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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

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

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.

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...
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 ORTHWOOOD’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.
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, jurors, and even justices in court. There was also “the long & tedious” nature of sometimes “frivolous” 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, even from a second decision in “a vexatious turbulent cause already judged,” and from the

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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 Burgesses\textsuperscript{13} or the Privy Council.\textsuperscript{14} Courts also reversed their own judgments without appeals when parties brought new matters to their attention.\textsuperscript{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.\textsuperscript{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—with the next two years.\textsuperscript{17} He agreed, although it is unclear how much, if anything, he ultimately paid.


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

\textsuperscript{15} See, e.g., Wyatt v. Ford (Va. Gen. Ct., Mar. 16, 1675/1676), \textit{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), \textit{in MINUTES OF THE COUNCIL}, supra note 6, at 277 (reversing its previous disposition); R v. Anderson (Va. Gen. Ct., Oct. 25, 1670), \textit{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), \textit{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), \textit{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), \textit{in 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), \textit{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).

\textsuperscript{16} See Remission of Gibson’s Fine (Northumberland Cnty. Ct., June 20, 1668), \textit{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).

\textsuperscript{17} Id.
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.\(^\text{18}\) His expulsion, however, marked only the beginning. Thereafter, Cole was a frequent litigant in,\(^\text{19}\) among other cases, one in which a female servant accused him of “abus[ing] her by very unlawful & careless beatings.”\(^\text{20}\) 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.”\(^\text{21}\) Of course, he did not keep his bargain; and in December 1663, another female servant accused him of beating her cruelly.\(^\text{22}\) 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.”\(^\text{23}\) 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,\(^\text{24}\) 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.”\(^\text{25}\) 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.


\(^{21}\) Application of Cole (Northumberland Cnty. Ct., Nov. 20, 1662), in NORTHUMBERLAND 1661–1665, supra note 8, at 34–36.


\(^{23}\) 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.

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

_Ludwell v. Scarborough_ 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. 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.” 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. 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.

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. 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.

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, and theft—especially hog

26 Id.
28 Id. at 239.
29 Id.
30 Id. at 239–40.
31 Id. at 240.
32 Id. at 240–41.
stealing—with whippings and heavy fines.\textsuperscript{35} Perjury was another serious offense for which a convict might be whipped as well as barred from giving any future testimony.\textsuperscript{36} Other noteworthy cases included prosecutions for sexual assault,\textsuperscript{37} forgery,\textsuperscript{38} piracy,\textsuperscript{39} witchcraft,\textsuperscript{40} drunkenness,\textsuperscript{41} unlawful sale of liquor,\textsuperscript{42} not tending corn,\textsuperscript{43} “making unreasonable hogsheads,”\textsuperscript{44} and trading with servants.\textsuperscript{45}

\textsuperscript{35} See, e.g., R v. Phillis (Va. Gen. Ct., June 22, 1670), in \textit{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 \textit{VIRGINIA COUNTY COURT RECORDS ORDER BOOK LANCASTER COUNTY, VIRGINIA 1662−1666,} at 94 (Ruth Sparacio & Sam Sparacio eds., 1993) [hereinafter \textit{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 \textit{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 \textit{LANCASTER 1662−1666,} supra, at 5 (explaining that breaking into a house and stealing corn is an offense properly held before the General Court).

\textsuperscript{36} See, e.g., R v. Stansby (York Cnty. Ct., Aug. 30, 1669), in \textit{3 YORK COUNTY 1657−1662,} supra note 6, microformed on 1000455991 (Genealogical Soc’y of Utah).

\textsuperscript{37} E.g., R v. Wiltshire (Northampton Cnty. Ct., Aug. 28, 1663), in \textit{8 NORTHAMPTON 1657−1664,} 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. \textit{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.” \textit{Id.} at 209. He received a penalty of thirty-nine lashes. \textit{Id.}

\textsuperscript{38} See, e.g., R v. Betts (Northampton Cnty. Ct., Dec. 28, 1665), in \textit{9 NORTHAMPTON 1664−1674,} supra note 7, at 63.

\textsuperscript{39} Complaint of Wraxall (Northampton Cnty. Ct., Feb. 7, 1669/1670), in \textit{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, and hence courts dismissed such cases if it became clear that no parish would be chargeable with support of the bastard child. Almost uniformly, those prosecuted were servant girls whose penalty—in addition to twenty lashes or payment of a fine—was to serve extra time to compensate their masters for the inconvenience of their pregnancy. These young female servants, of
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 fine\(^51\) 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, \textit{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, \textit{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 \textit{Waters v. Bishopp} (Northampton Cnty. Ct., July 28, 1664), in \textit{BISHOPP} 1664, \textit{supra} note 23, at 215–22 (allowing for recission 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 \textit{Waters v. Bishopp} and her child, see generally \textit{PAGAN}, \textit{supra} note 5.


\(^{52}\) See, e.g., R v. Mongon (Northampton Cnty. Ct., Sept. 1, 1663), in 8 NORTHAMPTON 1657–1664, \textit{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, \textit{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, \textit{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, \textit{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, \textit{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, \textit{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, \textit{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,\textsuperscript{54} even if the father’s female servant was the child’s mother.\textsuperscript{55} A master who impregnated his female servant would nonetheless still be fined,\textsuperscript{56} and the servant also would be found guilty of fornication,\textsuperscript{57} unless she could prove that intercourse had occurred against her will.\textsuperscript{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.\textsuperscript{59} When June Beadle was accused of adultery, her case was postponed,\textsuperscript{60} it “not appearing to the Court by positive proof . . . that she has a husband that lay claim to her.”\textsuperscript{61} Even when adultery became scandalous, the law did little about it. The Northumberland County Court did punish as libelous a bogus document

\textsuperscript{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).

\textsuperscript{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.


\textsuperscript{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 LANCASSTER 1670–1674, supra note 52, at 41 (mandating two skillful and honest citizens search the accused woman).

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

\textsuperscript{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).

\textsuperscript{61} R v. Beadle (Northampton Cnty. Ct., Apr. 28, 1663), in 8 NORTHAMPTON 1657–1664, supra note 34, at 293–94.
in the form of a false “contract of marriage . . . between Charles Ashton and the wife of David Lindsay,” a local minister, and did respond to complaints that Lindsay’s wife was poisoning him and that he had “clandestinely (unknown to the clerk) tak[en] away a petition” he had filed, perhaps in connection with his marital difficulties. 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. The court found him, like other adulterers, guilty only of the offense of “disorderly walking.”

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;” 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. 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,” or when the sheriff of James

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

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).
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 301440669329 (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 NORTHERNBERLAND 1661–1665, supra note 8, at 68 (discussing Moulton’s failure to appear before the court); Commonwealth v. Sanders (Northumberland Cnty. Ct., Apr. 20, 1660), in NORTHERNBERLAND 1657–1661, supra note 8, at 68 (discussing Warren’s misbehavior before the court when it pronounced its judgment); 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).
“openly did declare that she would not yield obedience to their [the judges’] order,” 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.” Philip Mongom, a “Negro,” when accused of stealing hogs, threw “hogs’ ears on the . . . court table.” 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.”

