenth century, plaintiffs were pleading in proper formulary words: in one assault case, for example, the plaintiff pleaded that the defendant “by force and arms . . . did beat bruise and batter and evilly entreat” the defendant “so that of his life he did despair.” Maupin v. Winder (Northumberland Cnty. Ct., Sept. 25, 1699), in Northumberland 1699–1700, *supra* note 190, at 69, 71. Failure to use proper words could result in abatement of a suit. *E.g.*, Clarke v. Hipkings (Middlesex Cnty. Ct., June 5, 1699), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1697–1700, at 73–74 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter MIDDLESEX 1697–1700]. Similarly, failure to recite “the action . . . in the [d]eclaration” could have the same affect. *E.g.*, Willis v. Thilman (Middlesex Cnty. Ct., Oct. 3, 1698), in MIDDLESEX 1697–1700, *supra*, at 52–53. Courts also had begun to specify what writs could be used for what purposes. They ruled, for example, that case would lie on a promise to pay rent, *e.g.*, Briscoe v. Dunkington (Middlesex Cnty. Ct., Oct. 7, 1700), in MIDDLESEX 1700–1702, *supra* note 128, at 26–27; for recovery of a legacy, *e.g.*, Covington v. Meriwether (Essex Cnty. Ct., Nov. 12, 1701), in ESSEX 1699–1702, *supra* note 247, at 94–95; or for recovery of a statutory penalty, *e.g.*, Swanson v. Burton (Middlesex Cnty. Ct., Apr. 7, 1701), in MIDDLESEX 1700–1702, *supra* note 128, at 47, 49–50. However, case would not lie for a trespass committed on a freehold. *E.g.*, Pley v. Maguyer (Essex Cnty. Ct., Apr. 10, 1696), in ESSEX 1695–1699, *supra* note 267, at 11. Debt also would lie for rent. *E.g.*, Fitzhugh v. Williams (Richmond Cnty. Ct., June 6, 1700), in RICHMOND 1699–1701, *supra* note 285, at 32–33. There remained, however, clear instances in which plaintiffs used and recovered judgment on improper writs, as with a writ of debt on what was described as a “[n]ote,” but was in fact a bill of exchange. Parrott v. Morgan (Middlesex Cnty. Ct., Jan. 7, 1705/1706), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1705–1707, at 25–26 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter MIDDLESEX 1705–1707]. Similarly, another plaintiff improperly used and recovered on a writ of case for an assault. Cobb v. Eaton (Northampton Cnty. Ct., Aug. 11, 1730), *microformed on* 00327515162127 (Library of Va.). For information on the common law forms of action in Virginia, see PAGAN, *supra* note 5, at 68–70.

³¹⁵ Brent v. Thompson (Stafford Cnty. Ct., June 12, 1690), in STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 97–98.

³¹⁶ Hall v. Stribling (Stafford Cnty. Ct., Feb. 8, 1692/1693), in STAFFORD 1692–1693, *supra* note 158, at 65.

³¹⁷ *E.g.*, Taylor v. Willis (Lancaster Cnty. Ct., Mar. 11, 1696/1697), in LANCASTER 1695–1699, *supra* note 144, at 31.

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owes nothing to a writ of debt.³¹⁸ Defendants also knew how to interpose other pleas, such as performance—either total³¹⁹ or partial³²⁰—duress,³²¹ illegality,³²² self-defense,³²³ statute of limitations,³²⁴ *res judicata*,³²⁵ settlement,³²⁶ discount or set-off,³²⁷ want of consideration,³²⁸

³¹⁸ *E.g.*, *Wormely v. Fluker* (Northumberland Cnty. Ct., Nov. 16, 1699), in *NORTHUMBERLAND 1699–1700*, *supra* note 190, at 83, 86. However, an incorrect plea would be rejected. *E.g.*, *Smith v. Gray* (Middlesex Cnty. Ct., Aug. 7, 1699), in *MIDDLESEX 1697–1700*, *supra* note 314, at 78.

³¹⁹ *E.g.*, *Brent v. Darnell* (Stafford Cnty. Ct., Mar. 13, 1689/1690), in *STAFFORD 1664–1668, 1689–1690*, *supra* note 127, at 69–70.

³²⁰ *E.g.*, *Gibson v. Battalia* (Stafford Cnty. Ct., Dec. 12, 1689), in *STAFFORD 1664–1668, 1689–1690*, *supra* note 127, at 58; *cf.*, *e.g.*, *Butler v. Hammersley* (Stafford Cnty. Ct., June 12, 1690), in *STAFFORD 1664–1668, 1689–1690*, *supra* note 127, at 96 (holding an executor who paid a debt up to the limit of estate funds in his possession was free from further liability).

³²¹ *E.g.*, *Somervill v. Settle* (Richmond Cnty. Ct., Sept. 4, 1707), in *RICHMOND 1707–1708*, *supra* note 160, at 41.

³²² *See, e.g.*, *Russell v. Mathews* (Richmond Cnty. Ct., Oct. 5, 1736), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1735–1736*, at 77–78 (Ruth Sparacio & Sam Sparacio eds., 2000) [hereinafter *RICHMOND 1735–1736*] (barring suit on an account because the plaintiff, an ordinary keeper, had extended more credit to the defendant than allowed by statute); *cf.*, *e.g.*, *Arnold v. Bramham* (Orange Cnty. Ct., May 30, 1752), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK ORANGE COUNTY, VIRGINIA 1752–1753*, at 26–27 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter *ORANGE 1752–1753*] (allowing the plaintiff to testify to accounts for liquor sales since he was within proviso of law allowing merchants to sell liquor for consumption off the premises).

³²³ *E.g.*, *Norris v. Thomas* (Northumberland Cnty. Ct., July 19, 1700), in *NORTHUMBERLAND 1700–1702*, *supra* note 130, at 1–2. A defendant was not entitled to use force against a plaintiff who merely threatened him with force. *See* *Hubbard v. Lynn* (Spotsylvania Cnty. Ct., June 2, 1747), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK SPOTSYLVANIA COUNTY, VIRGINIA 1746–1748*, at 27–28 (Sam Sparacio & Ruth Sparacio eds., 2000) [hereinafter *SPOTSYLVANIA 1746–1748*] (granting judgment against the defendant for assault and battery where the plaintiff only verbally threatened the defendant).

³²⁴ *E.g.*, *Booth v. Dudley* (Va. Gen. Ct., Oct. 1729), in 1 *RANDOLPH & BARRADALL*, *supra* note 308, at R9–11; *Ellis v. Garton* (Spotsylvania Cnty. Ct., Aug. 8, 1739), in *SPOTSYLVANIA 1738–1740*, *supra* note 122, at 67–68; *see* *Clay v. Day* (Westmoreland Cnty. Ct., June 25, 1712), in *WESTMORELAND 1712–1714*, *supra* note 128, at 6–7 (denying the defendant’s motion to dismiss based on the amount of time he occupied the land). Special rules existed for suits against a decedent’s estate; suits could be brought for any debts “authentically proved.” *Ellis v. Tomlin* (Richmond Cnty. Ct., Jan. 2, 1695/1696), in *RICHMOND 1694–1697*, *supra* note 151, at 75–76. Suits could also be brought for debts contracted within one year before the decedent’s death and proved by the oath of the creditor and one other person. *E.g.*, *Haslewood v. Tomlin* (Richmond Cnty. Ct., Jan. 2, 1695/96), in *RICHMOND 1694–1697*, *supra* note 151, at 74; *see* *Campbell v. Callaway* (Isle of Wight Cnty. Ct., Aug. 9, 1694), in 3 *SURRY & ISLE OF WRIGHT COUNTIES 1693–1695*, *supra* note 87, at 33 (barring a suit for being “out of date”); *see also* *Cole v. Godwin* (Northampton Cnty. Ct., July 28, 1699), *microfilmed on* 00327505162126 (Library of Va.) (barring a suit even though the debt was acknowledged within one year prior to the decedent’s death).

³²⁵ *E.g.*, *Abbot v. Abbot* (Va. Gen. Ct., Oct. 1729), in 1 *RANDOLPH & BARRADALL*, *supra* note 308, at R21; *Nusum v. Spencer* (Lancaster County Ct., Apr. 13, 1693), in *LANCASTER 1691–1695*, *supra* note 263, at 50. In *Hill v. Whitfield*, the court ruled that a final judgment for the plaintiff in a suit for stealing hogs did not preclude a subsequent suit for a statutory penalty for stealing

and, in a slander case, that words were not actionable.³²⁹ Defendants could also plead that persons who did not control their own legal affairs, such as wives,³³⁰ minors,³³¹ and servants,³³² could not bring suit or enter

the same hogs. (Isle of Wight Cnty. Ct., Oct. 9, 1693), in 3 SURRY & ISLE OF WRIGHT COUNTIES 1693-1695, *supra* note 87, at 1-2.

³²⁶ E.g., Sharp v. Marshall (Lancaster Cnty. Ct., Sept. 12, 1705), in LANCASTER 1703-1706, *supra* note 238, at 69. Compare Canterbury v. Sclater (Richmond Cnty. Ct., July 2 1733), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1732-1734, at 52 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter RICHMOND 1732-1734] (reporting the jury's recognition of settlement between the parties), with Canterbury v. Sclater (Richmond Cnty. Ct., Aug. 6, 1733), in RICHMOND 1732-1734, *supra*, at 65-66 (holding the settlement found by special verdict as binding). But see Drummond v. White (Northampton Cnty. Ct., Sept. 17, 1717), in 16 NORTHAMPTON COUNTY VIRGINIA RECORD BOOK COURT CASES & C 1717-1719, at 31-32 (Howard Mackey & Marlene A. Groves eds., 2003) [hereinafter 16 NORTHAMPTON 1717-1719] (holding that an oral agreement may not be pleaded in bar to suit on speciality).

³²⁷ E.g., Carter v. Trent (Richmond County Ct., Mar. 6, 1700/1701), in RICHMOND 1699-1701, *supra* note 285, at 57.

³²⁸ E.g., Chapman v. Bevan (Isle of Wight Cnty. Ct., Aug. 9, 1694), in 3 SURRY & ISLE OF WRIGHT COUNTIES 1693-1695, *supra* note 87, at 32. The court rejected the defense in *Chapman v. Bevan*, which involved suit on a speciality. *Id.*; cf. Green v. Ward (Isle of Wight Cnty. Ct., Dec. 1694), in 3 SURRY & ISLE OF WRIGHT COUNTIES 1693-1695, *supra* note 87, at 45 (stating prior agreements "cut off & excluded by a speciality"); Drummond v. White (Northampton County Ct., Sept. 17, 1717), in 16 NORTHAMPTON 1717-1719, *supra* note 326, at 32 (holding a parole agreement not binding against speciality). But see New v. Morriss (Goochland Cnty. Ct., May 1729), in 1 & 2 GOOCHLAND 1728-1731, *supra* note 183, at 88-89 (holding lack of consideration was a valid defense to suit on a bond).

³²⁹ E.g., Batson v. Fitchet (Northampton Cnty. Ct., Aug. 12, 1730), microformed on 00327515162127 (Library of Va.); Gibson v. Richee (Stafford Cnty. Ct., June 12, 1690), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 95. In some cases, courts rejected such a plea. E.g., Mutlow v. Ballard (Va. Gen. Ct., Oct. 1729), in 1 RANDOLPH & BARRADALL, *supra* note 308, at R9-10. Compare Scott v. White (Northumberland Cnty. Ct., Mar. 20, 1700/1701), in NORTHUMBERLAND 1700-1702, *supra* note 130, at 54 (considering the defendant's plea that the plaintiff failed to allege that the words "were spoken falsely and maliciously"), with Scott v. White (Northumberland Cnty. Ct., May 22, 1701), in NORTHUMBERLAND 1700-1702, *supra* note 130, at 63-64 (overruling the defendant's plea). Slanders, of course, generated considerable litigation. See, e.g., Bryant v. Cammell (Northumberland Cnty. Ct., Jan. 18, 1681/1682), in NORTHUMBERLAND 1680-1683, *supra* note 162, at 53 (reporting a case in which the defendant called plaintiff's wife a "whore"). Much of said litigation was ended by a public apology by the defendant. E.g., Neavil v. Arnold (Fauquier Cnty. Ct., Nov. 25, 1766), in FAUQUIER 1766-1767, *supra* note 247, at 38; Swan v. Hedgman (Lancaster Cnty. Ct., June 12, 1706), in LANCASTER 1703-1706, *supra* note 238, at 99-100; cf. Hamelin v. Jarmin (Charles City Cnty. Ct., Feb. 5, 1693/1694), in CHARLES CITY 1687-1695, *supra* note 105, at 170-71 (finding words "not actionable" but "contrary to good manners" and reducing damages given by the jury to costs only). People who repeated slanders initiated by others were not liable. E.g., Rallings v. Fraquair (Spotsylvania Cnty. Ct., Oct. 4, 1738), in SPOTSYLVANIA 1738-1740, *supra* note 122, at 26. In one case, a county justice sitting on the bench accused the presiding justice of being drunk. *In re Kemp* (Middlesex Cnty. Ct., Jan. 1, 1704/1705), in MIDDLESEX 1702-1704, *supra* note 203, at 96-97. The court determined that the presiding justice was not drunk. *Id.* at 97.

³³⁰ See, e.g., Jones v. Courtney (Northumberland Cnty. Ct., Dec. 22, 1681), in NORTHUMBERLAND 1680-1683, *supra* note 162, at 51 (voiding a contract because a wife entered into it without her husband); see also Nusum v. Spencer (Lancaster Cnty. Ct., Jan. 13,

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into contracts, or that one joint owner of an obligation could not sue thereon without joining co-owners.³³³ Indeed, by the end of the seventeenth century, special pleading had begun to emerge in Virginia's county courts.³³⁴ Pleas, it should be noted, were required to be in writing "for the better regulating and keeping the records and transferring the pre[ce]dents to posterity."³³⁵

1691/1692), in LANCASTER 1691-1695, *supra* note 263, at 9-10 (holding property of a wife before marriage becomes that of the husband upon marriage); *cf.* Jones v. Smith (Isle of Wight Cnty. Ct., Mar. 9, 1693/1694), in 3 SURRY & ISLE OF WRIGHT COUNTIES 1693-1695, *supra* note 87, at 18 (upholding suit against a widow and her new husband for bed claimed by the widow as inheritance from her deceased husband); Graves v. Barker (Prince William Cnty. Ct., Sept. 9, 1762), in PRINCE WILLIAM 1762, *supra* note 157, at 68 (holding suit abated by plaintiff's marriage). *But see In re. Payne* (Essex Cnty. Ct., June 10, 1696), in ESSEX 1695-1699, *supra* note 267, at 14-15 (granting the wife of an absent husband power to sue for debts); Millner v. Hightower (Richmond Cnty. Ct., June 8, 1736), in RICHMOND 1735-1736, *supra* note 322, at 48 (upholding a deed executed by a woman prior to marriage); Payne v. Mathews (Richmond Cnty. Ct., Mar. 5, 1701/1702), in RICHMOND 1699-1701, *supra* note 285, at 102 (upholding a note signed by a wife on behalf of her "lame" husband).

³³¹ See Velden v. Chelton (Lancaster Cnty. Ct., Aug. 12, 1730), in LANCASTER 1729-1732, *supra* note 126, at 30 (holding a minor may not appear in court except by guardian); Glascock v. Goad (Richmond Cnty. Ct., Mar. 6, 1705/1706), in RICHMOND 1705-1706, *supra* note 237, at 11-12 (stating in dictum that "no minor . . . [is] permitted to sue in any [c]ourt"); *see also* Johnston v. Johnston (Caroline Cnty. Ct., Oct. 15, 1773), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK CAROLINE COUNTY, VIRGINIA 1773-1774, at 37 (Ruth Sparacio & Sam Sparacio eds., 1994) [hereinafter CAROLINE 1773-1774] (reporting a case where a minor entered a plea that he was not bound by his contract). *But see In re. Terret* (King George Cnty. Ct., Jan. 5, 1722/1723), in KING GEORGE 1721-1723, *supra* note 127, at 66 (binding an underage youth who agreed to indenture even though his parents never agreed to it).

³³² See, e.g., Lennox & Co. v. Donaldson (Louisa Cnty. Ct., Aug. 10, 1768), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LOUISA COUNTY, VIRGINIA 1768-1769, at 53 (Lydia Sparacio Bontempo ed., 2001) [hereinafter LOUISA 1768-1769] (reporting the defendant's plea that he was a servant at the time of the sale); Peyton v. Marston (Middlesex Cnty. Ct., Nov. 19, 1677), in MIDDLESEX 1673-1678, *supra* note 104, at 82-83 (voiding a bill of sale entered into by a servant); McCarty v. Philpott (Richmond Cnty. Ct., Aug. 3, 1693), in RICHMOND 1692-1694, *supra* note 184, at 64 (dismissing suit where bill was passed during the time of servitude). A statutory penalty could also be imposed for unlawfully trading with a servant. See Carey v. Barefoote (Middlesex Cnty. Ct., Sept. 5, 1681), in MIDDLESEX 1680-1686, *supra* note 184, at 15-16 (ordering the defendant pay four times the value of the contract as a penalty); *cf. In re. Sheppard* (Middlesex Cnty. Ct., Apr. 10, 1676), in MIDDLESEX 1673-1678, *supra* note 104, at 53 (holding a servant may not assign the right of executorship).

³³³ E.g., Dudley v. Beverley (Middlesex Cnty. Ct. Feb. 5, 1682/1683), in MIDDLESEX 1680-1686, *supra* note 184, at 42.

³³⁴ See, e.g., Robinson v. Skipwith (Middlesex Cnty. Ct., Sept. 6, 1697), in MIDDLESEX 1697-1700, *supra* note 314, at 12-13 (reporting the defendant's plea of lawful seizure of the plaintiff's property). Compare Carter v. Scholfield (Lancaster County Ct., Dec. 11, 1701), in LANCASTER 1701-1703, *supra* note 247, at 14 (reporting the defendant's plea that the "Negroes" at issue in the suit lawfully belonged to him), with Carter v. Scholfield (Lancaster County Ct., Feb. 11, 1701/1702), in LANCASTER 1701-1703, *supra* note 247, at 17 (rejecting the defendant's plea).

³³⁵ Fitzhugh v. Dade (Stafford Cnty. Ct., June 11, 1690), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 90. *Contra* Carter v. Beale (Westmoreland Cnty. Ct., Apr. 26, 1711), in

Defendants also learned how to interpose procedural pleas in addition to substantive pleas in bar. By the early eighteenth century, for example, demurrers were in regular use.³³⁶ Suits would be dismissed if a plaintiff “brought the wrong action”³³⁷ or brought an action on a statute that had been repealed;³³⁸ if either the plaintiff³³⁹ or the defendant³⁴⁰ died; if a defendant did not reside in the county where suit was brought³⁴¹ or the matter at issue had occurred in another county;³⁴² if a

WESTMORELAND 1709–1712, *supra* note 206, at 43; *see* Order re Records (Charles City Cnty. Ct., Aug. 10, 1689), *in* CHARLES CITY 1687–1695, *supra* note 105, at 59 (directing the clerk to keep records at the courthouse rather than his own house).

³³⁶ *E.g.*, Arnold v. Sharp (Spotsylvania Cnty. Ct., Dec. 6, 1726), *in* SPOTSYLVANIA 1724–1730 (PART II), *supra* note 165, at 18.

³³⁷ Robinson v. Whitaker (Middlesex Cnty. Ct., Jan. 2, 1692/1693), *in* MIDDLESEX 1690–1694, *supra* note 162, at 61. Thus, courts decided that case would lie on a promise to pay rent. *E.g.*, Briscoe v. Dunkington (Middlesex Cnty. Ct., Oct. 7, 1700), *in* MIDDLESEX 1700–1702, *supra* note 128, at 26–27. Debt also would lie for rent. *E.g.*, Fitzhugh v. Williams (Richmond Cnty. Ct., June 6, 1700), *in* RICHMOND 1699–1701, *supra* note 285, at 32–33. Case also would lie for recovery of a legacy. *E.g.*, Gouldman v. Ransone (Essex Cnty. Ct., Mar. 11, 1700/1701), *in* ESSEX 1699–1702, *supra* note 247, at 74; *accord* Covington v. Meriwether (Essex Cnty. Ct., Nov. 12, 1701), *in* Essex 1699–1702, *supra* note 247, at 94. Likewise, case would lie for recovery of a statutory penalty. *E.g.*, Swanson v. Burton (Middlesex Cnty. Ct., Apr. 7, 1701), *in* MIDDLESEX 1700–1702, *supra* note 128, at 47, 49–50. However, case would not lie for a trespass committed on a freehold. *E.g.*, Pley v. Maguyer (Essex Cnty. Ct., Apr. 10, 1696), *in* ESSEX 1695–1699, *supra* note 267, at 10. Similarly, debt would not lie on an account. *E.g.*, Stringer v. Robins (Northampton Cnty. Ct., July 15, 1712), *in* 15 NORTHAMPTON 1710–1717, *supra* note 225, at 63. Further, trespass would not lie for committing waste by cutting down trees. *E.g.*, West v. Robyshaw (Northampton Cnty. Ct., May 19, 1713), *in* 15 NORTHAMPTON 1710–1717, *supra* note 225, at 91, 93.

³³⁸ *See* Francis v. Cock (Essex Cnty. Ct., June 10, 1702), *in* ESSEX 1699–1702, *supra* note 247, at 117 (holding a defense based on legislation that has been repealed void). *Compare* Johnson v. Henderson (Spotsylvania Cnty. Ct., Mar. 4, 1734/1735), *in* SPOTSYLVANIA 1734–1735, *supra* note 209, at 81–82 (reporting the defendant’s assignment of errors in the judgment against him), *with* Johnson v. Henderson (Spotsylvania Cnty. Ct., May 7, 1735), *in* SPOTSYLVANIA 1734–1735, *supra* note 209, at 94–95 (dismissing the suit where the action was based on legislation that had been repealed).

³³⁹ *E.g.*, Walker v. Row (Middlesex Cnty. Ct., Apr. 4, 1721), *in* VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1719–1721, at 71 (Ruth Sparacio & Sam Sparacio eds., 2000) [hereinafter MIDDLESEX 1719–1721].

³⁴⁰ *E.g.*, Draper v. Clayton (Lancaster Cnty. Ct., Apr. 9, 1701), *in* LANCASTER 1699–1701, *supra* note 210, at 87–88.

³⁴¹ *E.g.*, Grymes v. Harrison (Middlesex Cnty. Ct., Oct. 5, 1696), *in* MIDDLESEX 1694–1697, *supra* note 193, at 89. *But see* Stepto v. Jones (Lancaster Cnty. Ct., Sept. 14, 1704), *in* LANCASTER 1703–1706, *supra* note 238, at 44 (overruling a plea that the plaintiff and defendant were non-residents of the county since the plaintiff was a freeholder of the county); Neale v. Barrow (Westmoreland Cnty. Ct., Mar. 27, 1707), *in* WESTMORELAND 1705–1707, *supra* note 225, at 77 (holding the defendant may be sued in any county where he or she owns property even where the underlying offense is not local). A nonresident plaintiff would be required to give security to pay costs before suit could proceed. *See* Chamberlaine v. Marchbanks (Goochland Cnty. Ct., Nov. 1728), *in* 1 & 2 GOOCHLAND 1728–1731, *supra* note 183, at 35 (dismissing an action where the nonresident plaintiff failed to give security); Carstarphan v. Lewis (Spotsylvania Cnty. Ct.,

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writ was “not . . . executed in due time”³⁴³ or a declaration was “untimely” filed;³⁴⁴ if a declaration was uncertain³⁴⁵ or “not full or sufficient,”³⁴⁶ in that it did not, for example, indicate the time at which pleaded events occurred or were to occur³⁴⁷ or whether money became due by “bill bond or account;”³⁴⁸ if a variance existed between a writ and a declaration;³⁴⁹ if a party submitted an unsigned plea³⁵⁰ or a double plea;³⁵¹ if a suit against an estate sought judgment against an executor personally rather than against goods of the estate in the executor’s hands;³⁵² or if a suit for a statutory penalty was brought in the name of the informer only, rather than the informer and the crown.³⁵³

July 1, 1735), in *SPOTSYLVANIA 1734–1735*, *supra* note 209, at 108–09 (dismissing an action where the nonresident plaintiff failed to give security).

³⁴² *E.g.*, *Barrow v. Metcalfe* (Richmond Cnty. Ct., Mar. 2, 1709/1710), in *RICHMOND 1709–1710*, *supra* note 261, at 41.

³⁴³ *Johnson v. Hay* (Spotsylvania Cnty. Ct., Nov. 2, 1725), in *SPOTSYLVANIA 1724–1730 (PART I)*, *supra* note 184, at 79.

³⁴⁴ *Hawkins v. Moseley* (Essex Cnty. Ct., Apr. 10, 1696), in *ESSEX 1695–1699*, *supra* note 267, at 11.

³⁴⁵ *E.g.*, *Gray v. Grymes* (Middlesex Cnty. Ct., Apr. 6, 1696), in *MIDDLESEX 1694–1697*, *supra* note 193, at 74; *Peale v. French* (Rappahannock Cnty. Ct., Sept. 2, 1691), in *RAPPAHANNOCK 1689–1692*, *supra* note 56, at 71–72.

³⁴⁶ *Wormeley v. Carter* (Lancaster Cnty. Ct., Mar. 9, 1691/1692), in *LANCASTER 1691–1695*, *supra* note 263, at 14–15.

³⁴⁷ *E.g.*, *Pafford v. Jennings* (Middlesex Cnty. Ct., Dec. 4, 1704), in *MIDDLESEX 1702–1704*, *supra* note 203, at 86–87; *see Gibson v. Brent* (Stafford Cnty. Ct., Apr. 6, 1693), in *STAFFORD 1692–1693*, *supra* note 158, at 90 (showing a plea lacking a certain time). *But see Davis v. Tayler* (Richmond Cnty. Ct., June 6, 1700), in *RICHMOND 1699–1701*, *supra* note 285, at 31–32 (permitting a declaration that lacked the time at which the trespass was committed); *Gerrard v. Allerton* (Westmoreland Cnty. Ct., Mar. 1, 1705/1706), in *WESTMORELAND 1705–1707*, *supra* note 225, at 19–20 (overruling the defendant’s motion for dismissal based on several uncertainties).

³⁴⁸ *Herford v. Clarke* (Middlesex Cnty. Ct., Mar. 6, 1698/1699), in *MIDDLESEX 1697–1700*, *supra* note 314, at 66. *Contra Haines v. Pinkard* (Lancaster Cnty. Ct., Oct. 15, 1702), in *LANCASTER 1701–1703*, *supra* note 247, at 50–51.

³⁴⁹ *E.g.*, *Mann v. Bertrand* (Lancaster Cnty. Ct., Nov. 10, 1697), in *LANCASTER 1695–1699*, *supra* note 144, at 55; *Baker v. Jones* (Middlesex Cnty. Ct., Nov. 1, 1708), in *MIDDLESEX 1707–1708*, *supra* note 169, at 88. *But cf. Garlington v. Berratt* (Northumberland Cnty. Ct., July 19, 1700), in *NORTHUMBERLAND 1700–1702*, *supra* note 130, at 4–6 (denying a motion to abate for variance between the writ and declaration).

³⁵⁰ *E.g.*, *Plunkett v. Mercer* (King George Cnty. Ct., Nov. 5, 1725), in *KING GEORGE 1723–1725*, *supra* note 226, at 104–05.

³⁵¹ *E.g.*, *Pope v. Long*, Richmond Cnty. Ct. Mar. 1, 1703/1704, in *RICHMOND 1702–1704*, *supra* note 261, at 94–96.

³⁵² *E.g.*, *Russell v. Downing* (Northumberland Cnty. Ct., Sept. 17, 1703), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK NORTHUMBERLAND COUNTY, VIRGINIA 1702–1704*, at 73–74 (Lydia Bontempo & Ruth Sparacio eds., 2003) [hereinafter *NORTHUMBERLAND 1702–1704*]; *cf. Robinson v. Skipwith* (Middlesex Cnty. Ct., May 8, 1699), in *MIDDLESEX 1697–1700*, *supra* note 314, at 72–73 (dismissing a suit where executors were not properly appointed); *Garner v. Straughan* (Northumberland Cnty. Ct., Mar. 17, 1703/1704), in *NORTHUMBERLAND 1702–1704*,

There were limits, however, to the willingness of courts to rely on common-law technicalities.³⁵⁴ On one occasion, for example, a defendant interposed a technically insufficient plea that he “kn[e]w nothing of the matter,” issue was joined, and the case nonetheless proceeded to a plaintiff’s verdict.³⁵⁵ Parties at times also joined issue on other erroneous pleas, such as not guilty to a writ of debt,³⁵⁶ “nil debet” to an action of case,³⁵⁷ and not his deed to case.³⁵⁸ An especially interesting plea was interposed in *Thompson v. Frezer*,³⁵⁹ a suit by a county clerk for his fee for marrying the defendant. The defendant responded that the amount sought was “too large” and “exorbitant” and in excess of the sum provided by the legislature.³⁶⁰ The defendant won.³⁶¹ Yet another defendant won when a jury returned a verdict in an action for breach of contract that neither “the words or treatment between the parties nor the

supra, at 95–96 (dismissing a suit brought against the defendant personally rather than as administrator of the decedent).

³⁵³ *E.g.*, French v. Hawksford (Richmond Cnty. Ct., Apr. 3, 1700), in RICHMOND 1699–1701, *supra* note 285, at 14–15; Quidley v. Bledsoe (Spotsylvania Cnty. Ct., Sept. 7, 1725), in SPOTSYLVANIA 1724–1730 (PART I), *supra* note 184, at 58–59. *But see* Lyell v. Russell (Richmond Cnty. Ct., Mar. 5, 1739/1740), in RICHMOND 1738–1740, *supra* note 151, at 85–86 (holding joinder of an officer was not required in a suit against a creditor for unlawful arrest); *see also* Thornbury v. Coward (Richmond Cnty. Ct., Apr. 6, 1693), in RICHMOND 1692–1694, *supra* note 184, at 46–47 (holding that an action for malicious prosecution cannot be brought until plaintiff who brings the action is acquitted of charges in the initial prosecution).

³⁵⁴ *See* Bag v. Cooke (Va. Gen. Ct., Oct. 1736), in 1 RANDOLPH & BARRADALL, *supra* note 308, at R42–43 (arguing whether a plea in abatement could be interposed after special imparlance without known result).

³⁵⁵ Harvey v. Shelton (Northumberland Cnty. Ct., Apr. 17, 1702), in NORTHUMBERLAND 1702–1704, *supra* note 352, at 1, 4–5; *accord* Smitton v. Jones (Northumberland Cnty. Ct., July 17, 1702), in NORTHUMBERLAND 1702–1704, *supra* note 352, at 18–20 (overruling the defendant’s plea that he never sold any cow to the plaintiff and granting judgment for the plaintiff).

³⁵⁶ *E.g.*, Tunney v. Conner (Spotsylvania Cnty. Ct., Sept. 1, 1724), in SPOTSYLVANIA 1724–1730 (PART I), *supra* note 184, at 6. At a later term of court, however, the suit was dismissed on the ground of unspecified errors. Tunney v. Conner (Spotsylvania County Ct., June 1, 1725), in SPOTSYLVANIA 1724–1730 (PART I), *supra* note 184, at 49.

³⁵⁷ Chew v. Harrison (Spotsylvania Cnty. Ct., Mar. 2, 1724/1725), in SPOTSYLVANIA 1724–1730 (PART I), *supra* note 184, at 35–36. *But see* Harrall v. Williams (Spotsylvania Cnty. Ct., Aug. 6, 1729), in SPOTSYLVANIA 1724–1730 (PART III), *supra* note 127, at 111–12 (holding *nil debet* was not a proper plea to an action of case).

³⁵⁸ *E.g.*, Mackey v. Stone (Richmond Cnty. Ct., July 3, 1706), in RICHMOND 1705–1706, *supra* note 237, at 40–41.

³⁵⁹ (Stafford Cnty. Ct., Mar. 14, 1689/1690), in STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 79–80.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 79–80. However, in another case, in which a defendant tore in pieces a plea to which the plaintiff had objected, the court “[took] the said plea to be insufficient.” Hipkings v. Gray (Middlesex Cnty. Ct., Sept. 6, 1697), in MIDDLESEX 1697–1700, *supra* note 314, at 14–15.

