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Politicizing the Courts and Undermining the Law: A Legal History of Colonial North Carolina, 1660-1775

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POLITICIZING THE COURTS AND UNDERMINING THE LAW: A LEGAL HISTORY OF COLONIAL NORTH CAROLINA, 1660–1775*

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This Article is the first monographic history of the legal output of colonial North Carolina courts. Based on an examination of voluminous manuscript court records, it concludes that a fragile legal system developed during the first half-century of the existence of an initially small colony on the banks of the Albemarle Sound. Just as that legal system was gaining solid footing in the late 1720s however, it was destroyed when a sitting governor politicized it. The rule of law was slowly restored over the next quarter-century in the eastern portions of colonial North Carolina, and the legal system functioned effectively there during the last two decades before the American Revolution. But the vast geographic expanse of the colony, together with its ethnic and religious diversity, prevented the courts from governing western frontiers in depth. Instead, they confronted a series of riots in the 1760s that culminated in open rebellion in the 1770s. Although the then-governor successfully led an army against the rebels, that army could not sufficiently subdue them to enable the judges of the supreme court to meet regularly and govern the western regions. The Article thereby shows that effective enforcement of law depends on more than brute force; it requires the consent and support of local communities.

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INTRODUCTION

It seems obvious when writing about the history of government and law in early North Carolina to compare it to its southerly neighbor, South Carolina. Both originated as part of the same proprietary colony, Carolina, and they did not become fully separate entities until well into the eighteenth century.[1] But it is also necessary to contemplate the legal history of colonial North Carolina in the context of Virginia history because North Carolina was initially settled as an offshoot of Virginia even before the Carolina proprietary had come into existence.[2]

North Carolina, however, differed dramatically from both those colonies. Unlike South Carolina and Virginia, North Carolina never became one of the jewels of the British Empire's North American crown. A major reason, this Article urges, is that from the 1720s until the end of the colonial period at least some courts at various times in much of the colony were dysfunctional: suitors could not always get them to meet and pass judgment, and, at other times and places, suitors could not enforce the judgments they had obtained. Why was North Carolina's formal legal system so weak and dysfunctional?

As will emerge in the pages that follow, three factors contributed to the weakness of North Carolina's colonial legal system. The first was the absence of colony-wide social networks: North Carolina was a

1. *See* 3 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 191–92, 246–48, 258–59, 265–67 (1937).

2. *See id.* at 247.

geographically large entity settled by diverse peoples without ties to each other.[3] The second factor was the thinness of the colony's legal infrastructure. Unlike colonies such as Massachusetts, New York, Pennsylvania, South Carolina, and Virginia, colonial North Carolina never developed a sizable cadre of trained, full-time legal practitioners who, although appearing as opponents in litigation, worked together to build a professionalized bar committed to maintaining the rule of law. The judiciary also developed belatedly. A supreme court distinct from the governor and council did not exist until the early eighteenth century, and for most of the first half of that century, only a single member of the court possessed full judicial power to hear and decide cases.[4]

Despite North Carolina's lack of a cohesive social structure and the thinness of its legal infrastructure, the rule of law—the ideal of adjudication of disputes through dispassionate, impartial, and neutral decisionmaking pursuant to established norms—might have survived if the political and judicial leaders of the colony had nurtured it. But they did not. Instead, as this Article will attempt to show, the colony's governors, as well as its handful of judges and lawyers, adopted misguided policies leading to the complete politicization of the judiciary and the breakdown of law enforcement and the rule of law. As a result, by the mid-1760s, the western sections of North Carolina were in open rebellion against the government in the east.

Part I will begin by examining the legal system of North Carolina during its founding years and tracing the slow process through which the colony, confined mainly to the shores of the Albemarle Sound, adopted common law forms and constructed a body of law reasonably capable of serving the needs of its people. Next, Part II will describe the political conflicts of the late 1720s, ultimately between the governor and the judiciary, which undermined the authority of the courts and produced legal chaos by the end of the decade. A partial turning point came in the 1730s when, as Part III will show, new royal governors strove to restore the integrity of the judiciary and the rule of law. But, as Part III will also show, their efforts did not fully succeed in a geographically large colony where lawyers and judicial manpower were thinly spread.

Finally, in 1754, the legislature enlarged the judiciary and created a circuit riding system that judges were able to staff. As will appear in Part IV, this new system functioned effectively in the long-settled eastern portions of the colony. On the western frontier, however, the new system could not gain traction, resulting, as Part V will recount, in open

3. *See infra* Part V.D.
4. *See infra* Part III.C.

rebellion. Finally, a brief conclusion will urge that the experience of colonial North Carolina suggests how the rule of law can function only when the necessary legal infrastructure and community support for the law exist.

I. THE COLONY ON THE ALBEMARLE SOUND

At the outset, North Carolina exhibited considerable promise as an outpost for land-hungry Virginians. Virginia's main cash crop, tobacco, quickly exhausts the soil in which it is grown; Virginia planters were constantly searching for new places to cultivate, not only to increase, but even to maintain existing levels of tobacco production.[5] By the late 1650s "a steady flow" of Virginians had begun pushing south from existing settlements in Norfolk and on the south side of the James River into the roughly thirty-mile-wide swath of territory between what is now the border of Virginia and the Albemarle Sound.[6] This territory was closer to Virginia's main center on the James than much other new land, and, until the crown granted it to the Carolina proprietors, Virginians had no way of knowing that they were leaving their own colony when they migrated to it.[7]

A. The Institutional Structure of the New Colony

In March 1663, Charles II issued a charter that made a group of eight highly-placed confidants proprietors of a new colony encompassing what is now most of North Carolina, South Carolina, and Georgia. Even this charter did not represent a clean break for the Virginia settlers, however, because one of the eight proprietors was Sir William Berkeley, the governor of Virginia, who was immediately directed by his fellow proprietors to establish a government for the region along the Albemarle.[8] That government and its law would reflect both the cultural heritage of its Virginia settlers and the authoritative power of its Carolina rulers.

Thus, a colony-wide court with common law jurisdiction over civil actions was named, not, as in South Carolina, the Court of Common

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5. 1 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607–1660, at 38 (2008).

6. HUGH TALMAGE LEFLER & ALBERT RAY NEWSOME, NORTH CAROLINA: THE HISTORY OF A SOUTHERN STATE (3d ed. 1973); HARRY ROY MERRENS, COLONIAL NORTH CAROLINA IN THE EIGHTEENTH CENTURY: A STUDY IN HISTORICAL GEOGRAPHY 19–20 (1964).

7. *See* ANDREWS, *supra* note 1, at 247.

8. *See* M. EUGENE SIRMANS, COLONIAL SOUTH CAROLINA: A POLITICAL HISTORY, 1663–1763, at 3–6 (1966).

Pleas, but, as in Virginia, the General Court.[9] It was the successor to an early court held by the governor and council, and, although a 1685 statute provided for separate justices for the General Court, the governor or a deputy acting in his stead continued to preside over it until the early eighteenth century.[10] It was only in 1694 that one or two assistants, presumably practicing lawyers, were added to the court to assist it on technical points, and only in 1702 that justices separate from the council and lower house of the legislature held court by themselves.[11] Finally, in 1713 the office of chief justice was created and conferred on Christopher Gale, an able lawyer who held it for nearly two decades.[12] Appeals from the General Court were heard by the governor and council,[13] sitting as the Court of Chancery.[14]

Although named for its counterpart in Virginia, the General Court functioned in many notable respects very much like its companion, the Court of Common Pleas in South Carolina. One important similarity was that the North Carolina General Court, like the South Carolina court, would not calculate damages after giving a default judgment for a plaintiff on the merits; it would summon a jury to do so.[15] A more important similarity was that, just as South Carolina in 1712 had provided by statute that "all and every part of the common law of England, where the same is not ... inconsistent with the particular Constitutions, Customs and Laws of this Province," was in "full Force" in the colony,[16] so too North Carolina in 1711 had enacted "that the

9. JOHN SPENCER BASSETT, THE CONSTITUTIONAL BEGINNINGS OF NORTH CAROLINA 66–67 (Johns Hopkins Press 1894).

10. *Id.* at 66.

11. *Id.* at 66 & n.7.

12. *Id.* at 67.

13. *See id.* at 66–67. For a subsequent appointment of assistance, see *Appointment of Cockburne* (N.C. Gen. Ct. Mar. 31, 1724), *in* 2 COLONIAL RECORDS OF NORTH CAROLINA, at 551, 552 (William L. Saunders ed., Broadfoot Publ'g Co. 1993) (1886) [hereinafter COLONIAL RECORDS]. Although there is no direct evidence, my surmise, based on the nature of the appeals that were taken, is that the governor and council had jurisdiction to review the facts found, as well as the law applied by the General Court. For a motion arguing the contrary, see *King v. Porter* (N.C. Gen. Ct. cc. 1731), *microformed on* North Carolina State Archives, Reel Y.1.10003 (objecting to "the Council tak[ing] on them to be judges of the evidence, which belong to none but the jurors"). The disposition of the motion is unknown.

14. BASSETT, *supra* note 9, at 66–67.

15. *See* Bonbury v. Isaac (N.C. Gen. Ct. Oct. 1722), *microformed on* North Carolina State Archives, Reel 138.1; Jordan v. Willson (N.C. Gen. Ct. Apr. 2, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 87, 89; *cf.* Brett v. Steward (N.C. Gen. Ct. July 1727), *microformed on* North Carolina State Archives, Reel S.138.2 (Chancery directs General Court to summon a jury to determine damages in a case it had decided on the merits).

16. An Act to Put in Force in this Province the Several Statutes of the Kingdom of England or South Britain, therein particularly mentioned (1712), *in* 1 THE EARLIEST

Common law is and shall be in force in this Government, except such part ... [as] cannot be put in execution ...."[17] A statute of 1715 reenacted nearly identical language and also specified, as South Carolina had done,[18] which parliamentary statutes were in force in the colony.[19]

B. *The Common Law Foundation*

The 1711 and 1715 laws, it appears, merely codified preexisting practice. Court records indicate that the common law already had become the foundation of North Carolina law. As early as the mid-1690s, for example, litigants before the General Court were using common law writs, often correctly. The practice continued thereafter. There were actions of case brought to recover on accounts,[20] for failure to pay for goods that were delivered,[21] for failure to perform agreed labor,[22] and for breach of warranty in the sale of goods,[23] as well as writs of debt,[24] detinue,[25] ejectment,[26] scire facias,[27] trover,[28] and "ejectio

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PRINTED LAWS OF SOUTH CAROLINA, 1692–1734, at 304, 322 (John D. Cushing ed., 1978) [hereinafter An Act to Put in Force].

17. Act for the Better and More Effectual Preserving the Queen's Peace, and the Establishing a Good and Lasting Foundation of Government in North Carolina (1711), *in* 2 THE EARLIEST PRINTED LAWS OF NORTH CAROLINA, 1699–1751, at 166, 167 (John D. Cushing ed., 1977) [hereinafter EARLIEST LAWS].

18. An Act to Put in Force, *supra* note 16.

19. An Act for the Better and More Effectual Preserving the Queen's Peace (1715), *in* 2 EARLIEST LAWS, *supra* note 17, at 39–40.

20. *See* White v. Wilson (N.C. Gen. Ct. Sept. 25, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 406, 406.

21. *See* Porter v. Aysos (N.C. Gen. Ct. 1700), *microformed on* North Carolina State Archives, Reel Y.1.10008.

22. *See* Manwaring v. Beasley (N.C. Gen. Ct. Sept. 27, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 416, 416.

23. *See* Farloe v. Hencock (N.C. Gen. Ct. Nov. 28, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 430, 430.

24. *See* Cragge v. Robison (N.C. Gen. Ct. Mar. 1, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 451, 451. In one action of debt, the General Court ruled properly that a plaintiff did not need to allege consideration in order to proceed with his claim. *See* Collins v. Beasley (N.C. Gen. Ct. Apr. 1729), *microformed on* North Carolina State Archives, Reel S.138.2.

25. *See* Jones v. Cleaves (N.C. Gen. Ct. cc. 1712), *microformed on* North Carolina State Archives, Reel Y.1.10008; Lerry v. Bentley (N.C. Gen. Ct. Nov. 29, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 437, 437.

26. *See* Manwaring v. Wilson (N.C. Gen. Ct. Nov. 29, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 435, 435–36 (referring to an earlier action of ejectment in the General Court).

27. *See* Knight v. Porter (N.C. Gen. Ct. Apr. 3, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 95, 95.

28. *See* Guthrie v. Batcheler (N.C. Gen. Ct. Mar. 1716), *microformed on* North Carolina State Archives, Reel S.138.1.

firmae."[29] There was a writ of elegit,[30] as well as more informally instituted actions of defamation[31] and slander.[32]

Attorneys for defendants similarly followed common law practice in obtaining postponements on grounds of illness,[33] for instance, and in seeking dismissal of suits on technical grounds, such as death of one of the parties,[34] "the Insufficiency & uncertainty of y[e] Decla,"[35] the existence of a variance between the declaration and the instrument on which the suit rested,[36] or the defendant's receipt of a copy of the declaration either too near to trial[37] or before, rather than after, being arrested.[38] Other cases sought dismissal on more meaningful procedural grounds: that the plaintiff had failed to deliver a copy of his account to the defendant before trial,[39] that the plaintiff's declaration had failed to specify the goods that had been delivered for which payment was due on an account,[40] or that the declaration had failed to state specifically

29. Vaughan v. Glassler (N.C. Gen. Ct. Oct. 1712), *microformed on* North Carolina State Archives, S.138.1. The case appears to be one of a common recovery to bar a fee tail. For a later example of a common recovery, see *Little v. Lovick* (N.C. Gen. Ct. Apr. 1730), *microformed on* North Carolina State Archives, Reel S.138.4.

30. *See* Collings v. Lamb (N.C. Gen. Ct. Nov. 28, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 429, 430.

31. *See* Winn v. Jenins (N.C. Gen. Ct. July 27, 1703), *in* 1 COLONIAL RECORDS, *supra* note 13, at 588, 588.

32. *See* Rooker v. Wofl (N.C. Gen. Ct. cc. 1700), *microformed* on North Carolina State Archives, Reel Y.1.10008.

33. *See* Henley v. Heartley (N.C. Gen. Ct. Sept. 26, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 410, 410.

34. *See* Low v. Solley (N.C. Gen. Ct. July 1727), *microformed on* North Carolina State Archives, Reel S.138.2.

35. Glover v. Cleave (N.C. Gen. Ct. Jan. 3, 1714), *in* 2 COLONIAL RECORDS, *supra* note 13, at 150, 150. Plaintiffs would be permitted to replead following a dismissal on technical grounds. *See* Ogilby v. Roger (N.C. Gen. Ct. July 1722), *microformed on* North Carolina State Archives, Reel S.138.1.

36. *See* Winwright v. Wilkinton (N.C. Gen. Ct. July 1727), *microformed on* North Carolina State Archives, Reel S.138.4; Pirkins v. Mixon (N.C. Gen. Ct. July 29, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 99, 99; Robison v. Wallston (N.C. Gen. Ct. July 30, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 106, 106.

37. *See* Bell v. Worleys (N.C. Gen. Ct. July 1727), *microformed on* North Carolina State Archives, Reel S.138.4 (declaration received less than ten days before trial).

38. *See* Rice v. Scarborrow (N.C. Gen. Ct. Oct. 28, 1702), *in* 1 COLONIAL RECORDS, *supra* note 13, at 567, 567.

39. *See* Lerry v. Bentley (N.C. Gen. Ct. Sept. 25, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 409, 409.

40. *See* Holland v. Willson (N.C. Gen. Ct. Mar. 31, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 84, 85.

the defendant's allegedly defamatory language.[41] Motions such as these usually met with success.[42]

Numerous defendants also pleaded the general issue properly—non est factum, for instance, to a writ of debt.[43] Occasional defendants, rather than interposing a general denial, also began to employ special pleading to raise specific defenses: one defendant, for example, conceded liability on part of an account but denied liability on the rest;[44] a second conceded that he had borrowed a canoe but pleaded he did not damage it;[45] a third denied liability for payment of goods on the ground they were never delivered;[46] a fourth set up an account as a bar to a suit against him on a bill;[47] and a fifth pleaded the statute of limitations.[48] Plaintiff's lawyers also knew how to interpose a demurrer to a defendant's special plea to challenge its legal sufficiency.[49] Finally, lawyers were acquainted with standard common law forms such as penal bonds with a conditional defeasance[50] and nuncupative wills,[51] as well as standard procedures, such as one for taking depositions of

41. *See* Banbury v. Isaac (N.C. Gen. Ct. Oct. 1722), *microformed on* North Carolina State Archives, Reel S.138.1.

42. *See supra* notes 33–41.

43. *See* Plater v. Henley (N.C. Gen. Ct. Feb. 27, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 447, 447.

44. *See* White v. Wilson, (N.C. Gen. Ct. Sept. 25, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 406, 406.

45. *See* Ashworth v. Palmer (N.C. Gen. Ct. Oct. 28, 1702), *in* 1 COLONIAL RECORDS, *supra* note 13, at 567, 567.

46. *See* Wilkison v. Delamare (N.C. Gen. Ct. July. 27, 1703), *in* 1 COLONIAL RECORDS, *supra* note 13, at 589, 589.

47. *See* Bird v. Reed (N.C. Gen. Ct. July 27, 1703), *in* 1 COLONIAL RECORDS, *supra* note 13, at 588, 588.

48. *See* Eaton v. Overman (N.C. Gen. Ct. July 1727), *microformed on* North Carolina State Archives, Reel S.138.4. In some cases, it is unclear whether a plea was a procedural motion seeking dismissal of a suit or a substantive plea seeking to narrow issues for the jury. *See* Moseley v. Logan (N.C. Gen. Ct. cc. 1712), *microformed on* North Carolina State Archives, Reel Y.1.10013 (plea that choses in action could not be assigned); Manwaring v. Porter (N.C. Gen. Ct. Nov. 27, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 428, 428 (interpreting a plea of res judicata).

49. *See* Harfield v. Godfry (N.C. Gen. Ct. cc. 1700), *microformed on* North Carolina State Archives, Reel Y.1.10008. For a later example of a plaintiff filing demurrers to a defendant's plea, see *Moseley v. Vaille* (N.C. Gen. Ct. Apr. 1730), *microformed on* North Carolina State Archives, Reel S.138.4.