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. Robert Warren, for example, while drunk, “came into the faces of the Court . . . rudely intruding & . . . interrupting & upbraiding the Commissioners in their Pronouncing of Judgment.” 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.” The court then committed him to the sheriff and fined him 350 lb. tobacco at the next sitting court.

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(Northampton Cnty. Ct., Dec. 30, 1661), in 8 NORTHAMPTON 1657–1664, supra note 34, at 208–09 (discussing the couple’s “dangerous assail[t] on the sherrif”).
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).
80 Commonwealth v. Warren (Northampton Cnty. Ct., May 1, 1660), in 8 NORTHAMPTON 1657–1664, supra note 34, at 114.
81 Id.
82 Id.
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. 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 way bailable.” Another man received thirty lashes “for swearing and using profane words in the pulpit of [the] parish church.” 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 hypocris[y] of the Quaker.”

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.

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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).


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


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

Another offense connected with religion occurred when a minister, without a license, married two servants. 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. 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.” On another occasion, three men committed an assault in open court, while yet another county court had to deal with an unlawful assembly of malcontents. Even women created problems: the wives of George Spencer and David Goodale engaged in “scurrilous brawls” and provoked their husbands to file “reciprocal, frivolous[,

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.).

94 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 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”).
litigious suits.” Ultimately, these disorders culminated in Bacon’s Rebellion and in colony-wide civil strife.

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,” and only a spark was needed to set the colony ablaze.

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

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95 King v. Spencer & Goodale (Charles City Cnty. Cl., 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).
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).
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 villainous [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.
102 MORGAN, supra note 98, at 272–73.
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. Second, the section explains the role of patronage in controlling lower classes in colonial Virginia. Third, it examines the relationship between law and religion. Fourth, it explains the roles and relationships of both judges and jurors in the legal landscape of Virginia. Finally, it discusses the relation of the colony’s central government to local county elites.

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. 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).
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).


punishment,” on runaways.\footnote{Id. at 266.} 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.”\footnote{Id. at 260.} 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.”\footnote{Id. at 270.} The next year Virginia barred free blacks from “purchasing Christian servants,”\footnote{Id. at 280.} 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.”\footnote{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).}

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.\footnote{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.”).} 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.\footnote{See Motion of Edwards (Spotsylvania Cnty. Cl., 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. Cl., 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).}

The evidence is ambiguous and conflicting, but the view of Russell Menard and others seems correct—that until the end of the seventeenth
century Virginia planters preferred to import white, English-speaking indentured servants as their main labor force rather than African slaves who spoke strange languages.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{126} and judges routinely determined the age of servants and thus the length of time they were required to serve.\textsuperscript{127}


\textsuperscript{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).


\textsuperscript{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).

Courts also imposed punishment on runaway servants, with the standard penalty being extension of the period of service by twice the amount of time that a runaway had been absent. 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.

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 100045991 (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).

Judges were especially harsh on servants who spread “scandalous[,] false[,] and abusive language against [their] master[s].” The General Court ordered one such servant to receive thirty-nine lashes and apologize in open court. Likewise, servants who behaved violently toward their masters faced a broad range of penalties, including whipping and extra years of service, as did servants who, after claiming that their masters abused them, failed to prove their claims. For example, two female servants who accused their master of rape had to serve extra time when a grand jury refused to indict him. 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. 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. 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).

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, at 1699, 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).
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

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.
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,
mother had bound her son to servitude until he was twenty-four years old.\textsuperscript{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.\textsuperscript{146} Other courts freed servants who had been unlawfully bound.\textsuperscript{147} In one such case,\textsuperscript{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.\textsuperscript{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.”\textsuperscript{150} In all, courts freed numerous indentured servants held unlawfully,\textsuperscript{151} and in some cases even ordered the payment of wages for


\textsuperscript{145} \textit{In re.} Bengee (Rappahannock Cnty. Ct., May 2, 1688), in \textit{Virginia County Court Records Order Book (Old) Rappahannock County, Virginia 1687–1689}, at 26 (Ruth Sparacio & Sam Sparacio eds., 1990) [hereinafter \textit{Rappahannock 1687–1689}].

\textsuperscript{146} \textit{Id}.

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

\textsuperscript{148} Williams v. Nash (Lancaster Cnty. Ct., Nov. 1, 1663), \textit{microformed} on 1000549062 (Library of Va.).

\textsuperscript{149} \textit{Id}.

\textsuperscript{150} \textit{Id}.

\textsuperscript{151} \textit{See}, e.g., \textit{In re.} Letty (Essex Cnty. Ct., Aug. 20, 1728), in \textit{Virginia County Court Records Essex County, Virginia Order Book 1727–1729}, at 50 (Ruth Sparacio & Sam Sparacio eds., 2002) [hereinafter \textit{Essex 1727–1729}] (reporting jury verdict that a Native American was “a free woman”); Roades v. Heale (Lancaster Cnty. Ct., July 14, 1680), in \textit{Lancaster 1678–1681}, \textit{supra}
time worked following the end of the period of servitude. On occasion, the judiciary also had to protect servants who were bringing suits for freedom from intimidation and threats.

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, while in another an apprentice was freed when his master assigned him to tasks other than those for which he had been apprenticed. The courts also strove to prevent masters from unduly disciplining servants, 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 Whickern (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).


Note 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”).

Note 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
their “education and trade.” 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.

Judges also came to the aid of servants whose masters failed to provide adequate food or medical assistance. 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. Finally, masters were required to give former servants their freedom dues upon the expiration of their terms of service.

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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., 1998) [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).

of their terms.\textsuperscript{161} Other judges ordered masters to abide by the terms of the agreements by which they had obtained servants.\textsuperscript{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.\textsuperscript{163} Similarly, sailors were able to obtain special writs from the governor directing county courts to adjudicate their wage claims against their vessels.\textsuperscript{164} Wage laborers who failed to perform in accordance with the terms of their contracts might find their wages judicially reduced, however.\textsuperscript{165}

Efforts to uplift white servants and workers did not inopportune 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.\textsuperscript{166}

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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 previous years’ wages at the master’s death minus wages for one month of absence).

\textsuperscript{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).

\textsuperscript{165} See, e.g., Graime v. Peirsey (Spotsylvania Cnty. Ct., June 7, 1727), in VIRGINIA COUNTY COURT RECORDS ORDER BOOK ABSTRACTS SPOTSYLVANIA COUNTY, VIRGINIA 1724–1730 (PART II), at 63–67 (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).