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evidence at bar doth amount so high as to make a contract nor consummate a bargain.”³⁶²

Nor would cases be dismissed simply because a plaintiff failed to plead words not material thereto.³⁶³ Thus, a court did not dismiss an action for an apparent assault for want of the words “contra pacem” or “vie et armis” in the declaration.³⁶⁴ A court would not dismiss a suit involving title to land for the plaintiff’s failure to plead that his predecessor in interest was seised in fee simple as long as the predecessor was, in fact, so seised.³⁶⁵ Nor would a court dismiss a suit because the plaintiff’s name had been misspelled.³⁶⁶ Courts also rejected other technical claims, such as one that a defendant was improperly arrested on a court day when he happened to be in court on other business,³⁶⁷ and one that a defendant had improperly joined a plea in bar to a plea in abatement.³⁶⁸ Finally, the courts enforced agreements among

³⁶² *Gundry v. Bennet* (Stafford Cnty. Ct., May 11, 1692), in STAFFORD 1692-1693, *supra* note 158, at 1-2. In *Gibson v. Bowne*, the parties accused each other of detaining goods. (Stafford Cnty. Ct. Apr. 6, 1693), in STAFFORD 1692-1693, *supra* note 158, at 87-88. In a subsequent suit between the parties over the same matter, the court was met by pleas such as one that the defendant did not “in his heart think scorn to keep or detain any thing of the plaintiff.” *Bowne v. Gibson* (Stafford Cnty. Ct., Apr. 6, 1693), in STAFFORD 1692-1693, *supra* note 158, at 92-93. After highly irregular pleading, the court decided the first case in favor of Gibson where he was the plaintiff. *Gibson v. Bowne* (Stafford Cnty. Ct. Apr. 6, 1693), in STAFFORD 1692-1693, *supra* note 158, at 87-88. A jury decided the second case in his favor where he was the defendant. *Bowne v. Gibson* (Stafford Cnty. Ct., Apr. 6, 1693), in STAFFORD 1692-1693, *supra* note 158, at 92-93.

³⁶³ *E.g.*, *Scholfield v. Willis* (Middlesex Cnty. Ct., Aug. 3, 1696), in MIDDLESEX 1694-1697, *supra* note 193, at 84-85.

³⁶⁴ *Barloe v. Mitchell* (Lancaster Cnty. Ct., Oct. 11, 1699), LANCASTER 1699-1701, *supra* note 210, at 24. *But see* *Jones v. Mackey* (Richmond Cnty. Ct., Nov. 2, 1699), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1697-1699, at 128 (Ruth Sparacio & Sam Sparacio eds., 1991) [hereinafter RICHMOND 1697-1699] (dismissing a slander action for failure to allege that words were spoken “falsely and maliciously”).

³⁶⁵ *E.g.*, *Payne v. Shipway* (Rappahannock Cnty. Ct., Jan. 8, 1690/1691), in RAPPAHANNOCK 1689-1692, *supra* note 56, at 47-48; *Pope v. Pitman* (Richmond Cnty. Ct., Mar. 2, 1698/1699), in RICHMOND 1697-1699, *supra* note 364, at 74-75.

³⁶⁶ *E.g.*, *Willcocks v. Cammell* (Richmond Cnty. Ct., Feb. 4, 1702/1703), in RICHMOND 1702-1704, *supra* note 261, at 42. *But see* *Paris v. Stool* (Northampton Cnty. Ct., Jan. 15, 1711/1712), in 15 NORTHAMPTON 1710-1717, *supra* note 225, at 36, 38 (dismissing suit where the plaintiff misspelled the defendant’s name); *cf.* *Lynch v. Tarpley* (Richmond Cnty. Ct., Nov. 3, 1703), in RICHMOND 1702-1704, *supra* note 261, at 78-79 (dismissing suit for misnomer in plaintiff’s replication).

³⁶⁷ *Evans v. Jones* (Middlesex Cnty. Ct., Dec. 3, 1683), in MIDDLESEX 1680-1686, *supra* note 184, at 58.

³⁶⁸ *Briscoe v. Dunkington* (Middlesex Cnty. Ct., Oct. 7, 1700), in MIDDLESEX 1700-1702, *supra* note 128, at 26-27.

attorneys not to take advantage of technical errors³⁶⁹ and permitted parties to cure other technical defects by amending their pleadings.³⁷⁰

Judges also tolerated other sorts of deficient behavior on the part of attorneys. Illness of an attorney was reason for postponement of a matter,³⁷¹ as was death.³⁷² In addition, courts permitted defendants, whose attorneys had defaulted, to reopen cases on the date set for judgment and to plead to issue immediately.³⁷³ Another court permitted a litigant, whose attorney had “runaway,” to substitute a plea of the general issue in lieu of a possibly invalid double plea previously entered by the runaway attorney.³⁷⁴ A court would not grant an attorney a postponement, however, even of “a cause of great weight,” for the purpose of drafting a plea in bar after the defendant’s plea in abatement had been overruled.³⁷⁵ Similarly, a court would grant judgment against and charge costs to a litigant who personally and through counsel “unfairly left his action.”³⁷⁶

As the common-law jurisdiction of the county courts was maturing, an extensive jurisdiction in chancery was also emerging in those courts. Chancery, for example, performed key functions relating to the distribution of estates,³⁷⁷ such as setting off dower,³⁷⁸ distributing

³⁶⁹ *E.g.*, Thurman v. Bowdoin (Northampton Cnty. Ct., Apr. 13, 1731), *microformed on* 00327515162127 (Library of Va.).

³⁷⁰ *E.g.*, Bell v. Hord (Fauquier Cnty. Ct., June 23, 1767), *in* FAUQUIER 1766–1767, *supra* note 247, at 75; Skinker v. Robinson (King George Cnty. Ct., May 5, 1727), *in* KING GEORGE 1725–1728, *supra* note 126, at 54; *cf.* Fantleroy v. Smith (Richmond Cnty. Ct., Apr. 7, 1708), *in* RICHMOND 1707–1708, *supra* note 160, at 77 (permitting the clerk to amend the record to correct an error in transcription).

³⁷¹ *E.g.*, Corbin v. Beverich (Middlesex Cnty. Ct., Jan. 2, 1709/1710), *in* MIDDLESEX 1708–1710, *supra* note 249, at 53–54; *cf.* Barrow v. Metcalfe (Richmond Cnty. Ct., July 4, 1711), *in* RICHMOND 1710–1711, *supra* note 263, at 70 (postponing the case when the defendant’s attorney was absent “by reason of some other extraordinary business”).

³⁷² *E.g.*, *In re* Morgan (Northumberland Cnty. Ct., Dec. 15, 1680), *in* NORTHUMBERLAND 1680–1683, *supra* note 162, at 17.

³⁷³ *Compare* Ireson v. Stevens (Middlesex Cnty. Ct., Feb. 7, 1703/1704), *in* MIDDLESEX 1702–1704, *supra* note 203, at 45–46 (granting the defendant’s plea to hold over until next court session), *with* Ireson v. Stevens (Middlesex Cnty. Ct., May 1, 1704), *in* MIDDLESEX 1702–1704, *supra* note 203, at 58–59 (finding the defendant’s ultimate plea insufficient and ruling for the plaintiff).

³⁷⁴ Pley v. Beckham (Essex Cnty. Ct., Aug. 11, 1702), *in* ESSEX 1699–1702, *supra* note 247, at 127.

³⁷⁵ Scholfeild v. Willis (Middlesex Cnty. Ct. Feb. 3, 1695/1696), *in* MIDDLESEX 1694–1697, *supra* note 193, at 59–60; *cf.* Jackson v. Weekes (Middlesex Cnty. Ct., Jan. 1, 1699/1700), *in* MIDDLESEX 1697–1700, *supra* note 314, at 91–92 (refusing postponement for the defendant to bring in discount when the case already had been placed on the calendar twice).

³⁷⁶ Willis v. Scholfeild (Middlesex Cnty. Ct., Mar. 10, 1697/1698), *in* MIDDLESEX 1697–1700, *supra* note 314, at 37–38.

³⁷⁷ *See, e.g.*, Dunn v. Wythe (Va. Gen. Ct., Apr. 1739), *in* 2 RANDOLPH & BARRADALL, *supra* note 144, at B80–82 (deciding whether beneficiaries inherit as a next of kin or through the

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legacies,³⁷⁹ and directing the execution of deeds.³⁸⁰ In one case, chancery went beyond these functions when an administrator of an estate sued a man who purchased hogs from the decedent's widow, but when the purchaser responded that he had no knowledge whether the hogs belonged to the decedent or the widow personally, the court dismissed the suit.³⁸¹ Chancery also played a key role in determining rights of creditors.³⁸² In one case, for example, chancery enjoined a common-law judgment on a debt when it concluded that the debtor had paid it in full,³⁸³ while in another, chancery stayed a common-law suit on a bill allegedly obtained by fraud.³⁸⁴ It was the jurisdiction of chancery, of course, to foreclose mortgages.³⁸⁵

More generally, a litigant could seek "relief in th[e] equitable Court of Chancery according to the merits of his case" whenever he or she was

express devise); *Waddy v. Sturman* (Va. Gen. Ct., Oct. 1731), in 1 *RANDOLPH & BARRADALL*, *supra* note 308, at R61-63 (deciding an action of trespass arising out of the distribution of an estate); *Griffin v. Long* (Caroline Cnty. Ct., May 13, 1768), in *CAROLINE 1767-1768*, *supra* note 153, at 59-60 (concluding that specified slaves were not part of the decedent's estate); *Stone v. Stone* (Richmond Cnty. Ct., Apr. 3, 1706), in *RICHMOND 1705-1706*, *supra* note 237, at 21-22 (commanding an executrix to show cause for failing to probate a will when children brought suit to compel probate).

³⁷⁸ Compare *Wormeley v. Carter* (Lancaster Cnty. Ct., Nov. 12, 1691), in *LANCASTER 1691-1695*, *supra* note 263, at 4 (referring an action for failure to assign a dower correctly until the next court), with *Wormeley v. Carter* (Lancaster Cnty. Ct., Dec. 9, 1691), in *LANCASTER 1691-1695*, *supra* note 263, at 8-9 (dismissing the action where the sherrif incorrectly arrested the defendant).

³⁷⁹ E.g., *Taylor v. Pratt* (King George Cnty. Ct., Sept. 4, 1725), in *KING GEORGE 1723-1725*, *supra* note 226, at 96.

³⁸⁰ E.g., *Orchard v. Gowre* (Richmond Cnty. Ct., June 7, 1693), in *RICHMOND 1692-1694*, *supra* note 184, at 58.

³⁸¹ *Alliman v. Smith* (Middlesex Cnty. Ct., Nov. 7, 1701), in *MIDDLESEX 1700-1702*, *supra* note 128, at 73-75.

³⁸² See, e.g., *Pendleton v. Harrison* (Caroline Cnty. Ct., Sept. 13, 1765), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK CAROLINE COUNTY, VIRGINIA 1765*, at 58-59 (Ruth Sparacio & Sam Sparacio eds., 1989) [hereinafter *CAROLINE 1765*] (upholding a marital trust preventing a creditor from reaching a wife's assets); *Hickey v. Summers* (Middlesex Cnty. Ct., Mar. 3, 1706/1707), in *MIDDLESEX 1705-1707*, *supra* note 314, at 96 (voiding a previous judgment for a creditor and requiring the creditor to reimburse the plaintiff).

³⁸³ *Field v. Bronaugh* (Spotsylvania Cnty. Ct., Nov. 3, 1730), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK SPOTSYLVANIA COUNTY, VIRGINIA 1730-1732*, at 2 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter *SPOTSYLVANIA 1730-1732*].

³⁸⁴ *Brown v. Ingo* (Richmond Cnty. Ct., Sept. 4, 1718), in *RICHMOND 1718-1719*, *supra* note 151, at 4-6; cf. *Irby v. Portis* (Isle of Wight Cnty. Ct., Feb. 9, 1693/1694), in 3 *SURRY & ISLE OF WRIGHT COUNTIES 1693-1695*, *supra* note 87, at 16-17 (staying a judgment on specialty pending a chancery determination whether a prior, unfulfilled oral agreement constituted a defense to suit on specialty).

³⁸⁵ E.g., *Wilson v. Gardner* (Fairfax Cnty. Ct., Nov. 21, 1769), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK FAIRFAX COUNTY, VIRGINIA 1768-1770*, at 50-51 (Lydia Sparacio Bontempo ed., 2001) [hereinafter *FAIRFAX 1768-1770*].

“by the strict rules of the common law debarred of any satisfaction in the premises.”³⁸⁶ A litigant could not seek relief in chancery, however, if he or she had a remedy at common law,³⁸⁷ or if the issue to be tried in chancery was identical to that already tried at law.³⁸⁸ The precise location of the line specifying the availability of equitable relief was not, however, clear. Thus, Virginia courts permitted a person who would inherit an estate to seek injunctive relief against a current tenant threatening to commit waste.³⁸⁹ However, they did not permit an overseer who had managed an estate to sue in chancery to recover his promised share of the crop he had grown;³⁹⁰ apparently his only remedy was a common-law breach of contract suit. Of course, “Equity never decree[d] against an Act of Parliament [or of the colonial assembly,] which indeed would be transferring the legislative power.”³⁹¹

Another area of expanding jurisdiction was the criminal law.³⁹² Throughout the decades following Bacon’s Rebellion, Virginia’s courts

³⁸⁶ *Haley v. Eyres* (Stafford Cnty. Ct., Dec. 12, 1689), in STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 57. Thus, chancery set aside a jury verdict on a bill “[i]gnorantly” given by a widow under persuasion by a creditor for her deceased husband’s debt when she had never possessed or administered any part of his estate; the defense had not been available to her at the jury trial. *Northington v. Poole* (Middlesex Cnty. Ct., Nov. 11, 1689), in MIDDLESEX 1686–1690, *supra* note 312, at 86. In another case, the plaintiff’s correspondent in London had shipped goods to the plaintiff in Virginia, but the commander of the vessel, who had all the papers, refused to deliver the goods; because the plaintiff had no “evidence to prove the same . . . by the strict rules of law,” he was permitted to bring an action in chancery. *Gwin v. Scott* (Richmond Cnty. Ct., Feb. 7, 1694/1695), in RICHMOND 1694–1697, *supra* note 151, at 26; see *Gwin v. Scott* (Richmond Cnty. Ct., June 5, 1695), in RICHMOND 1694–1697, *supra* note 151, at 43 (presenting the defendant’s answer to the complaint); accord *Allerton v. Withers* (Stafford Cnty. Ct., Sept. 10, 1690), in STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 119–120 (reporting an action in chancery against an agent of the decedent who alone had knowledge of decedent’s assets but could not testify to that knowledge in suit at common law).

³⁸⁷ See, e.g., *Lutwidge v. French* (Va. Gen. Ct., Oct. 1735), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B181–83 (agreeing with counsel’s argument on the matter); *Gibson v. Maddocks* (Stafford Cnty. Ct., Apr. 6, 1693), in STAFFORD 1692–1693, *supra* note 158, at 87 (quashing the complaint because the plaintiff could pursue a common law remedy).

³⁸⁸ See, e.g., *Jones v. Beere* (Rappahannock Cnty. Ct., Sept. 5, 1688), in RAPPAHANNOCK 1687–1689, *supra* note 145, at 42 (denying an injunction that had been tried at law).

³⁸⁹ E.g., *Pigg v. Pigg* (Spotsylvania Cnty. Ct., Feb. 2, 1730/1731), in SPOTSYLVANIA 1730–1732, *supra* note 383, at 11–12.

³⁹⁰ *Rooker v. Tarpley* (Richmond Cnty. Ct., Aug. 5, 1731), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1731–1732, at 24–25 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter RICHMOND 1731–1732].

³⁹¹ *Knight v. Triplett* (Va. Gen. Ct., Oct. 1740), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B111, B127–28. Here, the court declined to invalidate or otherwise ignore legislation declaring an unrecorded deed void. *Id.* at B128–29; accord *Jones v. Porters* (Va. Gen. Ct., Apr. 1740), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B93, B95, B99 (showing counsel’s argument requesting not to transfer the legislative power to the equity court).

³⁹² For the most useful work on colonial Virginia criminal law, see generally CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA, *supra* note 198.

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continued to prosecute all the standard offenses of English law. Major felonies were sent to the General Court but only after a county court had found probable cause to prosecute, whereas lesser felonies, misdemeanors, and minor offenses were prosecuted at the county level.

Felonies sent to the General Court included assault resulting in disfigurement,³⁹³ arson,³⁹⁴ infanticide,³⁹⁵ larceny,³⁹⁶ murder,³⁹⁷ rape,³⁹⁸ and treason.³⁹⁹ Also arrested was a defendant who “dr[a]nk a health to King James and curse[d] his present majesty: King William.”⁴⁰⁰ Standard crimes tried at the county level were assault,⁴⁰¹ attempted rape,⁴⁰² contempt of court,⁴⁰³ defamation,⁴⁰⁴ hog-stealing,⁴⁰⁵ larceny,⁴⁰⁶

³⁹³ See, e.g., *Queen v. Quan* (Westmoreland Cnty. Ct., July 28, 1708), in WESTMORELAND 1707–1709, *supra* note 130, at 52 (reporting a man was arrested for allegedly biting off someone’s ear).

³⁹⁴ E.g., *King v. Cheek* (Spotsylvania Cnty. Ct., Apr. 1, 1729), in SPOTSYLVANIA 1724–1730 (PART III), *supra* note 127, at 71–72.

³⁹⁵ See, e.g., *King v. Jones* (Rappahannock Cnty. Ct., Apr. 2, 1690), in RAPPAHANNOCK 1689–1692, *supra* note 56, at 8–9 (reporting a case where a jury of matrons examined the alleged mother to determine if she had recently given birth). Another case involved a prosecution for concealing the birth of an illegitimate child; the testimony of the mother is reported in the court records. *King v. Lawson* (Rappahannock Cnty. Ct., Apr. 14, 1690), in RAPPAHANNOCK 1689–1692, *supra* note 56, at 14. It is noteworthy that the alleged father also was named Lawson. *Id.*; see also *Queen v. Marson* (Westmoreland Cnty. Ct., Jan. 29, 1706/1707), in WESTMORELAND 1705–1707, *supra* note 225, at 69–70 (reporting another case giving the testimony of a mother).

³⁹⁶ E.g., *King v. Marsh* (Spotsylvania Cnty. Ct., June 4, 1728), in SPOTSYLVANIA 1724–1730 (PART III), *supra* note 127, at 11–12; see also *R v. Alworthy* (Westmoreland Cnty. Ct., June 3, 1715), in WESTMORELAND 1714–1716, *supra* note 138, at 51–53 (reporting an examination of several witnesses and a defendant accused of larceny).

³⁹⁷ See, e.g., *King v. Day* (Essex Cnty. Ct., Apr. 10, 1700), in ESSEX 1699–1702, *supra* note 247, at 29; see also *Examination of Bush* (Lancaster Cnty. Ct., July 4, 1704), in LANCASTER 1703–1706, *supra* note 238, at 28–33 (recording detailed examinations of witnesses to the murder of a servant). Compare *Queen v. Several Indians* (Richmond Cnty. Ct., Sept. 7, 1704), in RICHMOND 1702–1704, *supra* note 261, at 124–26 (reporting examinations of several Native Americans suspected of murdering a white man), with *Queen v. Several Indians* (Richmond Cnty. Ct., Oct. 5, 1704), in RICHMOND 1702–1704, *supra* note 261, at 130–31 (reporting the subsequent prosecution of those Native Americans).

³⁹⁸ E.g., *King v. Burk* (Middlesex Cnty. Ct., Feb. 7, 1715/1716), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1714–1716, at 62 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter MIDDLESEX 1714–1716].

³⁹⁹ E.g., *King v. Jackman* (Northumberland Cnty. Ct., Apr. 7, 1686), in NORTHUMBERLAND 1683–1686, *supra* note 232, at 106.

⁴⁰⁰ *King v. Loveless* (Rappahannock Cnty. Ct., Aug. 5, 1691), in RAPPAHANNOCK 1689–1692, *supra* note 56, at 65.

⁴⁰¹ See, e.g., *King v. Poore* (Middlesex Cnty. Ct., Nov. 7, 1681), in MIDDLESEX 1680–1686, *supra* note 184, at 19 (prosecuting a servant for an assault on his overseer).

⁴⁰² E.g., *Queen v. Melone* (Middlesex Cnty. Ct., Mar. 1, 1702/1703), in MIDDLESEX 1702–1704, *supra* note 203, at 16.

⁴⁰³ See, e.g., *King v. Dinwiddie* (King George Cnty. Ct., Aug. 3, 1722), in KING GEORGE 1721–1723, *supra* note 127, at 46 (prosecuting a county sheriff for sundry abuses and contempt); see also *King v. Smith* (Essex Cnty. Ct., May 11, 1697), in ESSEX 1695–1699, *supra* note 267, at 43

perjury,⁴⁰⁷ publishing “false scandallous [sic] . . . news,”⁴⁰⁸ riot,⁴⁰⁹ servant conspiracy,⁴¹⁰ and trespass.⁴¹¹

The important development in the late seventeenth century, as shown above, was not the prosecution of standard offenses, but a revival of prosecutions of morals and regulatory offenses, which had largely disappeared from court dockets in the post-1660 era. Indeed, by the early eighteenth century, grand juries had developed the habit of presenting and having prosecuted as criminal virtually any conduct on which they frowned. As just noted, the late seventeenth and early eighteenth century saw a revival of regulatory prosecutions. Some regulatory offenses, such as contempt of court,⁴¹² disturbing the peace,⁴¹³

(penalizing a man for speaking threatening words to the jury foreman); *King v. Richins* (Middlesex Cnty. Ct., July 23, 1677), in *MIDDLESEX 1673-1678*, *supra* note 104, at 68-69 (punishing a man with banishment for scandalous words to the court and threatening language to the sheriff); *Summons of Upshaw* (Northampton Cnty. Ct., May 12, 1715), in 15 *NORTHAMPTON 1710-1717*, *supra* note 225, at 171-73 (holding a man in contempt of court for refusing to give his evidence on his oath). *But see* *Russell v. Southall* (Spotsylvania Cnty. Ct., Oct. 5, 1725), in *SPOTSYLVANIA 1724-1730 (PART I)*, *supra* note 184, at 70 (requiring the peace bond of a “peaceable quiet” man who cursed justices after receiving an accidental blow to head).

⁴⁰⁴ *See, e.g., King v. Field* (Lancaster Cnty. Ct., Oct. 12, 1687), in *LANCASTER 1687-1691*, *supra* note 186, at 10 (ordering thirty lashes for a man calling a woman a “whore” and claiming to have committed fornication with her).

⁴⁰⁵ *E.g., Carter v. Dunkan* (Westmoreland Cnty. Ct., Mar. 26, 1713), in *WESTMORELAND 1712-1714*, *supra* note 128, at 41; *see also King v. Sheppard* (Middlesex Cnty. Ct., Dec. 7, 1674), in *MIDDLESEX 1673-1678*, *supra* note 104, at 23-24 (ordering a penalty of two years servitude in lieu of corporal punishment for hog-stealing).

⁴⁰⁶ *E.g., King v. Simpson* (King George Cnty. Ct., Oct. 4, 1723), in *KING GEORGE 1721-1723*, *supra* note 127, at 104.

⁴⁰⁷ *E.g., King v. Cooper* (Rappahannock Cnty. Ct., Mar. 5, 1683/1684), in *RAPPAHANNOCK 1683-1685*, *supra* note 159, at 4-5; *cf. Goodridge v. Darnell* (Stafford Cnty. Ct., Mar. 12, 1690/1691), in *STAFFORD 1691-1692*, *supra* note 184, at 9-10 (ordering the sheriff to arrest a defendant found guilty in a civil suit of fraudulent packing of tobacco and to repair a pillory for his use thereof).

⁴⁰⁸ *King v. Townsend* (Middlesex Cnty. Ct., Jan. 2, 1687/1688), in *MIDDLESEX 1686-1690*, *supra* note 312, at 40.

⁴⁰⁹ *E.g., King v. Braydon* (Northumberland Cnty. Ct., May 24, 1686), in *NORTHUMBERLAND 1683-1686*, *supra* note 232, at 86.

⁴¹⁰ *See, e.g., King v. Nickson* (Middlesex Cnty. Ct., Nov. 14, 1687), in *MIDDLESEX 1686-1690*, *supra* note 312, at 2 (examining a servant charged with conspiracy with others to procure weapons and run away).

⁴¹¹ *See, e.g., King v. Locker* (Rappahannock Cnty. Ct., Nov. 6, 1684), in *RAPPAHANNOCK 1683-1685*, *supra* note 159, at 46 (ordering a penalty of 120 lashes after trial for trespass).

⁴¹² *E.g., King v. Fleming* (Goochland Cnty. Ct. Sept. 1731), in 3 *GOOCHLAND 1731-1735*, *supra* note 90, at 2-3.

⁴¹³ *E.g., King v. Holladay* (Spotsylvania Cnty. Ct., June 4, 1729), in *SPOTSYLVANIA 1724-1730 (PART III)*, *supra* note 127, at 99.

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failing to appear as a juror⁴¹⁴ or witness,⁴¹⁵ failing to notify authorities of tithables under a defendant's control and thereby undermining the tax system,⁴¹⁶ failing to read laws in church,⁴¹⁷ failing to assist or obstructing a sheriff or constable,⁴¹⁸ and jail break,⁴¹⁹ were prosecuted in an effort to strengthen the legal order and preserve the public peace.

⁴¹⁴ E.g., *King v. Keeling* (Rappahannock Cnty. Ct., Oct. 2, 1684), in RAPPAHANNOCK 1683–1685, *supra* note 159, at 41. *But see* *Worsdell's Petition* (Richmond Cnty. Ct., Feb. 1, 1715/1716), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1714–1715, at 85–86 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter RICHMOND 1714–1715] (remitting a fine when the jury refused to conduct a survey of land boundaries over three days in which no provisions were made available).

⁴¹⁵ See, e.g., *King v. Harrison* (Spotsylvania Cnty. Ct., May 3, 1727), in SPOTSYLVANIA 1724–1730 (PART II), *supra* note 165, at 40–41. Courts protected witnesses from civil arrest while attending or travelling to or from court. E.g., *Motion of Mercer* (Spotsylvania Cnty. Ct., June 5, 1733), in SPOTSYLVANIA 1732–1734, *supra* note 160, at 61–62.

⁴¹⁶ E.g., *Barnes v. Nelmes* (Northumberland Cnty. Ct., Nov. 23, 1677), in NORTHUMBERLAND 1677–1679, *supra* note 133, at 4–5. Compare *Vause v. Kemp* (Middlesex Cnty. Ct., Feb. 3, 1689/1690), in MIDDLESEX 1686–1690, *supra* note 312, at 95 (finding a sheriff guilty of receiving tax money attributable to concealed tithables), with *Willis v. Kemp* (Middlesex Cnty. Ct., Mar. 3, 1689/1690), in MIDDLESEX 1686–1690, *supra* note 312, at 96–97 (presenting the sheriff's motion to dismiss the action), and *Willis v. Kemp* (Middlesex Cnty. Ct., Apr. 7, 1690), in MIDDLESEX 1686–1690, *supra* note 312, at 102–03 (granting the sheriff's motion to dismiss). An owner of a servant could obtain an opinion from the court whether that servant was tithable or not. See, e.g., *In re. Ransom* (Middlesex Cnty. Ct., Mar. 2, 1673/1674), in MIDDLESEX 1673–1678, *supra* note 104, at 4–5 (finding the woman servant not tithable).

⁴¹⁷ Compare *King v. Churchwardens of King William Parish* (Goochland Cnty. Ct., June 1731), in 1 & 2 GOOCHLAND 1728–1731, *supra* note 183, at 359 (presenting the churchwardens for failing to read the law in church), with *King v. Churchwardens of King William Parish* (Goochland Cnty. Ct., June 1731), in 1 & 2 GOOCHLAND 1728–1731, *supra* note 183, at 393 (dismissing the presentment).

⁴¹⁸ E.g., *King v. Sturman* (Westmoreland Cnty. Ct., Oct. 1, 1719), in WESTMORELAND 1718–1721, *supra* note 169, at 61–62; cf. *King v. Evans* (Essex Cnty. Ct., Nov. 18, 1718), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK ESSEX COUNTY, VIRGINIA 1716–1723 (PART II), at 18 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter ESSEX 1716–1723 (PART II)] (fining a constable for misexecuting a warrant); *King v. Rapone* (Goochland Cnty. Ct., Dec. 1731), in 3 GOOCHLAND 1731–1735, *supra* note 90, at 41–42 (fining the defendant for assaulting a constable in execution of office); *R v. Robinson* (Lancaster Cnty. Ct., Nov. 12, 1729), in LANCASTER 1729–1732, *supra* note 126, at 1–2 (fining the defendant for abusing a deputy sheriff in execution of office). Civil liability also existed for persons who obstructed officials, even if officials subsequently were able to perform their duty and no long-term obstruction occurred. Compare *Foster v. Parker* (Spotsylvania Cnty. Ct., June 2, 1730), in SPOTSYLVANIA 1724–1730 (PART IV), *supra* note 186, at 59 (reporting jury finding that the defendant assaulted a sheriff who came to the defendant's home to serve an execution and that the sheriff was subsequently able to serve the execution), with *Foster v. Parker* (Spotsylvania Cnty. Ct., Aug. 5, 1730), in SPOTSYLVANIA 1724–1730 (PART IV), *supra* note 186, at 71–72 (finding the defendant guilty and fining him forty shillings).

⁴¹⁹ E.g., *Queen v. Cleve* (Richmond Cnty. Ct., Apr. 3, 17[0]7), in RICHMOND 1707–1708, *supra* note 160, at 4–5; *King v. Pigg* (Spotsylvania Cnty. Ct., Nov. 5, 1728), in SPOTSYLVANIA 1724–1730 (PART III), *supra* note 127, at 52–53; cf. *King v. Robinson* (Essex Cnty. Ct., July 16, 1728), in ESSEX 1727–1729, *supra* note 151, at 44 (fining the defendant for rescuing a prisoner).

A second sort of regulatory prosecution was brought to promote development of the economy. By the early eighteenth century county courts had assumed vast powers over economic matters. They determined county tax rates,⁴²⁰ supported the poor,⁴²¹ ordered men and goods impressed into public service,⁴²² probated wills,⁴²³ supervised the administration of estates,⁴²⁴ apportioned dower,⁴²⁵ examined separately

⁴²⁰ *E.g.*, Order to Pay Sheriff (King George Cnty. Ct., Nov. 4, 1726), in KING GEORGE 1725-1728, *supra* note 126, at 31-32.

⁴²¹ *See, e.g.*, *In re. Paine* (Northampton Cnty. Ct., Feb. 12, 1683/1684), *microformed on* 00327495162125 (Genealogical Soc’y of Utah) (granting 1000 lb. of tobacco to an “[a]ged, [i]mpotent widow”); *In re. Tilfaire* (Northampton County Ct., Jan. 1, 1677/1678), in 10 NORTHAMPTON 1674-1678, *supra* note 125, at 226, 228 (remitting payment to the person caring for a woman accidentally burned in a fire); *see also In re. Baker* (Charles City Cnty. Ct., 1665), in 3 VA. COLONIAL ABSTRACTS, *supra* note 10, at 36 (exempting from taxes a youth suffering from “convulsion [fits]”).

⁴²² *E.g.*, Order for Forty-Nine Men (Northumberland Cnty. Ct., July 2, 1676), in NORTHUMBERLAND 1674-1677, *supra* note 52, at 70-71; *In re. Townsend* (Stafford Cnty. Ct., June 27, 1666), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 28; *cf.* Assignment of Stith (Charles City Cnty. Ct., Sept. 15, 1691), in CHARLES CITY 1687-1695, *supra* note 105, at 109 (noting the public condemnation of land for construction of a town); *In re. Taylor* (Charles City Cnty. Ct., 1687/1688), in CHARLES CITY 1687-1695, *supra* note 105, at 7, 10 (noting the public condemnation of land for construction of a town); *In re. Lindsey* (King George Cnty. Ct., Apr. 5, 1723), in KING GEORGE 1721-1723, *supra* note 127, at 80 (seeking reimbursement for a horse pressed into public service); *In re. Haynes* (Lancaster Cnty. Ct., Dec. 12, 1677), in LANCASTER 1674-1678, *supra* note 156, at 82-83 (seeking reimbursement for a gun impressed into service); Impression of Roome (Rappahannock Cnty. Ct., Apr. 2, 1684), in RAPPAHANNOCK 1683-1685, *supra* note 159, at 16 (certifying that Roome had been impressed into service). *But see* Motion of Vallicote (Middlesex Cnty. Ct., Sept. 1, 1690), in MIDDLESEX 1690-1694, *supra* note 162, at 8 (exempting a school teacher from military service); *Read v. Pope* (Richmond Cnty. Ct., July 3, 1738), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1737-1738, at 81-82 (Ruth Sparacio & Sam Sparacio eds., 2000) [hereinafter RICHMOND 1737-1738] (finding a tort in the absence of proof of public need).

⁴²³ *E.g.*, Nuncupative Will of Whitnall (Rappahannock Cnty. Ct., Apr. 7, 1686), in RAPPAHANNOCK 1685-1687, *supra* note 101, at 39. In the absence of a will or an heir, an estate would escheat to the crown. *See* Will of Norman (Stafford Cnty. Ct., Apr. 5, 1665), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 9 (preventing an estate from escheating where an heir was found and proved).