50. *See* Bond of Spruill (N.C. Gen. Ct. 1695), *microformed on* North Carolina State Archives, Reel Y.1.10008.

51. *See* Will of Durant (N.C. Gen. Ct. Feb. 27, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 450, 450.

absent witnesses[52] and another by which a widow could disclaim a legacy and elect her dower instead.[53]

English common law did not, however, always apply; sometimes, the laws and customs of North Carolina governed. Justices of the peace, for example, took an oath to "do equal right to the poor and rich . . . after the laws and customs of this government" as well as "after the laws of England."[54] And, in the case of *Luton v. Champion*,[55] where a defendant pleaded that by English law an officer of the Court of Chancery had a privilege not to be sued in a common law court and that, because he was an officer of the North Carolina Court of Chancery, a suit against him in the General Court ought to be dismissed, the plaintiff disagreed.[56] He argued that "such pleas of privilege [did] not extend to the Plantations" because contrary "provision ha[d] been made by law" and "the practice ha[d] always been" to the contrary.[57]

C. Lapses from Common Law Practice

Moreover, there were numerous inexplicable lapses in the generally sophisticated approach of North Carolina lawyers. Most actions involving disputes over land titles and boundaries, for example, were commenced with writs of "trespass of ye case"[58] rather than simply trespass. Another frequent lapse occurred when plaintiffs brought actions of debt rather than case on bills other than sealed bonds.[59] More random lapses also occurred, as in one case in which a defendant

52. *See* Moseley v. Vaille (N.C. Gen. Ct. Apr. 1730), *microformed on* North Carolina State Archives, Reel S.138.4.

53. *See* Election of Bateman (N.C. Gen. Ct. Feb. 25, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 443, 443.

54. *See* Oath of Justices of the Peace (Oct. 1724), *microformed on* North Carolina State Archives, Reel S.138.1.

55. (N.C. Gen. Ct. Mar. 1717), *microformed on* North Carolina State Archives, Reel S.138.1.

56. *Id.*

57. *Id.*; *see also* Sunstein v. Goffe (N.C. Gen. Ct. Aug. 1724), *microformed on* North Carolina State Archives, Reel S.138.1. The defendant pleaded he was an officer of Chancery and hence immune from suit, and the plaintiff replied that the defendant was not a member of Parliament nor such an officer as was entitled to immunity. *Id.* Decision of the issue was postponed. *Id.*

58. *See, e.g.*, Mageo v. Pope (N.C. Gen. Ct. Feb. 26, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 445, 445–46. *But see* Goodlatt v. Nickollson (N.C. Gen. Ct. 1714), *in* 2 COLONIAL RECORDS, *supra* note 13, at 149, 149 (describing a writ of ejectment in a land case).

59. *See, e.g.*, Bayly v. King (N.C. Gen. Ct. Feb. 27, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 449, 449. A proper writ of case had been filed in the immediately preceding action of *White v. Moline* (N.C. Gen. Ct. Feb. 27, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 449, 449.

pleaded "Nill Debitt" in an action of case and the court accepted a jury verdict in his favor.[60]

Lapses such as these make it plain that North Carolina's legal system differed from its counterpart in South Carolina in its level of professionalization. At least on occasion, the North Carolina General Court was willing, whereas the South Carolina Court of Common Pleas was not, to ignore the formal requirements of the common law. Perhaps, the judges were not even aware that they were at times violating formal rules; it may be that North Carolina's judges often were left at sea because the North Carolina bar never attained the same height of professional sophistication that the bar in South Carolina did and thus never possessed the capacity to inform the judiciary of all the law's formal requirements.[61]

An even more important difference between North and South Carolina law occurred in the structure of the judiciary. Until the 1770s, South Carolina had a single Court of Common Pleas that sat only in Charleston and possessed the totality of common law jurisdiction over civil actions other than petty disputes, while a single Court of General Sessions sitting in Charleston, adjudicated all but petty criminal cases.[62] In North Carolina, in contrast, a series of local courts existed beneath the General Court. Known initially as precinct courts, they had jurisdiction to hear petit larceny and other minor criminal cases and shared with the General Court broad jurisdiction over civil actions not exceeding fifty pounds in value,[63] including cases involving title to land.[64] The General Court had jurisdiction to hear appeals from its decisions.[65]

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60. March v. Rich (N.C. Gen. Ct. July 28, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 102, 102. "Nil debet" was a proper response to an action of debt; "non assumpsit" to an action of case.

61. William E. Nelson, *The Height of Sophistication: Law and Professionalism in the City-State of Charleston, South Carolina, 1670–1775,* 61 S.C. L. REV. 1, 17–22, 30–37, 44–45 (2009) (noting the high degree of professionalism and competency of the South Carolina judiciary and bar). "Indeed, the learning and sophistication of the bar was such that it reached a plateau that few, if any, of the other colonies' bars attained." *Id.* at 45.

62. *See id.* at 37, 60–61.

63. *See* Commission of Judges (Perquimans Precinct Ct. Jan. 1703), *in* 1 COLONIAL RECORDS, *supra* note 13, at 574, 574–75. For a case that was dismissed as "being out of the Jurisdiccon of this Court," see *Jones v. Collings* (Perquimans Precinct Ct. Apr. 11, 1704), *in* 1 COLONIAL RECORDS, *supra* note 13, at 608, 608. *See also* Jones v. Williams (N.C. Gen. Ct. Apr. 1725), *microformed on* North Carolina State Archives, Reel S.138.1 (appealing on grounds, inter alia, of lack of jurisdiction below granted when appellee fails to appear). Extant records leave it unclear, however, whether the precinct courts were routinely so attentive to their jurisdiction. For a case in which a precinct court ignored its jurisdictional limits, see *King v. White* (Perquimans Precinct Ct. Nov. 6, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 401, 401, in which a jury convicted a defendant of grand larceny.

Sometimes the precinct courts adhered to professional, common law norms. Thus, they heard actions of case,[66] covenant,[67] debt,[68] detinue,[69] trespass,[70] and trover and conversion.[71] They also dismissed cases on a variety of technical grounds—for failure to file a declaration,[72] for a fault in a declaration,[73] and for failure to sign a declaration.[74] Finally, there was rudimentary special pleading, as in a defamation case in which a defendant pleaded "Justificacon."[75]

At the same time, though, the precinct courts tolerated an enormous amount of informality. A number of litigants, for example, proceeded by petition rather than by writ. Thus, two men who had lived with a third man until he died successfully petitioned to divide his share of their crop.[76] Another who had nursed a man during his final illness and buried him when he died sought to keep whatever property of the decedent he had in his custody "for His Satisfaction," and was granted permission.[77] A third obtained a "Writt of Restitution" after petitioning

64. *See, e.g.*, Wollard v. Smithwick (Perquimans Precinct Ct. May 1, 1693), *in* 1 COLONIAL RECORDS, *supra* note 13, at 387, 387.

65. *See* Kirby v. Jessup (N.C. Gen. Ct. Oct. 1723), *microformed on* North Carolina State Archives, Reel S.138.1; Bournsby v. Henly (N.C. Gen. Ct. Sept. 27, 1694), in 1 COLONIAL RECORDS, *supra* note 13, at 415, 415. For an appeal in an administrative matter involving a road, see *Petition of Moseley* (N.C. Gen. Ct. Mar. 26, 1723), *in* 2 COLONIAL RECORDS, *supra* note 13, at 509, 509.

66. *See, e.g.*, King v. Williamson (Perquimans Precinct Ct. Aug. 7, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 397, 397.

67. *See, e.g.*, Clarke v. Davenport (Perquimans Precinct Ct. Oct. 12, 1703), *in* 1 COLONIAL RECORDS, *supra* note 13, at 582, 582.

68. *See, e.g.*, Evins v. Devillard (Perquimans Precinct Ct. Feb. 1693), *in* 1 COLONIAL RECORDS, *supra* note 13, at 393, 393.

69. *See, e.g.*, Burnsby v. Devillard (Perquimans Precinct Ct. Feb. 1693), *in* 1 COLONIAL RECORDS, *supra* note 13, at 393, 393.

70. *See, e.g.*, Oates v. Stewart (Perquimans Precinct Ct. Apr. 10, 1705), *in* 1 COLONIAL RECORDS, *supra* note 13, at 621, 621.

71. *See, e.g.*, Hartly v. Gaskin (Perquimans Precinct Ct. Aug. 7, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 398, 398.

72. *See, e.g.*, Pope v. Philpott (Perquimans Precinct Ct. May 1693), *in* 1 COLONIAL RECORDS, *supra* note 13, at 397, 397.

73. *See, e.g.*, Bachelder v. Barrow (Perquimans Precinct Ct. Oct. 1697), *in* 1 COLONIAL RECORDS, *supra* note 13, at 488, 488.

74. *See, e.g.*, Lilly v. Manwaren (Perquimans Precinct Ct. Jan. 1697), *in* 1 COLONIAL RECORDS, *supra* note 13, at 481, 481.

75. Clark v. White (Perquimans Precinct Ct. July 11, 1704), *in* 1 COLONIAL RECORDS, *supra* note 13, at 611, 611.

76. Petition of Philips (Perquimans Precinct Ct. Oct. 14, 1701), *in* 1 COLONIAL RECORDS, *supra* note 13, at 551, 551.

77. Petition of Pricklo (Perquimans Precinct Ct. July 8, 1701), *in* 1 COLONIAL RECORDS, *supra* note 13, at 550, 550.

to recover property from a defendant convicted of stealing it.[78] And some creditor petitioners obtained attachments against the estates of their debtors without having to plead by writ or go to trial.[79] Other plaintiffs brought actions not listed in the register of writs—for defamation,[80] perjury,[81] and false molestation[82]—or wrong writs—debt on a bill[83] or debt to balance accounts.[84]

Two final cases were simply irregular and odd. In the first, a civil action by one woman against another for an assault, the defendant pleaded that "[s]he did not beat abuse & wound" the plaintiff; after unrecorded proceedings, the defendant, "acknowledging her fault & being Sorry for the Same," was dismissed paying only costs.[85] In the second, the jury, passing upon a legal issue about the validity of service of process that should have been raised with the court prior to trial, returned a verdict for the defendant, finding "It to be No Lawfull Arest It being Repugnant to the Lawes of england."[86]

Even more haphazard were the rules governing the jurisdiction of Chancery. At root, the ambiguity of those rules lay in the uncertain nature of the Court of Chancery itself. Throughout the proprietary period, the governor and council constituted the Court of Chancery, and the governor and council had jurisdiction to hear not only archetypal equity cases of a sort within the jurisdiction of the Court of Chancery in England, but any case, by appeal or otherwise, that a

78. Kitchin v. White (Perquimans Precinct Ct. Nov. 7, 1693), *in* 1 COLONIAL RECORDS, *supra* note 13, at 402, 402. For a criminal conviction, see *Rex v. White* (Perquimans Precinct Ct. Nov. 6, 1693), *in* COLONIAL RECORDS, *supra* note 13, at 401, 401.

79. *See, e.g.*, Petition of Butler (Perquimans Precinct Ct. Jan. 1697), *in* 1 COLONIAL RECORDS, *supra* note 13, at 483, 483; Petition of Harve (Perquimans Precinct Ct. Jan. 1697), *in* 1 COLONIAL RECORDS, *supra* note 13, at 481, 481.

80. *See, e.g.*, Manering v. Wilson (Perquimans Precinct Ct. May 1693), *in* 1 COLONIAL RECORDS, *supra* note 13, at 387, 387.

81. *See, e.g.*, Philpott v. Pope (Perquimans Precinct Ct. May 1693), *in* 1 COLONIAL RECORDS, *supra* note 13, at 387, 387.

82. *See, e.g.*, Belman v. Mannering (Perquimans Precinct Ct. Aug. 7, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 397, 397.

83. *See, e.g.*, Falconar v. Berry (Perquimans Precinct Ct. Jan. 9, 1704/05), *in* 1 COLONIAL RECORDS, *supra* note 13, at 617, 617. When the plaintiff at trial produced a bill that contained "no power" and had not been assigned, a nonsuit was granted on the defendant's motion. *Id.*

84. *See, e.g.*, Butler v. Fisher (Perquimans Precinct Ct. Apr. 1700), *in* 1 COLONIAL RECORDS, *supra* note 13, at 533, 533.

85. Norcomb v. Morgan (Perquimans Precinct Ct. Jan. 9, 1705), *in* 1 COLONIAL RECORDS, *supra* note 13, at 619, 619.

86. Lilly v. Houghton (Perquimans Precinct Ct. Apr. 1697), *in* 1 COLONIAL RECORDS, *supra* note 13, at 486, 486.

litigant chose to bring before them.[87] Thus, the court records contain entries like *Petition of Hobs*,[88] a 1709 complaint, made quite informally and pro se, that petitioner and his family had been subjected "to much poverty" because of "an unjust information" against him, with the result that he had been "made uncapable to take any thing in hand to maintain myself & family;" Hobs "pray[ed] . . . that I may be permitted to speak for my self" before the governor and council and "that the persons that I shall name before you may be present."[89]

The result of allowing anyone to seek a hearing before the governor and council was that, when a litigant in a precinct court appealed to the General Court, only to have the judgment below affirmed, he was free next to appeal to Chancery, without needing to show any inadequacy in his remedies at law or any other particular justification for Chancery to assume jurisdiction.[90] In other cases as well, the Court of Chancery heard appeals from the General Court without any showing that legal remedies were inadequate or that a matter was otherwise within its jurisdiction.[91] Only on occasion does one find petitioners seeking relief in Chancery because a case "was not actionable by law,"[92] because a suit had been "vexatiously brought . . . at common Law,"[93] or because a litigant was seeking to obtain the testimony of a party, which could not be given at common law.[94] Only in these cases did the Court of Chancery act as an equity court with limited jurisdiction rather than a court of appeals broadly empowered to hear any case brought to its attention.

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87. *See* BASSETT, *supra* note 9, at 70.

88. (N.C. Gen. Ct. 1709), *microformed on* North Carolina State Archives, Reel Y.1.10013.

89. *Id.*

90. *See, e.g.*, Bournsby v. Henly (N.C. Gen. Ct. Sept. 27, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 415, 415–16. The *Henly* case was finally affirmed. Bournsby v. Henly (N.C. Gen. Ct. Mar. 1, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 454, 454–55. *But see, e.g.*, Bournsby v. Mason (N.C. Gen. Ct. Mar. 1, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 454, 454–55 (involving the taking of a precinct court judgment to Chancery, which was ultimately dismissed for the petitioner's failure to complete the filing of his chancery bill).

91. *See, e.g.*, Manwaring v. Wilson (N.C. Gen. Ct. Nov. 29, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 436, 436; Wright v. Walker (N.C. Gen. Ct. Nov. 27, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 436, 436; Hopkins v. Butler (N.C. Gen. Ct. Nov. 26, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 426, 426; Smithwike v. Gillam (N.C. Gen. Ct. Sept. 28, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 422, 422.

92. Bentley v. Lerry (N.C. Gen. Ct. Sept. 28, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 420, 420.

93. Bentley v. Lerry (N.C. Chancery Ct. Nov. 29, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 437, 437.

94. *See, e.g.*, Manwaring v. Beasley (N.C. Gen. Ct. Nov. 29, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 437, 437.

The broad appellate jurisdiction of the Court of Chancery had two consequences. First, it gave North Carolina a three-level system of courts of general jurisdiction that probably was unique in the British American colonies. Second, together with the informality tolerated in the General Court and the precinct courts, it gave North Carolina a perspective on law totally different from that of South Carolina.[95]

Learned, sophisticated application of English law by a well-educated bench and bar was the norm in South Carolina. It was not the norm in North Carolina. In a sense, North Carolina had no law; all it possessed was a series of institutions striving to work out governance problems and hear disputes brought to their attention on an ad hoc basis. One such institution, not yet discussed, was the jury. Both the General Court and the precinct courts sat with juries and relied on them heavily. Judges, even in chancery, always relied on juries to assess damages,[96] and juries passed on legal issues, such as the validity of service of process, that were more appropriately raised with the court prior to trial.[97] And, when one litigant in a case titled *Outlaw v. Roundhoe*[98] sought to set aside a jury verdict on the ground that "the jury determined pure matter of law: viz. the extent of the authority & jurisdiction of a Justice of the Peace, which they cannot do but the Court only," his motion was overruled and the verdict affirmed. Similarly, in another case, *Cary v. Tookes*,[99] in which matters of fact were intertwined with issues of law in the jury's verdict, the losing party, after argument, agreed to "[i]nsist[] on the matter of Law only" as it had been raised in the pleadings; nonetheless, the court still denied his motion to set aside the verdict and arrest the judgment.[100] The General Court would not arrest judgment and set aside a verdict even when the losing party claimed that a juror "was very strenuous against" him,[101]

95. *See* Nelson, *supra* note 61, at 17–22, 30–37, 44–45.

96. *See* cases cited *supra* note 15.

97. *See, e.g.*, Lilly v. Houghton (Perquimans Precinct Ct. Apr. 1697), *in* 1 COLONIAL RECORDS, *supra* note 13, at 486, 486.

98. (N.C. Gen. Ct. Oct. 1722), *microfilmed on* North Carolina State Archives, Reel S.138.1.

99. (N.C. Gen. Ct. Oct. 29, 1713) 2 COLONIAL RECORDS, *supra* note 13, at 111, 111–12.

100. *Id.* at 111.