\textsuperscript{166} KULIKOFF, supra note 123, at 38–41.
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; and their diversity likely impeded their ability to organize resistance to planters’ impositions. 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. 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.

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”).


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 n{	extipa}[n]{	extipa}blesse obl{	extipa}ge 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).
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., GENTRY 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
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.\textsuperscript{178} He remained a significant force in Virginia government into the 1730s, when he was still a member of the Council.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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,”\textsuperscript{182} cursing by profaning God’s Holy Name,\textsuperscript{183} Sabbath abusing,\textsuperscript{184} drunkenness,\textsuperscript{185}  

\textsuperscript{178} Id. at 140.

\textsuperscript{179} Id. at 141, 234.


\textsuperscript{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).

\textsuperscript{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”).


\textsuperscript{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
fornication and adultery.” Other morals offenses, which had been largely ignored in the middle of the seventeenth century, included baptizing a child without authority, blasphemy, buggery, “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.
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,” allowing “unmarried persons to bed together,” “cohabiting with a Negro,” and selling liquor without a license.

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” or “for being reputed to live in fornication,” 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, 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”).


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).


King v. Moore (Augusta Cnty. Ct., June 22, 1764), microformed on 00305765162115 (Genealogical Soc’y of Utah).

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 00305785162117 (Genealogical Soc’y of Utah). The court obliged with twenty-one lashes. Id.


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 SPOTYSWILANIA 1738–1740, supra note 122, at 93–94 (punishing a woman for having an illegitimate child even though she had since married).
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 1701 and 1705 and fifteen between 1733 and 1737. 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.

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.” As late as the 1740s, a main threat to that hegemony came from Roman Catholics rather than dissenting Protestants, 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.” 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. Although the same court would not dismiss cases brought by a lawyer thought to be a Roman Catholic—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. Further, as late as 1756, legislation was enacted to disarm Catholics.

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. They were also under a duty to protect dissenting congregations from insult and abuse, although dissenters, in fact, frequently faced discrimination and even physical violence.

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,

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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].
208 See RAGOSTA, supra note 180, at 28–36 (discussing the fate of religious dissenters in the eighteenth century just before the Revolutionary War).
which even at the end of the colonial period was not readily granted.\textsuperscript{209} In addition, dissenting preachers could not preach without licenses,\textsuperscript{210} which were difficult to obtain,\textsuperscript{211} and would be prosecuted if they did.\textsuperscript{212} It appears, indeed, that no dissenting clergymen were licensed until the 1730s and 1740s.\textsuperscript{213} Another obstacle to dissent was the requirement that county courts report to the governor on meetings of dissenters within their jurisdiction.\textsuperscript{214} Therefore, it is not surprising that the Middlesex County Court reported in 1703 that no dissenting congregations existed in the county.\textsuperscript{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.\textsuperscript{216} Judges specified the locations where


\textsuperscript{211} See, e.g., \textit{In re} Magil (Westmoreland Cnty. Ct., Nov. 25, 1719), in \textit{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 lie before” the court).

\textsuperscript{212} See, e.g., \textit{R v. Organ} (Westmoreland Cnty. Ct., Aug. 28, 1717), in \textit{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”); \textit{see also RAGOSTA, supra note 180, at 18–19, 23 (discussing impediments to dissenting preachers).}

\textsuperscript{213} \textit{See RAGOSTA, supra note 180, at 40–41 (discussing examples of such licensure).}

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

\textsuperscript{215} \textit{Return of Court} (Middlesex Cnty. Ct., Nov. 1, 1703), in \textit{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.

\textsuperscript{216} \textit{See, e.g., Farnefold v. Mottrom} (Northumberland Cnty. Ct., Nov. 17, 1680), in \textit{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 preach and supervised vestry elections to insure that the clergy had adequate lay support. 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.

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. The court ordered the girl to state, on her twelfth birthday, whether she wished to affirm or disaffirm the marriage. When she disaffirmed the marriage, the court declared it null and void. County courts also had power to grant wives separate maintenance when husbands did not adequately provide for them, whereas courts required men who beat their wives to enter into peace bonds as well as to provide separate maintenance. Occasional cases even authorized spouses to live separately, with the husband providing for the wife according to his “estate, condition and quality.”

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).
221 Id. at 63.
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).
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 Hunger 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).


231 See, e.g., In re. Jackson (Botetourt Cnty. Ct., Mar. 14, 1771), microformed on 0030725162119 (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

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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.
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. Even after default judgments, juries of enquiry were used to determine damages not fixed by law. However, juries were not always used. Courts, for example, typically tried actions to balance accounts, as well as suits commenced by petition rather than by writ and suits in which one party demanded that the other prove his or her case by oath. Occasionally, other cases, even those involving rights in land, for no apparent reason were tried to the court as well. Of course, if both parties agreed, they could waive jury trial and submit a case for decision by the court or referees, especially in cases where


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 S. & S. eds., 1999) [hereinafter LANCER 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 0030755162114 (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).


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 submit 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).


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” or in cases where the parties had submitted an agreed statement of facts.

245 See Davis v. Skrine (King George Cnty. Ct., Dec. 8, 1722), in KING GEORGE 1721–1723, supra note 127, at 57 (referring to 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. Churchill (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 00307651621115 (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 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 1700–1712, supra note 206, at 18–19 (allowing a minister who preached a sermon 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 0030725162119 (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 Cnty. 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 003275162127 (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.
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. Likewise, a plaintiff would lose if he or she did not present enough evidence. One piece of evidence was always key; in a suit on an obligation, the written obligation had to be put into evidence.

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*, 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, 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.


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).

(Lancaster Cnty. Ct., May 13, 1668), in *Lancaster 1666–1669*, supra note 45, at 47.
“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.”

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.

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. 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. 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. On at least one
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. 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. 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.

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

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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.
tightly policed the processes of jury selection and deliberation. 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.” Cases of hung juries that could not agree on a verdict were exceedingly rare, however.

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. 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.”

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

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).

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).

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.

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).

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. 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. 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.

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. 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

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269 See, e.g., Stretton v. Martin, (Va. Gen. Ct., Oct. 1736), in 2 RANDOLPH & BARRADALL, supra note 144, at 852, 855–56 (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. Cl., 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. Cl., 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. Cl., 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)].


general verdict that the jury returned. 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.

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, 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. Second, it describes the structure of the colony’s political power. Third, it details the structure of the legal knowledge in Virginia. Finally, it explains county court independence.

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).
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).
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,” 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,” that “the law of England require[d] two witnesses” for resolving any dispute in court, that guardians had to be appointed for minors “by the law of England,” and that a sheriff could not retain fees “exacted . . . contrary to equity & law.”