⁴²⁴ *See, e.g.*, *Meriwether v. Coleman* (Essex Cnty. Ct., Aug. 11, 1701), in ESSEX 1699-1702, *supra* note 247, at 88-89 (upholding the validity of a grant of administration by the county court); *see also In re. Burge* (Charles City County Ct., Dec. 3, 1688), in CHARLES CITY 1687-1695, *supra* note 105, at 34-35 (granting a lapsed legacy to the widow rather than the nieces of the decedent); *In re. Wharton* (King George Cnty. Ct., May 8, 1725), in KING GEORGE 1723-1725, *supra* note 226, at 83 (appointing surety of administrator as administrator when in danger of being held liable on bond); *Nusum v. Spencer* (Lancaster Cnty. Ct., Jan. 14, 1691/1692), in LANCASTER 1691-1695, *supra* note 263, at 9-10 (holding that a husband, upon marriage, does not gain control of property held by his wife as executrix of her father); *Lewis v. Muttoone’s Children* (Northumberland Cnty. Ct., Apr. 21, 1681), in NORTHUMBERLAND 1680-1683, *supra* note 162, at 29 (ordering equal distribution of the estate among the children even though the decedent had left the plaintiff daughter out of his will); *Thomas v. Bloomfield* (Rappahannock Cnty. Ct., Sept. 5, 1688), in RAPPAHANNOCK 1687-1689, *supra* note 145, at 41 (holding an administrator who

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wives whose husbands were conveying land,⁴²⁶ and appointed and policed the work of guardians.⁴²⁷ More directly related to the economy was the judiciary's jurisdiction to distribute liquor licenses;⁴²⁸ to direct appropriate officials to care for the poor;⁴²⁹ to establish and maintain roads,⁴³⁰ bridges,⁴³¹ ferries,⁴³² and facilities for processing tobacco;⁴³³ to

executes a note promising to pay debts of the estate is liable on the note even if no assets of the estate are in his possession); *In re. Burnard* (Stafford Cnty. Ct., June 11, 1690), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 92 (exercising "charitable consideration" and granting a widow goods in addition to her paraphernalia).

⁴²⁵ *E.g.*, *In re. Metheny* (Stafford Cnty. Ct., Feb. 11, 1691/1692), in STAFFORD 1691-1692, *supra* note 184, at 75.

⁴²⁶ *E.g.*, Acknowledgment of Keare (Lancaster Cnty. Ct., July 11, 1688), in LANCASTER 1687-1691, *supra* note 186, at 36.

⁴²⁷ *See, e.g.*, *In re. Ellison* (King George Cnty. Ct., June 7, 1723), in KING GEORGE 1721-1723, *supra* note 127, at 93 (requiring the guardian appear before the court for alleged mismanagement of the estate); *In re. Lund* (Stafford Cnty. Ct., Nov. 12, 1690), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 128 (ordering the guardian deliver property that rightfully belongs to the minor); Order for Removal of Peirce (Westmoreland Cnty. Ct., Feb. 27, 1705/1706), in WESTMORELAND 1705-1707, *supra* note 225, at 8-9 (ordering the removal of a minor from the guardian's care because the guardian was also adjudged a minor).

⁴²⁸ *E.g.*, *In re. Mason* (Stafford Cnty. Ct., Nov. 11, 1691), in STAFFORD 1691-1692, *supra* note 184, at 51. They also set liquor prices. *E.g.*, Order re Rates of Liquor (Middlesex Cnty. Ct., Apr. 4, 1711), in MIDDLESEX 1710-1712, *supra* note 261, at 15. A license to sell liquor at one location did not authorize its holder to sell at any different location. Compare *King v. Searle* (Essex Cnty. Ct., Mar. 21, 1720/1721), in ESSEX 1716-1723 (PART III), *supra* note 269, at 72 (reporting jury verdict finding the defendant sold alcohol in a place other than where he was permitted), with *King v. Searle* (Middlesex Cnty. Ct., May 17, 1721), in ESSEX 1716-1723 (PART III), *supra* note 269, at 87-88 (fining the defendant 2000 lb. of tobacco for selling said alcohol).

⁴²⁹ *See, e.g.*, *In re. Stone* (Middlesex Cnty. Ct., Aug. 4, 1682), in MIDDLESEX 1680-1686, *supra* note 184, at 35 (directing a doctor to treat a man's sore leg); *cf. Stapleton v. Reeves* (Middlesex Cnty. Ct., July 4, 1687), in MIDDLESEX 1686-1690, *supra* note 312, at 26-27 (finding a doctor's charges "unreasonable").

⁴³⁰ *E.g.*, Order for Clearing of Highways (Stafford Cnty. Ct., Oct. 10, 1666), in STAFFORD 1664-1668, 1689-1690, *supra* note 127, at 32; *see also King v. Harrison*, (Va. Gen. Ct., Apr. 1737), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B60, B66 (conceding power in county courts to license gates across highways); *cf. Donally v. Mickleburrough* (Middlesex Cnty. Ct., Apr. 1, 1718), in MIDDLESEX 1716-1719, *supra* note 184, at 59-60 (ordering the implementation of a private road across neighboring plantations); *In re. Newton* (Stafford Cnty. Ct., July 12, 1693), in STAFFORD 1692-1693, *supra* note 158, at 106-07 (allowing a private road across a neighboring estate for getting tobacco to water without compensation).

⁴³¹ *E.g.*, *King v. Snall* (Spotsylvania Cnty. Ct., May 6, 1729), in SPOTSYLVANIA 1724-1730 (PART III), *supra* note 127, at 79.

⁴³² *E.g.*, *In re. Ferry* by Straham (Stafford Cnty. Ct., Oct. 9, 1691), in STAFFORD 1691-1692, *supra* note 184, at 48.

⁴³³ *E.g.*, Rolling House of Heaberd (King George Cnty. Ct., July 7, 1721), in KING GEORGE 1721-1723, *supra* note 127, at 5-6; *cf. Inspection of Davis* (Middlesex Cnty. Ct., Apr. 4, 1681), in MIDDLESEX 1680-1686, *supra* note 184, at 8 (reporting an inspectors' finding that Davis's tobacco was fraudulently packed).

appoint leather inspectors;⁴³⁴ to approve the amount of rent charged for leases;⁴³⁵ and to direct the keeping of boundary records.⁴³⁶ One of the judiciary's most important powers, authorized by statute, was to grant to owners on one side of a stream an acre of land on the opposite side, thereby enabling construction of a mill dam. In the process, the court would summon a jury to assess damages both to the individual whose acre was seized as well as to others along the stream whose land might be damaged by the mill.⁴³⁷

Courts also used the criminal law to discipline people who ignored their regulatory commands, as they prosecuted, for example, subjects who failed to maintain highways,⁴³⁸ farmers who planted tobacco after June 30⁴³⁹ or failed to grow the minimum required amount of corn,⁴⁴⁰ millers who failed to keep proper measures at a mill,⁴⁴¹ and vagrants.⁴⁴² Cases involving forfeiture of vessels for violating the Navigation Acts

⁴³⁴ *E.g.*, Appointment of Darrell (Stafford Cnty. Ct., May 18, 1693), in STAFFORD 1692-1693, *supra* note 158, at 95.

⁴³⁵ *E.g.*, Leases from Lee to Williams (Fairfax Cnty. Ct., May 15, 1769), in FAIRFAX 1768-1769, *supra* note 385, at 82.

⁴³⁶ *E.g.*, *In re*. Processioning of Lands (Stafford Cnty. Ct., Nov. 13, 1691), in STAFFORD 1691-1692, *supra* note 184, at 61; *cf.* *In re*. Jones (Rappahannock Cnty. Ct., Apr. 2, 1684), in RAPPAHANNOCK 1683-1685, *supra* note 159, at 12 (certifying that Jones had imported a specified number of immigrants and was entitled to fifty acres of land each); *In re*. Mitchell (Spotsylvania Cnty. Ct., May 5, 1747), in SPOTSYLVANIA 1746-1748, *supra* note 323, at 24 (recording a bill of exchange).

⁴³⁷ *E.g.*, *In re*. Jerdone (Louisa Cnty. Ct., Sept. 14, 1767), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LOUISA COUNTY, VIRGINIA 1767-1768, at 42 (Ruth Sparacio & Sam Sparacio eds., 2000) [hereinafter LOUISA 1767-1768]; *In re*. Snell (Spotsylvania Cnty. Ct., July 2, 1728), in SPOTSYLVANIA 1724-1730 (PART III), *supra* note 127, at 13. Rarely, courts denied petitions as being too prejudicial to the owner whose land was sought. *E.g.*, Branham v. Dozier (Richmond Cnty. Ct., Apr. 1, 1724), in RICHMOND 1722-1724, *supra* note 159, at 64. *But see, e.g.*, Adams v. Randolph's Executors (Goochland Cnty. Ct., Aug. 1731), in 1 & 2 GOOCHLAND 1728-1731, *supra* note 183, at 406 (granting a petition to build a mill that was prejudicial to an existing mill since the existing mill was out of repair). Also, legislation authorized the taking of land for mill dams. 2 HENING, *supra* note 115, at 260-61.

⁴³⁸ *E.g.*, Chandler v. South (Westmoreland Cnty. Ct., May 28, 1707), in WESTMORELAND 1705-1707, *supra* note 225, at 93.

⁴³⁹ *E.g.*, King v. Traverse (Stafford Cnty. Ct., Sept. 13, 1692), in STAFFORD 1692-1693, *supra* note 158, at 33; *cf.* R v. Feild (Spotsylvania Cnty. Ct., Sept. 5, 1727), in SPOTSYLVANIA 1724-1730 (PART II), *supra* note 165, at 82 (finding the defendant guilty of tending tobacco seconds).

⁴⁴⁰ *E.g.*, King v. Rawlls (Richmond Cnty. Ct., Nov. 2, 1692), in RICHMOND 1692-1694, *supra* note 184, at 34.

⁴⁴¹ *E.g.*, King v. Brown (Essex Cnty. Ct., Nov. 18, 1719), in ESSEX 1716-1723 (PART III), *supra* note 269, at 110.

⁴⁴² *See, e.g.*, King v. Eager (Augusta Cnty. Ct., May 22, 1767), microformed on 00303775162116 (Genealogical Soc'y of Utah); King v. Burgess (Richmond Cnty. Ct., Dec. 2, 1714), in RICHMOND 1714-1715, *supra* note 414, at 7; *cf.* Queen v. Mickenon (Middlesex Cnty. Ct., May 1, 1704), in MIDDLESEX 1702-1704, *supra* note 203, at 58 (ordering a man to appear before the court for "entertaining a sickly woman . . . likely to come upon the [p]arish").

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were also tried in county courts,⁴⁴³ as were cases involving the importation of slaves without payment of duty.⁴⁴⁴

It is noteworthy that courts prosecuted crime with little regard for procedural niceties. In many cases, courts dispensed with niceties and tried defendants summarily and administered punishment.⁴⁴⁵ A court, for example, judged one servant, who claimed to have committed a theft at the order of his master, “to be an [i]gnorant person” and thus gave him twenty lashes.⁴⁴⁶ Another court, however, found a man who had fraudulently taken and sold a horse to be “a man of [i]dle dissolute and lewd behavior and . . . of a very evil and loose conversation” as well as guilty of prior thefts and sentenced him to jail until further court

⁴⁴³ E.g., *Spencer v. Finny* (Northumberland Cnty. Ct., Mar. 5, 1677/1678), in NORTHUMBERLAND 1677-1679, *supra* note 133, at 24-26. A subsidiary issue in this case was whether the crew of the forfeited vessel could recover its wages and transportation expenses back to its home port out of the proceeds of the vessel and its cargo. *Id.* at 26.

⁴⁴⁴ E.g., *Lee v. Hall* (Westmoreland Cnty. Ct., Mar. 26, 1712), in WESTMORELAND 1709-1712, *supra* note 206, at 97. Peace bonds were another device used for these purposes. Thus, courts required individuals who threatened the community to give peace bonds upon some other individual's complaint, although they would discharge the bond as long as the person thereunder proved that he had, in fact, kept the peace. See, e.g., *In re. Mussen* (Stafford Cnty. Ct., Mar. 11, 1690/1691), in STAFFORD 1691-1692, *supra* note 184, at 6 (discharging Mussen from his peace bond). The court also required comparable securities from two leaders of local Native Americans. See *Trial of the Indians* (Stafford Cnty. Ct., Mar. 9, 1691/1692), in STAFFORD 1691-1692, *supra* note 184, at 95 (releasing six Native American prisoners after two of their leaders gave security). Peace bonds could be required not only for threatened acts of violence but even for moral offenses, as in the case of one Robert Hunter “notoriously known to have unseemingly kept company with” another man's wife. *Bond of Hunter* (Northumberland Cnty. Ct., Apr. 20, 1681), in NORTHUMBERLAND 1680-1683, *supra* note 162, at 28. Even when a bond was violated, a court might treat an impoverished man who put up security “as an object of charity” and remit the penalty. *In re. Ripley* (Essex Cnty. Ct., May 20, 1724), in ESSEX 1725-1729 (PART I), *supra* note 250, at 85. A court might show mercy even toward an “impoverish[ed]” defendant who, on the whole, had behaved well and recommend that the governor remit the penalty of a bond. *Davis's Petition* (Richmond Cnty. Ct., Mar. 5, 1718/1719), in RICHMOND 1718-1719, *supra* note 151, at 40.

⁴⁴⁵ See, e.g., *King v. Arramore* (Essex Cnty. Ct., Aug. 17, 1725), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK ESSEX COUNTY, VIRGINIA 1723-1725 (PART II) 67 (Ruth Sparacio & Sam Sparacio eds., 1989) [hereinafter ESSEX 1723-1725 (PART II)] (ordering thirty-nine lashes at the public whipping post for threatening to break into a house and murder the inhabitants); *King v. Hughes* (King George Cnty. Ct., Sept. 1, 1721), in KING GEORGE 1721-1723, *supra* note 127, at 9-10 (ordering twenty lashes for a husband and ten lashes for his wife at the public whipping post for receiving rum from a Negro slave). Compare *Golding v. Jackson* (Northampton County Ct., Aug. 17, 1715), in 15 NORTHAMPTON 1710-1717, *supra* note 225, at 184-85 (ordering the defendant to present a certificate to show that the tithable was not concealed), with *Golding v. Jackson* (Northampton County Ct., Nov. 15, 1715), in 15 NORTHAMPTON 1710-1717, *supra* note 225, at 189, 192 (dismissing the information because it was unsigned).

⁴⁴⁶ *King v. Lewis* (King George Cnty. Ct., Oct. 7, 1726), in KING GEORGE 1725-1728, *supra* note 126, at 26.

order.⁴⁴⁷ Another court held a third man “of a bad character and by pregnant circumstances . . . guilty” of a theft and ordered thirty-nine lashes, even though “the evidence [would] not touch his life.”⁴⁴⁸

Similarly, a court refused to declare an indictment insufficient because it lacked an addition to the defendant’s name stating his occupation or status.⁴⁴⁹ More significantly, courts issued broad search warrants, such as one to “search . . . every such suspected house[] and place” in response to complaints of crime,⁴⁵⁰ and another to seize twenty-nine hogsheads of tobacco, allegedly about to be shipped unlawfully from the colony.⁴⁵¹

Especially in the late seventeenth century, lines between the civil and criminal jurisdiction of courts were not always clear. One plaintiff, for instance, brought a civil action for conversion of a horse, which a court in 1691 resolved by requiring the defendant to acknowledge his offense on his knees and give a peace bond;⁴⁵² another brought a suit against a man who had stabbed him, which resulted both in damages and in the defendant being jailed and required to give a peace bond.⁴⁵³ Yet another plaintiff brought an ambiguous suit against a woman for “sinful & unchristian-like carriages” toward him and others during Sunday services.⁴⁵⁴ The attorney general brought suit against a fourth defendant who married the half-sister of his first wife.⁴⁵⁵ When the jury returned a

⁴⁴⁷ *Elkin v. Jones* (Stafford Cnty. Ct., Apr. 6, 1693), in *STAFFORD 1692-1693*, *supra* note 158, at 93.

⁴⁴⁸ *Queen v. Evans* (Middlesex Cnty. Ct., Feb. 16, 1712/1713), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK MIDDLESEX COUNTY, VIRGINIA 1712-1714*, at 12 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter *MIDDLESEX 1712-1714*].

⁴⁴⁹ *King v. Monteith* (King George Cnty. Ct., Sept. 5, 1724), in *KING GEORGE 1723-1725*, *supra* note 226, at 44.

⁴⁵⁰ *In re. Hamerton* (Middlesex Cnty. Ct., Jan. 4, 1702/1703), in *MIDDLESEX 1702-1704*, *supra* note 203, at 6-7.

⁴⁵¹ See *Information of Wharton* (Middlesex Cnty. Ct., Jan. 2, 1681/1682), in *MIDDLESEX 1680-1686*, *supra* note 184, at 25 (joining the information’s prayer to the governor to seize the tobacco); see also *Information of Wharton* (Middlesex Cnty. Ct., Feb. 6, 1681/1682), in *MIDDLESEX 1680-1686*, *supra* note 184, at 27 (condemning the tobacco seized in a subsequent search by the governor).

⁴⁵² *Mason v. Jones* (Stafford County. Ct., Nov. 12, 1691), in *STAFFORD 1691-1692*, *supra* note 184, at 56.

⁴⁵³ *Smyth v. Lugg* (Northumberland Cnty. Ct., Feb. 20, 1679/1780), in *NORTHUMBERLAND 1677-1679*, *supra* note 133, at 101; cf. *Richa v. Gibson* (Stafford Cnty. Ct., Nov. 12, 1691), in *STAFFORD 1691-1692*, *supra* note 184, at 54-55 (reporting a suit that simultaneously sought money damages, time in the pillory, cutting off the defendant’s ear, and imprisonment for fraud).

⁴⁵⁴ *Palmer v. Kendall* (Northampton Cnty. Ct., July 28, 1692), *microformed on* 00327495162125 (Genealogical Soc’y of Utah).

⁴⁵⁵ See *Attorney Gen. v. Bartholmew* (Charles City County Ct. Aug. 3, 1694), in *CHARLES CITY 1687-1695*, *supra* note 105, at 180-81.

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verdict of not guilty, the attorney general appealed to the General Court, contrary to the principle that no appeal is available to the prosecution following an acquittal in a criminal case.⁴⁵⁶

Ambiguity also resulted when peace bonds were used in lieu of criminal prosecutions. Courts, for instance, required individuals who threatened the community to give peace bonds upon some other individual's complaint, although they would discharge the bond as long as the person thereunder proved that he had, in fact, kept the peace.⁴⁵⁷ Peace bonds could be required not only for threatened acts of violence but even for morals offenses, as in the case of one Robert Hunter "notoriously known to have unseemingly kept company with" another man's wife.⁴⁵⁸

Six decades later, however, lines were clearly drawn. In one matter, when a victim and an alleged criminal settled their civil disputes and requested dismissal of a pending indictment, the king's attorney opposed the dismissal and the court ordered the criminal proceeding to go forward.⁴⁵⁹ By the mid-eighteenth century it had become clear that the same action simultaneously could be both a felony against the commonwealth and a trespass against an individual.⁴⁶⁰

Another area of expanded jurisdiction at the turn of the century covered criminal prosecutions against slaves. All slaves accused of crime were tried at the county level, even for the most serious offenses,⁴⁶¹ and they were punished for offenses of which only they could be guilty, such as verbal abuse of a white man, which a court found to be "intolerable

⁴⁵⁶ *Id.*

⁴⁵⁷ See *supra* note 444 and accompanying text (discussing discharge of peace bonds).

⁴⁵⁸ Bond of Hunter (Northumberland Cnty. Ct., Apr. 20, 1681), in NORTHUMBERLAND 1680-1683, *supra* note 162, at 28.

⁴⁵⁹ King v. Mannen (Orange Cnty. Ct., May 29, 1752), in ORANGE 1752-1753, *supra* note 322, at 15.

⁴⁶⁰ Smith v. Brown (Va. Gen. Ct., Oct. 1729), in 1 RANDOLPH & BARRADALL, *supra* note 308, at R1-7; see King v. Pryor (Va. Gen. Ct., Oct. 1733), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B34, B39 (refusing to dismiss the assault case because the defendant owed the king a fine).

⁴⁶¹ Compare King v. Jack (Spotsylvania Cnty. Ct. Apr. 4, 1732), in SPOTSYLVANIA 1730-1732, *supra* note 383, at 82 (finding a slave guilty of conspiring to rebel and murder a man), with King v. Jack (Spotsylvania Cnty. Ct., May 1, 1732), in SPOTSYLVANIA 1730-1732, *supra* note 383, at 93 (imposing the death penalty on the slave); compare King v. Old Caesar (Spotsylvania Cnty. Ct., Nov. 4, 1724), in SPOTSYLVANIA 1724-1730 (PART I), *supra* note 184, at 33 (finding a slave guilty of committing buggery on a four-year-old girl), with King v. Old Caesar (Spotsylvania Cnty. Ct., Nov. 18, 1724), in SPOTSYLVANIA 1724-1730 (PART I), *supra* note 184, at 33-34 (sentencing the slave to fifteen minutes in the pillory, ears cut off, and twenty-one lashes).

and insufferable.”⁴⁶² On the whole, trials of slaves nonetheless appear to have been fair, even though slaves were tried without juries and no grand jury presentments were required.⁴⁶³ However, many were acquitted, even of serious charges,⁴⁶⁴ and even slaves who were found guilty of felonies typically avoided the death penalty.⁴⁶⁵

Acquittal, however, did not always mean that no penalty was imposed—courts nonetheless subjected many slaves who were not guilty to serious whippings, often of thirty-nine lashes.⁴⁶⁶ One court even gave a master permission to castrate a “notorious runaway and night walker” who could not “be reclaimed by the ordinary methods of punishment,”⁴⁶⁷ while another was permitted to cut off a runaway slave’s “two great toes.”⁴⁶⁸ Another discrimination against blacks lay in more severe penalties given to women who bore illegitimate mulatto

⁴⁶² *In re. Barbee* (Stafford Cnty. Ct., Dec. 28, 1691), in STAFFORD 1691–1692, *supra* note 184, at 69; *accord* *Mills v. Wilke* (Lancaster Cnty. Ct., May 10, 1682), in LANCASTER 1682–1687, *supra* note 247, at 2.

⁴⁶³ *See, e.g., Queen v. Dick* (Westmoreland Cnty. Ct., Aug. 26, 1706), in WESTMORELAND 1705–1707, *supra* note 225, at 52–54 (convicting five slaves without a jury and ordering they be hanged).

⁴⁶⁴ *See, e.g., King v. Prince* (Fauquier Cnty. Ct., Sept. 18, 1767), in FAUQUIER 1766–1767, *supra* note 247, at 88–89 (acquitting a slave charged with rape); *see also King v. Dick* (Louisa Cnty. Ct., Apr. 29, 1747), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LOUISA COUNTY, VIRGINIA ORDERS 1744–1747, at 94–95 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter LOUISA 1744–1747] (acquitting a slave of the murder of a white man).

⁴⁶⁵ *See, e.g., Queen v. Dick* (Middlesex Cnty. Ct., June 22, 1703), in MIDDLESEX 1702–1704, *supra* note 203, at 28 (sparing a slave guilty of theft by gubernatorial pardon). Of course, some slaves were executed. *See, e.g., Queen v. Rascow* (Middlesex Cnty. Ct., Aug. 26, 1707), in MIDDLESEX 1707–1708, *supra* note 169, at 31–32 (convicting a slave of larceny and sentencing him to death by hanging). For some crimes of which slaves were found guilty, such as hog-stealing, their masters also were liable to pay monetary penalties to victims. *See, e.g., Newton v. Corbin* (Westmoreland Cnty. Ct., Nov. 28, 1711), in WESTMORELAND 1709–1712, *supra* note 206, at 93 (sentencing the slave to thirty-nine lashes and requiring his owner pay 200 lb. of tobacco). Slaves could not be executed unless at least four judges concurred. 8 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 522–23 (Univ. Press of Va. 1969) (1821).

⁴⁶⁶ *E.g., King v. Prince* (Fauquier Cnty. Ct., Sept. 18, 1767), in FAUQUIER 1766–1767, *supra* note 247, at 88–89.

⁴⁶⁷ *In re. Kemp* (Middlesex Cnty. Ct., Oct. 5, 1736), in MIDDLESEX 1735–1737, *supra* note 169, at 82. Castration was subsequently prohibited by statute except in cases of attempted rape of a white woman. 8 HENING, *supra* note 465, at 358.

⁴⁶⁸ *King v. Sawney* (Westmoreland Cnty. Ct., Aug. 27, 1718), in WESTMORELAND 1718–1721, *supra* note 169, at 19–20. Sawney, it appears, was a “continual runaway.” Motion of Eskridge (Westmoreland Cnty. Ct., Nov. 25, 1719), in WESTMORELAND 1718–1721, *supra* note 169, at 67, 69. Practices such as these later received statutory confirmation. *See* 6 HENING, *supra* note 142, at 111 (permitting dismemberment of runaway slaves).

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children—five years of additional servitude⁴⁶⁹—instead of the usual two years for an illegitimate white child.⁴⁷⁰ However, the greatest failure of the criminal justice system in connection with slavery lay in its failure to protect slaves' lives; whites charged with murdering slaves were invariably found not guilty by juries.⁴⁷¹

The county courts performed a number of other functions, which individually were of less importance than most of those noted above but which collectively conferred significant authority. Thus the courts legislated general rules, such as one prohibiting the capture of wild horses without prior court approval⁴⁷² and another prohibiting fishing at night.⁴⁷³ They also performed housekeeping tasks, such as scheduling a celebration for the birth of James II's son;⁴⁷⁴ selecting a site for building a courthouse;⁴⁷⁵ setting the boundaries of the jail yard;⁴⁷⁶ purchasing record books and law books,⁴⁷⁷ including copies of all the colony laws

⁴⁶⁹ *E.g.*, *Edmonds v. McCollins* (Lancaster Cnty. Ct., Sept. 12, 1705), in *LANCASTER 1703-1706*, *supra* note 238, at 68. *King v. Jones* presented an unusual legal issue when Jones declared that an East Indian slave fathered her illegitimate child. (Spotsylvania Cnty. Ct., May 4, 1736), in *SPOTSYLVANIA 1735-1738*, *supra* note 142, at 23. The issue was whether Jones was guilty of bearing a mulatto child; the court decided she was not since the statute "only relat[ed] to Negroes & mulattoes & [was] silent as to Indians." *Id.* Another unusual issue arose when a mulatto woman—following intercourse with a white man—produced an illegitimate child; she too was only required to undergo the penalty appropriate for bearing an illegitimate white child. *See Westcomb v. Bryan* (Westmoreland Cnty. Ct., Jan. 26, 1708/1709), in *WESTMORELAND 1707-1709*, *supra* note 130, at 66-67 (requiring the woman serve her master for an additional year).

⁴⁷⁰ *E.g.*, *Ward v. Owen* (Essex Cnty. Ct., Nov. 11, 1696), in *ESSEX 1695-1699*, *supra* note 267, at 25.

⁴⁷¹ *E.g.*, *Inquisition into Death of Jack* (Middlesex Cnty. Ct., Sept. 4, 1698), in *MIDDLESEX 1697-1700*, *supra* note 314, at 46-47.

⁴⁷² *See Rule re Wild Horses* (Stafford Cnty. Ct., July 9, 1690), in *STAFFORD 1664-1668, 1689-1690*, *supra* note 127, at 106 (fining a man 500 lb. of tobacco for capturing a wild horse); *cf. Complaint re Wolves* (Lancaster Cnty. Ct., Oct. 10, 1688), in *LANCASTER 1687-1691*, *supra* note 186, at 45 (seeking the Governor's permission to grant bounties for wolves' heads).

⁴⁷³ *By-Law Against Fishing* (Middlesex Cnty. Ct., Mar. 4, 1677/1678), in *MIDDLESEX 1673-1678*, *supra* note 104, at 96-97.

⁴⁷⁴ *Order re. Birth of Prince of Wales* (Rappahannock Cnty. Ct., Jan. 2, 1688/1689), in *RAPPAHANNOCK 1687-1689*, *supra* note 145, at 67.

⁴⁷⁵ *Compare Order for Courthouse* (Essex Cnty. Ct., Oct. 18, 1726), in *ESSEX 1725-1729 (PART I)*, *supra* note 250, at 29 (directing a courthouse to be built on Thomas Plumer's land), *with Order for Courthouse* (Essex Cnty. Ct., May 16, 1727), in *ESSEX 1725-1729 (PART I)*, *supra* note 250, at 48 (directing the courthouse to be built "near [the] top of [the] [h]ill").

⁴⁷⁶ *Order re Prison Rules* (Westmoreland Cnty. Ct., June 27, 1711), in *WESTMORELAND 1709-1712*, *supra* note 206, at 57-58.

⁴⁷⁷ *E.g.*, *Order re Law Books* (Northumberland Cnty. Ct., Dec. 21, 1685), in *NORTHUMBERLAND 1683-1686*, *supra* note 232, at 91-92; *Order for Record Book* (Richmond Cnty. Ct., Dec. 2, 1714), in *RICHMOND 1714-1715*, *supra* note 414, at 8. On one occasion when a loose sheet of judgments was lost, the individuals against whom the court had issued

that were in force;⁴⁷⁸ providing food and lodging for the justices during court term;⁴⁷⁹ adopting rules concerning scheduling of jury trials⁴⁸⁰ and postponement of cases on account of attorney absences;⁴⁸¹ prohibiting foreigners from pleading in court;⁴⁸² threatening anyone appearing drunk in court with time in the stocks;⁴⁸³ and prohibiting smoking in court.⁴⁸⁴ Finally, they received petitions, such as one “unanimously . . . [and] earnestly desired” by the people requesting the governor to call an Assembly into session.⁴⁸⁵

2. The Structure of Political Power

The county courts, in theory, were creatures of the central colonial government. Counties were created by statute, and judges were formally appointees of the Governor. However, in practice, the county

judgments had to return to court so that new judgments could be entered. Summons of Dangerfield (Essex Cnty. Ct., Dec. 10, 1701), in *ESSEX 1699–1702*, *supra* note 247, at 101–02.

⁴⁷⁸ See Appointment of Mercer (King George Cnty. Ct., Mar. 2, 1721/1722), in *KING GEORGE 1721–1723*, *supra* note 127, at 36–37 (appointing John Mercer to write out all of the current laws for the court); *cf.* Adjournment of Court (Middlesex Cnty. Ct., July 1, 1706), in *MIDDLESEX 1705–1707*, *supra* note 314, at 65 (postponing session of court until a copy of new enacted laws arrived from Williamsburg).

⁴⁷⁹ *E.g.*, Order to Ordinary Keeper (Spotsylvania Cnty. Ct., Dec. 9, 1726), in *SPOTSYLVANIA 1724–1730 (PART II)*, *supra* note 165, at 24.

⁴⁸⁰ See, *e.g.*, Rule About Actions (Westmoreland Cnty. Ct., June 26, 1712), in *WESTMORELAND 1712–1714*, *supra* note 128, at 9 (requiring that jury trials be “entered and called the first of every succeeding [docket]”).

⁴⁸¹ See, *e.g.*, Rule re Attorneys (King George Cnty. Ct., July 5, 1723), in *KING GEORGE 1721–1723*, *supra* note 127, at 95 (ordering that no future cases be continued due to attorney absences without a sufficient excuse); see also *In re. Darrell* (Stafford Cnty. Ct., May 10, 1692), in *STAFFORD 1691–1692*, *supra* note 184, at 117 (reporting the complainant’s request for immediate trial of the case so that servants summoned as witnesses could return to a frontier plantation to work and protect it against Native Americans).

⁴⁸² *E.g.*, Order re Foreigners (Stafford Cnty. Ct., Aug. 29, 1666), in *STAFFORD 1664–1668, 1689–1690*, *supra* note 127, at 30.

⁴⁸³ See, *e.g.*, Rule About Drunks in Court (Lancaster Cnty. Ct., Nov. 1683), in *LANCASTER 1682–1687*, *supra* note 247, at 26 (ordering anyone coming before the court drunk be placed in the stocks); *Queen v. Callahan* (Richmond Cnty. Ct., Apr. 2, 1707), in *RICHMOND 1707–1708*, *supra* note 160, at 3 (ordering an attendee who is drunk in court to be placed in the stocks); *cf.* *King v. Taylor* (Lancaster Cnty. Ct., Nov. 15, 1677), in *LANCASTER 1674–1678*, *supra* note 156, at 75–76 (fining a justice who was drunk in court 500 lb. of tobacco); *In re. Belfield* (Richmond Cnty. Ct., Oct. 2, 1723), in *RICHMOND 1722–1724*, *supra* note 159, at 40 (granting a justice’s request to deny the rumor he is drunk on the bench).

⁴⁸⁴ *E.g.*, Rule re “Rude and [U]ncivilized Custom of Sm[ok]ing in Court” (Rappahannock Cnty. Ct., June 3, 1691), in *RAPPAHANNOCK 1689–1692*, *supra* note 56, at 61.