101. Outlaw v. Roundtree (N.C. Gen. Ct. Oct. 1722), *microformed on* North Carolina State Archives, Reel S.138.1. It should be noted that the moving party did not allege prejudice, nor is there any indication that he had timely challenged the juror prior to the jury's being sworn. In *Howcott v. Porter* (N.C. Gen. Ct. July 1728), *microformed on* North Carolina State Archives, Reel S.138.2, the court did dismiss a juror to whom one of the parties in a timely fashion objected and then dismissed the entire jury because only eleven jurors remained. But when a new jury was summoned and only eleven jurors appeared, a motion to quash the array was denied; apparently, a twelfth juror could be chosen by the

although it would set aside a verdict if the jury had considered evidence not introduced at trial.[102]

It must be emphasized, however, that the lawfinding power of North Carolina juries and the freedom from judicial supervision that they enjoyed did not make the colony into a jurisdiction like Massachusetts, where juries applied broadly shared societal norms in adjudicating the cases before them.[103] It is not clear whether such norms existed,[104] even in the tiny colony in the decades around 1700 on the banks of the Albemarle. In any event, North Carolina juries did not have the type of final power that Massachusetts juries routinely possessed;[105] appeals to Chancery, sitting without a jury, were possible and frequent and could result in reconsideration of all aspects of a

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marshall from available subjects in the vicinity of the court. *Id.*; *see also* King v. Moseley (N.C. Gen. Ct. July 30, 1719), *in* 2 COLONIAL RECORDS, *supra* note 13, at 359, 360. A defendant "might call any evidence to prove any ill practice in the Marshall or any of the Officers but he not doing that & there not appearing anything in this matter contrary to the constant method and practice of this Court for summoning and Impannelling Grand Jurys and Jurys," it would not examine the officers "whether they have been guilty of any evil practice." *Id.*

102. *See* Barrow v. Mauls (N.C. Gen. Ct. July 1727), *microformed on* North Carolina State Archives, Reel S.138.2. For other examples of motions in arrest of judgment on which the court postponed rulings, see *Blount v. Worley* (N.C. Gen. Ct. July 1727), *microformed on* North Carolina State Archives, Reel S.138.2, in which the ground of the motion was that the court, at the jury's request, had erroneously permitted "the evidences," presumably witnesses, to be reexamined "without any further arguments thereon" by counsel, and *Mabson v. Reid* (N.C. Gen. Ct. Apr. 1725), *microformed on* North Carolina State Archives, Reel S.138.1. Another noteworthy case was *Luton v. Pollock* (N.C. Gen. Ct. Apr. 1723), *microformed on* North Carolina State Archives, Reel S.138.1, where a jury returned a special verdict reciting a decedent's will and the court determined fee simple title to land on the basis of the verdict. For a criminal case in which the jury found the facts and left the issues of law to the court, see *King v. Moseley* (N.C. Gen. Ct. Oct. 30, 1719), *in* 2 COLONIAL RECORDS, *supra* note 13, at 365, 365–67.

103. WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 29–30, 36–63 (Univ. of Ga. Press 1994) (1975).

104. A search for evidence of the existence of widely shared communitarian legal norms was outside the scope of the research for this Article, and it may be that North Carolina archival sources, such as church records for the period prior to 1776, are too thin to make such research feasible. On the other hand, there is much reason to believe that such norms did exist at least to some extent in western North Carolina in the second half of the eighteenth century. At least some of the religious groups, among them, the Quakers who settled there, were accustomed in other locales to resolving disputes among their congregants, and they probably brought the practice with them. *See* WILLIAM M. OFFUTT, JR., OF "GOOD LAWS" AND "GOOD MEN": LAW AND SOCIETY IN THE DELAWARE VALLEY, 1680–1710, at 146–81 (1995). In addition, it seems likely that, at times when the formal legal system was not functioning, alternative forms of dispute resolution picked up some of the slack.

105. *See* NELSON, *supra* note 103, at 21–31 (describing the power of Massachusetts juries during the late 1700s and early 1800s).

case.[106] Thus, North Carolina did not offer litigants in its courts a coherent body of law grounded in broadly shared community norms. Rather, it offered a set of dispute-resolving institutions and a hope that as litigants tried different forums they ultimately would find an acceptable one or alternatively exhaust themselves in the process of search. There was the jury, the precinct court, the General Court, and ultimately the Chancery Court, and there were litigants like the losing party in *Cary v. Tookes*, who tried them all.[107]

In a deep sense, the availability of appeals to a Court of Chancery which was not bound by English equity rules meant that North Carolina, as already suggested, had no law. English common law was present in the background, and the General Court, in particular, frequently applied it. Community institutions, perhaps, also applied local norms as a form of popular law. But ultimate authority lay not with juries and local community norms nor with the General Court and the common law, but with the governor and council, who sitting in Chancery could resolve disputes or solve problems however they thought best. North Carolina law thus had little reach greater than the length of the chancellor's—that is, the governor's—foot, and much depended on the governor's commitment to doing justice rather than promoting idiosyncratic policy goals or advancing his own self-interest.

D. The Judiciary's Early Effectiveness

Despite the potential for arbitrary gubernatorial lawmaking, North Carolina's three levels of courts effectively wielded broad administrative powers over many details of everyday life into the 1720s. Thus, Chancery granted land to men who imported servants or others into North Carolina, under a system analogous to Virginia's headright system,[108] and it established property boundaries and directed that they be surveyed.[109] Meanwhile, the General Court adjudicated petitions by

106. *See supra* notes 87–91 and accompanying text.

107. *See* Cary v. Tookes (N.C. Gen. Ct. Oct. 29, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 111, 111–12. After the court had denied Tookes's motion in arrest of judgment, he appealed to Chancery. *Id.*

108. *See* Right of Mills (N.C. Chancery Ct. Nov. 29, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 436, 436. For a description of the headright system, whereby anyone who transported himself or another received fifty acres for every person transported, see 1 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY: THE SETTLEMENTS 124–25 (1934).

109. *See* Hopkins v. Johnson (N.C. Chancery Ct. Nov. 29, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 436, 436.

servants and slaves claiming freedom;[110] in one case, the court even appointed an attorney to represent a black man claiming he had been manumitted,[111] although it ultimately denied him relief on the merits.[112] It also oversaw the placement of children into bondage,[113] ordered escaped and recaptured servants to serve extra time,[114] supervised the administration of estates,[115] directed the laying out of roads,[116] and ordered the establishment of a ferry.[117] The precinct courts, in turn, appointed men as packers of tobacco[118] and keepers of records of tolls collected,[119] and they recorded acknowledgments by wives of their relinquishment of dower when their husbands conveyed land.[120] They exercised overlapping jurisdiction with the General Court as they appointed overseers of highways,[121] supervised the administration of estates,[122] selected guardians for infants,[123] and ordered the placement of child paupers into bondage[124] and other children into apprenticeships.[125]

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110. *See, e.g.*, Petition of Vantrump (N.C. Gen. Ct. Feb. 3, 1727), *in* 2 COLONIAL RECORDS, *supra* note 13, at 702, 702–03; Bartliff v. Mills (N.C. Gen. Ct. Feb. 26, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13 at 447, 447; *cf.* Petition of Thomas (N.C. Gen. Ct. Apr. 1, 1727), *in* 2 COLONIAL RECORDS, *supra* note 13, at 698, 698–99 (seeking an order for the payment of corn and clothes due at the end of period of servitude).

111. *See* Laneer v. Harding (N.C. Gen. Ct. 1724), *in* 2 COLONIAL RECORDS, *supra* note 13, at 550, 550–51.

112. *See* Laneer v. Harding (N.C. Gen. Ct. Oct./Nov. 1724), *in* 2 COLONIAL RECORDS, *supra* note 13, at 557, 557. For an intermediate order in the case, see *Laneer v. Harding* (N.C. Gen. Ct. July/Aug, 1724), *in* 2 COLONIAL RECORDS, *supra* note 13, at 555, 555.

113. *See* Petition of Harvey (N.C. Gen. Ct. Feb. 26, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 448, 448.

114. *See* Complaint of Mettcalf (N.C. Gen. Ct. Apr. 1725), *microformed on* North Carolina State Archives, Reel S.138.1. The servant was ordered to serve twice the amount of time he had been missing plus an extra two years to compensate his master for the expenses of his recapture. *Id.*

115. *See* Petition of Robison (N.C. Gen. Ct. Feb. 26, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 445, 445.

116. *See* Order to Precinct of Chowan (N.C. Gen. Ct. Sept. 26, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 413, 413.

117. *See* Order *re* Ferry over Cape Fear River (N.C. Gen. Ct. Apr. 1, 1727), *in* 2 COLONIAL RECORDS, *supra* note 13, at 698, 698.

118. *See* Appointment of Parish (Perquimans Precinct Ct. July 9, 1706), *in* 1 COLONIAL RECORDS, *supra* note 13, at 653, 653.

119. *See* Appointment of Phelps (Perquimans Precinct Ct. July 9, 1706), *in* 1 COLONIAL RECORDS, *supra* note 13, at 653, 653.

120. *See* Acknowledgment of Hannah Maudin (Perquimans Precinct Ct. July 10, 1705), *in* 1 COLONIAL RECORDS, *supra* note 13, at 622, 622.

121. *See* Appointment of Harvey (Perquimans Precinct Ct. Feb. 9, 1703), *in* 1 COLONIAL RECORDS, *supra* note 13, at 576, 576.

122. *See* Petition of Fisher (Perquimans Precinct Ct. Feb. 9, 1703), *in* 1 COLONIAL RECORDS, *supra* note 13, at 576, 576; Appointment of Stewart (Perquimans Precinct Ct. Nov. 6, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 400, 400.

123. *See* Petition of Harris (Perquimans Precinct Ct. Apr. 11, 1702), *in* 1 COLONIAL RECORDS, *supra* note 13, at 563, 563. The court would select a guardian even when a

At least into the 1720s, North Carolina's courts also appear to have been able to enforce a wide range of criminal laws. Jurisdictional lines, however, were again blurry. In the General Court, for example, there were prosecutions for serious offenses, such as adultery,[126] counterfeiting,[127] fraud,[128] grand larceny,[129] homicide,[130] murdering and burying a bastard child,[131] perjury,[132] rape,[133] scandalous language of a

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father had left his estate to his son "to be enjoyed at 13 yeares of age," but the mother petitioned for a guardian because the son was "uncapable to manage it by reason of his tend[er] yeares." Petition of Arnold (Perquimans Precinct Ct. Aug. 7, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 398, 398. Because one Jonathan Bateman, perhaps her intended new husband, was the man appointed guardian at her request, one wonders whether the mother was seeking to deprive her son of his inheritance. *Id.*

124. *See* Order re Infant of Garrett (Perquimans Precinct Ct. Oct. 8, 1706), *in* 1 COLONIAL RECORDS, *supra* note 13, at 655, 655.

125. *See* Petition of Gardner (Perquimans Precinct Ct., Oct. 13, 1698), *in* 1 COLONIAL RECORDS, *supra* note 13, at 495, 495.

126. *See* King v. Hassell (N.C. Gen. Ct. July 31, 1719), *in* 2 COLONIAL RECORDS, *supra* note 13, at 363, 363; *cf.* King v. Wyer (N.C. Gen. Ct. July 31, 1719), *in* 2 COLONIAL RECORDS, *supra* note 13, at 363, 363 (describing a prosecution for keeping company with another man's wife).

127. *See* King v. Howard (N.C. Gen. Ct. Mar./Apr. 1725), *in* 2 COLONIAL RECORDS, *supra* note 13, at 586, 586–87.

128. *See* Petition of Alexander (N.C. Gen. Ct. Mar. 30, 1721), *in* 2 COLONIAL RECORDS, *supra* note 13, at 438, 438 (directing the attorney general to enter a nolle prosequi in a fraud prosecution because the defendant, Alexander, was "a person very ignorant in any Legal proceedings" who had innocently written language in a will that the testator had not directed him to write).

129. *See* King v. Doyle (N.C. Gen. Ct. July/Aug. 1722), *in* 2 COLONIAL RECORDS, *supra* note 13, at 474, 474. The jury found Doyle guilty only of petit larceny, apparently by ignoring the actual value of what he had stolen. *Id.* The court nonetheless sentenced him to thirty-nine lashes, a relatively severe penalty likely to be what he would have received had he been convicted of grand larceny and pleaded benefit of clergy. *Id.* The record leaves it unclear whether the *Doyle* case is one of simple jury nullification or one of judge-jury cooperation to avoid the death penalty for a multiple offender not eligible for the benefit of clergy, who was accused of stealing property worth a total of only sixty-seven shillings. *See id.*

130. *See, e.g.*, King v. Seneka (N.C. Gen. Ct. Aug. 25, 1726), *in* 2 COLONIAL RECORDS, *supra* note 13, at 665, 665 (describing a case where a Native American was charged with murder of a woman and her two children, pleaded guilty, and was hanged); King v. Dewham (N.C. Gen. Ct. Oct. 26, 1703), *in* 1 COLONIAL RECORDS, *supra* note 13, at 594, 594–95 (describing a case where a jury returned a verdict of guilty of manslaughter, but not of murder, and the defendant pleaded benefit of clergy and was ordered burnt in the hand with the letter *M*); *see also* King v. Speir (N.C. Gen. Ct. July 30, 1726), *in* 2 COLONIAL RECORDS, *supra* note 13, at 656, 656 (describing a homicide prosecution where it appears that the victim in the case died as a result of a botched abortion; the jury found the defendant, Ann Speir, not guilty).

131. *See, e.g.*, King v. Collar (N.C. Gen. Ct. Mar./Apr. 1720), *in* 2 COLONIAL RECORDS, *supra* note 13, at 398, 398–99.

132. *See, e.g.*, King v. Scarbrough (N.C. Gen. Ct. July 17, 1725), *in* 2 COLONIAL RECORDS, *supra* note 13, at 599, 599.

religious nature,[134] and hog and lamb stealing.[135] Prosecutions for seditious speech, such as one against a man accused of drinking to King James's health, saying "God damn King William," and disputing William and Mary's "right to the crown,"[136] likewise should be considered serious, even though they typically terminated in minor penalties such as requiring the defendant "publickly upon his knees [to] crave . . . pardon."[137]

But there also were cases involving minor offenses, such as drunkenness;[138] fornication,[139] including one case brought only against a male defendant;[140] breaking the Sabbath;[141] swearing;[142] selling liquor without a license;[143] not keeping roads in repair;[144] failing to report for

133. *See, e.g.*, King v. Butler (N.C. Gen. Ct. Jul. 27, 1721), *in* 2 COLONIAL RECORDS, *supra* note 13, at 442, 442.

134. *See, e.g.*, King v. Hassell (N.C. Gen. Ct. Nov. 1720), *in* 2 COLONIAL RECORDS, *supra* note 13, at 412, 412. Hassell's motion in arrest of judgment on the ground that he was not timely prosecuted was overruled, and he received a penalty of thirty-nine lashes. King v. Hassell (N.C. Gen. Ct. Nov. 1722), *in* 2 COLONIAL RECORDS, *supra* note 13, at 470, 470. For an intermediate order postponing consideration of the motion in arrest of judgment, see *King v. Hassell* (N.C. Gen. Ct. 1721), *in* 2 COLONIAL RECORDS, *supra* note 13, at 436, 436.

135. *See* King v. Spivy (N.C. Gen. Ct. Oct. 29, 1719), *in* 2 COLONIAL RECORDS, *supra* note 13, at 365, 365 (hog); King v. Bryant (N.C. Gen. Ct. 1722), *in* 2 COLONIAL RECORDS, *supra* note 13, at 468, 468–69 (lamb). In view of his being drunk and elderly, Bryant was merely made to stand in the public whipping post and stocks. *Id.* at 469.

136. King v. Philpon (N.C. Gen. Ct. Nov. 28, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 430, 430–31. In light of his "weakness and age," Philpon was required only to pay costs. *Id.* at 431.

137. King v. Clapper (N.C. Gen. Ct. Mar. 1, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 453, 453. For a later prosecution for sedition, allegedly against Governor George Burrington, see *King v. Castleton* (N.C. Gen. Ct. 1723/24), *microformed on* North Carolina State Archives, Reel Y.1.10002. The record in this prosecution is especially interesting because it displays the process of pretrial examination that occurred in criminal proceedings prior to indictment. *See id.*

138. *See, e.g.*, King v. Charleton (N.C. Gen. Ct. Apr. 2, 1720), *in* 2 COLONIAL RECORDS, *supra* note 13, at 401, 401.

139. *See, e.g.*, King v. Simpson (N.C. Gen. Ct. Oct. 20, 1722), *in* 2 COLONIAL RECORDS, *supra* note 13, at 478, 478. The reputed father of Simpson's children was ordered to be taken into custody on a charge of adultery. *Id.*

140. *See, e.g.*, King v. Butler (N.C. Gen. Ct. July 27, 1721), *in* 2 COLONIAL RECORDS, *supra* note 13, at 443, 443.

141. *See, e.g.*, King v. Spivy (N.C. Gen. Ct. Oct. 29, 1719), *in* 2 COLONIAL RECORDS, *supra* note 13, at 365, 365.

142. *See, e.g.*, King v. Cromen (N.C. Gen. Ct. July 28, 1720), *in* 2 COLONIAL RECORDS, *supra* note 13, at 411, 411.

143. *See, e.g.*, King v. White (N.C. Gen. Ct. July 31, 1719), *in* 2 COLONIAL RECORDS, *supra* note 13, at 363, 363.

144. *See, e.g.*, King v. Relf (N.C. Gen. Ct. Oct. 29, 1719), *in* 2 COLONIAL RECORDS, *supra* note 13, at 365, 365. Relf was overseer of the roads. *Id.*

jury duty;[145] mismarking hogs;[146] joining a white man and a mixed-race woman in marriage;[147] trading with slaves;[148] and requiring slaves to work on Sunday.[149] In the precinct courts, there were prosecutions for grand larceny,[150] petty larceny,[151] failing to report for jury duty,[152] fornication,[153] and fornication by servants.[154] In adjudicating criminal cases, the courts were duly sensitive to technical issues, such as claims about double jeopardy,[155] the statute of limitations,[156] the improper form of a jury verdict,[157] omission of key elements from the indictment,[158] and sometimes unstated claims.[159]

Finally, the North Carolina courts were able to assist creditors in collecting their debts. When, for example, the provost marshall could

145. *See, e.g.*, Summons of Speller (N.C. Gen. Ct. Oct. 27, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 116, 116.

146. *See, e.g.*, King v. Spivy (N.C. Gen. Ct. Oct. 29, 1719), *in* 2 COLONIAL RECORDS, *supra* note 13, at 365, 365.

147. *See, e.g.*, King v. Blacknall (N.C. Gen. Ct. Oct. 29, 1726), *in* 2 COLONIAL RECORDS, *supra* note 13, at 672, 672; *see also* Information of Blacknall (N.C. Gen. Ct. July 30, 1726), *in* 2 COLONIAL RECORDS, *supra* note 13, at 662, 662 (informing court of the marriage).