They also turned continually to the procedures and vocabulary of the common law. Young people, for example, were apprenticed “according to custom in England.” Other common-law words of art similarly appeared, such as “bills of exchange,” “escheat,” “fee tail,” “curtesy of England,” “quietas est,” “in trust,” “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 003275162125 (Genealogical Soc’y of Utah).
281 In re. Gale (York Cnty. Ct., Apr. 24, 1676), microformed on 1000445991 (Genealogical Soc’y of Utah).
283 In re. Page (York Cnty. Ct., Apr. 24, 1671), microformed on 1000445991 (Genealogical Soc’y of Utah).
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 Whittier 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].

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


294 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. Courtann (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 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-33 (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.

297 Estate of Gregory (York Cnty. Ct., Feb. 24, 1669/1670), microformed on 100045991 (Genealogical Soc'y of Utah).


299 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).
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.” Lawyers also knew how to engage in a “privy examination of a feme covert” to convey real property without subjecting it to dower.

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, audita querela, case, covenant, debt, deceit, detinue, elegit, replevin, scire facias, trespass, and trover. Two suits—one grounded on a statute

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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: PROPER TED 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., Bowrne 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.


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

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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 entreate” 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 effect. 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. Mervewether (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., Swarson 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 00327315162127 (Library of Va.). For information on the common law forms of action in Virginia, see PAGAN, supra note 5, at 68–70.

owes nothing to a writ of debt.\textsuperscript{318} Defendants also knew how to interpose other pleas, such as performance—either total\textsuperscript{319} or partial—duress,\textsuperscript{320} illegality,\textsuperscript{321} self-defense,\textsuperscript{322} statute of limitations,\textsuperscript{323} res judicata,\textsuperscript{325} settlement,\textsuperscript{326} discount or set-off,\textsuperscript{327} want of consideration,\textsuperscript{328} 

\footnotesize{\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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).

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

\textsuperscript{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, 1772), 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).

\textsuperscript{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).

\textsuperscript{324} E.g., Booth v. Dudley (Va. Gen. Ct., Oct. 1729), in 1 RANDOLPH & BARRADALL, supra note 308, at R9–11; Ellis v. Carton (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 WIGHT 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).

\textsuperscript{325} E.g., Abbot v. Abbot (Va. Gen. Ct., Oct. 1729), in 1 RANDOLPH & BARRADALL, supra note 308, at R22; 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

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and, in a slander case, that words were not actionable. Defendants could also plead that persons who did not control their own legal affairs, such as wives, minors, and servants, 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.


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 1693–1695, 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., Ralings 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.
into contracts, or that one joint owner of an obligation could not sue thereon without joining co-owners. Indeed, by the end of the seventeenth century, special pleading had begun to emerge in Virginia's county courts. Pleas, it should be noted, were required to be in writing “for the better regulating and keeping the records and transferring the pre[c]edents to posterity.”

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 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).


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).

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. Suits would be dismissed if a plaintiff “brought the wrong action” or brought an action on a statute that had been repealed; if either the plaintiff or the defendant died; if a defendant did not reside in the county where suit was brought or the matter at issue had occurred in another county; and if a defendant did not reside in the county where suit was brought.
writ was “not... executed in due time” or a declaration was “untimely” filed; if a declaration was uncertain or “not full or sufficient,” in that it did not, for example, indicate the time at which pleaded events occurred or were to occur or whether money became due by “bill bond or account;” if a variance existed between a writ and a declaration; if a party submitted an unsigned plea or a double plea; if a suit against an estate sought judgment against an executor personally rather than against goods of the estate in the executor’s hands; or if a suit for a statutory penalty was brought in the name of the informer only, rather than the informer and the crown.

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

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

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


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 1699–1700, 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 223, at 19–20 (overruling the defendant’s motion for dismissal based on several uncertainties).


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


There were limits, however, to the willingness of courts to rely on common-law technicalities. 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. Parties at times also joined issue on other erroneous pleas, such as not guilty to a writ of debt, “nil debet” to an action of case, and not his deed to case. An especially interesting plea was interposed in *Thompson v. Frezer*, a suit by a county clerk for his fee for marrying the defendant. The defendant responded that the amount sought was “too large” and “exhorbitant” and in excess of the sum provided by the legislature. The defendant won. 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

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

354 See Bag v. Cooke (Va. Gen. Ct., Oct. 1736), in 1 RANDBOLPH & BARRADALL, supra note 308, at R72–43 (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 Smilton 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.


359 *Id.*

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 “[t]ook 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.
evidence at bar doth amount so high as to make a contract nor consummate a bargain.”

Nor would cases be dismissed simply because a plaintiff failed to plead words not material thereto. 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. 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. Nor would a court dismiss a suit because the plaintiff’s name had been misspelled. 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, and one that a defendant had improperly joined a plea in bar to a plea in abatement. 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. Borne, 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.” Borne 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. Borne (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. Borne v. Gibson (Stafford Cnty. Ct., Apr. 6, 1693), in STAFFORD 1692–1693, supra note 158, at 92–93.


attorneys not to take advantage of technical errors\textsuperscript{369} and permitted parties to cure other technical defects by amending their pleadings.\textsuperscript{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,\textsuperscript{371} as was death.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{375} Similarly, a court would grant judgment against and charge costs to a litigant who personally and through counsel “unfairly left his action.”\textsuperscript{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,\textsuperscript{377} such as setting off dower,\textsuperscript{378} distributing...
legacies, and directing the execution of deeds. 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. Chancery also played a key role in determining rights of creditors. 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, while in another, chancery stayed a common-law suit on a bill allegedly obtained by fraud. It was the jurisdiction of chancery, of course, to foreclose mortgages.

More generally, a litigant could seek “relief in the 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 861–63 (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).

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 sheriff incorrectly arrested the defendant).

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

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


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. Sumers (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).


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 decreed 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).


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.
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.

Felocities sent to the General Court included assault resulting in disfigurement, arson, infanticide, larceny, murder, rape and treason. Also arrested was a defendant who “drink[d] a health to King James and curse[d] his present majesty: King William.”

Standard crimes tried at the county level were assault, attempted rape, contempt of court, defamation, hog-stealing, larceny, murder.
perjury,407 publishing “false scandalous [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).


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).


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).


413 E.g., King v. Holladay (Spotsylvania Cnty. Ct., June 4, 1729), in SPOTSYLVANIA 1724–1730 (PART III), supra note 127, at 99.
failing to appear as a juror\textsuperscript{414} or witness,\textsuperscript{415} failing to notify authorities of tithables under a defendant’s control and thereby undermining the tax system,\textsuperscript{416} failing to read laws in church,\textsuperscript{417} failing to assist or obstructing a sheriff or constable,\textsuperscript{418} and jail break,\textsuperscript{419} were prosecuted in an effort to strengthen the legal order and preserve the public peace.

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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 sherrif who came to the defendant’s home to serve an execution and that the sherrif 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).

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, supported the poor, ordered men and goods impressed into public service, probated wills, supervised the administration of estates, apportioned dower, 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]”).
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 1680–1685, 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
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”).