⁴⁸⁵ *In re. the People* (Middlesex Cnty. Ct., Dec. 5, 1681), in *MIDDLESEX 1680–1686*, *supra* note 184, at 21; see also *Petition to House of Burgesses* (Middlesex Cnty. Ct., Oct. 9, 1700), in *MIDDLESEX 1680–1686*, *supra* note 184, at 31–32 (protesting an increase in the minister’s salary and other matters).

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courts were largely self-perpetuating bodies, in that their sitting judges recommended whom the colony's Governor should appoint to the bench,⁴⁸⁶ and Governors generally followed their recommendations. On June 5, 1723, for example, the judges of Richmond County recommended to the Governor a list of men to appoint to the court, and on July 3, 1723, the Governor appointed each and every man on the list and no others.⁴⁸⁷ Although Governors appointed many other local officials,⁴⁸⁸ here too they typically acted on the advice of the county magistrates.⁴⁸⁹

Local oligarchies were strong, in part, because they typically acted with unanimity; only in rare cases did minorities "publicly and openly" express their "dissent,"⁴⁹⁰ whereas in the General Court publicly recorded dissents were frequent.⁴⁹¹ Governors accordingly had to placate local oligarchies, and they did not always succeed. In 1691, for instance, the presiding justice of the Stafford County Court refused to continue sitting after Martin Scarlet, whom the presiding justice accused of defaming him, had been sworn to serve on the bench.⁴⁹² Also in 1691,

⁴⁸⁶ *E.g.*, Recommendation of Corbin (Middlesex Cnty. Ct., Apr. 4, 1698), in MIDDLESEX 1697-1700, *supra* note 314, at 32.

⁴⁸⁷ Compare Recommendation of Justices (Richmond Cnty. Ct., June 5, 1723), in RICHMOND 1722-1724, *supra* note 159, at 18 (presenting a list of recommended judges to the governor), with Swearing of Justices (Richmond Cnty. Ct., July 3, 1723), in RICHMOND 1722-1724, *supra* note 159, at 19 (presenting a list of sworn justices identical to the prior list of recommended justices). A similar judicial appointment occurred in Westmoreland County. Compare Recommendation of Justices (Westmoreland Cnty. Ct., Feb. 22, 1709/1710), in WESTMORELAND 1709-1712, *supra* note 206, at 11-12 (presenting a list of recommended judges to the President), with Swearing of Justices (Westmoreland Cnty. Ct., May 31, 1710), in WESTMORELAND 1709-1712, *supra* note 206, at 16 (reporting the oath taken by those recommended), and Swearing of Justices (Westmoreland Cnty. Ct., June 1, 1710), in WESTMORELAND 1709-1712, *supra* note 206, at 18 (listing those appointed as justices).

⁴⁸⁸ *See, e.g.*, Appointment of Pope (Westmoreland Cnty. Ct., June 1, 1710), in WESTMORELAND 1709-1712, *supra* note 206, at 20-21 (reporting the appointment of a prosecutor).

⁴⁸⁹ *See, e.g.*, Recommendation of Barradall (King George Cnty. Ct., May 3, 1728), in KING GEORGE 1725-1728, *supra* note 126, at 79 (recommending Barradall to serve as the King's Attorney General); Recommendation of Baker (Richmond Cnty. Ct., Jan. 3, 1699/1700), in RICHMOND 1699-1701, *supra* note 285, at 3 (recommending Baker to serve as coroner). The power of local courts to recommend appointees rested on legislation. *See* Recommendation of Stoner (Goochland Cnty. Ct., Mar. 1728/1729), in 1 & 2 GOOCHLAND 1728-1731, *supra* note 183, at 83 (referring to an Act of Assembly that determined the method of appointing a sheriff).

⁴⁹⁰ *In re. Hathaway* (Stafford Cnty. Ct., Dec. 9, 1691), in STAFFORD 1691-1692, *supra* note 184, at 65. Compare *West v. Rabyshaw* (Northampton Cnty. Ct., May 20, 1713), in 15 Northampton 1710-1717, *supra* note 225, at 96 (delaying the decision because of a 2-2 vote), with *West v. Rabyshaw* (Northampton Cnty. Ct., June 16, 1713), in 15 NORTHAMPTON 1710-1717, *supra* note 225, at 97 (reaching a decision with a "fuller court" and with no dissent noted).

⁴⁹¹ *E.g.*, *Blackwell v. Wilkinson* (Va. Gen. Ct., Oct. 1768), in JEFFERSON, *supra* note 181, at 73, 85; *Rogers v. Spalden* (Va. Gen. Ct., Apr. 1739), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B80-81.

⁴⁹² Compare Swearing of Scarlet (Stafford Cnty. Ct., May 20, 1691), in STAFFORD 1691-1692, *supra* note 184, at 21 (reporting Martin Scarlet's sworn oath), with *In re. Fitzhugh* (Stafford Cnty.

in the same county, William Buckner refused to take the oaths required by Parliament to William III since he previously took oaths to James II and did not “in his conscience think himself fairly discharged from the said oaths in the life of King James,”⁴⁹³ while in the same year in Rappahannock County, a man appointed as sheriff likewise refused to take Parliament’s oaths.⁴⁹⁴ Loyalty to the monarchy established in the Glorious Revolution was a treasonous matter in the reign of William III, but Governors could do nothing about conduct bordering on treason beyond excusing locally important men from public service and weakening that service as a result.

Perhaps the greatest reason for the strength of county courts by mid-century was that the Governor, the Council, and the General Court became overworked. As Virginia expanded westward into the Piedmont and its population grew, the General Court had more work than it could process in its few brief sessions over the course of any year. In addition, distances between Williamsburg and outlying counties became too great for many litigants to bother bringing cases to the General Court. They turned instead to county courts and accepted what those courts decided.⁴⁹⁵

3. The Structure of Legal Knowledge.

The expanding common-law, equitable, criminal, and regulatory jurisdiction of Virginia’s county courts nonetheless fails to capture fully the power that those courts accumulated in the aftermath of Bacon’s Rebellion. Their power depended to some significant degree on the structure of legal knowledge in Virginia, which was quite different from what it was in most other colonies.

In New York and Pennsylvania, for example, most men who were learned in the law lived and were educated in the colonial capital and practiced both before local courts and their colony’s Supreme Court.⁴⁹⁶

Ct., June 10, 1691), in STAFFORD 1691–1692, *supra* note 184, at 21–23 (reporting the justice’s refusal to take the bench until his name had been cleared).

⁴⁹³ Refusal of Buckner (Stafford Cnty Ct., June 10, 1691), in STAFFORD 1691–1692, *supra* note 184, at 28; *cf.* Refusal of Gregge (Stafford Cnty. Ct., June 10, 1691), in STAFFORD 1691–1692, *supra* note 184, at 28 (reporting Gregge’s refusal to take an oath required by Parliament to the governor because he had given the governor “some reasons why he refused the same and further alleged that his honour [sic] did not then seem to be very well satisfied with his reasons”).

⁴⁹⁴ Comm’n of Travers (Rappahannock Cnty. Ct., June 3, 1691), in RAPPAHANNOCK 1689–1692, *supra* note 56, at 60.

⁴⁹⁵ See BILLINGS ET AL., *supra* note 112, at 213.

⁴⁹⁶ See 2 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE MIDDLE COLONIES AND THE CAROLINAS, 1660–1730*, at 57–58, 106–07 (2013).

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These lawyers travelled out from the colonial metropolis and transmitted knowledge back and forth between the capital and outlying counties.⁴⁹⁷ Virginia, in contrast, sent more of its sons to study law in the Inns of Court than did any other North American colony—over sixty in all.⁴⁹⁸ However, most of these men did not return to Virginia to practice law; instead, they came home to manage their estates and fortunes.⁴⁹⁹ As wealthy men of their counties, they then served on county courts.⁵⁰⁰

Edmund Scarborough, a county judge in Northampton County who had been trained at the Inns of Court, is an early example. What is interesting is how Scarborough wrote several opinions in the early 1660s reflecting rule-of-law and common-law values that he probably had learned in England. In one case, for example, he directed litigants to produce evidence that “may have such light as to guide us in the way of justice, which to do is the care & duty of the court,”⁵⁰¹ while in another he sought to reassure multiple creditors having claims against an estate that the court would “assure all effectual Justice” and would not be “more indulgent to one than the other in respect of priority.”⁵⁰² Scarborough’s views came together most clearly in a third case, *Foxcroft v. Gething*.⁵⁰³ As always, Scarborough was “zealous to do justice” — this time in connection with disposition of property under a will, for which he sought “the best construction of the donor’s intent.”⁵⁰⁴ The task, he recognized, was not easy. In words that would echo repeatedly in the centuries to come, he declared that law required “great study & much knowledge” and that he “could never read” or “determine [it] without contradiction: Sometimes the questions of right & wrong call in for their support statute law[,] precedents[,] equity[,] and when those lie not in a direct line to serve the occasion analogy must come in.”⁵⁰⁵

⁴⁹⁷ *Id.*

⁴⁹⁸ See E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT, xii-xxx (1924) (listing members of the Inns of Court and the states from which they came).

⁴⁹⁹ See, e.g., *id.* at 35, 41, 53, 96 (discussing the careers of William Byrd, Robert Carter, Gawen Corbin, and Benjamin Harrison).

⁵⁰⁰ See, e.g., *id.* at 20, 42 (discussing the careers of Robert Beverley and Wilson Cary).

⁵⁰¹ *Boys v. Webb* (Northampton Cnty. Ct., Mar. 5, 1662/1663), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 287-88. Judge Scarborough also wrote opinions in two other relevant cases. See *Allen v. Bucknor* (Northampton Cnty. Ct., Mar. 5, 1662/1663), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 287; *Alexander v. Estate of Bucknor* (Northampton Cnty. Ct., Mar. 2, 1662/1663), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 286-87.

⁵⁰² *Alexander v. Estate of Bucknor* (Northampton County Ct., Mar. 2, 1662/1663), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 286-87.

⁵⁰³ (Northampton Cnty. Ct., Jan. 28, 1662/1663), in 8 NORTHAMPTON 1657-1664, *supra* note 34, at 276-80.

⁵⁰⁴ *Id.* at 279.

⁵⁰⁵ *Id.* at 277.

“Reason . . . dictated this discourse,”⁵⁰⁶ although he also took the step “of writing what I speak that this may stand for affidavit to posterity . . . for whose sake I count myself chiefly obliged to vindicate truth & justice, which must prevail or the walls perish.”⁵⁰⁷

As a judicial author, Edmund Scarborough was no Oliver Wendell Holmes. Nonetheless, his opinion in *Foxcroft* conjoined all the central elements of common-law thinking—justice, precedent, and analogy—along with the importance of producing written opinions to guide judges and litigants in the future. *Foxcroft* thereby shows how post-restoration Virginia judges were committed to ascertaining, enunciating, and governing under law, in general, and Virginia’s version of the common law, in particular.

Career patterns such as Scarborough’s made the structure of legal authority in Virginia very different from what it was elsewhere. In New York and Pennsylvania, for example, trained lawyers aware of the work product of their colony’s highest court brought their legal knowledge to bear on local judges who were not trained in the law.⁵⁰⁸ In Virginia, on the other hand, county benches might contain men learned in the law who possessed independent knowledge of what the law required.⁵⁰⁹ Thus, in New York and Pennsylvania, it appears that lawyers taught law to local courts, whereas in Virginia it appears that county courts had sufficient confidence to determine the law by themselves.

The early Virginia bar, in short, was weak compared to local courts. In a colony like Pennsylvania, the bar served as the glue holding the legal system together, as most lawyers practiced both in local and colony-wide courts and thereby kept judges informed of what their colleagues in other courts were doing.⁵¹⁰ In Virginia, in contrast, lawyers who practiced in the General Court were not permitted to practice in county courts and vice-versa,⁵¹¹ whereas county court lawyers tended to practice only in their own county and immediately adjacent ones.⁵¹² County courts determined who could practice law before them, and

⁵⁰⁶ *Id.* at 279.

⁵⁰⁷ *Id.* at 276. For a later brief opinion by another judge construing an article of a will, see *In re. Tankard* (Northampton Cnty. Ct., Oct. 31, 1671), in 9 NORTHAMPTON 1664–1674, *supra* note 7, at 307–08.

⁵⁰⁸ See 2 NELSON, *supra* note 496, at 57–58 (describing New York lawyers’ legal sophistication).

⁵⁰⁹ See *id.* at 58 (describing the variances in Chesapeake area colonies’ laws versus those in New York).

⁵¹⁰ See *id.* at 107 (describing Pennsylvania’s bar system).

⁵¹¹ See 6 HENING, *supra* note 142, at 140, 143 (requiring General Court attorneys apply for county licenses and vice-versa, while restricting attorneys to one license at a time).

⁵¹² See FRANK L. DEWEY, THOMAS JEFFERSON: LAWYER 1 (1986) (noting that county lawyers would generally practice on a circuit of several adjacent counties).

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efforts to give the Governor control even of initial admissions to local bars appear to have failed, at least in the late seventeenth century.⁵¹³ Moreover, especially in early eighteenth-century Virginia, many attorneys were comparatively insignificant men—one man on whom there is data, for example, kept an ordinary in addition to engaging in some practice of law.⁵¹⁴

County courts also admitted and disciplined lawyers and thereby determined how they could practice.⁵¹⁵ In one case, for example, a court imprisoned a lawyer who refused to ask leave of the court whether the questions he proposed to ask witnesses might be asked of them, declaring “he would ask what questions he pleased.”⁵¹⁶ Local courts also determined issues such as the liability of lawyers for clerk’s fees in the cases they filed,⁵¹⁷ and whether, on the basis of the court’s view of the

⁵¹³ See *Barnes v. Conway* (Northumberland Cnty. Ct., Sept. 19, 1684), in NORTHUMBERLAND 1683–1686, *supra* note 232, at 42 (refusing to enforce Laws of 1680, Act VI, which required attorneys to obtain a license from the governor); *cf. In re. Taverner* (Lancaster Cnty. Ct., June 8, 1687), in LANCASTER 1687–1691, *supra* note 186, at 1 (permitting a lawyer “to plead to such business as [he] formerly entertained” despite his lack of license required by the governor’s proclamation). *But see Slaughter v. Waters* (Rappahannock Cnty. Ct., Aug. 4, 1686), in RAPPAHANNOCK 1685–1687, *supra* note 101, at 51 (entering an information against Waters for pleading without a license from the governor).

⁵¹⁴ See *Order re Laton* (Essex Cnty. Ct., Sept. 22, 1725), in ESSEX 1723–1725 (PART II), *supra* note 445, at 82 (granting Laton a license to keep an ordinary); *Merit v. Mayfield* (Essex Cnty. Ct., Feb. 17, 1724/1725), in ESSEX 1723–1725 (PART II), *supra* note 445, at 40 (identifying Laton as “Attorney” who confessed judgment on behalf of defendant); *see also Fisher v. Brown* (Essex Cnty. Ct., Sept. 16, 1724), in ESSEX 1723–1725 (PART II), *supra* note 445, at 13 (outlining a case in which Laton confessed judgment on behalf of defendant).

⁵¹⁵ See *License of Harris* (Northumberland Cnty. Ct., Aug. 20, 1684), in NORTHUMBERLAND 1683–1686, *supra* note 232, at 36 (granting an attorney’s license where licensure could not be obtained without court approval); *cf. Churchill v. Smith* (Middlesex Cnty. Ct., Mar. 1, 1702/03), in MIDDLESEX 1702–1704, *supra* note 203, at 17–18 (granting judgment for the defendant in a suit against the county justice for appearing in violation of a statute as a lawyer in a case pending before the court). *Compare Carnegie v. Davies* (Westmoreland Cnty. Ct., Apr. 30, 1708), in WESTMORELAND 1707–1709, *supra* note 130, at 32–33 (recording a motion that Eskridge, a member of the court, should not plead before the court as an attorney), *with Excuse of Eskridge* (Westmoreland Cnty. Ct., Mar. 28, 1716), in WESTMORELAND 1714–1716, *supra* note 138, at 64 (reporting refusal by the practitioner at bar to serve on the bench).

⁵¹⁶ *Imprisonment of Prosser* (Goochland County Ct., Aug. 18, 1730), in 1 & 2 GOOCHLAND 1728–1731, *supra* note 183, at 258–59. While in jail, he also refused to turn over the declaration that had been returned to him in the case he was litigating, apparently on the ground that prisoners had no duty to provide material to courts. *Id.* at 259. Ultimately, Prosser made peace with the court and was permitted to continue practicing. *See In re. Prosser* (Goochland Cnty. Ct., 1730), in 1 & 2 GOOCHLAND 1728–1731, *supra* note 183, at 283.

⁵¹⁷ *See, e.g., Colston v. Davis* (Richmond Cnty. Ct., Nov. 1, 1699), in RICHMOND 1697–1699, *supra* note 364, at 125–26 (holding lawyers liable for clerks’ fees).

strength of the evidence, attorney's fees should be awarded to plaintiffs in assault cases.⁵¹⁸

In the end, then, no one from outside the county judiciary controlled the county courts. Early eighteenth-century Virginia was not governed by a rule of law administered by professional lawyers.⁵¹⁹ Governors and appellate judges likewise were not in control. Power was exercised by local elites, who often possessed some training in the law and who ruled as they thought best. Their power, of course, was not absolute. They always had to take other institutional players into account and often had to seek their cooperation. However, the self-perpetuating oligarchy that sat on the county bench very much remained at the center of colonial Virginia's legal and political system.⁵²⁰

Rhys Isaac has described the place of county courts in the Virginia legal order of the first half of the eighteenth century. His description bears quotation at length:

At the county level the commissioning of squire justices, unsupervised by assizes of learned judges, encouraged the "determining of every thing by the Standard of Equity and good Conscience," as Robert Beverley described procedures. Beverley took pride in the way Virginia courts spurned "the impertinences of Form and Nicety." Colonel Landon Carter thought that issues should be decided rather by 'Good reason and Justice' than by "Precedents" and sneered at the "Mechanical knowledge" of attorneys. In this the colonel . . . was setting his face against the strict, literal application of what was to be found in law books and asserting a substantial role for the common sense of men of affairs⁵²¹

Another scholar of colonial Virginia law agrees. As Peter Hoffer has observed, the county courts "did not fear or compete with a professional judicial cadre" sitting on a central court.⁵²² "The highest court in the colony was not composed of professional judges, as in some of the other

⁵¹⁸ See, e.g., *Morris v. Taylor* (Richmond Cnty. Ct., July 2, 1733), in RICHMOND 1732-1734, *supra* note 326, at 52 (awarding the plaintiff attorney's fees).

⁵¹⁹ See A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810, at 53 (1981) (explaining how a possibly able bar in late seventeenth-century Virginia did not survive into the eighteenth century).

⁵²⁰ PAGAN, *supra* note 5, at 58.

⁵²¹ ISAAC, *supra* note 172, at 134.

⁵²² CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA, *supra* note 198, at xix.

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colonies and . . . in England.”⁵²³ Instead, the General Court, like the county courts, was composed of “experienced planter-lawyers rather than full-time judges. The county bench did not function in the shadow of more learned and respected central courts, but labored alongside them in a two-track system,”⁵²⁴ and judicial decisions “did not reflect hard and fast rules,” but judicial efforts “to make practical, not fine, distinctions.”⁵²⁵ Similarly, in Isaac’s view, “it was very much the gentleman’s sense of right, rather than the technical interpretation of texts, that prevailed” in localities.⁵²⁶

Both Isaac and Hoffer overstate somewhat the informality of county courts, which were more observant of legal norms than either concedes. Thus, there were instances of citation of General Court precedent both in the General Court itself and in a county court.⁵²⁷ However, Isaac and Hoffer are absolutely correct that county judges did not function in the shadow of the General Court. Local magistrates knew as much law as anyone in Virginia and accordingly felt free to depart from technical rules when equity and practical good sense so required.

4. The Independence of County Courts

As time went on, the county courts thus felt increasingly free to ignore the law laid down by the General Court. The 1731 case of *Waugh v. Bagg*⁵²⁸ and later county court cases on the same issue illustrate this point. *Waugh v. Bagg* addressed an important issue: whether a county court possessed power to set aside a jury verdict awarding excessive damages and to grant a new trial.⁵²⁹ The General Court ruled that it did not, reversed the county court judgment, and thereby reinstated the jury verdict.⁵³⁰ Nonetheless, county courts continued to grant new trials when juries returned verdicts awarding either excessive⁵³¹ or insufficient

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ *Id.* at xxix.

⁵²⁶ ISAAC, *supra* note 172, at 134.

⁵²⁷ *See, e.g.,* Reeves v. Waller (Oct. 1733), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B34 (using its own precedent to interpret a statute); Stocker v. Bisse (Charles City Cnty. Ct. Feb. 3, 1689), in CHARLES CITY 1687–1695, *supra* note 105, at 73–74 (using a five-year-old General Court case to determine the issue at present).

⁵²⁸ *Waugh v. Bagg* (Va. Gen. Ct., Oct. 1731), in 1 RANDOLPH & BARRADALL, *supra* note 308, at R61, R77–78.

⁵²⁹ *Id.*

⁵³⁰ *Id.* at R78.

⁵³¹ *E.g.,* Ashmore v. Scott (Prince William Cnty. Ct., July 7, 1762), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK PRINCE WILLIAM COUNTY, VIRGINIA 1761–1762, at 106–07 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter PRINCE WILLIAM 1761–1762].

damages.⁵³² Perhaps *Waugh v. Bagg* was distinguishable on its facts from the subsequent lower court cases; perhaps the lower courts did not even know that *Waugh v. Bagg* had been decided. Unfortunately, the destruction of most General Court records and the scantiness and imprecision of the records that have been preserved make it impossible to be certain. However, it seems that county court judges regarded General Court decisions merely as suggestions for how to think about issues rather than as fixed rules they were bound to follow.

*Reeves v. Waller*⁵³³ and later lower court decisions provide another example. Legislation enacted in 1715 had provided that suits for the recovery of debts under £5 be commenced by petition and tried by the court rather than commenced by writ and tried by jury. Thus, when Reeves brought suit by writ and won a forty shilling verdict, a county court set the verdict aside and ordered him to pay costs.⁵³⁴ Reeves then brought a writ of error in the General Court, which, although inclined at first to deny the writ, ultimately granted it.⁵³⁵ Nonetheless, subsequent county courts, apparently seeking to clear their dockets by forcing plaintiffs to bring small debt claims under the simpler petition procedure, ignored the *Reeves* result.⁵³⁶

At times, county courts even ignored mandates of central authorities in specific cases. In theory, county courts were under the control of the General Court, consisting of the Governor and Council, in the sense that county court decisions were subject to appeal. Appeals were, in fact, frequently taken from county courts,⁵³⁷ and the county courts routinely

⁵³² See, e.g., *Brown v. Hackett* (Caroline Cnty. Ct., Nov. 12, 1773), in *CAROLINE 1773-1774*, *supra* note 331, at 55-56 (granting a new trial when damages were too small); *Lenox & Scott v. Davis* (Culpeper Cnty. Ct. July 22, 1763), in *VIRGINIA COUNTY COURT RECORDS MINUTE BOOK CULPEPER COUNTY, VIRGINIA 1763-1764*, at 71 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter *CULPEPER 1763-1764*] (granting a new trial after the jury returned the same verdict twice, which the court found contrary to the evidence); cf. *Pulliam v. Turner* (Spotsylvania Cnty. Ct., July 4, 1739), in *SPOTSYLVANIA 1738-1740*, *supra* note 122, at 62 (finding "damage should be entered double" and therefore doubling the jury's verdict).

⁵³³ (Va. Gen. Ct., Oct. 1733), in 2 *RANDOLPH & BARRADALL*, *supra* note 144, at B34.

⁵³⁴ *Reeves v. Waller* (Va. Gen. Ct., Oct. 1733), in 2 *RANDOLPH V. BARRADALL*, *supra* note 144, at B34.

⁵³⁵ *Id.*

⁵³⁶ See *infra* notes 537-52 and accompanying text (demonstrating that county courts, although an inferior court, did not always obey mandates and rules of the General Court).

⁵³⁷ E.g., *North v. White* (Rappahannock Cnty. Ct., Apr. 2, 1684), in *RAPPAHANNOCK 1683-1685*, *supra* note 159, at 10-11; cf. *Hughlett v. Howson* (Northumberland Cnty. Ct., Sept. 19, 1700), in *NORTHUMBERLAND 1700-1702*, *supra* note 130, at 27, 29 (referring a case in which the county court justices divided equally to the General Court). In some cases, courts denied appeals prior to final judgment. See, e.g., *In re. Hambleton* (Stafford Cnty. Ct., Dec. 10, 1690), in *STAFFORD 1664-1668, 1689-1690*, *supra* note 127, at 137-38 (finding an interlocutory appeal to the General Court did not lie); see also *Nichol v. Harrison* (Spotsylvania Cnty. Ct., Nov. 2, 1731), in *SPOTSYLVANIA 1730-1732*, *supra* note 383, at 74-75 (denying an appeal on the ground that the

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obeyed the mandates rendered on appeal.⁵³⁸ As a general rule, “an inferior court [could] not hold plea or take cognizance of” a matter which “the General Court ha[d] adjudged,”⁵³⁹ and, even if not totally bereft of jurisdiction, a county court possessed only what limited jurisdiction the General Court delegated to it.⁵⁴⁰

But the general rule was not always followed, and the General Court did not successfully enforce every judgment. When one defendant, for example, moved to arrest judgment on a plaintiff’s verdict on the ground that the General Court had assumed jurisdiction over the case, which “therefore [ought] not to be judged of by an Inferior Court,” a county court denied the motion.⁵⁴¹ In another case, a county court declined to appoint an administrator for an estate as the Governor had directed it to do.⁵⁴² Similarly, the judges of another county refused to obey an order from the Governor to cease building a new courthouse on the grounds that they had already purchased materials and that their time in the old courthouse was about to expire.⁵⁴³ On yet another occasion, a county

losing litigant had no “legal proof”); *Bronaugh v. Field* (Spotsylvania Cnty. Ct., Dec. 1, 1730), in *SPOITSYLVANIA 1730-1732*, *supra* note 383, at 6 (denying an appeal as untimely). A litigant who failed to prosecute an appeal was liable for any damages suffered by the appellee. *E.g.*, *Brent v. Gibson* (Stafford Cnty. Ct., May 19, 1693), in *STAFFORD 1692-1693*, *supra* note 158, at 98.

⁵³⁸ *See, e.g.*, *Stevenson v. Ball* (Lancaster Cnty. Ct., Jan. 11, 1729/1730), in *LANCASTER 1729-1732*, *supra* note 126, at 8 (enforcing reversal by the General Court); *Spotswood v. Harrison* (Spotsylvania Cnty. Ct., Nov. 2, 1731), in *SPOITSYLVANIA 1730-1732*, *supra* note 383, at 74-75 (receiving an order of the General Court reversing the verdict of the county court and granting a new trial); *In re. Hathaway* (Stafford Cnty. Ct., Dec. 16, 1691), in *STAFFORD 1691-1692*, *supra* note 184, at 62 (obeying a mandate of the General Court to adjudicate the case); *Gibson v. Younge* (Stafford Cnty. Ct., Nov. 12, 1691), in *STAFFORD 1691-1692*, *supra* note 184, at 57 (reporting a finding by the General Court that the defendant had “very litigiously made his appeal” with “little reason” and direction to the county court to give “a definitive judgment of all matters depending without further benefit of appeal”); *cf. Dwight v. Wormeley* (Middlesex Cnty. Ct., Oct. 7, 1689), in *MIDDLESEX 1686-1690*, *supra* note 312, at 82 (obeying an order of the Governor that no counselor may be sued except by summons under hand of the Governor); *Gelding v. Dixon* (Northampton Cnty. Ct., July 29, 1675), *microformed on* 00327495162125 (Genealogical Soc’y of Utah) (submitting a statement of facts, on orders of the House of Burgesses, for legal decision by the legislature).

⁵³⁹ *Morris v. Carter* (Lancaster Cnty. Ct., Mar. 11, 1695/96), in *LANCASTER 1695-1699*, *supra* note 144, at 5-6.

⁵⁴⁰ *See, e.g.*, *Smoot’s Petition* (Richmond Cnty. Ct., May 7, 1702), in *RICHMOND 1702-1704*, *supra* note 261, at 5 (obeying an order to find facts on the claim that a sheriff had assaulted the petitioner’s wife).

⁵⁴¹ *Grymes v. Beverley* (Middlesex Cnty. Ct., Jan. 6, 1706/1707), in *MIDDLESEX 1705-1707*, *supra* note 314, at 83.

⁵⁴² Letter of Gooch (Spotsylvania Cnty. Ct., Oct. 1, 1728), in *SPOITSYLVANIA 1724-1730 (PART III)*, *supra* note 127, at 45.

⁵⁴³ Opinion re Courthouse (Middlesex Cnty. Ct., Nov. 6, 1704), in *MIDDLESEX 1702-1704*, *supra* note 203, at 83-84. Apparently, there previously had been doubt whether the court was complying with earlier rulings when it proceeded with the construction. Order re Courthouse (Middlesex Cnty. Ct., Sept. 4, 1704), in *MIDDLESEX 1702-1704*, *supra* note 203, at 75-76.

court declined to determine, as a letter from the Governor had directed, whether a Native American was properly held as a servant and sent the case back to the General Court,⁵⁴⁴ while, in a fifth case, a lower court reissued a judgment in favor of the plaintiff, even though the defendant had appealed to the General Court and the case apparently was pending there on appeal.⁵⁴⁵

Some county courts relied on technicalities to avoid enforcing General Court orders. Thus, one court declined to obey an order reversing a county court chancery decree on the ground that the appellant had failed to prosecute the order of the appellate court in a timely fashion.⁵⁴⁶ In another case in which the General Court had directed a defendant to submit an answer and the defendant refused, claiming the order of the General Court was “out of date,” the county court agreed that the defendant need not answer.⁵⁴⁷

The spirit of independence displayed by county courts emerged with special clarity in *Colsworthy v. Smith*,⁵⁴⁸ in which the General Court had enjoined Colsworthy and his agents and attorneys from proceeding on any suit at common law against Smith in the Essex County Court. The county court’s response was that the order to Colsworthy was “no prohibition to them to hear the said cause” if Colsworthy brought it forward to trial, which he did.⁵⁴⁹ Ultimately, however, the parties agreed to submit the case to referees.⁵⁵⁰ Later, when issues emerged in regard to the referees and the defendant sought to stop proceedings by relying on his injunction, the county court continued to persist in its view that it need “not take notice of the [i]njunction.”⁵⁵¹

In short, when county courts presented a united front to outsiders, as they usually did, they possessed considerable freedom to render whatever judgments they wished. They did not need to follow legal

⁵⁴⁴ Letter of Governor (Rappahannock Cnty. Ct., Mar. 5, 1684/1685), in RAPPAHANNOCK 1683–1685, *supra* note 159, at 72.

⁵⁴⁵ Maddocks v. Gibson (Stafford Cnty. Ct., Apr. 6, 1693), in STAFFORD 1692–1693, *supra* note 158, at 86.

⁵⁴⁶ Belfield v. Port (Richmond Cnty. Ct., July 6, 1709), in RICHMOND 1708–1709, *supra* note 257, at 72–73. The earlier litigation was *Port v. Belfield*. (Richmond Cnty. Ct., Mar. 3, 1708/1709), in RICHMOND 1708–1709, *supra* note 257, at 38–39; (Richmond Cnty. Ct., Mar. 2, 1708/1709), in RICHMOND 1708–1709, *supra* note 257, at 37–38.

⁵⁴⁷ Gwyn v. Thomas (Essex Cnty. Ct., Apr. 10, 1696), in ESSEX 1695–1699, *supra* note 267, at 7.

⁵⁴⁸ (Essex Cnty. Ct., Aug. 18, 1725), in ESSEX 1723–1725 (PART II), *supra* note 445, at 71; (Essex Cnty. Ct., May 19, 1725), in ESSEX 1723–1725 (PART II), *supra* note 445, at 59.

⁵⁴⁹ Colsworthy v. Smith (Essex Cnty. Ct., May 19, 1725), in ESSEX 1723–1725 (PART II), *supra* note 445, at 59.

⁵⁵⁰ *Id.*

⁵⁵¹ Colsworthy v. Smith (Essex Cnty. Ct., Aug. 18, 1725), in ESSEX 1723–1725 (PART II), *supra* note 445, at 71.

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doctrines elaborated and enforced by appellate courts. Despite Virginia's outward reception of common-law forms, law in the county courts ultimately rested on the common sense of local judges as well as on formal rules imposed from above. Everything effectively reinforced the power of local gentry. As Rhys Isaac has concluded, "[a]ll the different forms of gentry domination were subtly concentrated and institutionalized in the system of local government," where "county courts and parish vestries" worked together to ensure "the rightful rule of those whom . . . property, family, and learning set above the common folk."⁵⁵²

IV. THE SUBSTANCE OF THE LAW

The concentration of power in the local gentry determined, in turn, the substance of mid-eighteenth-century Virginia law. Central political authorities did not, because they could not, determine the law. Whatever power they possessed, as we shall see, resulted from their employment of carrots rather than their use of sticks—from bargains they made rather than obedience they coerced. Local gentlemen, as well, were not completely free to control the law; foundational market forces limited what they could do.