148. *See, e.g.*, Overman v. Wilson (N.C. Gen. Ct. Apr. 2, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 96, 96.

149. *See, e.g.*, King v. West (N.C. Gen. Ct. Oct. 29, 1719), *in* 2 COLONIAL RECORDS, *supra* note 13, at 365, 365.

150. *See, e.g.*, King v. White (Perquimans Precinct Ct. Nov. 7, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 401, 401.

151. *See, e.g.*, Queen v. Baily (Perquimans Precinct Ct. Jan. 6, 1706), *in* 1 COLONIAL RECORDS, *supra* note 13, at 650, 650; King v. Shreenes (Perquimans Precinct Ct. Nov. 6, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 401, 401.

152. *See, e.g.*, King v. Houghts (Perquimans Precinct Ct. Apr. 13, 1700), *in* 1 COLONIAL RECORDS, *supra* note 13, at 553, 553.

153. *See, e.g.*, Queen v. Evans (Perquimans Precinct Ct. July 10, 1705), *in* 1 COLONIAL RECORDS, *supra* note 13, at 622, 622.

154. *See, e.g.*, Queen v. Garrett (Perquimans Precinct Ct. Oct. 8, 1706), *in* 1 COLONIAL RECORDS, *supra* note 13, at 655, 655.

155. *See* King v. Thornton (N.C. Gen. Ct. 1726), *in* 2 COLONIAL RECORDS, *supra* note 13, at 646, 646 (refusal of a grand jury to return indictment after prior grand jury had done the same); *accord* King v. Porter (N.C. Gen. Ct. cc. 1731), *microformed on* North Carolina State Archives, Reel Y.1.10003 (arguing against a motion by prosecutor for new trial on the ground "that there is no new trial to be in a criminal case, where the defendant is acquitted").

156. *See* King v. Hassell (N.C. Gen. Ct. Nov. 1722), *in* 2 COLONIAL RECORDS, *supra* note 13, at 470, 470 (considering and denying motion in arrest of judgment).

157. *See* King v. Blount (N.C. Gen. Ct. Mar. 30, 1721), *in* 2 COLONIAL RECORDS, *supra* note 13, at 440, 440.

158. *See* King v. Allen (N.C. Gen. Ct. July 1726), *in* 2 COLONIAL RECORDS, *supra* note 13, at 661, 661.

159. *See* King v. Palmer (N.C. Gen. Ct. Mar./Apr. 1722), *in* 2 COLONIAL RECORDS, *supra* note 13, at 471, 471 (granting motion in arrest of judgment on unstated grounds). For earlier proceedings in the same case, see *King v. Palmer* (N.C. Gen. Ct. 1721), *in* 2 COLONIAL RECORDS, *supra* note 13, at 444, 444.

not find an alleged debtor in order to arrest or otherwise serve process on him, the courts would allow attachment of the debtor's estate.[160] They also would commit an insolvent debtor to the marshall's custody until he paid or secured payment of his debts.[161] And, as early as the mid-1690s, they had developed simplified procedures by which borrowers could confess judgment to their lenders[162] and creditors could prove claims against estates by oath,[163] and the "Greatest Credetor" would be appointed administrator of any estate for which the decedent had left no will.[164]

In sum, North Carolina's legal system during the colony's first half-century developed parallel to that of South Carolina. Although neither as sophisticated nor as much under professional control as the systems of South Carolina and Virginia, that of North Carolina functioned effectively and accomplished basic tasks of maintaining order and resolving disputes.

II. THE JUDICIAL SYSTEM'S COLLAPSE

Then, in the late 1720s, North Carolina's judicial system fell apart. The immediate cause of its collapse was political conflict and the politicization of the judiciary and the law. But political conflict alone

160. *See, e.g.*, Franck v. Smith (N.C. Gen. Ct. Mar. 31, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 91, 91. A creditor's option to attach a debtor's estate was not, however, granted automatically. *See, e.g.*, Wilkinson v. Stevens (Perquimans Precinct Ct. Feb. 9, 1703), *in* 1 COLONIAL RECORDS, *supra* note 13, at 575, 575. The plaintiff was denied attachment of the defendant's estate but the provost marshall was made liable on the judgment if he did not produce the defendant at the next court. *Id.* My interpretation of this cryptic case is that the marshall had failed to use appropriate efforts to find the defendant and that an attachment against the defendant's estate would be granted only when, following due diligence, the marshall had failed to serve the defendant. For an example of a suit against the marshall for failing to turn over goods that had been attached, see *Jones v. Cleaves* (N.C. Gen. Ct. cc. 1712), *microformed on* North Carolina State Archives, Reel Y.1.10008. *But see* Pugh v. Radick (N.C. Gen. Ct. July 1722), *microformed on* North Carolina State Archives, Reel S.138 (giving a plaintiff the choice, at his option, either of attaching the defendant's estate or having an order against the marshall to produce the defendant at the next court).

161. *See, e.g.*, Lawson v. Rutter (N.C. Gen. Ct. July 30, 1713), *in* 2 COLONIAL RECORDS, *supra* note 13, at 105, 105–06.

162. *See* Low v. Kitching (N.C. Gen. Ct. Feb. 25, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 443, 443; Wilkesons v. Lillington & Hartley (Perquimans Precinct Ct. Feb. 1, 1694), *in* 1 COLONIAL RECORDS, *supra* note 13, at 392, 392. For a later example of an authorization of an attorney to confess judgment on a debtor's behalf, see *Authorization of Hamilton* (N.C. Gen. Ct. Jan.1737/38), *microformed on* North Carolina State Archives, Reel Y.1.10027.

163. *See, e.g.*, Currey v. Durant (N.C. Gen. Ct. Feb. 27, 1695), *in* 1 COLONIAL RECORDS, *supra* note 13, at 451, 451.

164. *See, e.g.*, Petition of Snoden (Perquimans Precinct Ct. Nov. 1702), *in* 1 COLONIAL RECORDS, *supra* note 13, at 565, 565.

does not explain what happened: after all, conflict had been endemic in earlier North Carolina history, with governors arresting political opponents and opponents, in turn, seizing control of the government and placing governors themselves on trial.[165] But, under the leadership of competent and fair-minded governors from 1691 to 1705 and 1712 to 1725,[166] the colony's legal system had gained some traction, at least within the confines of the small Albemarle region.[167]

A more fundamental cause of the legal system's failure was that its roots in North Carolina had not penetrated as deeply as they had in some other colonies. The educated members of the bar were few, and they all resided in the small northeast corner of the colony along the Albemarle Sound and practiced almost entirely before the General Court and Chancery. North Carolina had no urban center like Philadelphia, from which an elite bar could travel with books and printed forms and thereby dictate the nature of the practice elsewhere in the countryside.[168] Nor did it possess the foundational cultural structure that Puritanism had given to a colony such as Massachusetts. As a result, when North Carolina began to expand in the eighteenth century,[169] the legal system could not keep pace with the expansion, and, when another period of political chaos occurred in the late 1720s, mainly as a result of poor political judgment on the part of two governors, the judiciary broke down.

A. Governor Everard vs. His Predecessor

Problems began with the arrival of the last proprietary governor, Richard Everard, who served from 1725 to 1731.[170] His predecessor as penultimate proprietary governor and later his successor as first royal

165. *See* MILTON READY, THE TAR HEEL STATE: A HISTORY OF NORTH CAROLINA 43–44 (2005).

166. LEFLER & NEWSOME, *supra* note 6, at 46–51, 53–54, 60–62, 66–67. For a recent book focusing on earlier periods of conflict, see NOELEEN MCILVENNA, A VERY MUTINOUS PEOPLE: THE STRUGGLE FOR NORTH CAROLINA, 1660–1713 (2009). I am not persuaded by McIlvenna's attribution of mutinous behavior in North Carolina to its early settlers' "rejection of any social hierarchy in their colony" and their determination "to build and defend, with force if necessary, a society of equals." *Id.* at 1. The evidence for that proposition is simply too thin. In any event, the proposition is not relevant to my analysis showing that, especially after 1713, North Carolina's legal system gained significant traction and functioned with some effectiveness in the Albemarle region.

167. *See supra* Part I.

168. *See* William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 59 SMU L. REV. 3, 16–17 (2006).

169. *See* MERRENS, *supra* note 6, at 53.

170. *See* State Library of North Carolina, Encyclopedia: North Carolina Governors, http://statelibrary.ncdcr.gov/nc/stgovt/governor.htm (last visited August 24, 2010).

governor,[171] George Burrington, whom historians have described as "energetic" although "headstrong" and "despotic,"[172] did not welcome Everard. On the contrary, Burrington allegedly declared that Everard was "no more fitt to be governor than a Hogg in the Woods" and that he, Burrington, would again "be Governo[r] . . . within nine months."[173] Burrington, it was said, also "riotously by force & armes assault[ed]" Governor Everard's house, as well as the house of a constable guarding the governor's house.[174] For these actions, he was indicted on charges of sedition and assault; Burrington was also indicted for breaking into a house where the collector of customs was a lodger, apparently while he had still been governor.[175]

Burrington had already left for England before proceedings on these indictments could go forward,[176] and he did not return while they were pending. But the prosecutions against him remained on the calendar and were called term after term,[177] and, when one of his followers, attorney John Ashe, sought to appear on Burrington's behalf but refused to accede to the court's request that he give special bail, permission to appear was denied.[178] As a result, political conflict and the judiciary's involvement therein remained ongoing. Only when Chief Justice Gale in November 1728 officially informed the governor and council that the indictments against Burrington had been pending for two years without result did the Council direct the attorney general to enter a nolle prosequi; the General Court, with the attorney general's consent, did so.[179]

Meanwhile other Burrington supporters had remained in North Carolina, and one in particular, Edmond Porter, caused a great deal of trouble. Several months after Burrington's indictment, Porter complained to the General Court that he had been assaulted in the public street by Governor Everard, the attorney general, the secretary

171. *See id.*

172. LEFLER & NEWSOME, *supra* note 6, at 71.

173. *See* King v. Burrington (N.C. Gen. Ct. Mar. 26, 1726), *in* 2 COLONIAL RECORDS, *supra* note 13, at 647, 648.

174. *Id.* at 650.

175. *Id.* at 649–50.

176. In two of the indictments, he was described as "late of Edenton." *See id.* at 650–51.

177. *See generally* 2 COLONIAL RECORDS, *supra* note 13, at 660, 670–71, 701–02, 713–14 (calling the case for several different terms).

178. *See* King v. Burrington (N.C. Gen. Ct. 1726), *in* 2 COLONIAL RECORDS, *supra* note 13, at 660, 660. Ashe had previously represented Burrington at an earlier term of court. *See* King v. Burrington (N.C. Gen. Ct. July/Aug. 1726), *in* 2 COLONIAL RECORDS, *supra* note 13, at 655, 655.

179. *See* King v. Burrington (N.C. Gen. Ct. Nov. 1, 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 830, 830–31.

of the colony, and several others. Concluding that Porter was "the Aggressor" and had, in fact, first assaulted the secretary, the court rejected his complaint.[180] Later, Porter was indicted for that assault and for beginning an affray in the presence of the governor in an effort "to sow dissension strife & discord among the people" and "raise faction and Sedition mutiny & Rebellion."[181] The grand jury also indicted Porter for "falsely & maliciously ... aspers[ing][,] Defam[ing,] Slander[ing] & bring[ing] into contempt"[182] Chief Justice Christopher Gale, with the aim "thereby to render him odious & contemptible and weaken the Administracon of Justice whereby Mutiny[,] Sedition[,] vice[,] aspersions[,] [and] immorality might prevaile."[183]

In dealing with former governor Burrington and supporters like Edmond Porter, the North Carolina power structure—that is, the governor, the attorney general, and the judiciary—initially presented a united front. But soon that front disintegrated as Porter persevered in his nefarious efforts to disrupt North Carolina's government.[184]

B. Beyond a Jurisdictional Squabble: The Common Law vs. Admiralty

The issue on which Porter's efforts finally proved successful occurred in the colony's Court of Admiralty, of which Porter was the judge.[185] The issue arose out of two libels that had been brought in admiralty against a ship captain named Samuel Northey—the first by one James Trotter for victuals furnished to the vessel while it was in port in Edenton and the second by a Dr. George Allen for damage to medicines shipped under Northey's command from Virginia to Edenton. Claiming, as reported by Chief Justice Gale, that the two libels failed to allege that the "cause[s] of action" were "super altum mare" but were, in fact, "at land infra corpus comitatus," Northey sought writs of prohibition from common law against admiralty on the ground that the two cases involved "special contract[s] ... not within the jurisdiction of the Admiralty."[186] In the two most extensive opinions delivered up to that time in the General Court, Chief Justice Gale

180. *See* Complaint of Porter (N.C. Gen. Ct. July 1, 1726), *in* 2 COLONIAL RECORDS, *supra* note 13, at 658, 659.

181. King v. Porter (N.C. Gen. Ct. Mar. 25, 1727), *in* 2 COLONIAL RECORDS, *supra* note 13, at 687, 687.

182. *Id.* at 690.

183. *Id.* at 693.

184. *See* text accompanying *supra* notes 180–83 and *infra* 185–203.

185. *See infra* note 187 and accompanying text.

186. Memorandum of the Chief Justice (N.C. Gen. Ct. Mar. 1728), *microformed on* North Carolina State Archives, Reel S.138.4.

granted the writs of prohibition, and, when Edmond Porter, the admiralty judge, ignored the writs and ordered Northey's arrest, Gale, with the approval of Governor Everard,[187] issued a writ of habeas corpus and commanded Northey's release.[188]

Once begun, the conflict between Chief Justice Gale, on behalf of the common law, and Judge Porter, on behalf of admiralty, dragged on. It might have amounted to nothing more than one of the many periodic jurisdictional conflicts in the history of Anglo-American law,[189] except that Governor Everard switched sides, probably because of direction received from England that he rein in the jurisdictional claims of the common law courts.[190] Everard's switch on behalf of the Admiralty Court and its judge, Edmond Porter, fractured North Carolina's power structure.

First, Governor Everard directed his son, as substitute for the attorney general, who was ill, to enter a nolle prosequi on the indictments that had been filed the previous year against Porter, who, Everard was "assured," in "no ways meant or intended any affront to myself in particular or to disturb the peace of this Government."[191] Next, Everard procured an assignment of a claim against Chief Justice Gale held by the master of a vessel sailing out of New York and, as assignee, personally brought a libel in admiralty against Gale. In April 1729, Gale informed his colleagues of the libel and proposed that, despite the Board of Trade's denial of their power to do so,[192] they issue a writ of prohibition and an order to arrest Judge Porter and to hold

187. *See* Letter from Richard Everard to the Lords of Trade (May 3, 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 761, 761–62. Conflict between Everard and Porter was further manifested by Porter's refusal to accept the man appointed by the governor to be the marshall of admiralty and by the council's decision that the governor had the right to make the appointment. *See* Minutes of the North Carolina Governor's Council (May 27, 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 764, 764–66.

188. Memoranda of the Chief Justice (N.C. Gen. Ct. Mar. 1728), *microformed on* North Carolina State Archives, Reel S.138.4. For Northey's petition for habeas corpus, see *Petition of Northey* (N.C. Gen. Ct. Apr. 29, 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 757, 757–61.

189. A previous issue, for instance, whether admiralty or common law should assume jurisdiction over a defendant who might be prosecuted either as a pirate or a robber had been settled by the council. *See* Minutes of the North Carolina Governor's Council (July 18, 1727), *in* 2 COLONIAL RECORDS, *supra* note 13, at 676, 676–77.

190. *See* Board of Trade Journals (Nov. 26, 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 816, 817. Upon consideration of Northey's complaint against Porter, the board ruled as follows: "[T]he authority of the Justices [sic] prohibition in his case denied." *Id.*

191. Order for Nolle Prosequi against Porter (N.C. Gen. Ct. July/Aug. 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 823, 823.

192. *See* Board of Trade Journals, *supra* note 190, at 817.

him in custody until he obeyed the prohibition. The other judges took Gale's request under advisement.[193]

At the same term of the General Court, meanwhile, Judge Porter had engaged in "an affray in the view and verge" of the court. For this, the General Court judges held Porter in contempt, issued an order for his arrest, and sent John Parke, who had been serving as provost marshall, to seize him. Parke found Porter in the company of Governor Everard, who "rose up from his seat, commanded him not to take anybody out of his company & further told him that he [Parke] was no marshall[194] and that . . . he [Everard] would protect everybody that was in his company."[195] Parke returned to court without arresting Porter.[196]

A rupture between the governor and the General Court had clearly been opened, as the two sides refused to recognize the legitimate authority of each other's agents and took coercive steps against them. Once opened, the rupture only grew, others became involved, and new alliances were formed. In 1727, George Allen, who practiced both law and medicine in Edenton and had sued in admiralty, it will be recalled, for breach of contract, apparently had been a supporter of George Burrington. As such, Allen, after being "checked for his want of good manners"[197] by Chief Justice Gale following the court's rejection of a motion he had argued,

> in an impudent manner then & there in open Court said to the Chief Justice these insolent words: viz., "I value you not" . . . thereby holding him & his authority in contempt & defiance. And further . . . he the said George then and there in open Court immediately after the aforesaid contemptuous speeches turned himself from the Bench to the common people without the rails which were many & uttered these seditious & opprobrious false & scandalous words & speeches: viz., "You see gentlemen that I

193. *See* Memorandum of Christopher Gale (N.C. Gen. Ct. Apr. 1729), *microformed on* North Carolina State Archives, Reel S.138.4. No record has been found of the ultimate result.

194. In Everard's eyes, one William Williams and neither John Parke nor Robert Route, who had been commissioned by the proprietors to replace Parke, was provost marshall: Everard had given Williams a commission for the office, but the General Court had refused to honor it because Everard "did not take the advice and consent of the majority of the council for granting the same" and Route had "not departed out of the Government as in the said commission is suggested." Commission of Williams (N.C. Gen. Ct. Apr. 1729), *in* 3 COLONIAL RECORDS, *supra* note 13, at 59, 59.