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 Heaber (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;\textsuperscript{434} to approve the amount of rent charged for leases;\textsuperscript{435} and to direct the keeping of boundary records.\textsuperscript{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.\textsuperscript{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,\textsuperscript{438} farmers who planted tobacco after June 30\textsuperscript{439} or failed to grow the minimum required amount of corn,\textsuperscript{440} millers who failed to keep proper measures at a mill,\textsuperscript{441} and vagrants.\textsuperscript{442} Cases involving forfeiture of vessels for violating the Navigation Acts

\textsuperscript{434} E.g., Appointment of Darrell (Stafford Cnty. Ct., May 18, 1693), in STAFFORD 1692–1693, supra note 158, at 95.
\textsuperscript{435} E.g., Leases from Lee to Williams (Fairfax Cnty. Ct., May 15, 1769), in FAIRFAX 1768–1769, supra note 385, at 82.
\textsuperscript{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).
\textsuperscript{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.
\textsuperscript{438} E.g., Chandler v. South (Westmoreland Cnty. Ct., May 28, 1707), in WESTMORELAND 1705–1707, supra note 225, at 93.
\textsuperscript{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).
\textsuperscript{440} E.g., King v. Rawlls (Richmond Cnty. Ct., Nov. 2, 1692), in RICHMOND 1692–1694, supra note 184, at 34.
\textsuperscript{441} E.g., King v. Brown (Essex Cnty. Ct., Nov. 18, 1719), in ESSEX 1716–1723 (PART III), supra note 269, at 110.
\textsuperscript{442} See, e.g., King v. Eager (Augusta Cnty. Ct., May 22, 1767), microformed on 0030375162116 (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. Micknon (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”).
were also tried in county courts, as were cases involving the importation of slaves without payment of duty.

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. A court, for example, judged one servant, who claimed to have committed a theft at the order of his master, “to be an ignorant person” and thus gave him twenty lashes. Another court, however, found a man who had fraudulently taken and sold a horse to be “a man of idle, 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

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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 “impoverished” 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).

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

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

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).
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).
children—five years of additional servitude—instead of the usual two years for an illegitimate white child. 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.

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 approval and another prohibiting fishing at night. They also performed housekeeping tasks, such as scheduling a celebration for the birth of James II’s son; selecting a site for building a courthouse; setting the boundaries of the jail yard; purchasing record books and law books, including copies of all the colony laws

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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[e]d to Negros & 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).


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”).


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;\textsuperscript{478} providing food and lodging for the justices during court term;\textsuperscript{479} adopting rules concerning scheduling of jury trials\textsuperscript{480} and postponement of cases on account of attorney absences;\textsuperscript{481} prohibiting foreigners from pleading in court;\textsuperscript{482} threatening anyone appearing drunk in court with time in the stocks;\textsuperscript{483} and prohibiting smoking in court.\textsuperscript{484} Finally, they received petitions, such as one “unanimously . . . [and] earnestly desired” by the people requesting the governor to call an Assembly into session.\textsuperscript{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
courts were largely self-perpetuating bodies, in that their sitting judges recommended whom the colony’s Governor should appoint to the bench, 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. Although Governors appointed many other local officials, here too they typically acted on the advice of the county magistrates.

Local oligarchies were strong, in part, because they typically acted with unanimity; only in rare cases did minorities “publicly and openly” express their “dissent,” whereas in the General Court publicly recorded dissents were frequent. 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. Also in 1691,

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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).


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. Ct.
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

493 Refusal of Buckner (Stafford Cnty 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).
494 Refusal of Gregge (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”).
495 Comm’n of Travers (Rappahannock Cnty Ct., June 3, 1691), in RAPPAHANNOCK 1689–1692, supra note 56, at 60.
496 See BILLINGS ET AL., supra note 112, at 213.

These lawyers travelled out from the colonial metropolis and transmitted knowledge back and forth between the capital and outlying counties.

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. However, most of these men did not return to Virginia to practice law; instead, they came home to manage their estates and fortunes. As wealthy men of their counties, they then served on county courts.

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,” 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.”

Scarborough’s views came together most clearly in a third case, *Foxcroft v. Gething*. 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.” 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.”

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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).
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).
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).


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.\footnote{518}{See, e.g., Morris v. Taylor (Richmond Cnty. Ct., July 2, 1733), \textit{in Richmond} 1732-1734, \textit{supra} note 326, at 52 (awarding the plaintiff attorney’s fees).}

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.\footnote{519}{See \textit{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).} 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.\footnote{520}{\textit{PAGAN}, \textit{supra} note 5, at 58.}

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 affairs . . . .\footnote{521}{\textit{ISAAC}, \textit{supra} note 172, at 134.}

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.\footnote{522}{\textit{CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA}, \textit{supra} note 198, at xix.} “The highest court in the colony was not composed of professional judges, as in some of the other
colonies and . . . in England.” 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,” and judicial decisions “did not reflect hard and fast rules,” but judicial efforts “to make practical, not fine, distinctions.” 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.

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. 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 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. The General Court ruled that it did not, reversed the county court judgment, and thereby reinstated the jury verdict. Nonetheless, county courts continued to grant new trials when juries returned verdicts awarding either excessive or insufficient

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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).
529 Id.
530 Id. at R78.
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. Hacket (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, 1799), in SPOTSYLVANIA 1738–1740, supra note 122, at 62 (finding “damage should be entered double” and therefore doubling the jury’s verdict).


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

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. In another case, a county court declined to appoint an administrator for an estate as the Governor had directed it to do. 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. On yet another occasion, a county losing litigant had no “legal proof”); Bronaugh v. Field (Spotsylvania Cnty. Ct., Dec. 1, 1730), in SPOTSYLVANIA 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.

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 SPOTSYLVANIA 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. Wormley (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); Geldinge 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).

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).


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, 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.

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. 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.

The spirit of independence displayed by county courts emerged with special clarity in Colsworthy v. Smith, 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. Ultimately, however, the parties agreed to submit the case to referees. 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.”

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

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

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. 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.