The foundation for everything in colonial Virginia was tobacco. As I have urged elsewhere, people migrated to Virginia in the early seventeenth century to get rich, and cultivating tobacco proved to be the way for some of them to do so.⁵⁵³ Growing tobacco, in turn, required three factors—capital, land, and labor—and law became the means by which those who got rich kept the three factors under control.⁵⁵⁴

First, this section discusses the basic monetary and debt system of colonial Virginia.⁵⁵⁵ Second, it discusses real property law in colonial Virginia.⁵⁵⁶ Third, it details Virginia's slavery laws.⁵⁵⁷ Finally, the section discusses how slavery fit into the colony's general social order.⁵⁵⁸

⁵⁵² ISAAC, *supra* note 172, at 133.

⁵⁵³ See 1 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607-1660*, at 7 (2008) (explaining that historians agree that "Virginia was founded primarily for economic profit").

⁵⁵⁴ See *id.* at 23-24 (discussing the history of tobacco cultivation in Virginia).

⁵⁵⁵ See *infra* Part IV.A (discussing Virginia's capital and debt laws).

⁵⁵⁶ See *infra* Part IV.B (discussing Virginian laws concerning land).

⁵⁵⁷ See *infra* Part IV.C (discussing Virginian law regarding slavery).

⁵⁵⁸ See *infra* Part IV.D (examining the role of slavery law within Virginia's social order).

A. *Capital and Debt*

It had become clear by the 1660s that Virginia's prosperity and place of preeminence among Britain's North American colonies depended upon the production and marketing of tobacco, which produced substantial tax revenue for the crown and huge profits for British merchants.⁵⁵⁹ In good years, when the amount of tobacco produced equaled the market's demand at a price at which planters could earn a profit and were also able to obtain capital to expand their production and buy luxury goods with which to celebrate their success.⁵⁶⁰ As a result, by the close of the seventeenth century Virginia was tied tightly into a complex, North Atlantic commercial economy.

All sorts of commercial disputes arose in this economy. Suits by mariners for wages were frequent,⁵⁶¹ as were suits on construction contracts⁵⁶² and suretyship agreements.⁵⁶³ Other common cases raised the issue of who bore the risk of loss. In one case, for example, the king's searchers seized a servant, who was being transported to Virginia at a Virginian's request, in England as his vessel was about to leave.⁵⁶⁴ The court ordered the ship captain to return to the Virginian the fare he had paid for the servant's transportation.⁵⁶⁵ In another case, in which a doctor leased a plantation with a dwelling house that burned down during the course of the lease, the issue was whether a covenant in the lease requiring the doctor to return the house in "good & tenantable" condition required him to rebuild.⁵⁶⁶ Other cases presented miscellaneous issues, such as one in which a court ruled that a buyer need not pay for tobacco delivered to him by contract until the seller delivered the entire contract amount,⁵⁶⁷ and another in which a

⁵⁵⁹ Gary M. Pecquet, *British Mercantilism and Crop Controls in the Tobacco Colonies: A Study of Rent-Seeking Costs*, 22 CATO J. 467, 469-70 (2003).

⁵⁶⁰ See *id.* at 470-72 (explaining the nature of the colonial tobacco market).

⁵⁶¹ E.g., *Parker v. Foxall* (Rappahannock Cnty. Ct., Mar. 4, 1685/1686), in RAPPAHANNOCK 1685-1687, *supra* note 101, at 33.

⁵⁶² E.g., *Rice v. Pavey* (Rappahannock Cnty. Ct., Nov. 7, 1684), in RAPPAHANNOCK 1683-1685, *supra* note 159, at 53.

⁵⁶³ See, e.g., *Batty v. Bradley* (Charles City Cnty. Ct., Dec. 3, 1694), in CHARLES CITY 1687-1695, *supra* note 105, at 193, 195 (ordering the defendant to indemnify the plaintiff for a payment on which defendant was surety).

⁵⁶⁴ *Chilton v. Wilson* (Lancaster Cnty. Ct., Feb. 12, 1678/1679), in LANCASTER 1678-1681, *supra* note 144, at 19.

⁵⁶⁵ *Id.*

⁵⁶⁶ *Barber v. Clarke* (Rappahannock Cnty. Ct., Aug. 3, 1687), in RAPPAHANNOCK 1685-1687, *supra* note 101, at 90. The court held that the covenant did not require him to rebuild. *Id.*

⁵⁶⁷ Compare *Hawkins v. Smith* (Essex Cnty. Ct., Feb. 19, 1718/1719), in ESSEX 1716-1723 (PART II), *supra* note 418, at 51 (reporting the jury's finding that the plaintiff refused to deliver the tobacco contracted for until the defendant had paid for the entire amount), with *Hawkins v.*

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consignee of goods who failed to receive orders from the owners sought permission to dispose of them.⁵⁶⁸

However, in addition to the good years that produced significant litigation, there also were bad years, and those years ultimately led to even more lawsuits. In some bad years, conditions such as drought destroyed the crops of some planters, who had little choice but to borrow money and fall into debt.⁵⁶⁹ Other years saw overproduction of tobacco and consequent low prices at which almost no planter could break even.⁵⁷⁰ Almost everyone then had to borrow money, and nearly everyone fell into debt.⁵⁷¹ Because everyone understood that no one could borrow unless creditors could be reasonably confident they would be repaid, facilitating the collection of debts soon became a staple of the Virginia legal system.⁵⁷² It remained such throughout the colonial period.

Although precise statistical analysis remains impossible due to the incompleteness and sloppiness of surviving court records, perusal of the extant records quickly shows that collection of debts remained numerically the most important category of judicial jurisdiction in the aftermath of the Restoration.⁵⁷³ In the early years, debt collection could be a remarkably informal process, as in one case in which the court authorized the creditor to retain the debtor's steer, already in the creditor's possession, in full satisfaction of the debt.⁵⁷⁴ In a second case, the court held the amount of corn that a debtor had consumed could not be "certainly proved or known" and gave judgment on the basis of a calculated guess.⁵⁷⁵ In a third situation, a debtor entered a plea that the giving of a mortgage constituted full satisfaction in payment of a bond

Smith (Essex Cnty. Ct., June 16, 1719), in *ESSEX 1716-1723 (PART II)*, *supra* note 418, at 72 (granting judgment for the defendant).

⁵⁶⁸ *In re. Corbin* (Middlesex Cnty. Ct., Sept. 3, 1694), in *MIDDLESEX 1694-1697*, *supra* note 193, at 3.

⁵⁶⁹ *See Pecquet*, *supra* note 559, at 470.

⁵⁷⁰ *See id.* at 470-71 (reporting a situation in 1681 where planters overstocked the tobacco market).

⁵⁷¹ BRUCE A. RAGSDALE, *A PLANTER'S REPUBLIC: THE SEARCH FOR ECONOMIC INDEPENDENCE IN REVOLUTIONARY VIRGINIA* 23 (1996) (noting Virginia's large amount of debt compared to other colonies).

⁵⁷² *See* 1 NELSON, *supra* note 553, at 44-47 (providing a summary of the development of debt collection in Virginia).

⁵⁷³ *Id.* at 45.

⁵⁷⁴ *Donding v. Porter* (Stafford Cnty. Ct., Sept. 7, 1664), in *STAFFORD 1664-1668, 1689-1690*, *supra* note 127, at 3.

⁵⁷⁵ *Jackson v. Wright* (Rappahannock Cnty. Ct., Sept. 4, 1685), in *RAPPAHANNOCK 1685-1687*, *supra* note 101, at 13-14.

for a large sum of money, although the court rejected the plea.⁵⁷⁶ In a fourth case, a debtor petitioned successfully that all executions against his estate be suspended on the ground that he had no assets to pay them.⁵⁷⁷

However, there never was a serious doubt that those who delivered goods were entitled to payment, even in the absence of an express promise to pay,⁵⁷⁸ and with increased caseloads, courts developed routinized and detailed procedures and processes, often favorable to creditors, which enabled them to collect. In one case, for example, “where [a] debtor remain[ed] in prison,” a court ruled that “his estate may be taken;”⁵⁷⁹ while in another case an “attachment . . . according to law [was] granted” when an arrest warrant was returned “non est inventus.”⁵⁸⁰ A third creditor received an attachment against the estate of a debtor who had left the county,⁵⁸¹ while other cases allowed recovery against individuals who helped debtors escape to or secret their property in another county beyond the jurisdiction of the court.⁵⁸² Cases

⁵⁷⁶ Compare *Beverley v. Prescott* (Middlesex Cnty. Ct., Apr. 7, 1684), in MIDDLESEX 1680–1686, *supra* note 184, at 69–70 (holding the mortgage did not constitute full satisfaction for the bond), with *Beverley v. Prescott* (Middlesex Cnty. Ct., Mar. 5, 1687/1688), in MIDDLESEX 1686–1690, *supra* note 312, at 45–46 (ordering the defendant to pay the bond amount).

⁵⁷⁷ *In re. Michael* (Northampton Cnty. Ct., Apr. 10, 1676), in 10 NORTHAMPTON 1674–1678, *supra* note 125, at 134.

⁵⁷⁸ Compare *Gibson v. Hughes* (Spotsylvania Cnty. Ct., June 6, 1749), in SPOTSYLVANIA 1724–1730 (PART III), *supra* note 127, at 5–6 (reporting the jury’s finding that the plaintiff’s account book did not contain any debts owed by the defendant), with *Gibson v. Hughes* (Spotsylvania Cnty. Ct., July 5, 1749), in SPOTSYLVANIA 1724–1730 (PART III), *supra* note 127, at 16 (holding that the defendant, who received goods from a merchant, was liable to the third party plaintiff who paid for them, even in the absence of a promise to reimburse the third party); compare *Smith v. Russell* (Spotsylvania Cnty. Ct., Nov. 5, 1729), in SPOTSYLVANIA 1724–1730 (PART IV), *supra* note 186, at 20 (reporting the jury’s finding that defendant failed to return a horse lent to him by the plaintiff), with *Smith v. Russell* (Spotsylvania Cnty. Ct., Dec. 3, 1729), in SPOTSYLVANIA 1724–1730 (PART IV), *supra* note 186, at 29 (holding that the defendant was obligated to return the horse even in the absence of an express promise to return it).

⁵⁷⁹ Declaration of Sept. 21, 1668 (Va. Gen. Ct.), in MINUTES OF THE COUNCIL, *supra* note 6, at 510–11.

⁵⁸⁰ *Suit Against Estate of Phillip Lymby* (Charles City County Ct., Feb. 1672/1673), 13 VA. COLONIAL ABSTRACTS, *supra* note 93, at 78.

⁵⁸¹ *Derrick v. Jones* (Stafford Cnty. Ct., Feb. 14 & 15, 1665/1666), in STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 20; cf. *Gibson v. Smith* (Lancaster Cnty. Ct., July 10, 1706), in LANCASTER 1703–1706, *supra* note 238, at 101–02 (holding that attachment lies against property of a nonresident debtor located within the county). *But see In re. Willsheir* (Charles City Cnty. Ct., Jan. 24, 1687), in CHARLES CITY 1687–1695, *supra* note 105, at 7–8 (releasing from attachment the property of a destitute widow whose husband under suit had absconded from the county).

⁵⁸² E.g., *Curtis v. Conner* (Richmond Cnty. Ct., Aug. 4, 1735), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1734–1735, at 84 (Ruth Sparacio & Sam Sparacio eds., 2000) [hereinafter RICHMOND 1734–1735]; *Peake v. Merriott* (Stafford Cnty. Ct., Dec. 12, 1689), in STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 59.

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dealing with different issues of attachment also established rules of priority among creditors seeking payment out of the same assets.⁵⁸³

Perhaps the most important pro-creditor rule, which remained in place from the past, was that, once a sheriff had served process on a debtor by arrest, the sheriff became liable for any judgment against the debtor, if—as occurred with some frequency—the debtor or his or her bail failed to appear in court.⁵⁸⁴ Similarly, if a sheriff attached personal property of a debtor, whoever possessed that property became liable for any judgment.⁵⁸⁵ Another important pro-creditor rule allowed debtors to appoint attorneys to represent them and come into court and confess judgment;⁵⁸⁶ this occurred in one seventeenth-century case for 400,000 lb.

⁵⁸³ See *Green v. Buckner* (Stafford Cnty. Ct., July 12, 1693), in *STAFFORD 1692-1693*, *supra* note 158, at 105 (dismissing the action where the debt had been paid several years earlier); *Cooper v. Redman's Adm'r* (Westmoreland Cnty. Ct., Aug. 29, 1717), in *WESTMORELAND 1716-1718*, *supra* note 212, at 65-66 (holding the plaintiff's action in debt took priority over a third party's claims). Compare *Fardo v. Eyles* (Richmond Cnty. Ct., Nov. 3, 1692), in *RICHMOND 1692-1694*, *supra* note 184, at 36 (granting judgment for the plaintiff against the defendant's estate where the defendant left the county), with *Harwood v. Eyles* (Richmond Cnty. Ct., Nov. 3, 1692), in *RICHMOND 1692-1694*, *supra* note 184, at 36 (holding that the plaintiff's debts took priority over all other debts owed by the defendant's estate).

⁵⁸⁴ E.g., *Bowzer v. Price* (Lancaster Cnty. Ct., Feb. 10, 1674/1675), in *LANCASTER 1674-1678*, *supra* note 156, at 21; *Johnson v. Farmer* (Spotsylvania Cnty. Ct., Feb. 6, 1733/1734), in *SPOTSYLVANIA 1734-1735*, *supra* note 209, at 1-2. If a deputy sheriff failed to properly insure a debtor's appearance, the deputy was not liable. Compare *Nance v. Hill* (Richmond Cnty. Ct., Aug. 6, 1729), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK RICHMOND COUNTY, VIRGINIA 1729-1731*, at 5-6 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter *RICHMOND 1729-1731*] (reporting the jury's finding that the plaintiff's debtor escaped while under the deputy supervisor's supervision), with *Nance v. Hill* (Richmond Cnty. Ct., Mar. 5, 1729/1730), in *RICHMOND 1729-1731*, *supra*, at 23-24 (dismissing the suit against the deputy sheriff). However, the sheriff was liable in such situations. E.g., *Johnson v. Davis* (Spotsylvania Cnty. Ct., Mar. 5, 1733/1734), in *SPOTSYLVANIA 1734-1735*, *supra* note 209, at 11-12. The sheriff could, in turn, sue the deputy and recover on the deputy's bond. E.g., *Johnson v. Davis* (Spotsylvania Cnty. Ct., May 7, 1735), in *SPOTSYLVANIA 1734-1735*, *supra* note 209, at 94. But see *Everitt v. Pabell* (Charles City Cnty. Ct., Feb. 1687), in *CHARLES CITY 1687-1695*, *supra* note 105, at 7, 13 (holding the sheriff was not liable for an escape from a jail that was constructed as the law directs); *Shapleigh v. Mathew* (Northumberland Cnty. Ct., Jan. 16, 1683/1684), in *NORTHUMBERLAND 1683-1686*, *supra* note 232, at 22-23 (holding the sheriff was not liable when process was never served on a debtor because the debtor was outside the jurisdiction). Compare *Bridges v. Chew* (Orange Cnty. Ct., Mar. 26, 1748), in *VIRGINIA COUNTY COURT RECORDS ORDER BOOK ORANGE COUNTY, VIRGINIA 1747-1748*, at 82-83 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter *ORANGE 1747-1748*] (reporting jury finding that the sheriff produced the debtor in court but later released the debtor for nonpayment of jailor's fees), with *Bridges v. Chew* (Orange Cnty. Ct., June 23, 1748), in *ORANGE 1748-1749*, *supra* note 261, at 3 (holding the sheriff was not liable).

⁵⁸⁵ E.g., *Blackburne v. Symons* (Rappahannock Cnty. Ct., Nov. 4, 1685), in *RAPPAHANNOCK 1685-1687*, *supra* note 101, at 15-16.

⁵⁸⁶ E.g., *Loxham v. Derrick* (Stafford Cnty. Ct., June 10, 1691), in *STAFFORD 1691-1692*, *supra* note 184, at 26.

of tobacco.⁵⁸⁷ Then there was the 1704 act of Parliament reversing the old rule that promissory notes assigned without the knowledge and consent of their maker could not be enforced at law by the assignee.⁵⁸⁸ There were also important rulings that land was subject to seizure to pay simple contract debts as long as a debtor's personal estate was exhausted first.⁵⁸⁹ Courts would also enter judgment against an executor or administrator for an estate's debts even if no estate property remained in his hands because courts recognized that the debtor might come upon such property in the future and ought to be liable to pay the debt.⁵⁹⁰ Rules of evidence, such as the rule allowing merchants to recover debts simply by presenting and swearing to their ledgers, also tilted in favor of creditors,⁵⁹¹ as did an act of Parliament permitting creditors residing in England to prove debts by affidavits sworn before the Lord Mayor of London.⁵⁹²

There also were some pro-debtor rules. The most important rule allowed debtors to pay in tobacco, "the customary pay of the country," rather than in cash.⁵⁹³ Another allowed the release of any defendant imprisoned more than twenty days for a debt of less than 2000 lb. of tobacco,⁵⁹⁴ while a third outlawed usury.⁵⁹⁵ A fourth, grounded in

⁵⁸⁷ *Stone v. Jones* (Rappahannock Cnty. Ct., Feb. 4, 1684/1685), in RAPPAHANNOCK 1683-1685, *supra* note 159, at 60.

⁵⁸⁸ *See Thomas v. Joanes* (Middlesex Cnty. Ct., Feb. 7, 1686/1687), in MIDDLESEX 1686-1690, *supra* note 312, at 17 (dismissing an action where the defendant did not have knowledge of or consent to the assignment to the plaintiff). *But cf. Whetstone v. Laight* (Middlesex Cnty. Ct., July 1, 1678), in MIDDLESEX 1677-1680, *supra* note 134, at 25 (upholding assignment of a note by the maker and assumption of the obligation by the assignee in the presence of the payee). The statute was the Promissory Note Act, 3, 4 Anne ch. 8 (1704).

⁵⁸⁹ *E.g., Farish v. Stevens* (Caroline Cnty. Ct., June 12, 1773), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK CAROLINE COUNTY, VIRGINIA 1773, at 74 (Ruth Sparacio & Sam Sparacio eds., 1994) [hereinafter CAROLINE 1773].

⁵⁹⁰ *See, e.g., Self v. Floury* (Fauquier Cnty. Ct., July 24, 1760), in FAUQUIER 1759-1761, *supra* note 257, at 55-56 (holding the debtor was liable to pay a creditor with money the debtor received by inheritance).

⁵⁹¹ 4 WILLIAM WALTER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL OF THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 327-28 (Univ. Press of Va. 1969) (1820); 6 HENING, *supra* note 142, at 53-55.

⁵⁹² *See, e.g., Rogers v. Spalden* (Va. Gen. Ct., Apr. 1739), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B81. In *Rogers*, the General Court refused to admit into evidence an affidavit sworn without notice to the debtor, but the plaintiff appealed that decision to the Privy Council. *Id.* The Privy Council reversed the judgment of the General Court and granted a new trial without, however, ruling clearly on the admissibility of the affidavit. JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 382-83 (1965).

⁵⁹³ *Willis v. Chowning* (Middlesex Cnty. Ct., Sept. 6, 1686), in MIDDLESEX 1686-1690, *supra* note 312, at 11.

⁵⁹⁴ *E.g., In re. Jarman* (Spotsylvania Cnty. Ct., Apr. 3, 1733), in SPOTSYLVANIA 1732-1734, *supra* note 160, at 47-48; *cf. In re. Wall* (Spotsylvania Cnty. Ct., May 4, 1731, in SPOTSYLVANIA

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eighteenth-century legislation common to the North American colonies, released insolvent debtors from jail if they turned over all their assets to be sold for the benefit of creditors.⁵⁹⁶ In fact, courts did release a large number of such debtors.⁵⁹⁷ However, these few concessions to debtors did nothing to change the reality that, to the extent debtors possessed assets, courts would do what they could to enable creditors to reach those assets for repayment of debts.

B. Land Law

The law of property was another subject on which Virginia adopted common-law rules, as modified by Virginia legislation—rules that persisted throughout the colonial era. At the most basic level, courts protected property rights by ordering the sheriff to remove from land trespassers who had no claim of right to be there.⁵⁹⁸ They also enforced the “usual way of alienations of lands and estates in this country,” which was by deed and “by acknowledging . . . assignment or alienation in court and recording the same.”⁵⁹⁹ Finally, they made important legal

1730–1732, *supra* note 383, at 31 (refusing to release the debtor from prison because his debt exceeded 2000 lb. of tobacco).

⁵⁹⁵ See 4 HENING, *supra* note 591, at 294–95 (setting the interest rate at 6%); 6 HENING, *supra* note 142, at 101–02 (setting the interest rate at 5%).

⁵⁹⁶ 3 HENING, *supra* note 130, at 385–87; 4 HENING, *supra* note 591, at 151–52; 7 HENING, *supra* note 205, at 549; 8 HENING, *supra* note 465, at 326.

⁵⁹⁷ *E.g.*, *In re. Mayfield* (Caroline Cnty. Ct., Sept. 9, 1743), in CAROLINE COUNTY, VIRGINIA ORDER BOOK 1740–1746 PART TWO 1742/3–1744, at 35 (John Frederick Dorman ed., 1973) [hereinafter CAROLINE 1742/3–1744]; *Carlyle & Dalton v. Burnett* (Fairfax Cnty. Ct., Mar. 22, 1769), in FAIRFAX 1768–1769, *supra* note 385, at 67; *Chancey v. Childress* (Louisa Cnty. Ct., Oct. 27, 1747), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LOUISA COUNTY, VIRGINIA 1747/48 AND 1766–1772, at 10–11 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter LOUISA 1747/48 & 1766–1772]; *In re. Boyd* (Northampton Cnty. Ct., Sept. 10, 1754), *microformed on* 00327545162130 (Genealogical Soc’y of Utah).

⁵⁹⁸ *E.g.*, *Williams v. Harper* (Stafford Cnty. Ct., Dec. 12, 1689), in STAFFORD 1664–1668, 1689–1690, *supra* note 127, at 55; *see also* *Thorpe v. Jones* (Essex Cnty. Ct., Sept. 11, 1700), in ESSEX 1699–1702, *supra* note 247, at 52 (finding the defendant not guilty of trespass if he entered land to obtain personal property belonging to him); *In re. Potter* (Middlesex Cnty. Ct., Dec. 5, 1681), in MIDDLESEX 1680–1686, *supra* note 184, at 24 (authorizing Potter to enter another’s land to retrieve personal property); *cf.* *Rider v. Hull* (Northumberland Cnty. Ct., Mar. 22, 1682/1683), in NORTHUMBERLAND 1680–1683, *supra* note 162, at 98–99 (placing tenant of a conditional fee in possession of the land with proviso that he not commit waste by cutting down more than an appropriate number of trees).

⁵⁹⁹ *Neale v. Shapleigh* (Northumberland Cnty. Ct., May 29, 1675), in NORTHUMBERLAND 1674–1677, *supra* note 52, at 28–29. If a deed consisted of an indenture with multiple parts, a litigant relying on the deed had to present all parts thereof. *See* *King v. Fleming* (Richmond Cnty. Ct., Mar. 2, 1703), in RICHMOND 1702–1704, *supra* note 261, at 98–99 (dismissing a suit where the plaintiff refused to present all parts of the indenture). Someone who conveyed land to which he or she lacked good title was, of course, liable in damages on any warranties of title. *See* *Rice v. Pavey* (Rappahannock Cnty. Ct., Jan. 8, 1690/1691), in RAPPAHANNOCK 1689–1692,

policy judgments, such as one barring Lord Fairfax as proprietor of the Northern Neck from using the remedy of distress to collect arrearages of rent;⁶⁰⁰ a second implying warranties of title in deeds transferring land;⁶⁰¹ a third barring judicial inquiries into the consideration received for a deed;⁶⁰² a fourth holding that a tenant by curtesy forfeited his estate if he tried to convey it in fee simple;⁶⁰³ a fifth authorizing the taking and recording of depositions of elderly people “acquainted with the ancient bounds of . . . lands;”⁶⁰⁴ and a sixth ruling that crops growing on land were part of a decedent’s real rather than personal estate.⁶⁰⁵ Of course, courts also adjudicated boundary claims⁶⁰⁶ and resolved disputes over title to other sorts of property, such as slaves,⁶⁰⁷ servants,⁶⁰⁸ and other forms of wealth.

The rules of property applied most frequently in court were those dealing with succession to land and other assets. In the absence of a will, land descended under the common-law rule of primogeniture.⁶⁰⁹ That

supra note 56, at 46–47 (ordering the defendant to pay the plaintiff 1600 lb. of tobacco for conveying land in which he lacked good title).

⁶⁰⁰ *Newton v. Brokenburrow* (Richmond Cnty. Ct., Nov. 4, 1696), in *RICHMOND 1694–1697*, *supra* note 151, at 115.

⁶⁰¹ *Prosser v. Smith* (Essex Cnty. Ct., Apr. 10, 1712), in *VIRGINIA COUNTY COURT RECORDS LAND TRIALS BOOK ESSEX COUNTY, VIRGINIA 1711–1741*, at 1–2 (Ruth Sparacio & Sam Sparacio eds., 1992) [hereinafter *ESSEX 1711–1741*].

⁶⁰² *See Brown v. Woffendall* (Richmond Cnty. Ct., June 2, 1697), in *RICHMOND 1697–1699*, *supra* note 364, at 2–3 (overruling the defendant’s plea that the plaintiff’s consideration was insufficient).

⁶⁰³ *Hammit v. Washington* (Richmond Cnty. Ct., Apr. 7, 1708), in *RICHMOND 1707–1708*, *supra* note 160, at 75–76; *cf. Rust v. Brent* (Westmoreland Cnty. Ct., Mar. 1, 1705/1706), in *WESTMORELAND 1705–1707*, *supra* note 225, at 15–17 (refusing to allow a life tenant to convey a fee simple).

⁶⁰⁴ *In re. Carter* (Westmoreland Cnty. Ct., Aug. 26, 1713), in *WESTMORELAND 1712–1714*, *supra* note 128, at 64–65.

⁶⁰⁵ *In re. Travers’s Estate* (Rappahannock Cnty. Ct., July 2, 1685), in *RAPPAHANNOCK 1683–1685*, *supra* note 159, at 97. Title to crops was the issue of a case later argued by Thomas Jefferson and George Wythe in the General Court. *See generally* BERNARD SCHWARTZ ET AL., *TH. JEFFERSON AND BOLLING V. BOLLING: LAW AND THE LEGAL PROFESSION IN PRE-REVOLUTIONARY AMERICA* (1997) (providing a detailed analysis of the *Bolling* case).

⁶⁰⁶ *See, e.g., Smith v. Briscoe* (Middlesex Cnty. Ct., Oct. 3, 1698), in *MIDDLESEX 1697–1700*, *supra* note 314, at 52 (ordering a surveyor to investigate the boundary line at issue in a trespass action).

⁶⁰⁷ *E.g., Taliaferro v. Taliaferro* (Essex Cnty. Ct., Aug. 18, 1725), in *ESSEX 1723–1725 (PART II)*, *supra* note 445, at 70.

⁶⁰⁸ *E.g., Smith v. Boughan* (Rappahannock Cnty. Ct., Feb. 5, 1690/1691), in *RAPPAHANNOCK 1689–1692*, *supra* note 56, at 54.

⁶⁰⁹ *But see Estate of Moss* (Louisa Cnty. Ct., Mar. 14, 1769), in *LOUISA 1768–1769*, *supra* note 332, at 84 (ordering division of the decedant’s estate “equally among his children agreeable to the Act of Distribution notwithstanding any will”).

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rule sometimes raised interesting issues, as in *Salisbury v. Dennis*,⁶¹⁰ in which Grandpa John died seized of some 300 acres of land that his eldest son Richard inherited upon Grandpa's death. His second son Paskall died next, and then Richard died.⁶¹¹ Paskall's only child, Mary, thereupon sued Grandpa's third son, John, Jr., for the land and won.⁶¹²

In practice, however, most property owners did not observe the rule of primogeniture. An owner of land or other property "might lawfully devise his estate to whom he thought expedient," and the courts would enforce such devises.⁶¹³ Many testators used wills to avoid primogeniture, and innumerable disputes arose over the meaning and validity of wills, in regard to both title to land,⁶¹⁴ and title to other assets, especially slaves.⁶¹⁵ In one case, for example, one of three devisees had been "unheard of and in remote parts for many years" and failed to appear to take his third of a devise.⁶¹⁶ The court responded by dividing the land equally between the other two, subject to a bond that they give the missing devisee his third should he appear.⁶¹⁷ He never did appear, but when his wife established upon his presumed death that she was his

⁶¹⁰ (Northumberland Cnty. Ct., Mar. 15, 1675/1676), in NORTHUMBERLAND 1674-1677, *supra* note 52, at 61.

⁶¹¹ *Id.*

⁶¹² *Id.*

⁶¹³ *Webb v. Smith* (Northumberland Cnty. Ct., Aug. 17, 1699), in NORTHUMBERLAND 1699-1700, *supra* note 190, at 53. Compare *Curtis v. Ayres* (Essex Cnty. Ct., May 19, 1725), in ESSEX 1723-1725 (PART II), *supra* note 445, at 62 (reporting jury finding that the plaintiff inherited a "Negro girl" through her grandmother's will), with *Curtis v. Ayres* (Essex Cnty. Ct., Aug. 19, 1725), in ESSEX 1723-1725 (PART II), *supra* note 445, at 74-75 (ordering the defendant to return the slave to the plaintiff). A devise would be enforced even if it excluded a child from his or her equal share. See *In re. James* (King George Cnty. Ct., Feb. 2, 1721/1722), in KING GEORGE 1721-1723, *supra* note 127, at 30-31 (ruling it "lawful" for a father to exclude his son from a share under his will). But see *Smith v. Smith* (Richmond Cnty. Ct., Aug. 4, 1725), in RICHMOND 1724-1725, *supra* note 184, at 63-64 (exercising chancery jurisdiction to give two granddaughters "a child's part" of their grandmother's estate).

⁶¹⁴ See, e.g., *Elliot v. Robinson* (Middlesex Cnty. Ct., Dec. 2, 1689), in MIDDLESEX 1686-1690, *supra* note 312, at 89 (determining a dispute over a child's share of her father's estate).

⁶¹⁵ See, e.g., *Ball v. Fox* (Lancaster Cnty. Ct., Sept. 14, 1704), in LANCASTER 1703-1706, *supra* note 238, at 36 (examining a dispute over the disposition of two slaves by will). The statement in the text remained true throughout the colonial period, as over one-third of the cases included in Jefferson's *Reports of Cases Determined in the General Court of Virginia from 1730, to 1740; and from 1768, to 1772* dealt with issues of inheritance and construction of wills. See generally JEFFERSON, *supra* note 181.

⁶¹⁶ *Will of Berry* (Rappahannock Cnty. Ct., Sept. 4, 1685), in RAPPAHANNOCK 1685-1687, *supra* note 101, at 13.

⁶¹⁷ *Id.*

“apparent heir,” she received his third of the land.⁶¹⁸ Disputes also occurred about whether land and other assets had been fairly divided.⁶¹⁹

By far the most important practices in connection with land, however, were those by which virgin land was distributed by the crown. As shown above, a cause underlying Bacon’s Rebellion was that a small group of planters owned so much vacant land that indentured servants, upon completing their term of servitude, were unable to obtain land. After suppression of the rebellion, English authorities routinely instructed Governors to distribute land more equitably and to prevent the accumulation of large landholdings by a small number of wealthy planters. As a result, land distribution policies became a subject of continuing political conflict between Governors and the Council, the entity of Virginia’s government most under the control of the great planters. By 1710, however, when the Board of Trade omitted provisions about land reform from the Governor’s instructions, the great planters had won. The old system in which land patents were given mainly to existing landholders was fully restored; grants often were made thereafter for tens of thousands of acres, and some even exceeded 100,000 acres.⁶²⁰ A minor dispute about whether a tax could be levied for sealing patents also was resolved in favor of Virginians, when the Privy Council agreed that no official could charge a fee for attaching the provincial seal to patents.⁶²¹

C. *The Law of Slavery*

As the previous discussion displays, Virginia’s labor force was transformed around the outset of the eighteenth century from one dependent on white indentured servants to one consisting mainly of black African slaves. Economic and demographic forces predominated in the transformation, but law was not irrelevant in connection with slavery.

⁶¹⁸ Will of Berry (Rappahannock Cnty. Ct., Jan. 6, 1686/1687), in RAPPAHANNOCK 1685–1687, *supra* note 101, at 69–70.