195. Report of Parke (N.C. Gen. Ct. Apr. 1729), *in* 3 COLONIAL RECORDS, *supra* note 13, at 59, 60.

196. Report of Parke (N.C. Gen. Ct. Apr. 1729), *microformed on* North Carolina State Archives, Reel S.138.2.

197. King v. Allen (N.C. Gen. Ct. Oct. 28, 1727), *in* 2 COLONIAL RECORDS, *supra* note 13, at 718, 718.

> cannot have common justice" . . . intending thereby to oppugn & asperse the justice, honor, integrity, and authority of the said Court & to move the said people then & there present to sedition, mutiny, and insurrection.[198]

When the court ordered Allen's arrest, he fled to his house and threatened to "be the death of any marshall that would offer to meddle with or touch him," and, in fact, displayed weapons when the marshall came to arrest him.[199]

It is not surprising that Allen, as a supporter of Burrington, was one of the two libellants whose proceedings in admiralty were prohibited by Chief Justice Gale in 1728. But something occurred thereafter to cause Allen to change sides. At the April 1729 term of the General Court, George Allen found himself in custody under an admiralty libel against him and accordingly sought a writ of habeas corpus.[200] In response to the writ, the marshall of the Court of Admiralty filed a return alleging that Allen was being held for contempt of Admiralty, in that while acting as advocate in that court *on behalf of Chief Justice Gale*, who only two years earlier had held him in contempt, Allen had filed an answer to a citation "which being read was looked upon to be both scandalous & insolent." The General Court promptly granted Allen his release.[201]

Next, William Little, the colony's attorney general, found himself arrested by the marshall of the Court of Admiralty on a charge of contempt. The marshall's return to the writ of habeas corpus issued on Little's behalf claimed that Little "by his pleas as well as in words protest[ed] against the Judge thereof as a competent judge and in the face of the open Court accused him [of] partiality & prejudice" and was therefore guilty of contempt.[202] The General Court, as usual, found the return "insufficient" and Little's commitment "illegal and unwarrantable" and ordered him released from custody.[203]

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198. *Id.* at 718–19.

199. *Id.* at 719.

200. Petition of Allen (N.C. Gen. Ct. Apr. 1729), *microformed on* North Carolina State Archives, Reel S 138.4.

201. Petition of Allen (N.C. Gen. Ct. Apr. 1729), *microformed on* North Carolina State Archives, Reel S.138.4. At its next term in July, the court also granted habeas corpus to one John Phelps, affirmed a writ of prohibition it had previously issued in Phelps's favor, and ordered him released from the admiralty's custody. *See* Phelps' Writ of Habeas Corpus (N.C. Gen. Ct. July 1729), *microformed on* North Carolina State Archives, Reel S.138.2.

202. Little's Writ of Habeas Corpus (N.C. Gen. Ct. Apr. 1730), *microformed on* North Carolina State Archives, Reel S.138.2.

203. *Id.*

The above narrative of the two-year conflict between the General Court and the Court of Admiralty[204] and the supporters of the two sides does not even begin, however, to capture the chaos that had enveloped the North Carolina judiciary in the late 1720s or the central role of Governor Everard in that chaos.

Everard contributed significantly to the chaos by seeking to intervene in the judicial process. Thus, he personally came to court to order a halt to a criminal prosecution of a James Bremen for opening a window in one Robert Pearce's house and assaulting Pearce. Everard was "fully assured & satisfied that the said indictment was grounded upon the malice of the said Robert Pearce and by the instigation of . . . [the] clerk of the General Court."[205] In fact, the court records contained strong documentation of the charge, including an affidavit by Pearce accusing Bremen, with Governor Everard at his side, of breaking into Pearce's lodging at 3 a.m., firing weapons at him, and saying "see what your lisping Judge can do now to help you"; Pearce's affidavit was corroborated, in turn, by oaths of a gentleman and an attorney at law.[206]

On an earlier occasion, Everard had come into court and accused John Lovick, the secretary of the province and also one of the judges, of tampering with the grand jury by conversing with its foreman during its proceedings. After requesting leave to clear themselves, the members of the grand jury testified that no person had ever tampered with them, although on further examination one of their members acknowledged that he had received a paper from Governor Everard. That paper was received into evidence.[207] Everard then proceeded to have Lovick arrested, allegedly for assaulting him. Because the arrest was made "without legall Examinacons . . . as by a law of this province . . . is directed & provided," a unanimous court held it unlawful, although it did permit Everard to testify before the grand jury in support of an indictment against Lovick.[208] The grand jury did inform the court that Lovick on a specific date had "give[n] ill language & blows" to Everard,

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204. For a detailed accusation of the alleged wrongs of Edmond Porter as admiralty judge, see *Complaint of William Little* (N.C. Gen. Ct. May 12, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 224, 224–32.

205. King v. Bremen (N.C. Gen. Ct. Apr. 1729), *in* 3 COLONIAL RECORDS, *supra* note 13, at 59, 59.

206. Information of Pearce (N.C. Gen. Ct. Apr. 1729), *in* 3 COLONIAL RECORDS, *supra* note 13, at 58, 61.

207. *See* Petition of Everard (N.C. Gen. Ct. June 2, 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 829, 829; Motion of Everard (N.C. Gen. Ct. June 2, 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 829, 829.

208. King v. Lovick (N.C. Gen. Ct. Oct. 29, 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 832, 832.

but refused to return an indictment.[209] When the court directed them that "they must return it either Billa vera or ignoramus they said they could find it no[t] otherwise."[210] The court concluded that the grand jury "return [was] invalid & insufficient ... to proceed upon it" and accordingly ordered that proceedings against Lovick be quashed.[211]

Everard also tried to use the law against William Little, the colony's attorney general. Again, he met resistance. He moved the General Court to issue a warrant against William Little directing him to turn over possession of the colony's statutes at large. Everard stated that he had given Little custody of the statutes "for the use of the public and not for his own private use."[212] The court, however, denied Everard's demand, but did send the provost marshall to Little to request return of the statutes.[213]

Everard's actions against both Lovick and Little probably occurred in connection with an indictment returned against the governor in August 1728 for striking George Allen with his cane.[214] It was during the grand jury proceedings resulting in that indictment that Everard had presented his paper to the jurors and that, he alleged, Lovick had spoken with a juror.[215] And, he probably needed the statutes in Little's hands in order to prepare his defense.

We lack archival evidence of the impact of these various events and proceedings. Nonetheless, it seems certain that they must have taught observant North Carolinians something which was painfully difficult, if not impossible, to unlearn—that the law in force in their colony was not a neutral and objective body of rules employed by the judiciary to achieve impartial resolution of disputes and just governance of the province. It had become plain, indeed, that the law had no capacity whatsoever to control the results in any matter in dispute. Rather, the law was a weapon that political actors, both on and off the bench, used in efforts to further their political agendas, promote their self-interest, protect their friends, and punish their enemies. Such misuse of law had not been unknown earlier in North Carolina, but Governor Everard's misuse was an exaggeration of what had come before. As such, it made the law "contemptible and odious to almost every person in the

209. *Id.*
210. *Id.*
211. *Id.*
212. Motion of Everard (N.C. Gen. Ct. 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 825, 825.
213. *Id.*
214. King v. Everard (N.C. Gen. Ct. 1728), *in* 2 COLONIAL RECORDS, *supra* note 13, at 828, 828–29.
215. *See supra* note 207 and accompanying text.

government"[216] and made it difficult for anyone to give the legal system his respect.

The ultimate problem was that the law became politicized not only in cases involving political issues or political actors, but also in run-of-the-mill, day-to-day cases that should have been completely apolitical. The key case was *King v. Smith*,[217] where a jury had convicted Solomon Smith of premeditated murder and the court had sentenced him to death; Governor Everard, however, refused to execute the death sentence and sent the following message to the court:

> As the life of a man is a thing of a very tender nature . . . I must tell you Gentlemen as the man was tryed [and] Condemned . . . [by a] Court . . . compounded of Officers not duly qualifyed to open such court that all proceedings therein are Extrajudiciall and Erroneous[.] [I] [t]herefore cannot without injury to my conscience sign such a Dead Warrant for the Execution of the unhappy prisoner till a Tryal de novo and the Court Compounded of officers duly qualified and those of my Appointment [is in place].[218]

This 1729 memorandum to the court, declaring all its proceedings extrajudicial and erroneous, cast into doubt the validity of every judgment rendered by the General Court during the entire period of time that Governor Everard had served in office.[219] Doubts persisted, moreover, for more than two years; in a 1731 prosecution for contempt for ignoring a writ of habeas corpus, for example, the defendant pleaded not guilty on the ground that "Christopher Gale, who is said to have signed the writ, was not then as he apprehends a legal judge to grant such writs."[220]

With the publication of Governor Everard's 1729 memo and the chaos in its aftermath, there was no colony-wide legal system left in

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216. Letter from John Lovick to the Board of Trade (Dec. 12, 1728), *in* 3 COLONIAL RECORDS, *supra* note 13, at 1, 1.

217. (N.C. Gen. Ct. Mar. 28, 1729), *in* 3 COLONIAL RECORDS, *supra* note 13, at 54, 54–56.

218. *Id.* at 56.

219. Perhaps Everard was questioning only the validity of judgments rendered after December 12, 1728, when authorities in North Carolina first learned that the proprietors had surrendered governance of the colony to the crown. Arguably, the authority of proprietary appointees came to an end on that date. *See* William L. Saunders, *Prefatory Notes* to 2 COLONIAL RECORDS, *supra* note 13, at iii, iii. If, however, that was Everard's understanding, it is unclear on what basis he concluded that he possessed power to appoint new justices.

220. Rex v. Snowden (N.C. Gen. Ct. Oct. 1731), *microformed on* North Carolina State Archives, Reel S.138.4.

North Carolina. Only power remained, and no one possessed very much of that. The government was "in the greatest Confusion," and the colony had "sunk so low that neither Peace or Order subsisted, the General Court suppressed, the Council set aside, ... some of the Precinct Courts fallen, ... [and] a General Discontent and Ferment among People."[221] The result was such "frequent Tumults and Riots ... that men" did not have "Security even in their own houses."[222]

III. THE EFFORTS TO RESTORE THE LEGAL SYSTEM

In 1729, the very year in which North Carolina's legal system reached its nadir, the proprietors completed their surrender of control over the colony's government to the king, and North Carolina became a royal colony.[223] The crown appointed George Burrington, Governor Everard's predecessor as proprietary governor, as the first royal governor. An essential task when he arrived in the colony in 1731, as well as for his three successors—Gabriel Johnston, Arthur Dobbs, and William Tryon, who governed the colony for all but two of the thirty-seven years between 1734, when Burrington left, and 1771, near the end of the colonial period—was to restore the power of the judiciary and the rule of law. Burrington and his three successors only partially succeeded.[224]

A. Continued Partisanship of the First Royal Governor

Burrington began by cleaning house, removing all the members of the General Court from office. One of those he removed was Chief Justice Christopher Gale, the most distinguished lawyer in North Carolina's history to that time.[225] Despite Gale's accomplishments, his removal from office was probably a wise move; as a leader of the popular party that had opposed first Burrington and then Everard,[226] Gale had been deeply enmeshed in the politics of the late 1720s,[227] and thus it seems likely Burrington could not have counted on his objectivity and neutrality. But Burrington found it difficult to replace Gale.

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221. Letter from George Burrington to the Duke of Newcastle (July 2, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 142, 142.

222. Letter from George Burrington to the Board of Trade of Great Britain (Sept. 4, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 202, 202.

223. *See* ANDREWS, *supra* note 1, at 267, 267.

224. *See* State Library of North Carolina, *supra* note 170.

225. *See* BASSETT, *supra* note 9, at 67.

226. *See* LEFLER & NEWSOME, *supra* note 6, at 71.

227. *See supra* notes 187–222 and accompanying text.

He first appointed William Smith,[228] whom he later described as "a Weak Rash Young Man, Drunk from Morning till Night,"[229] but who held office for only fifty days before resigning and leaving for England.[230] Then he tried to appoint John Lovick, a leader of the popular party who had served on the proprietary General Court, but that appointment never took effect.[231] Burrington's next choice was John Palin,[232] an assistant judge during the proprietary period who served only briefly and then resigned because of illness.[233] Finally, he settled on William Little,[234] who had been attorney general in the Everard years.[235] He wrote about Little, "I think he is an honest man, and am sure he is a very good lawyer, and in all respects well qualified to discharge the office of a Chief Justice,"[236] although others found him "unskilled in the law and in all respects unqualified to execute that post."[237] As assistant judges, he appointed, in the view of his opponents, four men, "one of whom can neither read nor write and all very weak persons and unskilled in the law."[238] Eventually the Provincial Assembly, in response to a speech by the governor, accused Little and his assistants of "perversion of justice," but indicated its expectation

228. *See* Commission of William Smith as Chief Judge, North Carolina (Apr. 4, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 136, 136.

229. Letter from George Burrington to the Board of Trade of Great Britain (July 1, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 140, 141.

230. *See* Report by George Burrington Concerning General Conditions in North Carolina (Jan. 1, 1733), *in* 3 COLONIAL RECORDS, *supra* note 13, at 429, 433 [hereinafter Report by Burrington]; Minutes of the North Carolina Governor's Council (July 26, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 250, 251; Minutes of the North Carolina Governor's Council (May 20, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 239, 239–40; Letter from Rice, Montgomery, and Ashe to the Duke of Newcastle (Sept. 16, 1732), *in* 3 COLONIAL RECORDS, *supra* note 13, at 356, 357, 368 [hereinafter Letter from Rice et al.].

231. *Compare* Letter from George Burrington to the Board of Trade of Great Britain (Sept. 4, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 202, 209 (expressing Burrington's desire to appoint Lovick to the position of chief justice), *with* Minutes of the North Carolina Governor's Council, *supra* note 230, at 250 (describing how "Lovick and Edmond Gale Esqrs . . . took their places at the Board accordingly," but as "assistant Justices of the General Court of this Province").

232. *See* Commission of William Smith as Chief Judge, North Carolina, *supra* note 228, at 136.

233. *See* Report by Burrington, *supra* note 230, at 433.

234. *See* Commission of William Little as Chief Judge, North Carolina (Oct. 18, 1732), *in* 3 COLONIAL RECORDS, *supra* note 13, at 492, 492–93.

235. *See* Report by Burrington, *supra* note 230, at 433.

236. *Id.*

237. *See* Letter from Rice et al., *supra* note 230, at 359.

238. *Id.* For the appointments, see Minutes of the North Carolina Governor's Council (July 27, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 250, 251.

that the perversion would end with the impending reassumption of the post of chief justice by William Smith.[239]

In a strikingly partisan move, Burrington raised two of his former friends and supporters to the council—John Ashe, the lawyer who had represented him on his indictments before the General Court, and Edmond Porter, who had led the opposition to Governor Everard after Burrington's departure.[240] But he quickly broke ranks with them. Roughly a year after his arrival in North Carolina, Burrington induced the council, by a 4-3 vote, to suspend Porter from the council and from his post as judge of the Admiralty Court.[241] And when Burrington, for his personal use, seized two horses belonging to Ashe, and Ashe filed an action in the General Court, Burrington argued that as governor he could not be sued in North Carolina but only in England, and the Court accepted his argument.[242] Then, the governor procured an indictment against Ashe for criminal defamation, and the court ordered his arrest, although following an initial hearing the prosecution was dropped.[243]

Opponents accused Burrington of seeking to "influence" the judiciary "in favor of his friends or to the prejudice of those he is displeased with."[244] He had "been heard to declare" prior to his reappointment as governor that he would "be the destruction of all those that had any hand in removing him" from his first term as governor.[245] And, in an effort to "crush those he has conceived a prejudice against,"[246] Burrington had issued the following order to the General Court:

> Whereas several ill disposed persons under pretence of being attorneys without being duly qualified have obtruded themselves & interfered and appeared in Court in defence of persons under

239. Answer to His Excellency George Burrington's Speech by Edward Moseley, Speaker of the North Carolina House of Burgesses (July 11, 1733), *in* 3 COLONIAL RECORDS, *supra* note 13, at 548, 552 [hereinafter Answer to Burrington by Moseley].

240. *See* List of 12 Persons Recommended by Captain Burrington to be of the Council of North Carolina (Aug. 6, 1730), *in* 3 Colonial Records, *supra* note 10, at 85, 85; Instructions for George Burrington (Dec. 14, 1730), *in* 3 COLONIAL RECORDS, *supra* note 13, at 90, 91 (listing both Ashe and Porter as members of the Council).

241. *See* Extracts of Minutes of Council (Feb. 19, 1732), *in* 3 COLONIAL RECORDS, *supra* note 13, at 329, 329–30.

242. *See* Minutes of General Court (Oct.–Nov. 1732), *in* 3 COLONIAL RECORDS, *supra* note 13, at 385, 386, 391.

243. *See* Letter from Rice, Ashe, and Montgomery to the Board of Trade (Nov. 17, 1732), *in* 3 COLONIAL RECORDS, *supra* note 13, at 375, 377–80.

244. *Id.* at 359.

245. Letter from the Inhabitants of North Carolina Opposing George Burrington's Re-Instatement as Governor, *in* 3 COLONIAL RECORDS, *supra* note 13, at 121, 123.

246. Letter from Rice et al., *supra* note 230, at 359.

> prosecutions for heinous offenses at the King's suit, which may occasion great confusion & obstruction of justice and may give countenance to faction and encourage offenders. ... You are therefore not to permit, allow, or suffer any person whatsoever to appear as counsel or attorney in any causes in the said Court without being duly qualified to plead and practice the law in Great Britain or have obtained my special license.[247]

The court used this directive to deny members of the popular party, such as Edward Moseley,[248] the privilege of practicing law.[249] Moseley, it should be noted, was plainly a competent attorney: he was "the oldest practitioner of the Law in this Province" who had practiced some twenty years,[250] had recovered three jury verdicts against Edmond Porter in a series of cases involving special pleading and legal issues such as the validity of an assignment,[251] and eventually would become chief justice.[252] When Moseley, despite his dismissal from the bar, nonetheless defended some individuals indicted at Burrington's behest, the governor had him arrested.[253] The General Court, however, released Moseley on habeas corpus, "there appear[ing] no sufficient cause for [his] detention."[254] At the same time, though, the General Court prosecuted individuals, presumably Governor Burrington's political opponents, who claimed to hold office without proper commissions from Burrington.[255]

The bias and partisanship of the Burrington Administration and, perhaps, its judges, following upon that of Governor Everard, would plague North Carolina and undermine the rule of law for decades to come. Two decades later, the General Assembly reminded the then-governor and council that "the time [was] still within the Memory of some of the Members of this House" when men were "admitted to

247. Order re Attorneys (N.C. Gen. Ct. Mar. 1732), *microformed on* North Carolina State Archives, Reel S.138.4.

248. *See* LEFLER & NEWSOME, *supra* note 6, at 71.