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

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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.\footnote{Gary M. Pecquet, \textit{British Mercantilism and Crop Controls in the Tobacco Colonies: A Study of Rent-Seeking Costs}, 22 CATO J. 467, 469–70 (2003).} 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.\footnote{See id. at 470–72 (explaining the nature of the colonial tobacco market).} 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,\footnote{E.g., Parker v. Foxall (Rappahannock Cnty. Ct., Mar. 4, 1685/1686), in \textit{RAPPAHANNOCK 1685–1687}, supra note 101, at 33.} as were suits on construction contracts\footnote{E.g., Rice v. Pavey (Rappahannock Cnty. Ct., Nov. 7, 1684), in \textit{RAPPAHANNOCK 1683–1685}, supra note 159, at 53.} and suretyship agreements.\footnote{See, e.g., Batty v. Bradley (Charles City Cnty. Ct., Dec. 3, 1694), in \textit{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).} 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.\footnote{Chilton v. Wilson (Lancaster Cnty. Ct., Feb. 12, 1678/1679), in \textit{LANCASTER 1678–1681}, supra note 144, at 19.} The court ordered the ship captain to return to the Virginian the fare he had paid for the servant’s transportation.\footnote{Id.} 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.\footnote{Barber v. Clarke (Rappahannock Cnty. Ct., Aug. 3, 1687), in \textit{RAPPAHANNOCK 1685–1687}, supra note 101, at 90. The court held that the covenant did not require him to rebuild. \textit{Id.}} 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,\footnote{Compare Hawkins v. Smith (Essex Cnty. Ct., Feb. 19, 1718/1719), in \textit{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.} and another in which a
consignee of goods who failed to receive orders from the owners sought permission to dispose of them.\footnote{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.\footnote{569} Other years saw overproduction of tobacco and consequent low prices at which almost no planter could break even.\footnote{570} Almost everyone then had to borrow money, and nearly everyone fell into debt.\footnote{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.\footnote{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.\footnote{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.\footnote{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.\footnote{575} In a third situation, a debtor entered a plea that the giving of a mortgage constituted full satisfaction in payment of a bond.

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\item \footnote{568}{In re. Corbin (Middlesex Cnty. Ct., Sept. 3, 1694), in MIDDLESEX 1694–1697, supra note 193, at 3.}
\item \footnote{569}{See Pecquet, supra note 559, at 470.}
\item \footnote{570}{See id. at 470–71 (reporting a situation in 1681 where planters overstocked the tobacco market).}
\item \footnote{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).}
\item \footnote{572}{See 1 NELSON, supra note 553, at 44–47 (providing a summary of the development of debt collection in Virginia).}
\item \footnote{573}{Id. at 45.}
\item \footnote{574}{Donding v. Porter (Stafford Cnty. Ct., Sept. 7, 1664), in STAFFORD 1664–1668, 1689–1690, supra note 127, at 3.}
\item \footnote{575}{Jackson v. Wright (Rappahannock Cnty. Ct., Sept. 4, 1685), in RAPPAHANNOCK 1685–1687, supra note 101, at 13–14.}
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for a large sum of money, although the court rejected the plea. 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.

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, 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;” while in another case an “attachment . . . according to law [was] granted” when an arrest warrant was returned “non est inventus.” A third creditor received an attachment against the estate of a debtor who had left the county, 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. Cases


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).


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


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).


of tobacco.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{591} as did an act of Parliament permitting creditors residing in England to prove debts by affidavits sworn before the Lord Mayor of London.\textsuperscript{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.\textsuperscript{593} Another allowed the release of any defendant imprisoned more than twenty days for a debt of less than 2000 lb. of tobacco,\textsuperscript{594} while a third outlawed usury.\textsuperscript{595} A fourth, grounded in

\textsuperscript{587} Stone v. Jones (Rappahannock Cnty. Ct., Feb. 4, 1684/1685), in RAPPAHANNOCK 1683–1685, supra note 159, at 60.

\textsuperscript{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).

\textsuperscript{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].

\textsuperscript{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).


\textsuperscript{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).

\textsuperscript{593} Willis v. Chowning (Middlesex Cnty. Ct., Sept. 6, 1686), in MIDDLESEX 1686–1690, supra note 312, at 11.

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. In fact, courts did release a large number of such debtors. 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. 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.” 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.
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, 1700), 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,\(^\text{600}\) a second implying warranties of title in deeds transferring land,\(^\text{601}\) a third barring judicial inquiries into the consideration received for a deed,\(^\text{602}\) a fourth holding that a tenant by curtesy forfeited his estate if he tried to convey it in fee simple,\(^\text{603}\) a fifth authorizing the taking and recording of depositions of elderly people “acquainted with the ancient bounds of . . . lands;”\(^\text{604}\) and a sixth ruling that crops growing on land were part of a decedent’s real rather than personal estate.\(^\text{605}\) Of course, courts also adjudicated boundary claims\(^\text{606}\) and resolved disputes over title to other sorts of property, such as slaves,\(^\text{607}\) servants,\(^\text{608}\) 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.\(^\text{609}\) 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).

\(^{606}\) Newton v. Brokenburrow (Richmond Cnty. Ct., Nov. 4, 1696), in Richmond 1694–1697, supra note 151, at 115.


\(^{608}\) 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).


\(^{611}\) 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).

\(^{612}\) 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).

\(^{613}\) E.g., Taliferro v. Taliferro (Essex Cnty. Ct. Aug. 18, 1725), in Essex 1723–1725 (Part II), supra note 445, at 70.


\(^{615}\) 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”).
rule sometimes raised interesting issues, as in *Salisbury v. Dennis*, 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. Paskall’s only child, Mary, thereupon sued Grandpa’s third son, John, Jr., for the land and won.

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. 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, and title to other assets, especially slaves. 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. 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. He never did appear, but when his wife established upon his presumed death that she was his

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611 *Id.*
612 *Id.*
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 GEORGE, supra note 11.
617 *Id.*
“apparent heir,” she received his third of the land. Disputes also occurred about whether land and other assets had been fairly divided.

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. 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.

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.

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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.
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.” 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. 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.

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. 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. As a result, a number of cases found persons of African descent to be free. By
statute, anyone who attempted to sell as a slave someone who was not a slave was subject to a penalty.\footnote{8 HENING, supra note 465, at 123–25.}

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.\footnote{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).} Slaves in Virginia, in contrast, worked under the same conditions endured by white indentured servants and white owners of small plantations.\footnote{See supra text accompanying notes 125–66 (describing the treatment of white indentured servants compared to black slaves).}
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. 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, 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. 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. 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.” 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.” The administratrix could then convert the slaves and other property of the decedent into cash or other fungible assets that creditors could accept.

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631 See cases cited supra note 142 (providing an example of such an agreement).
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

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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 &
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.
slaves had been annexed to land.\textsuperscript{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,\textsuperscript{642} at which point the Virginia legislature declared them to be chattels.\textsuperscript{643} The Privy Council, however, disallowed this act,\textsuperscript{644} and the 1727 law, as modified by Parliament’s 1732 act, thus remained in force throughout the colonial period.\textsuperscript{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,\textsuperscript{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,\textsuperscript{647} to divide slaves among devisees on the basis of value rather than by reference to family or other

\textsuperscript{641} Id. at 225–26.
\textsuperscript{644} Id. at 432.
\textsuperscript{646} 4 HENING, supra note 591, at 226.
\textsuperscript{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. Failure to do so to the satisfaction of the devisees would lead to complex litigation and subsequent judicial division of slaves.

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. 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.

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. 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

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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. 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. 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).