⁶¹⁹ *E.g.*, Marshall v. James (Rappahannock Cnty. Ct., Sept. 4, 1685), in RAPPAHANNOCK 1685–1687, *supra* note 101, at 14–15. A common problem occurred when a testator gave away more than he or she possessed; at that point, the court would appoint referees to distribute to every legatee his or her proportionate share. *E.g.*, Randolph v. Fetherston (Charles City Cnty., Apr. 3, 1690), in CHARLES CITY 1687–1695, *supra* note 105, at 76, 78.

⁶²⁰ See BILLINGS ET AL., *supra* note 112, at 147, 153, 160–61, 171–72, 194–95, 209–11 (providing examples and explanations concerning the Privy Council’s role in land distribution). These preceding factual assertions can be located within this source.

⁶²¹ Glenn Curtis Smith, *The Affair of the Pistole Fee, Virginia, 1752–55*, 48 VA. MAG. HIST. & BIOGRAPHY 209, 213 (1940).

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Statutes had created the category of slavery in the first place, and thereafter judges had to determine many legal issues involving slaves, such as whether a master was liable for the criminal act of his “Negro [w]oman.”⁶²² Of interest here is that judges even turned to law to give blacks protection from the worst excesses of cruel masters. For instance, they protected slaves whose masters beat them excessively.⁶²³ Also, courts required masters wishing to punish slaves even more severely by placing them in irons or by amputating body parts first to obtain judicial approval.⁶²⁴

Perhaps the most telling difference, however, between early slavery law and what the law of slavery would later become was in regard to burdens of proof. Unlike later law, early law did not presume that a person was a slave simply because he or she possessed an African ancestor.⁶²⁵ The person claiming the alleged slave had to prove the fact of slavery, and neither African ancestry nor possession of the alleged slave since the time of his or her birth sufficed as proof.⁶²⁶ As a result, a number of cases found persons of African descent to be free.⁶²⁷ By

⁶²² Barret v. Gibson (Va. Gen. Ct., Oct. 1731), in 1 RANDOLPH & BARRADALL, *supra* note 308, at R61, R70. The master was held not liable. *Id.* at R72.

⁶²³ *E.g.*, Abuse of Lucy (Essex Cnty. Ct., Mar. 16, 1725/26), in ESSEX 1725-1729 (PART I), *supra* note 250, at 1.

⁶²⁴ *See, e.g.*, *In re. Kemp* (Middlesex Cnty. Ct., Oct. 5, 1736), in MIDDLESEX 1735-1737, *supra* note 169, at 82 (granting the master leave to castrate a runaway slave); *King v. Sawney* (Westmoreland Cnty. Ct., Aug. 27, 17198), in WESTMORELAND 1718-1721, *supra* note 169, at 19-20 (granting the master leave to cut off Sawney’s “two great toes”). Sawney, it appears, was a continual runaway. *In re. Eskridge* (Westmoreland Cnty. Ct., Nov. 25, 1719), in WESTMORELAND 1718-1721, *supra* note 169, at 67, 69.

⁶²⁵ *See* 6 HENING, *supra* note 142, at 365-66 (requiring proof that a person was a slave before returning that person to the owner).

⁶²⁶ *E.g.*, *Loyd v. Thacker* (Richmond Cnty. Ct., Aug. 4, 1697), in RICHMOND 1697-1699, *supra* note 364, at 10-11; *see also* 6 HENING, *supra* note 142, at 365-66 (stating that an owner claiming a runaway slave in the public realm must be able to prove his ownership of the property).

⁶²⁷ *E.g.*, *In re. Jack* (Charles City Cnty. Ct., Nov. 13, 1665), in 13 VA. COLONIAL ABSTRACTS, *supra* note 93, at 53, 56; *In re. Gardner* (Louisa Cnty. Ct., Feb. 11, 1771), in LOUISA 1770-1772, *supra* note 151, at 33; *Irvin v. Arnold* (Orange Cnty. Ct., Mar. 27, 1755), in ORANGE 1755-1756, *supra* note 245, at 9; *Roger v. Metcalfe* (Richmond Cnty. Ct., May 6, 1734), RICHMOND 1734-1735, *supra* note 582, at 4-5; *Lewis v. Harris* (Stafford Cnty. Ct., May 20, 1691), in STAFFORD 1691-1692, *supra* note 184, at 20; *see also* *Gwinn v. Bugg* (Va. Gen. Ct., Oct. 1769), in JEFFERSON, *supra* note 181, at 87-89 (considering whether a child born to a “white woman” and “Negro man” was a free person); *In re. Mingo* (Charles City Cnty. Ct., Aug. 3, 1692), in CHARLES CITY 1687-1695, *supra* note 105, at 130-31 (refusing to give effect to manumission granted by will by “taking note of the law barring [N]egroes their freedom”); *In re. Parker* (Loudoun Cnty. Ct., May 10, 1758), in VIRGINIA COUNTY COURT RECORDS LOUDOUN COUNTY, VIRGINIA ORDER BOOK 1757-1758, at 69-70 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter LOUDOUN 1757-1758] (revoking the sale of a mulatto child and granting custody to a couple who agreed to raise her). *But see* *Munro v. Shropshire* (Westmoreland Cnty. Ct., June 26, 1706), in WESTMORELAND 1705-1707, *supra* note 225, at 43-44 (ordering the plaintiff to deliver the

statute, anyone who attempted to sell as a slave someone who was not a slave was subject to a penalty.⁶²⁸

That masters and judges usually did not treat slaves cruelly and sometimes governed them by the rule of law did not mean, however, that Virginia slavery was just and humane. It was not. However, it is necessary to think more precisely than many previous scholars have done to appreciate what made it unjust and inhumane. The concept of slavery has been deployed to encompass many different sorts of master-servant relationships, and we need to focus on Virginia's unique form of slavery if we are to understand fully its injustice and inhumanity.

Slavery, of course, is grounded upon inequality—a condition that would induce many nineteenth-century and later philosophers to condemn it. However, inequality was a routine element of seventeenth- and eighteenth-century life. Slavery may have been worse in degree than most other unequal relationships of its time, but the inequality associated with it was not different in kind. No society has ever in practice condemned every form of hierarchy. Thus, we need to examine various factors beyond mere inequality to understand the peculiar injustice and inhumanity of Virginia slavery.

Heightened cruelty is a possible factor, but there is no evidence that seventeenth- and eighteenth-century Virginia masters were especially cruel; Simon Legree was not among them. Difficult working conditions could have the same impact; slaves on Caribbean sugar plantations, for example, were effectively sentenced to early death by the conditions under which they labored.⁶²⁹ Slaves in Virginia, in contrast, worked under the same conditions endured by white indentured servants and white owners of small plantations.⁶³⁰

"mulatto" child to the defendant and that the child be bound to the defendant); *cf.* Obligation of Griggs (Lancaster Cnty. Ct., May 10, 1682), in LANCASTER 1682-1687, *supra* note 247, at 1 (reporting an agreement to free "a Negro boy" after he completes twenty-one years of service); *In re. Bowler* (Louisa Cnty. Ct., Mar. 9, 1773), in VIRGINIA COUNTY COURT RECORDS LOUISA COUNTY, VIRGINIA ORDER BOOK ABSTRACT 1766-1774, at 29 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter LOUISA 1766-1774] (allowing slaves to bring suit for freedom in forma pauperis); *In re. Maguire* (Richmond Cnty. Ct., June 2, 1709), in RICHMOND 1708-1709, *supra* note 257, at 56-57 (appointing counsel to represent an indigent servant in suit for freedom); *William v. Neale* (Westmoreland Cnty. Ct., Mar. 31, 1708), in WESTMORELAND 1707-1709, *supra* note 130, at 27-28 (finding that an East Indian fraudulently trapped in a native country and wrongfully sold as a slave was free).

⁶²⁸ 8 HENING, *supra* note 465, at 123-25.

⁶²⁹ See SIDNEY W. MINTZ, THREE ANCIENT COLONIES: CARIBBEAN THEMES AND VARIATIONS 13-14 (2010) (noting that the number of living slaves in Jamaica and Saint Domingue indicated that slavery conditions were deadly).

⁶³⁰ See *supra* text accompanying notes 125-66 (describing the treatment of white indentured servants compared to black slaves).

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What made Virginia slavery particularly unjust and inhumane was the structure of Virginia's economy and of the law undergirding that economy. To understand why, we must return to basic facts about the law and economy and to analyze how the law of slavery intersected with them.

Consider first the intersection of the law of slavery with the law of debtor and creditor. Suppose a kindly master wanted to reward a faithful slave by keeping that slave's family intact. Could the master do that? Could slaves enter into secure human relationships with each other and with those who owned them? As outlined above, indentured servants could make and enforce contracts to serve their masters well and obtain early release as a reward.⁶³¹ Could slaves enforce contracts for rewards in return for faithful service? Were masters free to perform such contracts if they wished? In general, the answer to these questions is no. The law stood directly in the path of anyone treating slaves as human; they were merely assets that, in addition to performing labor, served as collateral for the payment of debts.

The case of *Hughlett v. Schreever*,⁶³² a suit by an administratrix c.t.a. against a defendant claiming under a decedent's will, illustrates the inhumanity that the law of slavery made inevitable in Virginia. The decedent had owned four slaves; his will gave these slaves to his subsequently deceased daughter, through whom the defendant Schreever, in turn, claimed.⁶³³ Perhaps the goal of the bequest was to keep the slaves together within the daughter's family and thereby preserve ongoing human relationships. In any event, when the daughter died, Schreever took possession of the slaves and kept them together.⁶³⁴ The court, however, was concerned, as it had to be if Virginians were to continue borrowing money, about the "just rights and dues" of creditors and "that the debts" of the decedent "ought to be satisfied before any legacies."⁶³⁵ Accordingly, it ordered that the administratrix be given possession of "the whole personal estate" of the decedent "as well Negroes as other his said estate of what nature or condition soever."⁶³⁶ The administratrix could then convert the slaves and other property of the decedent into cash or other fungible assets that creditors could accept

⁶³¹ See cases cited *supra* note 142 (providing an example of such an agreement).

⁶³² (Northumberland Cnty. Ct., Mar. 20, 1700/1701), in NORTHUMBERLAND 1700-1702, *supra* note 130, at 54, 56-60.

⁶³³ *Id.* at 56-67.

⁶³⁴ *Id.* at 57.

⁶³⁵ *Id.* at 57, 59.

⁶³⁶ *Id.* at 59.

to satisfy debts. If she failed to do so, the slaves could be attached and sold by the sheriff to pay off the debts.⁶³⁷

The same preference for the rights and dues of creditors and the satisfaction of debts applied even while debtors were alive. Masters might try to treat slaves decently and kindly, but it was more important that they earned enough money to repay whatever debts they had accumulated and to keep from borrowing more. If meeting their obligations meant that they had to work slaves harder, they had little choice. If it meant selling a few slaves and breaking up slave families and communities, they had little choice. Perhaps a slave owner who had a good relationship with his or her provider of capital could make promises for the future and thereby postpone the day of reckoning. But ultimately, if planters failed to use their slave property to satisfy the claims of creditors, their slaves could be attached by the sheriff and sold at auction to pay off debts even while the original borrower remained alive.⁶³⁸

The Virginia legislature vacillated between treating slaves as chattels, which would have rendered it easy for creditors to seize them for unpaid debts, and real estate, which made their seizure more difficult. At first, in 1705, the legislature declared slaves to be real estate.⁶³⁹ However, when owners began to grant and bequeath slaves with less than fee simple titles and subject to remainders, which effectively exempted them from seizure by creditors, the legislature in 1727 changed its mind. It declared slaves to be chattels unless their owner took specified steps to annex them to a particular tract of land, in which event they would pass with the land subject to any limitations attached to the land.⁶⁴⁰ At the same time, the statute also sought to balance the policy of keeping slaves together on a plantation against the rights of creditors. After providing that executors and administrators, in general, could not sell slaves, the statute declared that “to bind the property of slaves, so that they may not be liable to the payment of debts, must lessen, and in process of time, may destroy the credit of the country” and therefore gave executors and administrators authority to sell slaves to pay debts, although for no other purposes, even when

⁶³⁷ *E.g.*, Taylor v. Estate of McCoy (Louisa Cnty. Ct., June 13, 1743), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LOUISA COUNTY, VIRGINIA 1742-1744, at 27 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter LOUISA 1742-1744].

⁶³⁸ *E.g.*, James v. Estate of Tyler (Spotsylvania Cnty. Ct., May 7, 1729), in SPOTSYLVANIA 1724-1730 (PART III), *supra* note 127, at 86; Robinson v. Churchill (Fauquier Cnty. Ct., Feb. 28, 1765), in FAUQUIER 1764-1766, *supra* note 160, at 21.

⁶³⁹ 3 HENING, *supra* note 130, at 333-35.

⁶⁴⁰ 4 HENING, *supra* note 591, at 222-23, 225.

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slaves had been annexed to land.⁶⁴¹ Five years later, Parliament, in full agreement with the latter principle, made slaves, whatever the nature of property in them, liable throughout the empire to seizure for debt,⁶⁴² at which point the Virginia legislature declared them to be chattels.⁶⁴³ The Privy Council, however, disallowed this act,⁶⁴⁴ and the 1727 law, as modified by Parliament's 1732 act, thus remained in force throughout the colonial period.⁶⁴⁵

It is difficult to see how the crown, British merchants, and Virginia planters could have prospered if the law had not made slaves subject to sale to pay debts. As long as tobacco remained the main source of the colony's wealth, it was inevitable that planters would accumulate indebtedness during bad times. It was equally inevitable that the law would adopt pro-creditor rules as a means of encouraging lenders to lend against the hope that better times would follow. Once slaves, who had no bargaining power, became "the greatest part of the visible estates" of most planters,⁶⁴⁶ it is difficult to see how anyone could have avoided making them, in effect, collateral for loans. The minute one understands what it means for human beings to be the collateral on which a system of credit and finance rests, one understands the perversity and ultimate inhumanity of Virginia slavery.

Consider next the intersection of the law of property with the law of slavery. Although primogeniture was the default rule for succession to real property, most property owners made wills that divided property, both real and personal, among all their children, often equally. Even in the absence of significant debt, the law would force whoever administered an estate under such a will, in the absence of a specific, contrary direction from the testator or a court,⁶⁴⁷ to divide slaves among devisees on the basis of value rather than by reference to family or other

⁶⁴¹ *Id.* at 225–26.

⁶⁴² See 5 THE STATUTES AT LARGE, FROM THE FIR[S]T YEAR OF THE REIGN OF KING GEORGE THE SECOND 583 (London 1786) [hereinafter 5 THE STATUTES AT LARGE] (setting forth An Act for the More Ea[s]y Recovery of Debts in His Majesty's Plantations and Colonies in America enacted in 1732). For a thorough analysis of the act and its effects on American debt and property law, see Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 408, 408–39 (2006).

⁶⁴³ 5 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 432–36 (Univ. Press of Va. 1969) (1819).

⁶⁴⁴ *Id.* at 432.

⁶⁴⁵ See THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 66–71 (1996) (discussing the history and operation of the law in colonial Virginia).

⁶⁴⁶ 4 HENING, *supra* note 591, at 226.

⁶⁴⁷ See, e.g., *In re. Battaile* (Caroline Cnty. Ct., Nov. 11, 1773), in CAROLINE 1773–1774, *supra* note 331, at 39–40 (ordering that slaves "be worked together" until the children who were to receive them under the testator's will all reached their majority).

ties.⁶⁴⁸ Failure to do so to the satisfaction of the devisees would lead to complex litigation and subsequent judicial division of slaves.⁶⁴⁹

Note how the law of succession, by placing this burden on executors and administrators, functioned much as the law of debtor and creditor did. It treated slaves not as human beings but as fungible property capable of being translated into money.

Even in the eighteenth-century world of inequality, it was possible for people in different socio-legal categories to enter into human relationships with each other. Women surely were not the economic or legal equals of men, but eighteenth-century men and women nonetheless had loving relationships with each other. Thus, we know that John Adams loved Abigail, and vice versa.⁶⁵⁰ Similarly, it seems clear that Thomas Jefferson had a decades-long, intimate relationship with a slave, Sally Hemings, from which Hemings derived considerable power, sustenance, and possibly even love.⁶⁵¹

Under profound conditions of inequality, Eugene Genovese tells us, slaves made their own world, built relationships with their masters and other whites, established families, and created communities.⁶⁵² By allowing slaves to engage in such activities, their masters recognized them as human beings and formed human relationships with them. Relationships between masters and slaves were unequal, and for that reason one might be critical of them. However, they were not different in kind from the many sorts of unequal, but nonetheless fulfilling

⁶⁴⁸ *E.g.*, *In re. Catlett v. Catlett* (Caroline Cnty. Ct., Mar. 11, 1742/3), in *CAROLINE 1742/3-1744*, *supra* note 597, at 3; *In re. Retterford* (Essex Cnty. Ct., Sept. 17, 1728), in *ESSEX 1727-1729*, *supra* note 151, at 66-67; *Moor v. Elliot* (Northampton Cnty. Ct., Apr. 9, 1751), *microformed on* 00327535162129 (Lib. of Va.); *Div. of Slaves of Poythress* (Prince George Cnty. Ct., July 1775), in *PRINCE GEORGE COUNTY VIRGINIA MISCELLANY 1711-1814*, at 12 (Benjamin B. Weisiger III ed., 1986) [hereinafter *PRINCE GEORGE 1711-1814*].

⁶⁴⁹ *E.g.*, *Smith v. Griffin* (Va. Gen. Ct., Oct. 1772), in *JEFFERSON*, *supra* note 181, at 132; *Marston v. Parrish* (Va. Gen. Ct., Apr. 1730), in *1 RANDOLPH & BARRADALL*, *supra* note 308, at R35-36. Compare *Wilson v. Belfield* (Richmond Cnty. Ct., Aug. 7, 1723), in *RICHMOND 1722-1724*, *supra* note 159, at 31-33 (reporting jury finding that slaves devised by will to the plaintiff's wife were taken to satisfy a debt to the defendant), with *Wilson v. Belfield* (Richmond Cnty. Ct., Oct. 2, 1723), in *RICHMOND 1722-1724*, *supra* note 159, at 40-41 (granting judgment for the defendant). For a case addressing a complex legal issue, whether slaves could be entailed without being annexed to land, see *Blackwell v. Wilkinson* (Va. Gen. Ct., Oct. 1768) in *JEFFERSON*, *supra* note 181, at 73-86.

⁶⁵⁰ See generally *MY DEAREST FRIEND: LETTERS OF ABIGAIL AND JOHN ADAMS* (Margaret A. Hogan & C. James Taylor eds., 2007) [hereinafter *MY DEAREST FRIEND*] (exploring the relationship between John and Abigail Adams).

⁶⁵¹ See generally *ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSEY* (1997) (detailing the relationship between Thomas Jefferson and Sally Hemings).

⁶⁵² See generally *EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974) (discussing the relationships that slaves created in their communities).

relationships that always have existed and continue to exist in the world. Slaves also formed invaluable, and sometimes equal, relationships with each other.

However, the law—the law of property, the law of debt, and the patterns of indebtedness underlying it—rendered all slave relationships precarious. Whatever masters may have done, the law and the underlying economy did not treat slaves as humans but as fungible property convertible into cash.⁶⁵³ The law said they were property—“considered no otherwise than horses or cattle”—and the British merchants who lent money to Virginia planters thought of slaves as cash equivalents for securing their debt.⁶⁵⁴ Slaves were mere numbers that merchants used in an impersonal marketplace established to satisfy Europe’s demand for tobacco. They were never considered as people capable of developing relationships either with each other or with whites—relationships that, however unequal, were still human.

Whereas indentured servants could complete their terms of servitude and then live out human—if impoverished—lives, slaves could not. Slaves’ complete lack of security—their constant vulnerability to an impersonal marketplace structured and supported by law that could deprive them at any moment of anything they created—meant that slaves could not hope to feel any of the emotions or enjoy any of the satisfactions that lie at the core of human existence. The law and the economic conditions that governed it, by depriving slaves of the fruits of creativity, deprived them of humanity, and white Virginians were as powerless as blacks to modify that deprivation.

In short, Virginia’s law of property and debt, together with the economic realities underlying it, were continually replicating the original sin of slavery. The original sin lay in snatching people from their homes, their families, their communities, and all they had created, and depositing them in a strange world from which they could never return. Of course, indentured servants and other immigrants to America also experienced separation from home, family, and community. But they had voluntarily made the decision to separate in order to build better lives for themselves, and, once in the new world, they could focus on building such lives. Slaves could not. If they tried, the law of slavery, grounded in the ownership rights of masters and creditors, sooner or later would destroy whatever they built. The law, like the original slave trader, would snatch slaves from their homes, their families, their

⁶⁵³ See *supra* text accompanying notes 639–45 (discussing the treatment of slaves as real property and chattel).

⁶⁵⁴ *Tucker v. Sweney* (Va. Gen. Ct., Apr. 1730), in 1 RANDOLPH & BARRADALL, *supra* note 308, at R35, R39.

communities, and the lives they had made and deposit them in yet another strange world from which they could not return. Slaves thus had to live in constant fear that they would be separated from everything they valued, and, as a result, at least some must have given up trying to generate anything of value.

D. Slavery and Social Order

Based as it was on underpinnings of slavery, the legal order of Virginia functioned effectively into the mid-eighteenth century. The eighteenth-century litigation process consisted of a series of inputs from the General Court, the county benches, and jurors in imprecise, varying amounts.⁶⁵⁵ Although each institution possessed a capacity to obstruct the others—county courts sometimes ignored General Court mandates, and judges and juries did not always agree—the system worked well when all three institutions cooperated. It was this capacity for obstruction together with the need for cooperation that set the parameters within which the Governor and his councilors, the county justices, and juries had to perform their duties and exert their power. The Governor and other central authorities in Jamestown and Williamsburg needed the cooperation of the county elites that sat on the county courts to govern the localities effectively. At the same time, the county elites needed the support of central authorities and, in particular, of the Governor to maintain their dominant position at home.

The accommodation that center and periphery reached was for county oligarchies to support the crown's mercantilist policies, which were highly profitable to British merchants and generated substantial revenues for the king. In return, the Governor provided leading planters with what they most needed—land. Tobacco quickly depletes the soil, and as land in the older, settled parts of Virginia became exhausted, the planters who lived there in great munificence became increasingly dependent on newly opened frontier lands for their income. For some seventy-five years after Bacon's Rebellion, authorities in Jamestown and Williamsburg accommodated the great planters more than ever, and

⁶⁵⁵ See *supra* Part II.D (discussing the roles of judges and jurors); *supra* Part II.E.1 (explaining the dichotomy of power divided between the county and General Court). The destruction of the records of the General Court for the colonial period vastly complicates the task of determining the power of different institutions. On the surface, for example, it appears that Virginia law was a good deal less uniform than the law of most colonies as counties disagreed with each other about the appropriate rule to follow on numerous issues. However, that lack of uniformity may be a mirage: the fact that two local courts disagree with each other may reflect disagreement, but it may also reflect an appellate court's intervening reversal of the first court's judgment. In the absence of the appellate court's records or of citations thereto, a historian has no certain way of knowing.

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nearly all new land patented east of the Blue Ridge found its way into wealthy planters' hands.⁶⁵⁶ The planters, in turn, used their economic power in localities to keep underclasses in control.⁶⁵⁷

V. TOWARD REVOLUTION AND INDEPENDENCE:
VIRGINIA LAW AFTER THE MID-EIGHTEENTH CENTURY

The Virginia legal system's efficiency probably peaked around 1750. Thereafter, it entered into slow decline and finally in the mid-1770s came apart.

A. *The Decay of Judicial Power*

By the mid-eighteenth century, Virginia's law had assumed the essential forms it would possess for the remainder of the colonial period. Of course, many features of that law would change in minor ways, but one trend was especially noteworthy. Over the course of a quarter century, the power of the General Court over county courts and the power of judges over juries decreased marginally, while in two years—1763 and 1774—the bargain over land on which the accommodation between county oligarchies and authorities in Williamsburg had rested broke down. The result was that Virginia, which had been one of the most placid, well ordered, and reliably loyal of Britain's North American colonies, became one of the most uniformly rebellious.

The common-law forms of action remained the foundation for Virginia's legal system,⁶⁵⁸ and over time that system became increasingly formalistic.⁶⁵⁹ Despite whatever flexibility may have existed earlier,⁶⁶⁰ it

⁶⁵⁶ See ISAAC, *supra* note 172, at 117-18 (discussing the expansion of "[g]reat houses" that were "monuments of family pride" in this area); accord, L. SCOTT PHILYAW, VIRGINIA'S WESTERN VISION: POLITICAL AND CULTURAL EXPANSION ON AN EARLY AMERICAN FRONTIER 30-36 (2004) (discussing the preferential land policy that rewarded wealthy members of society with land).

⁶⁵⁷ But see ISAAC, *supra* note 172, at 137 (noting that the mid-eighteenth-century role of Glasgow merchant houses in tobacco marketing undermined the economic power of Virginia elites). The most recent analysis of the role of Scottish merchants is consistent with that of Isaac. See TILLSON, *supra* note 173, at 154-55, 166-67 (explaining why Virginia's wealthy planters lost power to the Scottish tobacco producers).

⁶⁵⁸ See, e.g., *Buckner v. Robinson* (Caroline Cnty. Ct., Sept. 12, 1771), in CAROLINE 1771-1772, *supra* note 209, at 40 (recording a dower action); *Taylor v. Boggess* (Fairfax Cnty. Ct., June 20, 1769), in FAIRFAX 1768-1769, *supra* note 385, at 98 (recording a replevin action); *Dempsey v. Shepherd* (Orange Cnty. Ct., Apr. 28, 1758), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK ORANGE COUNTY, VIRGINIA 1757-1759, at 25 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter ORANGE 1757-1759] (recording a detinue action).

⁶⁵⁹ Courts, however, still refused to dismiss cases for purely formalistic pleading errors. Compare *Ramey v. Fletcher* (Fauquier Cnty. Ct., July 24, 1760), in FAUQUIER 1759-1761, *supra* note 257, at 55 (reporting the defendant's plea that the plaintiff husband erroneously pleaded damage to himself and his wife rather than to himself alone), with *Ramey v. Fletcher* (Fauquier

became clear after mid-century, for example, that in suits where the amount in controversy was under £5, plaintiffs were required to proceed by petition rather than by writ,⁶⁶¹ while cases under the value of 200 lb. of tobacco were within the exclusive jurisdiction of individual justices of the peace.⁶⁶² Pleading also developed in an increasingly formalized fashion, as defendants continued to use proper pleas of the general issue in response to different writs, such as did not assume to a writ of assumpsit,⁶⁶³ not guilty to a writ of case,⁶⁶⁴ and owes nothing to a writ of debt.⁶⁶⁵ Parties also continued to file special pleas, such as performance, either total⁶⁶⁶ or partial,⁶⁶⁷ self-defense,⁶⁶⁸ the statute of limitations,⁶⁶⁹ full

Cnty. Ct., Aug. 30, 1760), in FAUQUIER 1759-1761, *supra* note 257, at 69-70 (holding the defendant's plea was not sufficient to prevent judgment for the plaintiffs).

⁶⁶⁰ See Warren M. Billings, *Pleading, Procedure, and Practice: The Meaning of Due Process of Law in Seventeenth-Century Virginia*, 47 J. S. HIST. 569, 582-83 (1981) (discussing the use and flexibility of "bill procedure" in colonial Virginia).

⁶⁶¹ See, e.g., Jones v. Pickett (Fauquier Cnty. Ct., Aug. 28, 1762), in FAUQUIER 1761-1762, *supra* note 144, at 106-07 (dismissing the action where the plaintiff did not proceed by petition). For a judgment dismissing a suit when the jury returned a verdict under £5 because the court surmised the plaintiff had been evading "the Petition Law," see Burford v. Phillips (Louisa Cnty. Ct., May 10, 1768), in LOUISA 1768-1769, *supra* note 332, at 7-8; accord Laird v. Smith (Botetourt Cnty. Ct., May 13, 1773), *microformed on* 00307225162119 (Genealogical Soc'y of Utah) (dismissing a suit where the plaintiff utilized a writ to claim "more than is due him" to evade the petition requirement).

⁶⁶² See, e.g., Kelly v. Sims (Louisa Cnty. Ct., June 13, 1743), in LOUISA 1742-1744, *supra* note 637, at 27 (dismissing a suit where the amount in controversy valued 83.5 lb. of tobacco); Broughton v. Duett (Spotsylvania Cnty. Ct., June 5, 1734), in SPOTSYLVANIA 1734-1735, *supra* note 209, at 45 (dismissing a suit where the balance due was "not cognizable before the court"). Cases in which a plaintiff claimed £10 or more in damages could be commenced in the General Court even if the plaintiff ultimately recovered less than £10. See, e.g., Tute v. Freeman (Va. Gen. Ct., Oct. 1736), in 2 RANDOLPH & BARRADALL, *supra* note 144, at B52 (denying the defendant's motion to overrule a judgment for £9 where the plaintiff claimed £25 in damages).

⁶⁶³ E.g., Lewis v. Rootes (Culpeper Cnty. Ct., Mar. 18, 1763), in CULPEPER 1763-1764, *supra* note 532, at 7-8.

⁶⁶⁴ E.g., Pinkard v. Petty (Culpeper Cnty. Ct., May 20, 1763), in CULPEPER 1763-1764, *supra* note 532, at 43.

⁶⁶⁵ E.g., Williams v. Dobbs (Middlesex Cnty. Ct., Mar. 2, 1735/1736), in MIDDLESEX 1735-1737, *supra* note 169, at 69.

⁶⁶⁶ E.g., Dillard v. Sanders (Culpeper Cnty. Ct., July 23, 1763), in CULPEPER 1763-1764, *supra* note 532, at 76.

⁶⁶⁷ E.g., Davis v. Slaughter (Culpeper Cnty. Ct., May 19, 1763), in CULPEPER 1763-1764, *supra* note 532, at 41.

⁶⁶⁸ E.g., Roach v. McKey (Louisa Cnty. Ct., June 13, 1743), in LOUISA 1742-1744, *supra* note 637, at 24.

⁶⁶⁹ E.g., Ashby v. Williams (Fauquier Cnty. Ct., Aug. 26, 1763), in VIRGINIA COUNTY COURT RECORDS MINUTE BOOK FAUQUIER COUNTY, VIRGINIA 1762-1763, at 89 (Ruth Sparacio & Sam Sparacio eds., 1993) [hereinafter FAUQUIER 1762-1763]. Parties also sued to confirm title to land by adverse possession. E.g., Buckner v. Lodowick (Caroline Cnty. Ct., Mar. 12, 1767), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK CAROLINE COUNTY, VIRGINIA 1765-1767, at 64-65 (Ruth Sparacio & Sam Sparacio eds., 1989) [hereinafter CAROLINE 1765-1767]; see also

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administration,⁶⁷⁰ lack of consideration,⁶⁷¹ and usury.⁶⁷² By mid-century, special pleading had fully developed in Virginia's county courts.⁶⁷³

At the same time, chancery practice also became formalized with the use, for example, of demurrers,⁶⁷⁴ depositions,⁶⁷⁵ and service of process by publication.⁶⁷⁶ One court, for example, dismissed a case dealing with distribution of an estate on demurrer when the complainant sued in his own name rather than in the name of his three daughters, the alleged heirs of the estate.⁶⁷⁷

Harrison v. Blair (Va. Gen. Ct., Apr. 1731), in 1 BARRADALL & RANDOLPH, *supra* note 308, at R54-55 (granting judgment based on the limitation period in force at the time of judgment rather than at the time of filing the plea).

⁶⁷⁰ *E.g.*, Nelson v. Edmondson (Augusta Cnty. Ct., May 25, 1750), *microformed on* 00303745162113 (Genealogical Soc'y of Utah).

⁶⁷¹ *Compare* Broadwater v. Connell (Loudoun Cnty. Ct., Dec. 14, 1757), in LOUDOUN 1757-1758, *supra* note 627, at 42 (reporting the defense of lack of consideration), *with* Broadwater v. Connell (Loudoun Cnty. Ct., Apr. 12, 1758), in LOUDOUN 1757-1758, *supra* note 627, at 63 (sustaining the defense on a post-verdict motion). In the mid-eighteenth century, lack of consideration also appears to have constituted a good defense to a writ of debt. *E.g.*, Moffet v. Graham (Augusta Cnty. Ct., Aug. 20, 1746), *microformed on* 00303745162113 (Genealogical Soc'y of Utah).

⁶⁷² *See, e.g.*, Sligh v. Broadik (Loudoun Cnty. Ct., Aug. 12, 1762), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LOUDOUN COUNTY, VIRGINIA 1762, at 90-91 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter LOUDOUN 1762] (recognizing a claim of compound interest as a successful defense in a post-verdict motion).