249. *See* Motion of Moseley (N.C. Gen. Ct. Mar. 1732), *microformed on* North Carolina State Archives, Reel S.138 (denying Moseley's motion for admission as an attorney).

250. Letter from Rice et al., *supra* note 230, at 360.

251. *See* Moseley v. Porter (N.C. Gen. Ct. July 1729), *microformed on* North Carolina State Archives, Reel S.138.2.

252. *See* Petition of Chancey (N.C. Gen. Ct. Apr. 1745), *microformed on* North Carolina State Archives, Reel Y.1.10033 (identifying Moseley as chief justice).

253. Letter from Rice et al., *supra* note 230, at 360.

254. Habeas of Moseley (N.C. Gen. Ct. July 1732), *microformed on* North Carolina State Archives, Reel S.138.4.

255. *See* King v. Sherwin (N.C. Gen. Ct. Dec. 1734), *microformed on* North Carolina State Archives, Reel Y.1.10004.

practise as Attorneys or Lawyers" who were "not properly qualified for that Business . . . with no other Recommendation, Capacity, or Ability than that of being obseqious tools of a bad Administration," while "others, ancient Practisers of good character, known integrity, and knowledge in the Law ha[d] been obstructed in their Business or Practice for no other reason than that they or their Clients . . . ha[d] incurred the Displeasure of the Chief Magistrate."[256]

B. The Law's Slow Recovery

Nevertheless the royal government did experience gradual, partial success in "resettling the authorities of the Judicatures, and restraining Profligate, lawless men, from unruly actions."[257] It mattered that Chief Justice Little, whatever the complaints against him, was not totally partisan; he and his fellow judges, after all, did release Edward Moseley from the custody in which Governor Burrington had placed him and ultimately did refuse to proceed with the prosecution against John Ashe.[258] William Smith's resumption of the office of chief justice also undoubtedly helped.[259] Even more important were the actions of Burrington's long-term successor as governor, Gabriel Johnston, who sought to put an end to past animosities and build an inclusive administration, by achieving a reconciliation, for example, with a popular leader like Edward Moseley, who was eventually appointed to the bench.[260]

Most important of all was the fact that ordinary people needed law to perform a variety of tasks, such as facilitating the collection of debts[261] and enforcing contracts for the shipment of goods.[262] Some entity also had to perform routine administrative jobs, such as directing

256. Message to the Council from the General Assembly (Apr. 9, 1753), *in* 5 COLONIAL RECORDS, *supra* note 13, at 70, 70.

257. Report by Burrington, *supra* note 230, at 429.

258. *See* Letter from Rice, Ashe, and Montgomery to the Board of Trade, *supra* note 243, at 377–80.

259. *See* Answer to Burrington by Moseley, *supra* note 239, at 552.

260. *See supra* notes 248–52 and accompanying text.

261. The judiciary continued to honor authorizations for confession of judgment, *see* Agreement of Baldwin (N.C. Gen. Ct. Jan. 1735/36), *microformed on* North Carolina State Archives, Reel Y.1.10027, and also began to use printed instruments for recording debts. *See* Bill of Caronot (N.C. Gen. Ct. Aug. 1755), *microformed on* North Carolina State Archives, Reel Y.1.10013; Bond of Allein (N.C. Gen. Ct. Dec. 1732), *microformed on* North Carolina State Archives, Reel Y.1.10028. The judiciary also received petitions on grounds of hardship to extend time for the payment of debts. *See* Petition of Chancey (N.C. Gen. Ct. Apr. 1745), *microformed on* North Carolina State Archives, Reel Y.1.10033.

262. *See* Davis v. Johnson (N.C. Gen. Ct. July 1730), *microformed on* North Carolina State Archives, Reel Y.1.10028.

juries to lay out roads,[263] approving the appointment of administrators[264] and guardians,[265] confirming apprenticeships,[266] receiving wives' acknowledgments of their waiver of dower upon their husbands' sale of property,[267] granting a property owner permission to make a drain,[268] returning fugitive slaves to their masters,[269] and releasing men who became ill in jail.[270] In addition, there was a less routine task—to register buildings as permissible locations for conducting dissenting Protestant religious services.[271]

Finally, the criminal law had to be enforced, and thus there were prosecutions for arson,[272] assault,[273] bastardy,[274] profanity,[275] sedition,[276]

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263. *See* Order Appointing Jury to Lay Out Road (N.C. Gen. Ct. 1737/38), *microformed on* North Carolina State Archives, Reel S.138.2; *cf.* Petition of Jones (N.C. Gen. Ct. July 1747), *microformed on* North Carolina State Archives, Reel Y.1.10032 (seeking order directing men living near road to perform work thereon). The court also granted rights to operate ferries. In one case, a Henry Baker claimed property in a ferry right he had been granted and alleged that a subsequent grant to another, obtained without informing authorities of the prior grant to Baker, violated his right. *See* Petition of Baker (N.C. Gen. Ct. Aug. 1755), *microformed on* North Carolina State Archives, Reel Y.1.10036.

264. *See, e.g.*, Petition of Gale (N.C. Gen. Ct. cc. 1750), *microformed on* North Carolina State Archives, Reel Y.1.10035; *cf., e.g.*, Petition of Gunn (N.C. Gen. Ct. Jan. 1755), *microformed on* North Carolina State Archives, Reel Y.1.10036 (seeking appointment of "dividers" to apportion decedent's estate according to terms of decedent's will).

265. *See* Motion of Parris (N.C. Gen. Ct. 1736/1737), *microformed on* North Carolina State Archives, Reel S.138.3.

266. *See* Motion of Stone (N.C. Gen. Ct. Apr. 1737), *microformed on* North Carolina State Archives, Reel S.138.3; *cf.* Petition of Craven (N.C. Gen. Ct. Apr. 1737), *microformed on* North Carolina State Archives, Reel S.138.3 (estimating age of servant boy and granting petitioner right to hold him for ten years).

267. *See* Deed of Williams (N.C. Gen. Ct. July 1735), *microformed on* North Carolina State Archives, Reel S.138.3.

268. *See* Motion of Potter (N.C. Gen. Ct. Jan. 1735/36), *microformed on* North Carolina State Archives, Reel S.138.3.

269. *See* Petition of Scolley (N.C. Gen. Ct. cc. 1744), *microformed on* North Carolina State Archives, Reel Y.1.10033; Motion of Shute (N.C. Gen. Ct. Mar. 1732), *microformed on* North Carolina State Archives, Reel S.138.4. The General Court also heard petitions for freedom by slaves, *see* Petition of Derry (N.C. Gen. Ct. cc. 1738), *microformed on* North Carolina State Archives, Reel Y.1.10026, and servants. *See* Petition of Demsy (N.C. Gen. Ct. cc. 1750), *microformed on* North Carolina State Archives, Reel Y.1.10035; Petition of Weaver (N.C. Gen. Ct. Nov. 1737), *microformed on* North Carolina State Archives, Reel Y.1.10026; *cf.* Complaint of Wilson (N.C. Gen. Ct. July 1737), *microformed on* North Carolina State Archives, Reel S.138.3 (requiring a servant girl who got pregnant to serve master two extra years for "troubles and expenses" she caused).

270. *See* Petition of Ball (N.C. Gen. Ct. July 1732), *microformed on* North Carolina State Archives, Reel S.138.4.

271. *See* Petition of Herritage (N.C. Gen. Ct. Apr. 1742), *microformed on* North Carolina State Archives, Reel Y.1.10029.

272. *See* King v. Wallace (N.C. Gen. Ct. Mar. 1744), *microformed on* North Carolina State Archives, Reel Y.1.10005.

theft,[277] breaking and entering and theft,[278] contempt of court,[279] defects in roads,[280] keeping a disorderly house,[281] killing hogs,[282] failing to repair a mill dam,[283] refusing to perform an offical duty,[284] revealing grand jury secrets,[285] and stripping naked and swimming with members of the opposite sex.[286] In processing these cases, the General Court again became attentive to procedural issues as it heard motions to quash indictments for uncertainty[287] and motions in arrest of judgment on similar grounds.[288] One of the latter cases also contained interesting claims that a conspiracy could not be prosecuted if only one person was indicted and that a jury verdict was invalid because one of the jurors was not on the approved jury list.[289]

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273. *See* Complaint of Winter (N.C. Gen. Ct. Sept. 1738), *microformed on* North Carolina State Archives, Reel Y.1.10004.

274. *See* Complaint of Blackwell (N.C. Gen. Ct. July 1737), *microformed on* North Carolina State Archives, Reel S.138.3 (father ordered into custody until he gives security to indemnify precinct).

275. *See* King v. Waltham (N.C. Gen. Ct. Jan. 1737/38), *microformed on* North Carolina State Archives, Reel S.138.3.

276. *See* King v. King (N.C. Gen. Ct. Mar. 1742), *microformed on* North Carolina State Archives, Reel Y.1.10005.

277. *See* Examination of Butler (N.C. Gen. Ct. Feb. 1738), *microformed on* North Carolina State Archives, Reel Y.1.10005; Examination of Smith (N.C. Gen. Ct. May 1734), *microformed on* North Carolina State Archives, Reel Y.1.1.0003.

278. *See* Complaint of Mitchel (N.C. Gen. Ct. Dec. 1741), *microformed on* North Carolina State Archives, Reel Y.1.10030.

279. *See* King v. Dalton (N.C. Gen. Ct. Jan. 1736/37), *microformed on* North Carolina State Archives, Reel S.138.3.

280. *See* King v. Highway in Lower St. Paul's Parish (N.C. Gen. Ct. Jan. 1749), *microformed on* North Carolina State Archives, Reel Y.1.10036; *cf.* Complaint of Ketter, (N.C. Gen. Ct. Oct. 1736), *microformed on* North Carolina State Archives, Reel S.138.3 (obstructing road).

281. *See* King v. Abelle (N.C. Gen. Ct. July 1737), *microformed on* North Carolina State Archives, Reel S.138.3.

282. *See* King v. Jones (N.C. Gen. Ct. Feb. 1734), *microformed on* North Carolina State Archives, Reel Y.1.10028.

283. *See* King v. Anderson (N.C. Gen. Ct. Mar. 1742), *microformed on* North Carolina State Archives, Reel Y.1.10030.

284. *See* King v. Martin (N.C. Gen. Ct. Aug. 1741), *microformed on* North Carolina State Archives, Reel Y.1.10005.

285. *See* King v. Castellau (N.C. Gen. Ct. 1736), *microformed on* North Carolina State Archives, Reel Y.1.10004.

286. *See* King v. Vail (N.C. Gen. Ct. July 1737), *microformed on* North Carolina State Archives, Reel S.138.3.

287. *See* King v. Hammer (N.C. Gen. Ct. cc. 1738), *microformed on* North Carolina State Archives, Reel Y.1.10004.

288. *See* King v. Fisher (N.C. Gen. Ct. cc. 1745), *microformed on* North Carolina State Archives, Reel Y.1.10005; King v. Ryan (N.C. Gen. Ct. cc. 1745), *microformed on* North Carolina State Archives, Reel Y.1.10005.

289. *See* King v. Ryan (N.C. Gen. Ct. cc. 1745), *microformed on* North Carolina State Archives, Reel Y.1.10005.

The General Court also regained much of its civil jurisdiction. In doing so, it sometimes displayed technical sophistication, as, for example, in the numerous cases in which it granted common recoveries,[290] in cases in which defendants filed demurrers questioning the legal sufficiency of a plaintiff's action[291] or entered pleas other than or in addition to the general issue,[292] in its continued practice of abating actions upon the death of either party,[293] and in its delaying trials because of the absence of witnesses.[294] There also were unusual cases, such as one in which the General Court was asked to grant "full faith & entire credit" to a Massachusetts judgment[295] and one in which in which a defendant claimed immunity under "the royal prerogative as well as by ancient custom" from a suit involving a seizure of property in the collection of quitrents.[296]

Cases of appeal to the General Court and of motions to set aside jury verdicts were two sorts of matters on which lawyers were especially attentive to technical detail. On one appeal, for example, a defendant sought a reversal because the court below had been mistitled and the jury had found him not liable for false imprisonment but had

290. *See, e.g.*, Goodright v. Thrustout (N.C. Gen. Ct. July 1739), *microformed on* North Carolina State Archives, Reel Y.1.10028.

291. *See* Hull v. McMann (N.C. Gen. Ct. cc. 1746), *microformed on* North Carolina State Archives, Reel Y.1.10034; Richards v. Beckett (N.C. Gen. Ct. Oct. 1737), *microformed on* North Carolina State Archives, Reel Y.1.10026; *cf.* Pugh v. Barker (N.C. Gen. Ct. cc. 1737), *microformed on* North Carolina State Archives, Reel Y.1.10025 (seeking dismissal of suit on ground that attachment by which suit was commenced was issued contrary to law).

292. *See* Luten v. Luten (N.C. Gen. Ct. cc. 1750), *microformed on* North Carolina State Archives, Reel Y.1.10035 (plea by guarantor that plaintiff failed to obtain writ of execution against primary debtor); Allen v. Maxwell (N.C. Gen. Ct. Oct. 1743), *microformed on* North Carolina State Archives, Reel Y.1.10030 (plea of full administration); Eaton v. Robertson (N.C. Gen. Ct. July 1739), *microformed on* North Carolina State Archives, Reel Y.1.10026 (plea of tender); Cheves v. Hammer (N.C. Gen. Ct. July 1739), *microformed on* North Carolina State Archives, Reel Y.1.10028 (plea that debt not yet matured); Watham v. Kelly (N.C. Gen. Ct. Oct. 1738), *microformed on* North Carolina State Archives, Reel Y.1.10026 (plea that chattels seized upon distress for nonpayment of rent).

293. *See* Alleyn v. Mitchener (N.C. Gen. Ct. Apr. 1735), *microformed on* North Carolina State Archives, Reel S.138.3.

294. *See* Campbell v. Dobbins (N.C. Gen. Ct. cc. 1750), *microformed on* North Carolina State Archives, Reel Y.1.10036.

295. *See* Oakeman v. Peyton (N.C. Gen. Ct. cc. 1750), *microformed on* North Carolina State Archives, Reel Y.1.10035.

296. Hutton v. Swann (N.C. Gen. Ct. cc. 1738), *microformed on* North Carolina Sate Archives, Reel Y.1.10026; *accord*, Trotter v. Moseley (N.C. Gen. Ct. cc. 1738), *microformed on* North Carolina State Archives, Reel Y.1.10026.

nonetheless given the plaintiff damages therefor.[297] In another appeal, the defendant urged error for the plaintiff's failing to identify the county of venue and for using forms appropriate for an action of debt in an action of case,[298] while a third alleged that the plaintiff's declaration was improperly dated.[299] A more substantive claim was that a plaintiff should have proceeded against a garnishee before proceeding against the defendant and should have obtained a jury verdict for the amount of damages before seizing and selling goods.[300]

Motions in arrest of judgment were similarly made for improperly dating documents[301] and for bringing suit in the wrong court—in this case the General Court, which was alleged to lack jurisdiction, rather than a local court.[302] Other post-verdict motions questioned jury verdicts—one plaintiff, for example, objected to a verdict in his favor which had failed to award him costs.[303] Several cases sought to set aside verdicts on the ground that "the evidence" was "not sufficient in law to maintain the issue" for the victorious party.[304] Arguably, these motions sought to give the judiciary and thereby the legal profession rather than the jury a degree of control over lawfinding that it apparently had lacked in the proprietary period.

The growing sophistication of the legal profession was also demonstrated by formal opinions of counsel that happen to have been

297. *See* Pleapet v. Calef (N.C. Gen. Ct. cc. 1743), *microformed on* North Carolina State Archives, Reel Y.1.10031; *cf.* Stevens v. Everely (N.C. Gen. Ct. cc. 1745), *microformed on* North Carolina State Archives, Reel Y.1.10033 (court below improperly titled and its judgment not properly sealed); Executors of Maxwetz v. Porter (N.C. Gen. Ct. cc. 1743), *microformed on* North Carolina State Archives, Reel Y1.10033 (jury failed to return verdict on issue raised by defendant).

298. *See* Richard v. Legedler (N.C. Gen. Ct. cc. 1745), *microformed on* North Carolina State Archives, Reel Y.1.10034.

299. *See* Jerman v. Miller (N.C. Gen. Ct. cc. 1739), *microformed on* North Carolina State Archives, Reel Y.1.10027.

300. *See* Pilkington v. Park (N.C. Gen. Ct. Oct. 1740), *microformed on* North Carolina State Archives, Reel Y.1.10027.

301. *See* James v. Cartwright (N.C. Gen. Ct. July 1745), *microformed on* North Carolina State Archives, Reel Y.1.10034.

302. *See* Williams v. Larother (N.C. Gen. Ct. cc. 1745), *microformed on* North Carolina State Archives, Reel Y.1.10034.

303. *See* James v. Cartwright (N.C. Gen. Ct. July 1745), *microformed on* North Carolina State Archives, Reel Y.1.10034.