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. 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

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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.
nearly all new land patented east of the Blue Ridge found its way into wealthy planters’ hands. The planters, in turn, used their economic power in localities to keep underclasses in control.

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, and over time that system became increasingly formalistic. Despite whatever flexibility may have existed earlier, 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).

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 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, while cases under the value of 200 lb. of tobacco were within the exclusive jurisdiction of individual justices of the peace. 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, not guilty to a writ of case, and owes nothing to a writ of debt. Parties also continued to file special pleas, such as performance, either total or partial, self-defense, the statute of limitations, the defendant’s plea was not sufficient to prevent judgment for the plaintiffs).


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).

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 852 (denying the defendant’s motion to overrule a judgment for £9 where the plaintiff claimed £25 in damages).

E.g., Lewis v. Roots (Culpeper Cnty. Ct., Mar. 18, 1763), in CULPEPER 1763–1764, supra note 532, at 7–8.

E.g., Pinkard v. Petty (Culpeper Cnty. Ct., May 20, 1763), in CULPEPER 1763–1764, supra note 532, at 43.


E.g., Dillard v. Sanders (Culpeper Cnty. Ct., July 23, 1763), in CULPEPER 1763–1764, supra note 532, at 76.

E.g., Davis v. Slaughter (Culpeper Cnty. Ct., May 19, 1763), in CULPEPER 1763–1764, supra note 532, at 41.

E.g., Roach v. McKey (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”).
administration, lack of consideration, and usury. By mid-century, special pleading had fully developed in Virginia’s county courts.

At the same time, chancery practice also became formalized with the use, for example, of demurrers, depositions, and service of process by publication. 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.


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 (Loudon 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).


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).


Heale v. Fox’s Adm’rs (Lancaster Cnty. Ct., Feb. 10, 1730/1731), in LANCERSTER 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. 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.” Other courts threw out presentments because of uncertainty of the presentment or “irregularity of the Proceedings.” For example, the case of a defendant charged in a county where his offense had not occurred was transferred to the proper county, and another court dismissed a presentment for swearing because of the crown’s failure to insert “the particular oaths” therein. 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 promissee 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”).

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); Chattin 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 I), supra note 184, at 36.


See King v. Cannon (Fairfax Cnty. Ct., Aug. 16, 1768), in FAIRFAX 1768–1769, supra note 385, at 11.
names of the persons on whose information they were rendered. 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. 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. Similar sorts of formalistic claims also were advanced and at times sustained in civil cases. 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.

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. Another defendant obtained dismissal of a presentment because one member of the grand jury was not a freeholder.

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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).

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).


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).


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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{694} The crown thereupon dropped the prosecution, the constable went free, and the warrant was never served.\textsuperscript{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,”\textsuperscript{696} although local courts retained power to grant leave to

\textsuperscript{690} King v. Kelly (Spotsylvania Cnty. Ct., June 4, 1734), in SPOTSYLVANIA 1734–1735, supra note 209, at 40–41.
\textsuperscript{691} King v. Scot (Augusta Cnty. Ct., Mar. 2, 1750/51), microformed on 00303745162113 (Genealogical Soc’y of Utah).
\textsuperscript{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).
\textsuperscript{693} E.g., Smith v. Matterson (Augusta Cnty. Ct., May 20, 1767, microformed on 00303775162116 (Genealogical Soc’y of Utah).
\textsuperscript{694} King v. Colhoun (Augusta Cnty. Ct., May 24, 1755), microformed on 00303755162114 (Genealogical Soc’y of Utah).
\textsuperscript{695} Id.
\textsuperscript{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
practice in individual cases and to recommend for examination men of "good demeanor." The legislature also had succeeded in regulating attorneys' fees. 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.

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. 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, as did two of the three named by the Governor without court recommendation. Only one of the three, William Lynd, described by one of the eight as a man who "had begged himself into the Commission," thereby "slighting the court," took the oath.

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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 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 "exhorbitant 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 "exhorbitant fees").

699 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 Refusals of Johnston, Robinson, Thornton, Chew, Tutt, Carr, Waller & Turner (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).

702 Refusal of Thornton (Spotsylvania County Ct., June 5, 1744), in SPOTSYLVANIA 1742–1744, supra note 160, at 73.

703 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.\footnote{See Comm’n of the Peace (Spotsylvania County Ct., July 3, 1744), \textit{in SPOTSYLVANIA 1742–1744}, \textit{supra} note 160, at 73–74 (issuing commission for Waller and Robinson).}

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.\footnote{Refusals of Lamkin, Ransdell, \& Churchill (Fauquier County Ct., July 23, 1761), \textit{in FAUQUIER 1761–1762}, \textit{supra} note 144, at 7.} 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,\footnote{Recommendation for Comm’n of the Peace (Northampton Cnty. Ct., Jan. 12, 1768), \textit{microformed on} 00327485162124 (Library of Va.).} while James Nisbett was willing to serve in Prince William County if he was placed third in the commission but not otherwise.\footnote{Reasons of Nisbett (Prince William Cnty. Ct., May 5, 1762), \textit{in PRINCE WILLIAM 1761–1762}, \textit{supra} note 531, at 76.} 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.\footnote{Order re Coke (Northampton Cnty. Ct., July 16, 1762), \textit{microformed on} 00327485162124 (Library of Va.).} 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.\footnote{Id.}

Appeals from county courts to the General Court remained the norm. But at times, county courts denied appeals,\footnote{See, \textit{e.g.}, Moffet v. Graham (Augusta Cnty. Ct., Aug. 22, 1746), \textit{microformed on} 00303745162113 (Genealogical Soc’y of Utah) (stating “no appeal should be granted on a general verdict without errors . . . first filed”).} 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.\footnote{See \textit{SMITH}, \textit{supra} note 592, at 356 (providing Perry v. Churchill as an example). But cf. \textit{id.} at 357–58 (discussing \textit{Lidderdale v. Chiswell} where the council directed the court below to receive and authenticate the appellant’s bill of exceptions and thereupon considered appeal).} 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
would be to find without evidence, for the plaintiffs, where twelve men, upon their oaths, have, upon evidence, found for the defendant.”.

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.” 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.

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,* 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.

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, to enjoin enforcement of

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714 Id. at 358 n.33.
717 (Spotsylvania Cnty. Ct., June 3, 1735), in *SPOTSylvANIA 1734–1735,* supra note 209, at 99; see also Lewis v. Golston (Spotsylvania Cnty. Ct., June 4, 1735), in *SPOTSylvANIA 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 *SPOTSylvANIA 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, to rule on the admissibility of evidence, to preserve objections to their rulings by way of bills of exceptions, and to set aside verdicts and grant new trials when juries returned verdicts contrary to the evidence. In another case, a court held a verdict “idle and void” because jurors had “misbehaved themselves.”