⁶⁷³ *See, e.g.*, Bowler v. Sutton (Caroline Cnty. Ct., Sept. 14, 1771), in CAROLINE 1771-1772, *supra* note 209, at 60 (granting the defendant leave to waive a former plea and file a new special plea); Pettitt v. Burton (Northampton Cnty. Ct., Dec. 10, 1745), *microformed on* 00327525162128 (Genealogical Soc'y of Utah) (allowing the plaintiff to submit a special plea before the next court date).

⁶⁷⁴ *E.g.*, Coleman v. Kirtley (Culpeper Cnty. Ct., Aug. 19, 1763), in CULPEPER 1763-1764, *supra* note 532, at 102; Spotswood v. Davis (Spotsylvania Cnty. Ct., Dec. 3, 1729), in SPOTSYLVANIA 1724-1730 (PART IV), *supra* note 186, at 29.

⁶⁷⁵ *E.g.*, Russell v. Estate of Borden (Augusta Cnty. Ct., Aug. 23, 1754), *microformed on* 00303755162114 (Genealogical Soc'y of Utah); Turner v. Nelson (Fauquier Cnty. Ct., June 23, 1767), in FAUQUIER 1766-1767, *supra* note 247, at 74-75. Of course, depositions also were used at common law and could be taken in colonies outside Virginia. *E.g.*, Deposition of Stocton (Albemarle Cnty. Ct., Sept. 28, 1773), in ALBEMARLE COUNTY VIRGINIA COURT PAPERS 1744-1783, at 54 (Benjamin B. Weisiger III. ed., 1995) [hereinafter ALBEMARLE 1744-1783]. Courts preferred, however, to hear testimony *viva voce*. *E.g.*, Palmer v. Word (Spotsylvania Cnty. Ct., July 5, 1738), in SPOTSYLVANIA 1738-1740, *supra* note 122, at 14-15. Thus, the court would not grant postponements for taking depositions when a litigant had had sufficient time to obtain a deposition in the past. *E.g.*, Scarburgh v. Holden (Northampton Cnty. Ct., Aug. 9, 1748), *microformed on* 00327525162128 (Genealogical Soc'y of Utah).

⁶⁷⁶ *E.g.*, Bullitt v. Strother (Fauquier Cnty. Ct., Mar. 23, 1773), in VIRGINIA COUNTY COURT RECORDS MINUTE BOOK FAUQUIER COUNTY, VIRGINIA 1772-1773, at 43 (Ruth Sparacio & Sam Sparacio eds., 1996) [hereinafter FAUQUIER 1772-1773].

⁶⁷⁷ Heale v. Fox's Adm'rs (Lancaster Cnty. Ct., Feb. 10, 1730/1731), in LANCASTER 1729-1732, *supra* note 126, at 41-43. Chancery also had developed the capacity to refer an issue of fact to a jury for trial at common law. *Compare* Mann v. Sutton (Caroline Cnty. Ct., June 11, 1768), in CAROLINE 1767-1768, *supra* note 153, at 77 (referring the issue to a jury of whether the

A positive consequence of increased formalism was that attorneys became able to use either printed or pre-written forms with blanks to be filled rather than having to draft individualized pleadings on a case-by-case basis.⁶⁷⁸ However, the main consequence of formalism's growth was to decrease judicial discretion and hence the degree of judicial control over the processing of litigation.

This weakening of judges is clearest when the role of formalism is examined in the mid-eighteenth-century Virginia criminal process, where conformity with legal niceties increasingly came to matter. One court dismissed a presentment for profane swearing, for example, because the defendant had "never had the . . . law delivered to him by the churchwardens . . . & was entirely ignorant thereof."⁶⁷⁹ Other courts threw out presentments because of uncertainty of the presentment⁶⁸⁰ or "irregularity of the Proceedings."⁶⁸¹ For example, the case of a defendant charged in a county where his offense had not occurred was transferred to the proper county,⁶⁸² and another court dismissed a presentment for swearing because of the crown's failure to insert "the particular oaths" therein.⁶⁸³ Other courts dismissed presentments for not including the

complainant was a slave or free person), *with* Mann v. Sutton (Caroline Cnty. Ct., July 15, 1768), *in* CAROLINE 1767-1768, *supra* note 153, at 81 (granting judgment for the plaintiff upon jury finding that she was a free person). The inevitable result was that the jurisdiction of equity and common law became somewhat overlapping. *See In re. Thompson* (Augusta Cnty. Ct., Aug. 21, 1767), *microformed on* 00303775162116 (Genealogical Soc'y of Utah) (authorizing a debtor, who sought injunctive relief against a judgment on a note he had allegedly paid before the promisee had assigned it to the party who brought suit, to file the bill in chancery although noting that he "might have had his relief in the suit at law").

⁶⁷⁸ *See* Garner v. Covington (Fauquier Cnty. Ct., June 27, 1760), *in* FAUQUIER 1759-1761, *supra* note 257, at 49-50 (granting the defendant's motion to have the plaintiff fill in the blanks in the declaration); Chatten v. Buxton (Lancaster Cnty. Ct., May 12, 1738), *in* VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1736-1739, at 61-62 (Ruth Sparacio & Sam Sparacio eds., 1998) [hereinafter LANCASTER 1736-1739] (abating the suit because blanks in the declaration were not filled up); Horsnail v. Glover (Spotsylvania Cnty. Ct., Aug. 7, 1728), *in* SPOTSYLVANIA 1724-1730 (PART III), *supra* note 127, at 27-28 (granting the plaintiff "leave to fill up the blanks in his declaration").

⁶⁷⁹ King v. Marye (Spotsylvania Cnty. Ct., June 1, 1736), *in* SPOTSYLVANIA 1735-1738, *supra* note 142, at 26.

⁶⁸⁰ *E.g.*, King v. Winter (Richmond Cnty. Ct., Nov. 4, 1735), *in* RICHMOND 1735-1736, *supra* note 322, at 6.

⁶⁸¹ Dismissal of Presentments (Spotsylvania Cnty. Ct., Mar. 2, 1724/1725), *in* SPOTSYLVANIA 1724-1730 (PART I), *supra* note 184, at 36.

⁶⁸² *See* King v. Hollis (Fauquier Cnty. Ct., Aug. 28, 1769), *in* VIRGINIA COUNTY COURT RECORDS MINUTE BOOK FAUQUIER COUNTY, VIRGINIA 1767-1769, at 105-06 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter FAUQUIER 1767-1769] (transferring the case to Loudoun County).

⁶⁸³ King v. Cannon (Fairfax Cnty. Ct., Aug. 16, 1768), *in* FAIRFAX 1768-1769, *supra* note 385, at 11.

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names of the persons on whose information they were rendered.⁶⁸⁴ Likewise, when another defendant following conviction moved in arrest of judgment because the information against him had not stated the date of the offense or the penalty provided by the legislature and had not prayed for the issuance of process against him, the prosecution dropped the proceeding.⁶⁸⁵ One defendant even moved in arrest of judgment on the ground that he should have been indicted at common law rather than under a statute.⁶⁸⁶ Similar sorts of formalistic claims also were advanced and at times sustained in civil cases.⁶⁸⁷ Another, somewhat analogous case, however, rejected a lawyer's claim of error in failing to grant him a continuance so he could prepare his legal argument.⁶⁸⁸

In criminal cases, particular attention was paid to juries, who apparently had the power of nullification. When one defendant, for example, was accused of living openly with a woman without benefit of marriage and the Queen's attorneys objected "that the fact aforesaid in the presentment aforesaid was a sufficient conviction thereof," the court overruled the crown's objection and impanelled a jury; the jury acquitted the defendant.⁶⁸⁹ Another defendant obtained dismissal of a presentment because one member of the grand jury was not a

⁶⁸⁴ *E.g.*, King v. Ansley (Fairfax Cnty. Ct., Aug. 16, 1768), in FAIRFAX 1768-1769, *supra* note 385, at 11-12. *But see* King v. Morrow (Augusta Cnty. Ct., Aug. 25, 1749), *microformed on* 00303745162113 (Genealogical Soc'y of Utah) (denying a motion to quash because one grand juror was not a freeholder).

⁶⁸⁵ *Compare* King v. Ramey (Fauquier Cnty. Ct., July 23, 1762), in FAUQUIER 1761-1762, *supra* note 144, at 84 (recording the defendant's reasons supporting his motion), *with* King v. Ramey (Fauquier Cnty. Ct., Aug. 24, 1764), in VIRGINIA COUNTY COURT RECORDS MINUTE BOOK FAUQUIER COUNTY, VIRGINIA 1763-1764, at 86 (Ruth Sparacio & Sam Sparacio eds., 1995) [hereinafter FAUQUIER 1763-1764] (recording the prosecutor's discontinuance).

⁶⁸⁶ King v. Walmsley (Loudoun Cnty. Ct., May 12, 1763), in LOUDOUN 1762-1763, *supra* note 144, at 66-67.

⁶⁸⁷ *See, e.g.*, Chilton v. Lasswell (Loudoun Cnty. Ct., Feb. 14, 1759), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK LOUDOUN COUNTY, VIRGINIA 1758-1759, at 25-26 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter LOUDOUN 1758-1759] (recording the plaintiff's post-verdict motion in a slander case that the defendant had failed to specify what goods the plaintiff had allegedly stolen), *with* Chilton v. Lasswell (Loudoun Cnty. Ct., June 14, 1759), in LOUDOUN 1758-1759, *supra*, at 73 (granting the defendant's post-verdict motion).

⁶⁸⁸ Downs v. Denton (Augusta Cnty. Ct., Sept. 1, 1750), *microformed on* 00303745162113 (Genealogical Soc'y of Utah).

⁶⁸⁹ Queen v. Champ (Richmond Cnty. Ct., July 2, 1707), in RICHMOND 1707-1708, *supra* note 160, at 28. The woman with whom Champ was accused of living had the judgment against her set aside because she "was not summoned to answer the suit nor had any notice of the trial." *Compare* Queen v. Carter (Richmond Cnty. Ct., July 3, 1707), in RICHMOND 1707-1708, *supra* note 160, at 30 (fining the defendant for failing to appear and answer the presentment against her), *with* Queen v. Carter (Richmond Cnty. Ct., Sept. 3, 1707), in RICHMOND 1707-1708, *supra* note 160, at 40-41 (finding the presentment insufficient for uncertainty).

freeholder,⁶⁹⁰ and a third moved to set aside a verdict because some of the petit jurors who convicted him had served on the grand jury that had presented him.⁶⁹¹ Except for trials before the General Court in Williamsburg, juries were drawn from the vicinage where the crime had been committed; even for trials before the General Court six jurors were drawn from the county of the alleged crime.⁶⁹² This reliance on jurors who often knew something about the defendant and the case, together with technical rules that limited prosecutorial freedom, inevitably reduced the freedom of judges, at least in some cases, to convict defendants whom they believed guilty.

The judiciary's declining power also emerged in prosecutions affecting law enforcement. In a number of cases, for example, defendants were charged with interfering with judges and other officers in the execution of their duties.⁶⁹³ Another case grew out of a prosecution of a constable for refusing to serve a warrant—when a prosecution witness failed to appear, the court in formalist fashion declined to grant a postponement, thereby enforcing an agreement to try the case at the present term.⁶⁹⁴ The crown thereupon dropped the prosecution, the constable went free, and the warrant was never served.⁶⁹⁵

Other changes in the mid-eighteenth century similarly altered the dynamic between the bench and the bar, strengthening lawyers and weakening lay judges, however slightly. The most important change occurred when men seeking to practice as attorneys were required to pass an examination administered by a “person or persons, learned in the law,”⁶⁹⁶ although local courts retained power to grant leave to

⁶⁹⁰ King v. Kelly (Spotsylvania Cnty. Ct., June 4, 1734), in *SPOTSYLVANIA 1734–1735*, *supra* note 209, at 40–41.

⁶⁹¹ King v. Scot (Augusta Cnty. Ct., Mar. 2, 1750/51), *microformed on* 00303745162113 (Genealogical Soc'y of Utah).

⁶⁹² Billings, *supra* note 660, at 579; *see, e.g.*, Queen v. Peacock (Richmond Cnty. Ct. Apr. 11, 1706), in *RICHMOND 1705–1706*, *supra* note 237, at 32–33 (ordering the case be continued in Williamsburg).

⁶⁹³ *E.g.*, Smith v. Matterson (Augusta Cnty. Ct., May 20, 1767, *microformed on* 00303775162116 (Genealogical Soc'y of Utah).

⁶⁹⁴ King v. Colhoun (Augusta Cnty. Ct., May 24, 1755), *microformed on* 00303755162114 (Genealogical Soc'y of Utah).

⁶⁹⁵ *Id.*

⁶⁹⁶ 4 HENING, *supra* note 591, at 360–61; *e.g.*, License of Lewis (Middlesex Cnty. Ct., Apr. 3, 1733), in *MIDDLESEX 1735–1737*, *supra* note 169, at 3. The 1732 act, which gave the Governor and Council authority to appoint bar examiners, was repealed in 1742. 5 HENING, *supra* note 643, at 171. The act was replaced by a law authorizing the General Court to appoint examiners from among the attorneys practicing before it. 6 HENING, *supra* note 142, at 140; *see also* License of Buchanan (Fauquier Cnty. Ct., May 26, 1766), in *FAUQUIER 1764–1766*, *supra* note 160, at 96

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practice in individual cases⁶⁹⁷ and to recommend for examination men of “good demeanor.”⁶⁹⁸ The legislature also had succeeded in regulating attorneys’ fees.⁶⁹⁹ These changes weakened local courts marginally. Another change was the increasing presence of law books in the colony, which made it easier for attorneys to cite precedent rather than relying on a common-sense conception of justice.⁷⁰⁰

Judges of the General Court lost even more power than county courts lost. The county courts, it will be recalled, were largely self-perpetuating bodies that recommended to the Governor whom he should appoint.⁷⁰¹ A telling event occurred in Spotsylvania County in 1744, when the Governor appointed three justices whom the court had not recommended; as a result, eight other justices refused to take their oaths or to serve,⁷⁰² as did two of the three named by the Governor without court recommendation.⁷⁰³ Only one of the three, William Lynd, described by one of the eight as a man who “ha[d] begged himself into the Commission,” thereby “slighting the court,”⁷⁰⁴ took the oath.⁷⁰⁵

(administering an attorney’s license); License of Pemberton (Louisa Cnty. Ct., Feb. 8, 1773), in LOUISA 1766–1774, *supra* note 627, at 17–18 (administering an attorney’s license).

⁶⁹⁷ Compare Kennan v. Bailey (Richmond Cnty. Ct., Feb. 6, 1738/1739), in RICHMOND 1738–1740, *supra* note 151, at 13 (reporting a suit against an attorney for practicing outside the county in which he was licensed), with Kennan v. Bailey (Richmond Cnty. Ct., Apr. 3, 1739), in RICHMOND 1738–1740, *supra* note 151, at 22–23 (granting judgment for the defendant attorney).

⁶⁹⁸ 6 HENING, *supra* note 142, at 141; see, e.g., Certification of Turner (Spotsylvania Cnty. Ct., Nov. 8, 1732), in SPOTSYLVANIA 1732–1734, *supra* note 160, at 33 (ordering the clerk to certify that Turner “h[a]s the [c]haracter of an [h]onest man”).

⁶⁹⁹ See 5 HENING, *supra* note 643, at 181–82; 6 HENING, *supra* note 142, at 371–72 (placing limitations on attorney fees); see also Oath of Waller (Louisa Cnty. Ct., Dec. 13, 1742), in LOUISA 1742–1744, *supra* note 637, at 2 (reporting several attorneys’ oaths not to exact or receive “exorbitant fees”); Oath of Power (Middlesex Cnty. Ct., Dec. 7, 1742), in MIDDLESEX 1740–1745, *supra* note 261, at 60–61 (reporting several attorneys’ oaths not to exact or receive “exorbitant fees”).

⁷⁰⁰ See Wills v. Estate of Prescoat (Essex Cnty. Ct., June 20, 1728), in ESSEX 1727–1729, *supra* note 151, at 41 (ordering the defendant to deliver several law books to the plaintiff to satisfy a debt).

⁷⁰¹ See, e.g., Recommendation of Madison (Orange Cnty. Ct., July 25, 1755), in ORANGE 1755–1756, *supra* note 245, at 67–68 (recommending James Madison’s father to be a justice).

⁷⁰² Refusals of Johnston, Robinson, Thornton, Chew, Tutt, Carr, Waller & Turner (Spotsylvania Cnty. Ct. June 5, 1744), in SPOTSYLVANIA 1742–1744, *supra* note 160, at 72–73.

⁷⁰³ Refusals of Strother & Hunter (Spotsylvania Cnty. Ct., June 5, 1744), in SPOTSYLVANIA 1742–1744, *supra* note 160, at 73; accord Refusal of Peyton (Prince William Cnty. Ct., Nov. 1, 1762), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK PRINCE WILLIAM COUNTY, VIRGINIA 1762–1763, at 2 (Ruth Sparacio & Sam Sparacio eds., 1999) [hereinafter PRINCE WILLIAM 1762–1763] (reporting a justice’s refusal to serve because “the Commission of the Peace [was] not . . . made out according to the late nomination” by the sitting justices).

⁷⁰⁴ Refusal of Thornton (Spotsylvania County Ct., June 5, 1744), in SPOTSYLVANIA 1742–1744, *supra* note 160, at 73.

⁷⁰⁵ Oath of Lynd (Spotsylvania Cnty. Ct., June 5, 1744), in SPOTSYLVANIA 1742–1744, *supra* note 160, at 73.

Apparently the matter was solved by compromise, when the Governor issued a new commission of the peace containing one of the three men he wanted, but not Lynd.⁷⁰⁶

Similarly, two decades later in Fauquier County, Wharton Ransdell refused to serve as a justice of the peace; John Churchill refused to serve while John Crump remained on the court; and George Lamkin indicated he did not want to be included in any future commission of the peace.⁷⁰⁷ Similarly, the Northampton County Court withdrew a recommendation that it had made for the appointment of several justices of the peace when one of them declined to serve,⁷⁰⁸ while James Nisbett was willing to serve in Prince William County if he was placed third in the commission but not otherwise.⁷⁰⁹ Also, in 1762, Richard Coke presented the Northampton County Court with a commission to be crown prosecutor, after the court had recommended James Henry for the post.⁷¹⁰ The court acted on an assumption, which was probably false, that its recommendation had not been properly communicated to authorities in Williamsburg and therefore ordered that Coke “be not admitted to take the oaths to qualify him” until the further pleasure of the Governor and Attorney General be known.⁷¹¹

Appeals from county courts to the General Court remained the norm. But at times, county courts denied appeals,⁷¹² while at other times appellate courts refused to consider appeals from general verdicts when evidence had not been taken down in writing and submitted on appeal under proper seal.⁷¹³ This led one litigant to argue, somewhat vaguely and over broadly that “no such general verdict from Virginia . . . ever was opened or look[ed] into, or can be, by the laws of the land; which

⁷⁰⁶ See Comm’n of the Peace (Spotsylvania County Ct., July 3, 1744), in SPOTSYLVANIA 1742–1744, *supra* note 160, at 73–74 (issuing commission for Waller and Robinson).

⁷⁰⁷ Refusals of Lamkin, Ransdell, & Churchill (Fauquier County Ct., July 23, 1761), in FAUQUIER 1761–1762, *supra* note 144, at 7.

⁷⁰⁸ Recommendation for Comm’n of the Peace (Northampton Cnty. Ct., Jan. 12, 1768), *microformed on* 00327485162124 (Library of Va.).

⁷⁰⁹ Reasons of Nisbett (Prince William Cnty. Ct., May 5, 1762), in PRINCE WILLIAM 1761–1762, *supra* note 531, at 76.

⁷¹⁰ Order re Coke (Northampton Cnty. Ct., July 16, 1762), *microformed on* 00327485162124 (Library of Va.).

⁷¹¹ *Id.*

⁷¹² See, e.g., Moffet v. Graham (Augusta Cnty. Ct., Aug. 22, 1746), *microformed on* 00303745162113 (Genealogical Soc’y of Utah) (stating “no appeal should be granted on a general verdict without errors . . . first filed”).

⁷¹³ See SMITH, *supra* note 592, at 356 (providing *Perry v. Churchill* as an example). *But cf. id.* at 357–58 (discussing *Lidderdale v. Chiswell* where the council directed the court below to receive and authenticate the appellant’s bill of exceptions and thereupon considered appeal).

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would be to find without evidence, for the plaintiffs, where twelve men, upon their oaths, have, upon evidence, found for the defendant."⁷¹⁴

County courts also refused at times to obey orders from the Governor and the General Court. One case of direct disobedience occurred when a county court declined to obey a mandamus from the General Court requiring the county to build a specified bridge, which the county court declared would require a "needless tax" and be "altogether useless."⁷¹⁵ The court also took note of topographical conditions that would make construction difficult and challenged the bona fides of the man who had obtained the mandamus, when it accused him of offering not to enforce the mandamus if tithables under his control were relieved of other work on the roads.⁷¹⁶

As a result of disobedience such as this, the General Court developed a practice of issuing its orders, not to county courts, but to litigants, who were more amenable. In *Lewis v. Golston*,⁷¹⁷ for example, in which the General Court had prohibited the plaintiff from suing the defendant in county court, the county court, when presented with the prohibition, agreed only to "take the same into consideration." In the end, however, it did not need to do so, because the plaintiff, "rather than run the risk of being adjudged guilty of contempt," withdrew his suit, "saving," however, his "good right by law to commence his action & . . . to prosecute the same" in the county court.⁷¹⁸ In a case such as *Golston*, the county court not only declared its independence from the General Court, but the General Court recognized that independence and did nothing direct about it.

County courts, in turn, lost authority vis-a-vis juries impanelled in the cases they heard. Of course, they continued to police procedures followed by juries during their deliberations,⁷¹⁹ to enjoin enforcement of

⁷¹⁴ *Id.* at 358 n.33.

⁷¹⁵ *Slaughter v. Justices* (Fauquier Cnty. Ct., Sept. 28, 1767), in FAUQUIER 1766-1767, *supra* note 247, at 90-91; see *Letter of Gooch* (Spotsylvania Cnty. Ct., Oct. 1, 1728), in SPOITSYLVANIA 1724-1730 (PART III), *supra* note 127, at 45 (declining to appoint an administrator as directed by the governor). *But see In re. Hathaway* (Stafford Cnty. Ct., Dec. 16, 1691), in STAFFORD 1691-1692, *supra* note 184, at 62-65 (obeying the mandate of the General Court to adjudicate the case).

⁷¹⁶ *Slaughter v. Justices* (Fauquier Cnty. Ct., Sept. 28, 1767), in FAUQUIER 1766-1767, *supra* note 247, at 91.

⁷¹⁷ (Spotsylvania Cnty. Ct., June 3, 1735), in SPOITSYLVANIA 1734-1735, *supra* note 209, at 99; see also *Lewis v. Golston* (Spotsylvania Cnty. Ct., June 4, 1735), in SPOITSYLVANIA 1734-1735, *supra* note 209, at 103 (granting the plaintiff's motion for additional time to familiarize himself with the General Court's order).

⁷¹⁸ *Lewis v. Golston* (Spotsylvania Cnty. Ct., July 1, 1735), in SPOITSYLVANIA 1734-1735, *supra* note 209, at 108.

⁷¹⁹ See *Shields v. Wilson* (Augusta Cnty. Ct., June 1, 1751), *microformed on* 00303745162113 (Genealogical Soc'y of Utah) (setting aside a verdict because two jurors departed the jury room during deliberations).

common-law judgments,⁷²⁰ to rule on the admissibility of evidence,⁷²¹ to preserve objections to their rulings by way of bills of exceptions,⁷²² and to set aside verdicts and grant new trials when juries returned verdicts contrary to the evidence.⁷²³ In another case, a court held a verdict “idle and void” because jurors had “misbehaved themselves.”⁷²⁴

Judges also continued on occasion to penetrate beyond the rubric of contrary to evidence, which implicitly meant that a jury had disobeyed the law, and explicitly set aside verdicts contrary to law. In one such case, a jury returned a plaintiff’s verdict for money owed, but the court, finding that the obligation arose out of “gaming contrary to act of Assembly,” set the verdict aside.⁷²⁵ In another case, a jury returned a

⁷²⁰ *E.g.*, *Crabb v. Martin* (Botetourt Cnty. Ct., Apr. 14, 1772), *microformed on* 00307225162119 (Genealogical Soc’y of Utah); *see also* *Ledderdale v. Harrison* (Augusta Cnty. Ct., Nov. 20, 1756), *microformed on* 00303755162114 (Genealogical Soc’y of Utah) (ruling in chancery that the petitioner in chancery owed only £6, 3 shillings, and 9 pence and that payment of that sum would discharge the larger verdict that Harrison had obtained at common law).

⁷²¹ *See, e.g.*, *McCullom v. Hunter* (Augusta Cnty. Ct., June 18, 1757), *microformed on* 00303755162114 (Genealogical Soc’y of Utah) (allowing the defendant to prove a written instrument given in consideration for land that was never conveyed); *Beard v. Moore* (Augusta Cnty. Ct., Mar. 19, 1756), *microformed on* 00303755162114 (Genealogical Soc’y of Utah) (permitting a witness with a record of criminal conviction to give an unsworn statement to the jury, but not to testify under oath).

⁷²² *E.g.*, *Hamilton v. Ellzey* (Loudoun Cnty. Ct., Aug. 15, 1764), *in* VIRGINIA COUNTY COURT RECORDS ORDER BOOK LOUDON COUNTY, VIRGINIA 1764, at 54–55 (Ruth Sparacio & Sam Sparacio eds., 1997) [hereinafter *LOUDOUN 1764*]; *Rogers v. Marshall* (Northampton Cnty. Ct., May 8, 1750), *microformed on* 00327535162129 (Library of Va.).

⁷²³ *E.g.*, *Doah v. Sayers* (Augusta Cnty. Ct., Aug. 22, 1747), *microformed on* 00303745162113 (Genealogical Soc’y of Utah); *Darnall v. Morgan* (Fauquier Cnty. Ct., Oct. 26, 1764), *in* FAUQUIER 1764–1766, *supra* note 160, at 6; *Stubblefield v. Moore* (Spotsylvania Cnty. Ct., July 1, 1740), *in* SPOTSYLVANIA 1738–1740, *supra* note 122, at 104. *But compare* *Garner v. Darnall* (Fauquier Cnty. Ct., Mar. 28, 1761), *in* FAUQUIER 1759–1761, *supra* note 257, at 93 (reporting the defendant’s motion for a new trial on the ground that the jury rendered a verdict for the wrong party), *with* *Garner v. Darnall* (Fauquier Cnty. Ct., Aug. 29, 1761), *in* FAUQUIER 1761–1762, *supra* note 144, at 19 (denying the defendant’s motion for new trial). Even when a jury found contrary to evidence, a court had discretion to accept its verdict. *See, e.g.*, *Henslee v. Tutt* (Spotsylvania Cnty. Ct., Mar. 1, 1742/1743), *in* SPOTSYLVANIA 1742–1744, *supra* note 160, at 3–4 (considering whether to grant a new trial where the jury found contrary to the evidence). Although, in the case just cited, the court ultimately did, in fact, grant a new trial. *Henslee v. Tutt* (Spotsylvania Cnty. Ct., Apr. 5 1743), *in* SPOTSYLVANIA 1742–1744, *supra* note 160, at 7–8.

⁷²⁴ *Galloway v. Mann* (Augusta Cnty. Ct., Aug. 23, 1764), *microformed on* 00303765162115 (Genealogical Soc’y of Utah).

⁷²⁵ *Beverley v. Barksdale* (Caroline Cnty. Ct., Aug. 15, 1772), *in* VIRGINIA COUNTY COURT RECORDS ORDER BOOK CAROLINE COUNTY, VIRGINIA 1772–1773, at 49–50 (Ruth Sparacio & Sam Sparacio eds., 1993) [hereinafter *CAROLINE 1772–1773*]; *see also* *Hackett v. Goodall* (Caroline Cnty. Ct., May 13, 1773), *in* CAROLINE 1773, *supra* note 589, at 20–21 (admitting evidence that money was won playing dice in a suit for a statutory penalty for unlawful gambling); *Thornton v. Evans* (Richmond Cnty. Ct., Feb. 7, 1694/1695), *in* RICHMOND 1694–1697, *supra* note 151, at 22–23 (reporting jury verdict upholding the defendant’s plea that recovery of winnings at a game of cards was outlawed by statute). *But see* *Russell v. Morton* (Richmond Cnty. Ct., June 5,

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general verdict for the defendant, and the court directed it to consider its verdict further.⁷²⁶ When it returned later with the same verdict, the court granted the plaintiff a new trial.⁷²⁷ In a third case, in which a defendant requested a special verdict and informed the jury of legal questions that would arise thereon, the court denied the request and instructed the jury “to do as pleased,”⁷²⁸ although when the jury returned a general verdict for the plaintiff, the court granted a new trial.⁷²⁹ On at least one occasion, a court dispensed with a jury entirely and concluded that particular evidence constituted a bar to a plaintiff’s suit, and accordingly, it rendered the equivalent of summary judgment for the defendant.⁷³⁰

Nonetheless, despite the vast power of judges to reject jury verdicts, at least some lawyers were prepared to argue that general verdicts were immune from judicial review.⁷³¹ For whatever reason, courts at times stayed their hand and did not exert their full power over juries. A 1769 case, *Doe v. Anderson*,⁷³² which grew out of a title dispute to three plantations and 600 acres of land, probably typifies how cases were routinely tried. At issue was the admissibility of a deposition taken some sixteen years earlier and a copy of an alleged original survey, which was certified as a true copy by the proprietor’s alleged agent.⁷³³ Plaintiff’s attorney objected to the admission of oral testimony needed to

1733), in RICHMOND 1732-1734, *supra* note 326, at 43-44 (allowing the plaintiff to recover winnings at a card game). Compare *Swan v. Parkes* (Rappahannock Cnty. Ct. Mar. 5, 1684/1685), in RAPPAHANNOCK 1683-1685, *supra* note 159, at 71 (reporting a suit brought to recover money owed on a wager on a horse), with *Swan v. Parkes* (Rappahannock Cnty. Ct., May 6, 1685), in RAPPAHANNOCK 1683-1685, *supra* note 159, at 80 (allowing plaintiff’s suit to proceed).

⁷²⁶ *Seekright v. Goar* (Middlesex Cnty. Ct., June 7, 1743), in MIDDLESEX 1740-1745, *supra* note 261, at 73.

⁷²⁷ *Id.*

⁷²⁸ *Barbour v. Sandys* (Orange Cnty. Ct., Apr. 24, 1755), in ORANGE 1755-1756, *supra* note 245, at 23.

⁷²⁹ Compare *id.* (reporting the jury’s general verdict for the plaintiff), with *Barbour v. Sandys* (Orange Cnty. Ct., May 22, 1755), in ORANGE 1755-1756, *supra* note 245, at 34 (granting a new trial). See also *Thompson v. Boylston* (Botetourt Cnty. Ct., Nov. 12, 1772), microformed on 00307225162119 (Genealogical Soc’y of Utah) (denying the plaintiff’s motion for special verdict).

⁷³⁰ *Mercer v. Crump* (Fauquier Cnty. Ct., Mar. 28, 1761), in FAUQUIER 1759-1761, *supra* note 257, at 98.

⁷³¹ See SMITH, *supra* note 592, at 357-58 & n.33 (providing the respondent’s argument in *Lidderdale v. Chiswell* as an example); see also *supra* text accompanying note 714 (setting forth the text of the argument).

⁷³² (Fauquier Cnty. Ct., Sept. 26, 1769), in VIRGINIA COUNTY COURT RECORDS MINUTE BOOK FAUQUIER COUNTY, VIRGINIA 1769-1771, at 12-13 (Ruth Sparacio & Sam Sparacio eds., 1996) [hereinafter FAUQUIER 1769-1771].

⁷³³ *Id.* at 12.

authenticate the documents and also to their quality as hearsay.⁷³⁴ However, “[t]he court admitted them generally without giving any charge to the jury;”⁷³⁵ the court, that is, simply let the jury determine without guidance the weight to be given to disputed evidence and thus the entire outcome of the case. Similarly, a court in a 1752 case, *Patton v. Shann*,⁷³⁶ refused a defendant’s request to direct the jury that special damages had not been proved and instead sent the jury out without direction.

Judges, in short, possessed a limited willingness to police juries, as *Riddle v. Stodghill*,⁷³⁷ a 1751 action of trespass for an assault, illustrates. Initially, the jury in *Riddle* returned a verdict for the defendant, but the court, finding that verdict contrary to the evidence, directed it to reconsider.⁷³⁸ The jury did reconsider and returned a plaintiff’s verdict for one penny damages—technically, but not in practical impact, vastly different from the initial verdict rejected by the bench.⁷³⁹ Nonetheless, the court, for reasons the record fails to illuminate, accepted the new verdict and entered judgment thereon.⁷⁴⁰ Perhaps the court was satisfied with an apparent compromise. Perhaps it appreciated that its real power to police juries was limited. Perhaps there were underlying facts that the record fails to reveal.