304. Goodtitle v. Boutwell (N.C. Gen. Ct. Apr. 1746), *microformed on* North Carolina State Archives, Reel Y.1.10035; *accord* Sureau v. Cathall (N.C. Gen. Ct. Sept. 1743), *microformed on* North Carolina State Archives, Reel Y.1.10032 (note placed before jury "not evidence sufficient in law to maintain the issue"); Grafton v. LePelly (N.C. Gen. Ct. Apr. 1742), *microformed on* North Carolina State Archives, Reel Y.1.10030 (evidence "not sufficient in law to maintain the aforesaid issue"); Bird v. Bonner (N.C. Gen. Ct. cc. 1739), *microformed on* North Carolina State Archives, Reel Y.1.10027 (words spoken "not actionable" and plaintiff "by law not entitled to have and maintain the action" of slander).

preserved in court records. One such opinion, for instance, dealt with the financial rights, in light of a will and an antenuptial agreement, of a widow who planned to remarry.[305] Another addressed the eligibility for bankruptcy of millers who simply ground corn for a fee in comparison with millers who purchased corn, ground it, and then resold it.[306]

On the other hand, there were many cases in which the General Court proceeded with little or no formality. For example, it entertained a "plea of defamation,"[307] a suit for entering the plaintiff's land in which the declaration tracked the language of an action of trespass but failed so to name itself,[308] an appeal from a precinct court of a suit for conversion in which the declaration tracked the language of an action of trover but failed so to name itself,[309] a petition for the discovery in detail of the assets of an intestate,[310] and a petition, rather than a common law action, seeking relief against defendants who had encouraged petitioner's slave to run away.[311]

C. *The Problem of Geographic Dispersion*

The greatest failure of the General Court, however, lay in its inability to administer the law effectively in the large areas of North Carolina distant from the Albemarle Sound. By the 1730s, extensive settlement had occurred around Bath and New Bern, located inland from the central North Carolina coast, and around Wilmington in the southeast corner of the colony.[312] Communication lines between the settled areas were poor.[313] Meanwhile, the General Court was meeting

305. *See* Opinion of K. Evans (Oct. 17, 1755), *microformed on* North Carolina State Archives, Reel Y.1.10036.

306. *See* Opinion of Edward Grene (Feb. 1, 1759), *microformed on* North Carolina State Archives, Reel Y.1.10036.

307. Morell v. Rudd (N.C. Gen. Ct. July 1745), *microformed on* North Carolina State Archives, Reel Y.1.10008.

308. *See* Shakleford v. Chadwick (N.C. Gen. Ct. cc. 1750), *microformed on* North Carolina State Archives, Reel Y.1.10036.

309. *See* Kerniege v. Tuniclife (N.C. Gen. Ct. cc. 1737), *microformed on* North Carolina State Archives, Reel Y.1.10026.

310. *See* Petition of Pilkington (N.C. Gen. Ct. cc. Mar. 1745), *microformed on* North Carolina State Archives, Reel Y.1.10034.

311. *See* Petition of Parke (N.C. Gen. Ct. cc. 1746), *microformed on* North Carolina State Archives, Reel Y.1.10034.

312. *See* LEFLER & NEWSOME, *supra* note 6, at 78–79; MERRENS, *supra* note 6, at 21–24; *see also* LEFLER & NEWSOME, *supra* note 6, at 55–57, 63 (discussing the original settlement of Bath and New Bern in the 1710s).

313. *See* LEFLER & NEWSOME, *supra* note 6, at 103, 112 (describing good roads as "few and far between" in early North Carolina and the 1715 law that required public notices to be distributed to each plantation, even though no private post delivery occurred until 1757).

only on the Albemarle in Edenton, which is located nearly fifty miles from Bath, over eighty miles from New Bern, and well over 100 miles from Wilmington.[314] As result of these circumstances, litigants and witnesses found it nearly impossible to travel to court from most parts of the colony, which meant that not only civil but even criminal cases from those parts could not be adjudicated.

North Carolinians were aware of the need to bring justice to remote parts as early as Governor Burrington's second administration. They understood that, because "the Limits of th[e] province [were] very extensive,"[315] centralized offices, governance, and administration were "very inconvenient" resulting in "Great delay of Justice, which ha[d] occasioned great Murmurs and Discontents among the Inhabitants."[316] "[T]o the End that Justice may be more effectually administred,"[317] the General Assembly proposed in 1731 the appointment of "General Courts in each of . . . three Counties proposed to be erected" and "that the power of the Court of Chancery may be lodged in the Justices of the Countys as it is in Virginia,"[318] and it prepared legislation for that purpose.[319] Meanwhile, the Council had prepared a bill to establish circuit courts.[320]

The circuit court bill, however, raised a difficult issue—who would ride circuit. Governor Burrington was of the view that the assistant judges on the General Court possessed the same power to hear and

314. By comparison, New York and Philadelphia are approximately ninety miles apart.

315. An Act, to Fix a Place for the Seat of Government, and for Keeping Public Offices; for Appointing Circuit Courts, and Defraying the Expence Thereof; and also for Establishing the Courts of Justice, and Regulating the Proceedings Therein (Dec. 5, 1746), *in* 1 EARLIEST LAWS, *supra* note 17, at 224, 224 [hereinafter Act for the Seat of Government]. This legislation, of course, did not take effect then, but the language of this later 1746 bill probably encapsulates the problems that North Carolinians saw in 1731.

316. Act, for appointing Sherifs in the Room of Marshals of this Province, for prescribing the Method of appointing them, and for limiting the Time of their Continuance in the Office, and directing their Duty therein, and for abolishing the Office of Provost-Marhsal of this Province; and for altering the Names of the Precincts into Counties (Mar. 6, 1738), *in* 1 EARLIEST LAWS, *supra* note 17, at 86, 86 [hereinafter Act for appointing Sherifs].

317. *Id.*

318. Letter to George Burrington and Council from A. Williams, General Assembly (May 15, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 280, 281.

319. *See* Minutes of General Assembly (Apr. 17, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 291, 291 (ordering that "a Bill be prepared for the more easy Administration of Justice to the Inhabitants in the Remote parts of this Government").

320. *See* Minutes of General Assembly (May 4, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 310, 310.

adjudicate cases that the chief justice possessed[321] and that "allowing the Chief Justice to be Sole Judge would . . . establish[] . . . a common Law Court contrary to the Constitution of the English Law."[322] Accordingly he would have allowed the assistant judges to ride circuit. But several members of the council, including Chief Justice William Smith, thought that only the chief justice possessed judicial power; the assistants, in their view, had power only "to Inform & advise . . . and not to adjudge,"[323] and the council ultimately took this view—"that the Assistants have not . . . any Judicial Power."[324]

Perhaps because of this disagreement between Governor Burrington, on the one hand, and the chief justice and the council, on the other, it was not until 1738 that legislation creating circuit courts was enacted,[325] along with legislation abolishing the colony-wide Office of Provost Marshall and replacing it with locally appointed sheriffs for each county.[326] The circuit courts, held only by the chief justice,[327] conducted trials under a nisi prius system and reported cases back to the full General Court meeting in Edenton on the Albemarle, where all initial writs had to be filed.[328] The fact that few records from the period exist indicates that the burdens of circuit riding placed upon the chief justice and the court clerk were so heavy either that the circuit courts met only infrequently and heard few cases or that their proceedings were irregularly recorded.[329] In either case, it seems that the circuit courts were relatively ineffective in bringing law and justice to more remote parts of North Carolina.

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321. Letter of George Burrington to William Smith, Edmond Porter, John Baptiste Ashe & Cornelius Harnett, Members of the Council (May 20, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 241, 242.

322. Message to Council from George Burrington, Governor of North Carolina (May 15, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 223, 233.

323. *See* Letter from William Smith et al. to Governor Burrington (May 18, 1731), in 3 COLONIAL RECORDS, *supra* note 13, at 236, 237.

324. Message from the Upper House (May 5, 1731), *in* 3 COLONIAL RECORDS, *supra* note 13, at 310, 310.

325. An Act, for Appointing Circuit Courts, and for Enlarging the Power of the County Courts (Mar. 6, 1738), *in* 1 EARLIEST LAWS, *supra* note 17, at 91, 91.

326. *See* Act for appointing Sherifs, *supra* note 316, at 91.

327. Such, at least, is what my examination of extant General Court records for the 1738–1746 period suggests.

328. An act . . . to erect . . . [an] Office or Place for the safe keeping the Records of the General Court, and for repairing the Court-house at Edenton, *in* 1 EARLIEST LAWS, *supra* note 17, at 91, 91.

329. A judgment that is not properly recorded is of little more value than no judgment at all.

The legislature sought to remedy this ineffectiveness in 1746, when it passed a new law altering the 1738 Act.[330] But the 1746 Act for holding courts "at the most proper and convenient Place" and "for appointing circuit courts" only made matters worse.[331] It did nothing to cure the excessive burdens that the earlier Act had placed on the chief justice when it confirmed that he alone could hold circuit courts except "in Case of Sickness or Disability," when an assistant justice could serve as a substitute.[332] It did relieve the clerical burden by appointing three clerks, one each for the northern, western, and southern circuits.[333] Its most significant change was to move the seat of the General Court from Edenton, in the northeast corner of the colony, to New Bern, which was far more centrally located and thus more accessible to litigants and witnesses.[334]

But these two changes, as already noted, did more harm than good. With the departure of the court from Edenton, the somewhat fragile legal profession that had grown up around it atrophied. The quality of the judges and lawyers staffing the General Court appears to have declined: one chief justice, in the view of one governor, had "neither capacity nor law, sufficient to be Chief Justice."[335] The clerk's office at Edenton also lost a large part of its work, and therefore its fees, and it too must have atrophied. It does not appear that effective clerical and professional institutions replacing the old ones at Edenton developed either in New Bern or in the designated locations for holding circuit courts. One reason was that judges, lawyers, and clerks need books, and often those books were not readily available in locations where they were needed,[336] despite the legislature's appropriation of public money for supplying books to localities.[337] Whatever may have occurred,

330. Act for the Seat of Government, *supra* note 315, at 224.

331. *Id.*

332. *Id.* at 226.

333. *Id.* at 227.

334. *Id.* at 225.

335. Letter from Arthur Dobbs to the Board of Trade (Nov. 9, 1754), *in* 5 COLONIAL RECORDS, *supra* note 13, at 144, 146.

336. For a complaint to that effect, see *id.* at 146–47.

337. *See* An Act to Provide Certain Law Books (Mar. 17, 1749), *in* 1 EARLIEST LAWS, *supra* note 17, at 317, 321–22. The list of books that the legislature authorized to be purchased was not an impressive one—"*Nelson's* Justice, *Cary's* Abridgment of the Statutes, *Swinburn* of Wills, or *Godolphin's* Orphan's Legacy, and *Jacob's* Law Dictionary, or *Wood's* Institutes" —nor was the use to which they were to be put—at every court sitting, the books were to be "laid, by the Clerk of each Court, on the Court table, for the use and perusal of the justices of such court, and of all such as may have any Matters depending in court." *Id.* This legislation did little to facilitate the sort of quality preparation on the part of judges and attorneys that is required for a high level of legal practice and that could have been found in colonial cities such as Boston, Charleston, New York, and Philadelphia.

though, one fact is clear: following the passage of the 1746 Act, minutes of the General Court's sittings exist only for three terms, two in 1749 and one in 1751.[338] One must infer either that the court did not meet in most of the terms it was scheduled to meet[339] or that its sittings were lackadaisically recorded and its records carelessly deposited.[340]

Similarly, professional sophistication and care languished at the level of the county courts—local bodies that had replaced the old precinct courts. Although there were numerous instances of writs of case being used properly in actions to recover for breach of promise,[341] there also were many instances of writs being misused. Writs of case were brought, for instance, to recover on sealed bonds,[342] while a writ of debt was brought on one "bill or script in writing."[343] In one matter, a

338. Business conducted in these terms was routine. *See, e.g.*, Porter v. Crocker (N.C. Gen. Ct. Sept. 1749), *microformed on* North Carolina State Archives, Reel S.138.4 (detailing a jury verdict for plaintiff in action of account); Scollay v. Connor (N.C. Gen. Ct. Sept. 1749), *microformed on* North Carolina State Archives, Reel S.138.4 (default judgment in action of case on bill of exchange); Adams v. Brown (N.C. Gen. Ct. Mar. 1749), *microformed on* North Carolina State Archives, Reel S.138.4 (default judgment in action of case on promissory note); Harvey v. Waters (N.C. Gen. Ct. Mar. 1749), *microformed on* North Carolina State Archives, Reel S.138.4 (returning a jury verdict for plaintiff in an action of detinue to recover slave).

339. The fact that the legislature found it necessary when it adopted a 1754 Act for establishing the supreme courts to provide that none of the supreme "[c]ourts shall be discontinued . . . by Reason of the death of the Chief Justice, or other Justices of the said Courts, or any other unavoidable Let or Hindrance of their Attendance to hold Court," *see* Act of Dec. 12, 1754, *in* 25 THE STATE RECORDS OF NORTH CAROLINA 274, 274 (Walter Clark ed., 1906) [hereinafter STATE RECORDS], suggests that earlier sittings of the General Court had been discontinued; *cf.* Proclamation of Governor Arthur Dobbs (Apr. 29, 1755), *in* 5 COLONIAL RECORDS, *supra* note 13, at 489, 489–90 (addressing failure of justices of the peace to perform their duties).

340. Of course, records for some terms may have been lost over the centuries. But it seems unlikely that the vast majority of the records were lost after being properly deposited. Between 1694, the year of the earliest extant General Court records, and 1746 minutes exist for the majority of the terms in which the General Court would have been scheduled to meet; I have no explanation for why that pattern changed after 1746 except those given in the text. *See* Message from the Counsel to the Lower House (Apr. 6, 1753), *in* 5 COLONIAL RECORDS, *supra* note 13, at 66, 66–67 (referring to a bill "to relieve such Persons that have or may suffer, by the Loss of Records" in a specified county as a result of the failure to timely build a courthouse). The legislature sought to solve the problem of poor recordkeeping in its 1754 Act for establishing the supreme courts of justice. *See* Act of Dec. 12, 1754, *in* 25 STATE RECORDS, *supra* note 339, at 274, 281 (providing "[t]hat for the more entire and better Preservation of the Records of the Court, where any Cause is finally determined, the Clerk shall enter all the Proceedings therein . . . in a Book well bound with Vellum").

341. *See, e.g.*, Smith v. Land (Perquimans County Ct. Apr. 1741), *microformed on* North Carolina State Archives, Reel C.077.

342. *See, e.g.*, Smith v. Blitchenden (Perquimans County Ct. Jan. 1757), *microformed on* North Carolina State Archives, Reel C.077.30003.

343. Devitt v. Orinton (Perquimans Precinct Ct. Apr. 1737), *microformed on* North

clerk carelessly labeled an action a "plea of debt" and then proceeded to copy into the record the text of the declaration, which identified itself as "a plea of trespass upon the case,"[344] while in another, a plaintiff simply brought a bill alleging that the defendant "with force and arms" had impounded his horse for three days, until it died.[345] County courts also appear to have had difficulty serving process—so much so that one entered an order directing the discontinuance of actions once a sheriff on four occasions entered a return of "non est inventus."[346]

In any event, especially in the decade after 1746, the judicial system lost most of whatever effectiveness it had recovered after the politicization of the law during the Everard and Burrington years. The system's decline, in turn, left North Carolina in turmoil. As one visitor observed, in many locales there was "perfect anarchy":[347]

> [C]rimes [were] of frequent occurrence, such as murder, robbery, etc. But the criminals [could] not be brought to justice. The citizens [did] not appear as jurors, and if court [was] held to decide such criminal matters no one [was] present. If anyone [was] imprisoned the prison [was] broken open and no justice administered. In short most matters [were] decided by blows.[348]

IV. THE ESTABLISHMENT OF LAW IN THE EAST

Something had to be done. Accordingly the legislature in 1754 adopted[349] two laws—"An Act for Establishing the Supreme Courts"[350] and an "Act for Establishing County Courts."[351] The first Act

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Carolina State Archives, Reel C.077.30001.

344. Newbury v. Rogerson (Perquimans County Ct. Jan. 1757), *microformed on* North Carolina State Archives, Reel C.077.30003.

345. Chaple v. Rogers (Perquimans Precinct Ct. Apr. 1738), *microformed on* North Carolina State Archives, Reel C.077.30002.

346. Order re Discontinuance of Actions (Craven County Ct. Nov. 1751), *microformed on* North Carolina State Archives, Reel C.028.30002.

347. WILLIAM S. POWELL, NORTH CAROLINA THROUGH FOUR CENTURIES 145 (1989) (recording a statement made by Moravian Bishop August Gottleib Spangenberg on arriving in North Carolina in 1752).

348. *Id.*

349. *See generally* 5 COLONIAL RECORDS, *supra* note 13, at 228, 230, 258–59, 264, 298 (recording no incidents of controversy in the General Assembly from December 1754 to January 1755).

350. An Act, for Establishing the Supreme Court of Justice, Oyer and Terminer, and General Gaol Delivery of North Carolina (Dec. 12, 1754), *in* 25 STATE RECORDS, *supra* note 339, at 274, 274 [hereinafter Act for Establishing the Supreme Courts].

351. An Act of Establishing County Courts, for enlarging their Jurisdiction, and Setting the Proceedings therein (Dec. 12, 1754), *in* 25 STATE RECORDS, *supra* note 339, at 287 [hereinafter Act for Establishing County Courts]. When the Act was disallowed by the privy council, county courts stopped meeting and postponed pending cases until new legislation was

established five separate and distinct supreme courts to sit in five different locations, each to be composed, however, of the same chief justice and the same three other justices.[352] Each of the five courts was to be held either by the chief justice or, in his absence, by any two other justices.[353] These new supreme courts were not nisi prius courts; writs were to be filed, proceedings commenced, and judgments rendered in the locale in which a given court met, not in Edenton or New Bern.[354] Each court also had its own clerk, who was under specific instructions about how to keep both docket books and permanent record books, and relied on local sheriffs to carry out service of process and execution of judgments.[355]

The County Court Act provided for the continued existence of county courts, which the Act defined as courts of record composed of all the justices of the peace for the county, who were recommended by vote of the county court for appointment by the governor. The courts met quarterly in each county. They were given jurisdiction over all civil actions of a value between twenty-five shillings and forty pounds and all criminal actions, except those punishable by loss of life or body member. The justices were granted "full power and authority as amply and as fully to all intents and purposes as Justices of the Peace in the counties of England to preserve, maintain, and keep the peace."[356] Litigants could proceed from county courts to supreme courts either by appeal or by writ of error.

A. The Law's Effectiveness in Edenton and New Bern

The new supreme courts appear to have functioned effectively in Edenton and New Bern, where sittings occurred regularly, but not in the more recently settled regions on the frontier, where sittings were rare.[357] The common law writ system was in place, for example, in the eastern courts. There were actions of account,[358] case on a promissory note,[359] case for goods sold,[360] covenant,[361] debt on a bond,[362] debt on a

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enacted. *See* Order Postponing Cases (Cumberland County Ct. Nov. 1762), *microformed on* North Carolina State Archives, Reel C.029.30001.