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. In another case, a jury returned a

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720 E.g., Crabb v. Martin (Botetourt Cnty. Ct., Apr. 14, 1772), microformed on 00307225162119 (Genealogical Soc'y of Utah); see also Lederdale 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., McCollom 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).


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,
general verdict for the defendant, and the court directed it to consider its verdict further.\textsuperscript{726} When it returned later with the same verdict, the court granted the plaintiff a new trial.\textsuperscript{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,”\textsuperscript{728} although when the jury returned a general verdict for the plaintiff, the court granted a new trial.\textsuperscript{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.\textsuperscript{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.\textsuperscript{731} For whatever reason, courts at times stayed their hand and did not exert their full power over juries. A 1769 case, \textit{Doe v. Anderson},\textsuperscript{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.\textsuperscript{733} Plaintiff’s attorney objected to the admission of oral testimony needed to

\textsuperscript{726} Seekright v. Goar (Middlesex Cnty. Ct., June 7, 1743), \textit{in MIDDLESEX 1740–1745}, supra note 261, at 73.

\textsuperscript{727} Id.

\textsuperscript{728} Barbour v. Sandys (Orange Cnty. Ct., Apr. 24, 1755), \textit{in ORANGE 1755–1756}, supra note 245, at 23.

\textsuperscript{729} Compare id. (reporting the jury’s general verdict for the plaintiff), \textit{with} Barbour v. Sandys (Orange Cnty. Ct., May 22, 1755), \textit{in ORANGE 1755–1756}, supra note 245, at 34 (granting a new trial). \textit{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).

\textsuperscript{730} Mercer v. Crump (Fauquier Cnty. Ct., Mar. 28, 1761), \textit{in FAUQUIER 1759–1761}, supra note 257, at 98.

\textsuperscript{731} \textit{See} \textit{SMITH}, supra note 592, at 357–58 & n.33 (providing the respondent’s argument in \textit{Liddedale v. Chiswell} as an example); \textit{see also} \textit{supra} text accompanying note 714 (setting forth the text of the argument).


\textsuperscript{733} Id. at 12.
authenticate the documents and also to their quality as hearsay.\textsuperscript{734} However, “[t]he court admitted them generally without giving any charge to the jury;”\textsuperscript{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, \textit{Patton v. Shann},\textsuperscript{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 \textit{Riddle v. Stodghill},\textsuperscript{737} a 1751 action of trespass for an assault, illustrates. Initially, the jury in \textit{Riddle} returned a verdict for the defendant, but the court, finding that verdict contrary to the evidence, directed it to reconsider.\textsuperscript{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.\textsuperscript{739} Nonetheless, the court, for reasons the record fails to illuminate, accepted the new verdict and entered judgment thereon.\textsuperscript{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 \textit{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

\textsuperscript{734} Id. at 13.
\textsuperscript{735} Id.
\textsuperscript{736} (Augusta Cnty. Ct., Nov. 17, 1752), microformed on 00303745162113 (Genealogical Soc’y of Utah).
\textsuperscript{737} (Orange Cnty. Ct., Aug. 23, 1751), in \textit{ORANGE 1749–1752}, supra note 247, at 73.
\textsuperscript{738} Id.
\textsuperscript{739} Id.
\textsuperscript{740} Id.
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


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).


746 Tyler, supra note 741, at 70.

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”).
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).
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. 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. 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, 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. 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.”

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. 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).
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.\footnote{Id.}

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.

\section*{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.\footnote{See supra Part IV.B (discussing land distribution policies in colonial Virginia in depth).} 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 \textit{status quo}.\footnote{See Holton, supra note 168, at xiii–xvii, 3–38 (discussing the efforts of Virginia’s elite gentlemen in maintaining wealth and power).}

Indeed, land speculation became so important to maintaining the \textit{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
land his demand raised a storm.\textsuperscript{765} Although such fees were common in other colonies, they had not been paid in Virginia for several decades.\textsuperscript{766}

The fee demanded by Dinwiddie was not a trivial one—roughly the purchase price of a cow.\textsuperscript{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.\textsuperscript{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.\textsuperscript{769} Dinwiddie promptly removed Randolph from his post as Attorney General and appointed George Wythe in his stead.\textsuperscript{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.\textsuperscript{771} In 1754 the Council rejected both arguments and upheld Dinwiddie’s right to collect the fee.\textsuperscript{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.\textsuperscript{773} Virginians accordingly celebrated what they counted as a victory; they also were pleased when the Privy Council directed Dinwiddie to restore

\textsuperscript{765} Billings et al., supra note 112, at 256–57.
\textsuperscript{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).
\textsuperscript{767} Billings et al., supra note 112, at 256.
\textsuperscript{768} Id.; see also Smith, supra note 621, at 220–21 (discussing the role of the pistle fee dispute in the revolution).
\textsuperscript{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).
\textsuperscript{770} Greene, supra note 769, at 402.
\textsuperscript{771} Id. at 401. For a transcript of arguments presented on behalf of the Assembly, see id. at 412–19.
\textsuperscript{772} Id. at 405.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{776} Their ultimate disappointment

\textsuperscript{774} Greene, supra note 769, at 405.


\textsuperscript{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,
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 “anti-American” [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

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777 Griffith, 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.\textsuperscript{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 \textquotedblleft ha[d] a manifest tendency to destroy British as well as American freedom.\textquotedblright\textsuperscript{783} This last resolution passed by only one vote, and that vote was reversed on the following day.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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:

\begin{quote}
[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
\end{quote}

\textsuperscript{783} Beman, supra note 747, at 36.
\textsuperscript{784} Id. at 38–39.
\textsuperscript{785} Id. at 43.
\textsuperscript{786} 8 Hening, supra note 465, at 199–200.
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).

https://scholar.valpo.edu/vulr/vol48/iss3/9
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. 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.

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. 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. 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.

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. Thus, in two counties for which records are printed—Caroline in the tidewater and Fauquier in the piedmont—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, while Fauquier records

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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 ld. at 101–02.
796 ld. at 102.
797 ld. at 97 tbl.6, 102.
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
from June 1773 to April 1774 are 116 pages long with over 900 entries.\textsuperscript{800} From June 1774 to May 1775, in contrast, Caroline records are only twenty-three pages in length with fewer than 300 entries,\textsuperscript{801} while Fauquier records are some twenty-seven pages, also with fewer than 300 entries.\textsuperscript{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.\textsuperscript{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—that 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.\textsuperscript{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
vessel. 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. Several weeks later, Dunmore himself fled Williamsburg and began raising an army to defend Britain's interests. 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.

The threat of a slave revolt pushed Virginians nearly unanimously in the direction of independence. 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. 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. 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. On June 29, a new constitution was proclaimed, and Patrick Henry was elected Governor. The royal colony of Virginia thereby came to an end, and the new Commonwealth of Virginia came into place.

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).