Several years later, a new issue of constitutional dimension came to the fore and led a jury to behave exactly as the jury in *Riddle v. Stodghill* had behaved. Again the court stayed its hand.

Legislation in 1696, which over the years had been slightly amended, set the annual salary of clergymen at 16,000 lb. of tobacco, which at the then price of 10 shillings per hundred lb. gave a salary of approximately £80 per year. In 1755, the House of Burgesses, fearing that a drought would lead to a tobacco shortage and a spike in its price, gave local bodies the option of paying all salaries in cash rather than tobacco, at a rate of two pennies per lb. of tobacco. When approved by the Council and the Governor, this act, which remained in force only for ten months, gave clergymen an annual salary of approximately £130. Anticipating that tobacco prices might rise above two pennies per lb., some clergymen

⁷³⁴ *Id.* at 13.

⁷³⁵ *Id.*

⁷³⁶ (Augusta Cnty. Ct., Nov. 17, 1752), *microformed on* 00303745162113 (Genealogical Soc’y of Utah).

⁷³⁷ (Orange Cnty. Ct., Aug. 23, 1751), *in* ORANGE 1749–1752, *supra* note 247, at 73.

⁷³⁸ *Id.*

⁷³⁹ *Id.*

⁷⁴⁰ *Id.*

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were unhappy, but when prices topped out at the two penny rate they did nothing.⁷⁴¹

A second drought, with the accompanying concern about rising prices, led to the adoption of a second Two Penny Act in 1758, this time with a duration of one year. When prices in fact rose to six pennies per lb., which would have worked out to annual salaries of £400, the clergy memorialized the Privy Council to disallow the legislation. The council, in fact, disapproved the legislation in the summer of 1759, but official word thereof did not reach Virginia until over a year after passage of the 1758 act, the effect of which had already expired.⁷⁴²

Nonetheless, several ministers brought separate suits to recover back pay in the form of the difference during the year the act was in effect between the two pennies per lb. of tobacco they received and the six pennies market price.⁷⁴³ The legal issue in the cases was whether the Privy Council's disallowance became effective only on the date when official notice was received in Virginia, in which case the ministers lost, or whether the Two Penny Act was *void ab initio*, in which case the clergy was entitled to its back pay.⁷⁴⁴ In the first two suits, one minister won and one lost.⁷⁴⁵

A third suit, known to historians as the *Parsons' Cause* was filed in Hanover County, in which the court ruled as a matter of law that the Two Penny Act was *void ab initio* and summoned a jury of enquiry to calculate the damages to which the plaintiff minister was entitled.⁷⁴⁶ The defendant vestry thereupon retained Patrick Henry, the son of the county court's presiding justice, to represent it.⁷⁴⁷ In addressing the jury, Henry, whom opposing counsel accused of "'treason,'" ignored the issue of damages and addressed directly the merits of his father's ruling of

⁷⁴¹ See 2 LYON GARDINER TYLER, HISTORY OF VIRGINIA: THE FEDERAL PERIOD 1763-1861, at 61-62 (1924) (discussing this controversial legislation). The preceding factual scenario comes from this source.

⁷⁴² See *id.* at 63-66 (discussing the subsequent legislation regard clergymen's salary). The preceding factual scenario comes from this source. See also SMITH, *supra* note 592, at 607-626 (discussing this appeal and others surrounding the *Parson's Cause* with great doctrinal precision); CRAIG YIRUSH, SETTLERS, LIBERTY, AND EMPIRE: THE ROOTS OF EARLY AMERICAN POLITICAL THEORY, 1675-1775, at 169-79 (2011) (providing the most recent discussion of the *Parson's Cause* itself and those surrounding it); *infra* text accompanying notes 746-51 (briefly discussing the *Parson's Cause*).

⁷⁴³ See TYLER, *supra* note 741, at 70-76 (discussing the several suits initiated in regards to the act).

⁷⁴⁴ See *id.* at 70 (explaining that a plaintiff would receive damages only if a jury found the law to be invalid).

⁷⁴⁵ ROBERT DOUTHAT MEADE, PATRICK HENRY: PATRIOT IN THE MAKING 123-24 (1957).

⁷⁴⁶ TYLER, *supra* note 741, at 70.

⁷⁴⁷ RICHARD R. BEEMAN, PATRICK HENRY: A BIOGRAPHY 19-20 (1974) (discussing Henry's arguments before the jury).

law.⁷⁴⁸ Henry called the Two Penny Act “a good law . . . of general utility” that “could not, consistently with the original compact between King and people, . . . be annulled.”⁷⁴⁹ In Henry’s view, “a King, by disallowing Acts of this salutary nature, from being the father of his people, degenerate[d] into a Tyrant, and forfeit[ed] all right to his subjects’ obedience.”⁷⁵⁰ The jury, like the one in *Riddle v. Stodghill*, agreed and effectively nullified the court’s ruling of law by returning a verdict of one penny damages, and when the plaintiff moved to set aside the verdict as contrary to the evidence, the court overruled the motion.⁷⁵¹

Some present in the courtroom may have wondered why Henry adopted so extreme a position, and it is possible that he was merely seeking popularity.⁷⁵² However, there also may have been a legal reason. Writing some fifteen years later in his *Notes on the State of Virginia*, Thomas Jefferson observed that, although juries typically decided only the facts and took their law from the court, “this division of the subject lies within their discretion only. And if the question relate[s] to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.”⁷⁵³ Henry, that is, may have needed to argue his case as a constitutional one in order to deny law-finding power to the court and confer such power instead on the jury.

Knox v. Daniel,⁷⁵⁴ a case from 1768, is consistent with this interpretation of Jefferson’s understanding. There the jury returned a verdict for £75 damages upon finding that the defendant “maliciously and unjustly to vex, injure, and oppress” the plaintiff “without any just or reasonable cause” had him bound over to an examining court on suspicion of felony.⁷⁵⁵ The defendant moved in arrest of judgment on

⁷⁴⁸ *Id.* at 19.

⁷⁴⁹ *Id.*

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.* at 19–20; see also MEADE, *supra* note 745, at 124–34 (providing a detailed account of the *Parson’s Cause*). Ultimately, the General Court, and later the Privy Council, rejected the position of the Hanover County Court and ruled that the disallowance of the Two Penny Act took effect only upon its official communication to authorities in Virginia. See SMITH, *supra* note 592, at 623–24 (discussing rejection by the Privy Council); TYLER, *supra* note 741, at 74 (discussing rejection by the General Court).

⁷⁵² See BEEMAN, *supra* note 747, at 20 (providing Henry’s supposed declaration to Maury that Henry took such position “to render himself popular”).

⁷⁵³ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (William Peden ed., 1955).

⁷⁵⁴ Compare *Knox v. Daniel* (Fauquier Cnty Ct., Oct. 25, 1768), in FAUQUIER 1767–1769, *supra* note 682, at 62 (reporting the jury verdict and defendant’s motion to arrest the judgment), with *Knox v. Daniel* (Fauquier Cnty. Ct., June 26, 1770), in FAUQUIER 1769–1771, *supra* note 732, at 54 (reporting the court’s denial of the defendant’s motion).

⁷⁵⁵ *Knox v. Daniel* (Fauquier Cnty. Ct., Oct. 25, 1768), in FAUQUIER 1767–1769, *supra* note 682, at 62.

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four grounds: (1) that suit had been brought in a county other than where the alleged tort had occurred; (2) the plaintiff had not given notice of his intent to sue; (3) the quite large £75 damage verdict was excessive; and (4) the jurors improperly had separated and taken meals at their own expense between the time they began receiving evidence and the time they returned their verdict in open court.⁷⁵⁶ Indeed, the defendant implied that the jurors changed their verdict after separating. Normally the defendant's fourth allegation would have led to rejection of a jury verdict, but in *Knox* it did not.⁷⁵⁷ Perhaps the court deferred to the jury because it did not credit the defendant's factual claims. However, the case also may have been one where the jury had ignored standard black-letter law to protect a subject's liberty and the court, recognizing the jury's superior authority, tolerated its doing so.

Oldum v. Allerton,⁷⁵⁸ a 1739 case of which Jefferson was almost certainly aware, also fits with what he wrote in *Notes on the State of Virginia*. Although *Oldum* involved a different issue—the immunity of judges to suit—the argument of counsel reported in the case made the same distinction presented in Jefferson's *Notes on the State of Virginia* between ordinary litigation, where judges should enjoy immunity, and matters involving judicial bias or threats to the liberty of the subject.⁷⁵⁹ Counsel made the standard argument that it would be “dangerous” to place “Power . . . in the hands of a single person subject to no control” because “Human nature is too depraved to depend altogether upon the virtue & integrity of the judge[.] Power is apt to intoxicate & spoil the best tempers Fences against arbitrary power should be kept up.”⁷⁶⁰

At the same time the argument of counsel recognized the “hardship” that would be imposed on judges by subjecting them to suit on account of their judgments.⁷⁶¹ However, counsel continued:

Besides the Justices in these cases are always very tenderly dealt with by the jury in their damages if it appears to be a mere mistake in judgment. On the contrary where there are any marks of violence or oppression o[r] partiality or passion[,] they [the jurors]

⁷⁵⁶ *Id.*

⁷⁵⁷ See *Knox v. Daniel* (Fauquier Cnty. Ct., June 26, 1770), in FAUQUIER 1769–1771, *supra* note 732, at 54 (denying the defendant's motion).

⁷⁵⁸ (Va. Gen. Ct., Oct. 1739), in 2 BARRADALL & RANDOLPH, *supra* note 144, at B320, B331–43.

⁷⁵⁹ See *id.* at B332–34 (providing the issue presented in the case and the court's distinction between liability and nonliability of the judiciary).

⁷⁶⁰ *Id.* at B341.

⁷⁶¹ *Id.* at B342.

make them [the judges] smart for it in damages as indeed they ought.⁷⁶²

We can best make sense out of Jefferson's *Notes on the State of Virginia* and the cases that have just been discussed if we start with the proposition that early eighteenth-century judicial practices of good conscience, good reason, and justice were being transformed in the 1760s and 1770s by lawyers like Jefferson into a more formal and mechanical body of legal knowledge and legal rules. Gentlemen justices such as Patrick Henry's father maintained control of their localities by avoiding appearances of oppression or partiality; they understood that, if they behaved badly, their underlings in one way or another might make them smart. As Virginia's legal profession moved to the fore in the second half of the century, however, lawyers like Jefferson were no longer satisfied that judges would practice good conscience and maintain appearances lest the people somehow sanction them. The lawyers strove to articulate rules with which they could bind the judges.

Accordingly, *Notes on the State of Virginia* spelled out as a rule—that judges had no power to set aside a jury verdict in a case of constitutional magnitude—what previously had only been a tendency to respect jury freedom in cases of public significance. Inevitably, as the power of lawyers and their rules increased, that of lay justices in particular and courts in general became more and more constrained.

B. *The Collapse of the Land Bargain*

As noted above, land distribution policy was a highly contested political issue in late seventeenth- and early eighteenth-century Virginia.⁷⁶³ By 1710, however, the great planters had won the contest, and the crown had acquiesced in the practice of granting virgin lands almost entirely to leading planters. The planters then developed extensive land speculation schemes, on which they became quite dependent as they strove to maintain the economic *status quo*.⁷⁶⁴

Indeed, land speculation became so important to maintaining the *status quo* that leading Virginians became unduly sensitive to any threats to it. Thus, when in 1752 Governor Robert Dinwiddie, in pursuit of his instructions, demanded the payment of a fee for sealing patents granting

⁷⁶² *Id.*

⁷⁶³ See *supra* Part IV.B (discussing land distribution policies in colonial Virginia in depth).

⁷⁶⁴ See HOLTON, *supra* note 168, at xiii–xvii, 3–38 (discussing the efforts of Virginia's elite gentlemen in maintaining wealth and power).

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land his demand raised a storm.⁷⁶⁵ Although such fees were common in other colonies, they had not been paid in Virginia for several decades.⁷⁶⁶

The fee demanded by Dinwiddie was not a trivial one—roughly the purchase price of a cow.⁷⁶⁷ Such a fee would have had its greatest impact on people seeking small grants and on speculators seeking a large number of grants—speculators who often were members either of the Governor’s Council or of the House of Burgesses.⁷⁶⁸ However, opponents of the fee did not protest against it on economic grounds. Instead, they turned to a young lawyer for legal and constitutional argument when the House of Burgesses appointed Peyton Randolph, who had been educated at the Inns of Court and was only in his early thirties, to travel to England for a substantial fee of £2500 and argue their cause before the Privy Council.⁷⁶⁹ Dinwiddie promptly removed Randolph from his post as Attorney General and appointed George Wythe in his stead.⁷⁷⁰

In essence, the Burgesses’ argument before the Privy Council made two points: (1) that by agreeing earlier to issue land patents without charging any fee the crown had established a precedent from which it could not now depart; and (2) the fee amounted to a tax and that no tax could be levied in Virginia without the consent of the House of Burgesses.⁷⁷¹ In 1754 the Council rejected both arguments and upheld Dinwiddie’s right to collect the fee.⁷⁷² However, it made some concessions to the Burgesses: it exempted from the fee patents that had been filed before Dinwiddie’s announcement of the fee, grants of fewer than 100 acres, and grants of land west of the Alleghany Mountains, with the result that few grants remained that were covered by the fee.⁷⁷³ Virginians accordingly celebrated what they counted as a victory; they also were pleased when the Privy Council directed Dinwiddie to restore

⁷⁶⁵ BILLINGS ET AL., *supra* note 112, at 256–57.

⁷⁶⁶ *See id.* (providing brief general discussions of the conflict over Governor Dinwiddie’s proposed fees); *see also* TYLER, *supra* note 741, at 58–60 (discussing briefly petitions and appeals brought in regards to the tax).

⁷⁶⁷ BILLINGS ET AL., *supra* note 112, at 256.

⁷⁶⁸ *Id.*; *see also* Smith, *supra* note 621, at 220–21 (discussing the role of the pistle fee dispute in the revolution).

⁷⁶⁹ *See* Jack P. Greene, *The Case of the Pistole Fee: The Report of a Hearing on the Pistole Fee Dispute Before the Privy Council, June 18, 1754*, 66 VA. MAG. HIST. & BIOGRAPHY 399, 399, 402 (1958) (providing brief background information on the dispute and discussing Randolph’s appointment by the House of Burgesses); *see also* JONES, *supra* note 498, at 179 (providing biographical information on Randolph as a member of the Inns of Court).

⁷⁷⁰ Greene, *supra* note 769, at 402.

⁷⁷¹ *Id.* at 401. For a transcript of arguments presented on behalf of the Assembly, *see id.* at 412–19.

⁷⁷² *Id.* at 405.

⁷⁷³ BILLINGS ET AL., *supra* note 112, at 257; Greene, *supra* note 769, at 404.

Randolph to the office of Attorney General, and Dinwiddie consented to the payment of Randolph's £2500 fee.⁷⁷⁴

The importance of the dispute over Dinwiddie's demand for a fee upon issuing land grants lay less in the substance of the dispute than in the habits of mind it created. The three-year-long conflict between Dinwiddie and the Burgesses established important patterns of thought that channeled future Virginia resistance to British demands.

At its root, the dispute was about an economic matter of central importance to Virginia's great planters—their access to new land on cheap, favorable terms. They could not tolerate the possibility that crown officials might alter the land bargain worked out at the beginning of the century, a bargain on which their economic security depended. The planters argued, however, not on economic but on legal and constitutional grounds. Their belief that they had triumphed on those grounds acculturated them to turn to lawyers and constitutional argument when, within a decade, new conflicts with Great Britain arose.

The role that law and the constitution played in obstructing Dinwiddie's demands also made the interests of the bar congruent with the interests of planters. The two groups had not necessarily shared interests when debt collection had been the main task of Virginia law and lawyers; then, lawyers and planters had sometimes been at odds. However, once the great planters conceived of lawyers as protectors of the constitutional, and thus economic, structure of Virginia society their alliance became firm. Lawyers became important figures in the inner circle that dominated Virginia culture.

The next conflict over land policy—and a more important one than Governor Dinwiddie's demand for a fee for issuing land patents—emerged in the aftermath of the Seven Years War. Virginians had expected Britain's victory in the war to open the Ohio Valley to settlement and accordingly were sorely disappointed by the Proclamation of 1763, which barred all settlement west of the Appalachians.⁷⁷⁵ Nothing better demonstrates how badly the great planters needed the western land in which they were speculating than the continual efforts they made and the hope they maintained for the crown to rescind the proclamation.⁷⁷⁶ Their ultimate disappointment

⁷⁷⁴ Greene, *supra* note 769, at 405.

⁷⁷⁵ See COLIN G. CALLOWAY, *THE SCRATCH OF A PEN: 1763 AND THE TRANSFORMATION OF NORTH AMERICA* 92 (2006) (explaining the effect of the Proclamation of 1763).

⁷⁷⁶ See *id.* at 60–62, 92–94, 98–99 (2006) (providing a brief history of the proclamation and discussing attempts to sell and acquire land in this region); PATRICK GRIFFIN, *AMERICAN LEVIATHAN: EMPIRE, NATION, AND REVOLUTIONARY FRONTIER* 50, 55–61, 85–94, 134–36 (2007) (discussing attempts to acquire land despite the proclamation and the resulting consequences); HOLTON, *supra* note 168, at 3–13, 28–32, 35 (discussing tensions between land speculators,

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came in 1774, when the British ministry, in a conscious effort to discourage western speculation and settlement, drafted the Quebec Act so as to incorporate into the Roman Catholic province of Quebec much of the land Virginians had hoped to exploit.⁷⁷⁷

London's policy of discouraging western speculation and settlement did not lead Virginians directly to revolution,⁷⁷⁸ but it tended in that direction. The policy made it more difficult for Virginia planters to pay debts to British creditors and to abide by long-accepted arrangements, such as those sanctioned by the Navigation Acts requiring that all Virginia tobacco to be marketed through Great Britain.⁷⁷⁹ This led notable Virginians, such as Arthur Lee and George Washington, to suppose that the ministry was "antiamerican" [sic] and had a "'malignant disposition to American[s].'"⁷⁸⁰ They and the group of legal thinkers associated with them then did what litigants and lawyers typically do in the context of an interest-group conflict—they developed theoretical arguments in support of their economic positions. In the process, they translated, and thereby escalated, their economic materialist battle over land, tobacco marketing, and debt into a constitutional controversy that called into question longstanding, settled assumptions about the relationship of Virginia to Great Britain.⁷⁸¹

When, before the middle of the century, Virginia's great planters understood that they had cut a deal with the crown that gave them land in return for their acceptance of mercantalist policies, they could both cope with the economic consequences of the deal and see themselves as equal participants in a consensual, fair process of governance. It did not matter that they were not represented in Parliament as long as they

Native Americans, and the Privy Council over land out west); PHILYAW, *supra* note 656, at 46–64 (discussing the attempts of Virginia's "land barons" to acquire "Land of the Western Waters" in the midst of the proclamation). Perhaps the most extreme example of these efforts was a large-scale military adventure by Virginians against Ohio Valley Native Americans that has come to be known as Lord Dunmore's War. Patrick Griffin tends to treat the adventure as largely orchestrated by Dunmore for his own political purposes. See GRIFFIN, *supra*, at 97–123. Woody Holton, on the other hand, sees Virginia speculators rather than Governor Dunmore as the driving force. See HOLTON, *supra* note 168, at 33–35.

⁷⁷⁷ GRIFFIN, *supra* note 776, at 102; HOLTON, *supra* note 168, at 33; see PHILYAW, *supra* note 656, at 62–64 (discussing efforts to speculate land out west despite legislative hindrances in the 1760s and 1770s).

⁷⁷⁸ See HOLTON, *supra* note 168, at 36 (arguing that the abolition of western land speculation was not a "paramount concern" in the revolution).

⁷⁷⁹ See *id.* at 3–4, 46–66 (discussing Jefferson's and Washington's difficulties in maintaining their land agreements as well as tensions arising due to the Navigation Acts).

⁷⁸⁰ *Id.* at 9, 32. For statements of Edmund Pendleton and Thomas Jefferson, see *id.* at 35–36 & 36 n.54.

⁷⁸¹ See, e.g., YIRUSH, *supra* note 742, at 158–79 (discussing the pistole fee dispute and the *Parson's Cause* as disputes that tested constitutional principles).

participated in other ways as free men in the lawmaking process and could live with the material output of that process. However, when crown and Parliament claimed supreme power and by proclamation and legislation changed fundamental ground rules that had been in place for decades Virginians feared both for their economic well-being and for the loss of their freedom and power.⁷⁸² Thus, their economic and constitutional interests were congruent.

The first impact of this congruence was to transform what might have been a trivial political conflict in Virginia—the conflict over the Stamp Act—into a supreme constitutional controversy. Patrick Henry was again at the center of the controversy in Virginia with his introduction in the House of Burgesses of five resolutions against the Stamp Act, the last of which declared that the act “ha[d] a manifest tendency to destroy *British* as well as *American* freedom.”⁷⁸³ This last resolution passed by only one vote, and that vote was reversed on the following day.⁷⁸⁴ However, the debate among the Burgesses gave play to radical ideas and when the stamp distributor for Virginia arrived in the colony he was met by a mob and forced to resign his office.⁷⁸⁵

As a result, no stamps were available for sale, and business could not proceed as usual. Lawyers had to decide what to do. Thus, the legislature, following the Stamp Act’s repeal, extended the period for recording deeds and other documents that had not been recorded in the absence of stamps.⁷⁸⁶ Similarly, the courts had to decide how to proceed in the absence of the stamps required on judicial documents. Some closed down and declined to transact any business requiring stamps, while others continued to do business on the ground that no stamps were available and that it was essential they remain open. Most interesting was Northampton County Court, which responded as follows to an inquiry from its nonjudicial officers whether they would incur any penalties for keeping the court open without using stamped paper:

[T]he said court unanimously declared it to be their [o]pinion that the said [a]ct did not bind, affect, or concern the inhabitants of this [c]olony, inasmuch as they conceive the same to be unconstitutional, and that

⁷⁸² See T. H. BREEN, *TOBACCO CULTURE: THE MENTALITY OF THE GREAT TIDEWATER PLANTERS ON THE EVE OF REVOLUTION* 124–59, 196–203 (2001) (discussing these fears as relating to the increasing debts owed by Tidewater tobacco planters).

⁷⁸³ BEEMAN, *supra* note 747, at 36.

⁷⁸⁴ *Id.* at 38–39.

⁷⁸⁵ *Id.* at 43.

⁷⁸⁶ 8 HENING, *supra* note 465, at 199–200.

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the said several officers may proceed in the execution of their respective [o]ffices, without incurring any [p]enalty by means thereof.⁷⁸⁷

With this somewhat-modern, judicial declaration of unconstitutionality, which was entered formally into the record apparently for the purpose of protecting officials from liability, at least some Virginia legal actors began to move along with actors in other colonies in directions that ultimately would result in a new distinctively American common law of constitutionalism.

The movement occurred in fits and starts, however, and for over a decade the direction of movement was often unclear. In 1769, for example, many Virginians joined other colonists in a boycott of imported British goods that aimed to pressure British merchants to urge Parliament to repeal the Townsend duties, but they refused to put further pressure on the merchants by withholding exports of tobacco, which was then commanding high prices.⁷⁸⁸ In this instance, the ideological interests of those advancing constitutional arguments and the material interests of the great planters were not congruent, and the limited boycott had only a limited effect.⁷⁸⁹

As the price of tobacco fell during the next five years, the economic interest of planters became more congruent with the presentation of strong constitutional arguments. Thus, when Parliament in 1774 passed the Quebec Act and the other Intolerable Acts, Virginia joined a boycott that included a ban on tobacco exports, which was then commanding an extremely low price.⁷⁹⁰ Non-exportation, however, created a problem. Without income from the sale of their tobacco, Virginia planters had no money with which to pay debts to British creditors. Thus, non-exportation required the enactment of legislation to stop debt collection, which in turn would further pressure Parliament to repeal the Intolerable Acts.⁷⁹¹ Such legislation, though, appeared certain to be met with a gubernatorial veto and thus seemed incapable of being passed.

However Lord Dunmore, the royal Governor, came to the rescue. Under Virginia law, various fees paid to court officers were set by

⁷⁸⁷ *In re. Clerk and Other Officers* (Northampton Cnty. Ct., Feb. 11, 1766), *microformed on* 00327485162124 (Library of Va.); *accord* TYLER, *supra* note 741, at 85-86.

⁷⁸⁸ HOLTON, *supra* note 168, at 85, 92-94.

⁷⁸⁹ *See id.* at 85-95 (discussing the colonists' efforts to boycott importation and exportation of goods).

⁷⁹⁰ *See id.* at 100-11 (discussing the boycott of 1774).

⁷⁹¹ *See* DEWEY, *supra* note 512, at 99 (discussing legislative pressure to stop debt collection); *see also* HOLTON, *supra* note 168, at 110-18 (discussing the consequences of the boycott on tobacco exportation).

statute, and the statute setting those fees had expired in April 1774. Renewal of the fee bill thus was on the legislature's agenda at its May 1774 session, but before the legislature acted Governor Dunmore dissolved the House of Burgesses when it approved a resolution condemning Parliament's closure of the Port of Boston.⁷⁹² Historians dispute whether the Burgesses intentionally postponed consideration of the fee bill in the expectation that they would be dissolved or whether failure to enact the bill before dissolution was a mere accident.⁷⁹³

Whatever the intention of the legislature, the law, lawyers, and courts, in alliance with the economic interests of the planters, now entered the picture. At a rump session of the Burgesses in Raleigh Tavern the day after dissolution, the issue arose how the courts should deal with the failure to enact the fee bill.⁷⁹⁴ Some thought they should stay open and establish fees by themselves, while others thought that in the absence of statutory fees, the courts were required to close.⁷⁹⁵ An intermediate position was that courts should remain open for criminal prosecutions, administration of estates, and recording of documents, but should not hear debt cases or civil suits more generally.⁷⁹⁶

Demonstrating their independence of the General Court now that the land bargain had completely collapsed, the county justices did what most of the former Burgesses wanted: in most counties, they remained open but ceased to hear all but occasional debt and civil cases.⁷⁹⁷ Thus, in two counties for which records are printed—Caroline in the tidewater and Fauquier in the piedmont⁷⁹⁸—judicial business declined markedly. Caroline County records in the year from June 1773 to May 1774 are 183 pages in length and contain over 1600 entries,⁷⁹⁹ while Fauquier records

⁷⁹² HOLTON, *supra* note 168, at 117–18.

⁷⁹³ Compare HOLTON, *supra* note 168, at 117–18 (asserting that the Burgesses knew that the Governor was going to dissolve the General Assembly and thus postponed consideration of the fee bill), with DEWEY, *supra* note 512, at 100–01 (contending that the Burgesses thought they had another month of business when the Governor unexpectedly dissolved the Assembly).

⁷⁹⁴ DEWEY, *supra* note 512, at 101.

⁷⁹⁵ *Id.* at 101–02.

⁷⁹⁶ *Id.* at 102.

⁷⁹⁷ *Id.* at 97 tbl.6, 102.

⁷⁹⁸ The Antient Press published printed records of Caroline County in 1994 and of Fauquier County in 1996. See, e.g., CAROLINE 1773, *supra* note 589; CAROLINE 1773–1774, *supra* note 331; FAUQUIER 1772–1773, *supra* note 676; VIRGINIA COUNTY COURT RECORDS MINUTE BOOK FAUQUIER COUNTY, VIRGINIA 1773–1775 (Ruth Sparacio & Sam Sparacio eds., 1996) [hereinafter FAUQUIER 1773–1775]; VIRGINIA COUNTY COURT RECORDS MINUTE BOOK FAUQUIER COUNTY, VIRGINIA 1775–1779 (Ruth Sparacio & Sam Sparacio eds., 1996) [hereinafter FAUQUIER 1775–1779]; VIRGINIA COUNTY COURT RECORDS ORDER BOOK CAROLINE COUNTY, VIRGINIA 1774–1778 (Ruth Sparacio & Sam Sparacio eds., 1994) [hereinafter CAROLINE 1774–1778].

⁷⁹⁹ See CAROLINE 1773, *supra* note 589, at 45–99 (reporting cases from June 1773 until July 1773); CAROLINE 1773–1774, *supra* note 331, at 1–100 (reporting cases from August 1773

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from June 1773 to April 1774 are 116 pages long with over 900 entries.⁸⁰⁰ From June 1774 to May 1775, in contrast, Caroline records are only twenty-three pages in length with fewer than 300 entries,⁸⁰¹ while Fauquier records are some twenty-seven pages, also with fewer than 300 entries.⁸⁰² The disappearance of debt and other civil litigation, in short, reduced county court business to somewhere between thirteen percent and thirty-three percent of what it had been.

The local judiciary, through legal interpretation rather than a legislative act, thereby put maximum pressure on Parliament to repeal the Intolerable Acts. There was nothing that the Governor and the General Court could do in response, although the General Court itself, over which the Governor presided, sought to remain open. However, it too was forced to suspend its sessions when the small group of attorneys who practiced before it organized a boycott, which litigants and witnesses later joined.⁸⁰³

The turn of Virginians to lawyers in the summer of 1774, following habits of mind that had grown up over the previous quarter century, thus effectively demonstrated their independence of royal authority and of the colony's central government. Local courts, with their self-perpetuating membership, went about business as usual, except that they declined to hear the one category of cases—those involving debt collection—that central authorities most wanted them to hear. However, although they acted independently, most Virginians were by no means yet ready to declare that independence formally even as tensions continued to mount through the autumn and winter of 1774–1775.⁸⁰⁴

Then, in April 1775, Governor Dunmore took two steps that pushed Virginians closer to open rebellion. On April 21, apparently out of fear that he and other senior officials were threatened with bodily harm, Dunmore ordered the colony's supply of gunpowder removed from the Williamsburg Powder Magazine and placed on board a royal naval

until March 1774); CAROLINE 1774–1778, *supra* note 798, at 1–29 (reporting cases from March 1774 until May 1774).

⁸⁰⁰ See FAUQUIER 1772–1773, *supra* note 676, at 75–102 (reporting cases from June 1773 until August 1773); FAUQUIER 1773–1775, *supra* note 798, at 1–89 (reporting cases from August 1773 until April 1774).

⁸⁰¹ See CAROLINE 1774–1778, *supra* note 798, at 29–52 (reporting cases from June 1774 until May 1775).

⁸⁰² See FAUQUIER 1773–1775, *supra* note 798, at 89–107 (reporting cases from June 1774 until January 1775); FAUQUIER 1775–1779, *supra* note 798, at 1–9 (reporting cases from February 1775 until May 1775).

⁸⁰³ DEWEY, *supra* note 512, at 5.

⁸⁰⁴ See HOLTON, *supra* note 168, at 136 (“It was a long way from the boycott of 1774 to the Revolution of 1776.”).

vessel.⁸⁰⁵ The next day he quietly warned the speaker of the House of Burgesses that if any senior British official was harmed, he would proclaim freedom for slaves.⁸⁰⁶ Several weeks later, Dunmore himself fled Williamsburg and began raising an army to defend Britain's interests.⁸⁰⁷ At first, he welcomed slaves who joined his forces by promising them freedom, and later in November 1775 he proclaimed publicly that he would free any slaves that joined.⁸⁰⁸

The threat of a slave revolt pushed Virginians nearly unanimously in the direction of independence.⁸⁰⁹ Beginning in the spring of 1776, courts began to appoint officials such as sheriffs "pursuant to an ordinance of convention" rather than on a commission from the royal governor.⁸¹⁰ Over the next several months, it became increasingly clear that a formal declaration of independence, together with the formal establishment of a new government, were necessary to maintain internal order and obtain foreign support essential to defeat Great Britain.⁸¹¹ Accordingly, on May 15, 1776, the Virginia convention directed its delegates in Congress to propose independence, and on May 16, the Union Jack was hauled down from the Williamsburg capitol and replaced with a continental flag.⁸¹² On June 29, a new constitution was proclaimed, and Patrick Henry was elected Governor.⁸¹³ The royal colony of Virginia thereby came to an end, and the new Commonwealth of Virginia came into place.⁸¹⁴

⁸⁰⁵ *Id.* at 143–44.

⁸⁰⁶ *Id.* at 144–45.

⁸⁰⁷ *Id.* at 133.

⁸⁰⁸ *Id.* at 148–49.

⁸⁰⁹ *See id.* 149, 158–61 (discussing colonists' reactions to Dunmore's actions).

⁸¹⁰ Appointment of Dally (Northampton Cnty. Ct., Mar. 12, 1776), *microformed on* 00327485162124 (Library of Va.); *accord* Appointment of Fleming (Botetourt Cnty. Ct., Apr. 16, 1776), *microformed on* 00307225162119 (Genealogical Soc'y of Utah).

⁸¹¹ *See* HOLTON, *supra* note 168, at 171–75, 183–205 (providing a detailed discussion on efforts to end the war).

⁸¹² *Id.* at 204.

⁸¹³ *Id.*

⁸¹⁴ *See id.* (discussing the establishment of the Commonwealth of Virginia).