352. Act for Establishing the Supreme Courts, *supra* note 350, at 274.

353. *See id.*

354. *See id.* at 276.

355. *See id.* at 281.

356. Act for Establishing County Courts, *supra* note 351, at 289.

357. This statement is based on examination of supreme court records.

358. *See* Leech v. Bartlett (Sup. Ct. New Bern May 1767), *microformed on* North Carolina State Archives, Reel S.138.3.

359. *See* Cook v. McMann (Sup. Ct. Edenton May 1761), *microformed on* North Carolina State Archives, Reel C.201.30003.

judgment of a Maryland court,[363] detinue,[364] dower,[365] ejectment,[366] indebitatus assumpsit,[367] quantum meruit,[368] quantum valebant,[369] replevin,[370] scire facias,[371] trespass quare clausum fregit,[372] and trover.[373] There were also common recoveries.[374] Motions in arrest of judgment[375] on technical grounds were commonplace, as was the use of special pleading.[376] In one case, the court was asked to rule whether a defendant could introduce proof of the running of the statute of limitations under a plea of the general issue.[377]

Probably the most important legal development in Edenton and New Bern in the last two decades of the colonial period is that the supreme court there obtained plenary control over the law-finding

360. *See* Vann v. Garret (Sup. Ct. Edenton May 1761), *microformed on* North Carolina State Archives, Reel C.201.30003.

361. *See* Sasser v. Caswell, (Sup. Ct. New Bern Mar. 1759), *microformed on* North Carolina State Archives, Reel S.138.3.

362. *See* Lewis v. Luton (Sup. Ct. Edenton Nov. 1760), *microformed on* North Carolina State Archives, Reel C.201.30003.

363. *See* Rook v. Kilbie (Sup. Ct. Edenton 1760), *microformed on* North Carolina State Archives, Reel C.201.30003.

364. *See* Fulcher v. Brinson (Sup. Ct. New Bern May 1763), *microformed on* North Carolina State Archives, Reel S.138.3.

365. *See* Crawford v. Green (Sup. Ct. New Bern Nov. 1767), *microformed on* North Carolina State Archives, Reel S.138.3.

366. *See* Clarmwell v. Seylor (Sup. Ct. New Bern Mar. 1759), *microformed on* North Carolina State Archives, Reel 138.3.

367. *See* Scot v. Fleming (Sup. Ct. Edenton Nov. 1760), *microformed on* North Carolina State Archives, Reel C.201.30003.

368. *See* Brown v. Leech (Sup. Ct. Edenton Nov. 1760), *microformed on* North Carolina State Archives, Reel C.201.30003.

369. *See* Scot v. Fleming (Sup. Ct. Edenton Nov. 1760), *microformed on* North Carolina State Archives, Reel C.201.30003.

370. *See* Barrington v. Grinder (Sup. Ct. New Bern May 1763), *microformed on* North Carolina State Archives, Reel S.138.3.

371. *See* James v. Rice (Sup. Ct. New Bern May 1768), *microformed on* North Carolina State Archives, Reel C.206.30001.

372. *See* Hare v. Williams (Sup. Ct. Edenton May 1761), *microformed on* North Carolina State Archives, Reel C.201.30003.

373. *See* Legardere v. Mills (Sup. Ct. New Bern Apr. 1761), *microformed on* North Carolina State Archives, Reel S.138.3.

374. *See, e.g.*, Williams v. Gray (Sup. Ct. Edenton Apr. 1772), *microformed on* North Carolina State Archives, Reel C.201.30003.

375. *See, e.g.*, Skinner v. Moore (Sup. Ct. Edenton Oct. 1771), *microformed on* North Carolina State Archives, Reel C.201.30001; *see also* King v. Johnson (Craven County Ct. June 1743), *microformed on* North Carolina State Archives, Reel C.028.30002 (motion to set aside verdict on the ground of the "foreman not keeping with his fellow jurors").

376. *See, e.g.*, Peyton v. Freeman's Executor (Sup. Ct. New Bern Mar. 1758), *microformed on* North Carolina State Archives, Reel S.138.3.

377. *See* Campbell v. Laney (Sup. Ct. Edenton Nov. 1761), *microformed on* North Carolina State Archives, Reel C.201.30001.

power of juries. Parties routinely used demurrers to the evidence to test whether facts offered in evidence were sufficient as a matter of law to support a verdict.[378] There also were postverdict motions for a new trial[379] as distinguished from motions in arrest of judgment, as well as a motion to set aside a verdict.[380] Juries appeared quite willing to defer to the court on points of law, as they returned innumerable special verdicts that decided only the facts and left the law to the bench.[381]

Other important developments occurred in the law of debtor and creditor. On the one hand, creditors gained an important remedy not given by the General Court of garnishing money and property owed to debtors by third parties.[382] On the other hand, defendants imprisoned on civil process gained the benefit of a section of the Act creating the supreme courts empowering a court to discharge them from jail,[383] in addition to their right to discharge upon proof of insolvency.[384]

The supreme courts at Edenton and New Bern effectively enforced the criminal law, with prosecutions for a wide range of both major and

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378. *See, e.g.*, Ringle v. Parkinson (Sup. Ct. New Bern Nov. 1769), *microformed on* North Carolina State Archives, Reel C.206.30001; Roberts v. Nunning (Sup. Ct. Edenton Nov. 1764), *microformed on* North Carolina State Archives, Reel C.201.30001; *cf.* Jones v. Sumner (Bute County Ct. Aug. 1768), *microformed on* North Carolina State Archives, Reel C.015.30001 (evidentiary ruling by county court on admissibility of sealed writing appealed to supreme court).

379. *See, e.g.*, Bond v. Sumner (Sup. Ct. Edenton Oct. 1769), *microformed on* North Carolina State Archives, Reel C.201.30001 (grounds of motion unstated); Lenox v. Wheatley (Sup. Ct. Edenton Apr. 1769), *microformed on* North Carolina State Archives, Reel 201.30003 (grounds of motion unstated).

380. *See* Scholar v. Watson (Sup. Ct. New Bern Oct. 1758), *microformed on* North Carolina State Archives, Reel S.138.3 (grounds of motion unstated).

381. *See, e.g.*, Safser v. Cade (Sup. Ct. New Bern Nov. 1761), *microformed on* North Carolina State Archives, Reel S.138.3.

382. *See, e.g.*, Bell v. Terrell, (Sup. Ct. Edenton Nov. 1767), *microformed on* North Carolina State Archives, Reel C.201.30003; Forman v. Green (Sup. Ct. New Bern May 1763), *microformed on* North Carolina State Archives, Reel S.138.3; Summons of Hall (Cumberland County Ct. Apr. 1759), *microformed on* North Carolina State Archives, Reel C.029.30001; Biles v. Sackett (Rowan County Ct. Oct. 19, 1757), *in* 1 ABSTRACTS OF THE MINUTES OF THE COURT OF PLEAS AND QUARTER SESSIONS, ROWAN COUNTY, NORTH CAROLINA, 1763–1774, at 79, 79 (Jo White Linn ed., 1979) [hereinafter ROWAN MINUTES]; *cf.* Hughes v. Cole (Surry County Ct. Sept. 25, 1772), *in* W.O. ABSHER, SURRY COUNTY, NORTH CAROLINA MINUTES, 1768–1789, at 4, 4 (1985) [hereinafter SURRY MINUTES] (attaching an absconder's property to satisfy a just debtor).

383. Act for Establishing the Supreme Courts, *supra* note 350, at 284.

384. *See, e.g.*, Larkan v. Crocker (Sup. Ct. Edenton May 1766), *microformed on* North Carolina State Archives, Reel C.201.30003; Fiske v. Tanhard (Sup. Ct. New Bern May 1763), *microformed on* North Carolina State Archives, Reel S.138.3; Frohock v. Cook (Rowan County Ct. May 5, 1775), 3 ROWAN MINUTES, *supra* note 382, at 9, 9. The bail of an insolvent debtor who was discharged was exonerated from any liability. *See* Buchanan v. McConack (Sup. Ct. Edenton Apr. 1771), *microformed on* North Carolina State Archives, Reel C.201.30003.

minor offenses, including adultery,[385] assault,[386] criminal libel,[387] forgery,[388] fornication,[389] homicide,[390] larceny,[391] nuisance,[392] perjury,[393] petit larceny,[394] and failing to appear as a juror[395] or a witness.[396] They appear to have done so fairly: in one case, for instance, they appointed counsel to represented a defendant who requested an attorney.[397]

Finally, the two courts dealt with a variety of administrative matters, such as appointing administrators,[398] admitting attorneys to practice,[399] distributing the slaves of decedents,[400] issuing a commission to the mayor of New York City to examine a witness on behalf of a North Carolina litigant,[401] issuing a writ of mandamus on behalf of

385. *See* King v. Pratt (Sup. Ct. New Bern May 1764), *microformed on* North Carolina State Archives, Reel S.138.3.

386. *See* King v. Rawlings (Sup. Ct. New Bern Sept. 1757), *microformed on* North Carolina State Archives, Reel S.138.3.

387. *See* King v. Harry (Sup. Ct. New Bern Apr. 1759), *microformed on* North Carolina State Archives, Reel S.138.3.

388. *See* King v. Ormond (Sup. Ct. New Bern Nov. 1763), *microformed on* North Carolina State Archives, Reel S.138.3.

389. King v. Dennis (Sup. Ct. New Bern Nov. 1763), *microformed on* North Carolina State Archives, Reel S.183.3 (male defendant acquitted by jury).

390. *See* King v. Harper (Sup. Ct. Edenton Oct. 1768), *microformed on* North Carolina State Archives, Reel C.201.30003 (not guilty of murder but only of chance medley); King v. Luten (Sup. Ct. Edenton Nov. 1763), *microformed on* North Carolina State Archives, Reel C.201.30003 (prosecution for killing another's slave while in the process of giving correction).

391. *See* King v. Dawson (Sup. Ct. New Bern Mar. 1759), *microformed on* North Carolina State Archives, Reel S.138.3.

392. *See* King v. Latham (Sup. Ct. New Bern Nov. 1763), *microformed on* North Carolina State Archives, Reel S.138.3.

393. *See* King v. Scott (Sup. Ct. New Bern Nov. 1763), *microformed on* North Carolina State Archives, Reel S.138.3.

394. *See* King v. Buck (Sup. Ct. New Bern Nov. 1763), *microformed on* North Carolina State Archives, Reel S.138.3 (defendant acquitted by jury on ground that he was not Francis Buck but Francis Dickson).

395. *See* King v. Eborne (Sup. Ct. New Bern Sept. 1757), *microformed on* North Carolina State Archives, Reel S.138.3.

396. *See* King v. Connors (Sup. Ct. New Bern Mar. 1758), *microformed on* North Carolina State Archives, Reel S.138.3.

397. *See* King v. Dawson (Sup. Ct. New Bern Mar. 1759), *microformed on* North Carolina State Archives, Reel S.138.3.

398. *See* Appointment of Sanderson (Sup. Ct. Edenton May 1764), *microformed on* North Carolina State Archives, Reel C.201.30001.

399. *See* Admission of Brimage (Sup. Ct. New Bern May 1769), *microformed on* North Carolina State Archives, Reel C.206.30001 (upon license from governor).

400. *See* Jordan v. Perry (Sup. Ct. Edenton Apr. 1758), *microformed on* North Carolina State Archives, Reel C.201.30003.

401. *See* Campbell v. Henderson (Sup. Ct. Edenton Nov. 1760), *microformed on* North Carolina State Archives, Reel C.201.30003; *accord, e.g.*, Montgomery v. Feagley (Rowan County Ct. Apr. 21, 1762), *in* 1 ROWAN MINUTES, *supra note* 382, at 144, 144 (ordering deposition of witness residing in North Carolina); Anderson v. Fullerton (Rowan County Ct., Apr. 18, 1755), *in* 1 ROWAN MINUTES, *supra* note 382, at 38, 38 (ordering deposition

subordinate officials claiming wrongful ouster from office,[402] and hearing applications for freedom on behalf of slaves.[403] Finally, the courts governed their own internal procedures, issuing orders about postponement of cases[404] and the priority in which cases would be tried[405] and directing lawyers to wear barristers' gowns in the courtroom.[406]

B. Mixed Effectiveness in Wilmington

Proceedings in the Wilmington court, especially those of an administrative and criminal nature, looked quite similar. Thus, there was a mandamus issued against county justices of the peace on behalf of a court clerk seeking restoration to office[407] and a petition for admission to practice as an attorney.[408] There were criminal prosecutions for homicide in which lawyers were appointed at the defendant's request "to speak to matters of law";[409] counterfeiting;[410] horse theft;[411]

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of witness residing in another colony); *cf.* Crunk v. Denton (Rowan County Ct. Apr. 19, 1759), *in* 1 ROWAN MINUTES, *supra* 382, at 104, 104 (ordering admission of deposition into evidence).

402. *See* Motion of Gordon (Sup. Ct. New Bern Nov. 1766), *microformed on* North Carolina State Archives, Reel S.138.3.

403. Petition of Swann (Sup. Ct. New Bern Nov. 1764 and Nov. 1766), *microformed on* North Carolina State Archives, Reel S.138.3; *cf.* Complaint of Donald (New Hanover County Ct. June 1740), *microformed on* North Carolina State Archives, Reel C.070.30001 (suit in county court to enforce contract to free servant); Petition of Marsh (New Hanover County Ct. June 1739), *microformed on* North Carolina State Archives, Reel C.070.30001 (county court order directing extra service on the part of runaway slave).

404. *See* Order re Postponements (Sup. Ct. New Bern Apr. 1757), *microformed on* North Carolina State Archives, Reel S.138.3.

405. *See* Order re Trials (Sup. Ct. New Bern Mar. 1758), *microformed on* North Carolina State Archives, Reel S.138.3.

406. *See* Order re Dress of Attorneys (Sup. Ct. Edenton Apr. 1770), *microformed on* North Carolina State Archives, Reel C.201.30003. Lower courts also engaged in rulemaking. *See, e.g.*, Tavern License Fees Order (Rowan County Ct. July 15, 1755), *in* 1 ROWAN MINUTES, *supra* note 382, at 40, 40 (ordering no petition for liquor licenses to be read unless fees were paid).

407. *See* King v. Justices of Bladen (Sup. Ct. Wilmington Oct. 1767), *microformed on* North Carolina State Archives, Reel C.208.30001; *but see* King v. Justices (New Hanover County Ct. Oct. 1774), *microformed on* North Carolina State Archives, Reel C.070.30001 (indictment against justices for failing to repair courthouse "quashed, the Court not having jurisdiction thereof").

408. *See* Petition of McCulloch (Sup. Ct. Wilmington Apr. 1762), *microformed on* North Carolina State Archives, Reel C.208.30001 (petitioner produced diploma from Middle Temple).

409. King v. Simpson (Sup. Ct. Wilmington Apr. 1765), *microformed on* North Carolina State Archives, Reel C.208.30001. The defendant, who was found guilty only of manslaughter and not murder, received benefit of clergy. *Id.*

410. *See* King v. Norris (Sup. Ct. Wilmington Nov. 1771), *microformed on* North Carolina State Archives, Reel C.208.30001.

larceny;[412] nuisance;[413] perjury;[414] petit larceny;[415] failing to erect stocks and a pillory;[416] and illegally issuing warrants.[417] On the civil side there were motions for a new trial[418] and for special verdicts,[419] as well as motions to quash writs for technical defects.[420] But here there was a major difference: far fewer civil actions were filed in Wilmington than in either Edenton or New Bern, and in fact, no civil cases were recorded in the court minutes for a four-year interval between October 1764, when the last cases were heard and November 1768, when new cases were filed.

V. THE FAILURE OF LAW IN THE WEST

A. The Weakness of the Judiciary

On North Carolina's western frontier, in turn, matters were totally different than in the east. At supreme court sittings in Hillsborough and Salisbury, the two locations at which the court met in the west, far fewer cases were filed than in the east. Moreover, the cases that were filed were routine in nature and raised few legal issues. Only two civil cases in Hillsborough raised legal issues: in the first, a judgment was arrested and a jury verdict set aside "for want of a proper declaration,"[421] while in the second, an appeal was dismissed when the court upheld a

411. *See* King v. Williams (Sup. Ct. Wilmington May 1768), *microformed on* North Carolina State Archives, Reel 208.30001 (defendant convicted and sentenced to death).

412. *See* King v. Clunne (Sup. Ct. Wilmington Apr. 1762), *microformed on* North Carolina State Archives, Reel 208.30001.

413. *See* King v. Paine (Sup. Ct. Wilmington May 1768), *microformed on* North Carolina State Archives, Reel C.208.30001.

414. *See* King v. Martin (Sup. Ct. Wilmington Nov. 1769), *microformed on* North Carolina State Archives, Reel C.208.30001.

415. *See* King v. Smith (Sup. Ct. Wilmington Nov. 1768), *microformed on* North Carolina State Archives, Reel C.208.30001.

416. *See* Motion of Ashe (Sup. Ct. Wilmington Apr. 1765), *microformed on* North Carolina State Archives, Reel C.208.30001.

417. *See* Motion of Attorney General (Sup. Ct. Wilmington Nov. 1769), *microformed on* North Carolina State Archives, Reel C.208.30001.

418. *See* Bradley v. Lyon (Sup. Ct. Wilmington Apr. 1761), *microformed on* North Carolina State Archives, Reel C.208.30001; *cf.* Sims v. Simpson (New Hanover County Ct. June 1764), *microformed on* North Carolina State Archives, Reel C.070.30001 (granting motion in arrest of judgment).

419. *See* Scott v. Jordain (New Hanover County Ct. Jan. 1773), *microformed on* North Carolina State Archives, Reel C.070.30001; Robards v. Phillips (Sup. Ct. Wilmington Oct. 1760), *microformed on* North Carolina State Archives, Reel C.208.30001.

420. *See* Owens v. Stevens (Cumberland County Ct. Apr. 1759), *microformed on* North Carolina State Archives, Reel C.029.30001.

421. Boyd v. Partu (Sup. Ct. Hillsborough Mar. 1768), *microformed on* North Carolina State Archives, Reel C.204.30001.

demurrer to the declaration.[422] In one criminal case, an indictment was quashed "by reason of the irregularity of the [grand jury's] return,"[423] while in a murder prosecution there was a motion in arrest of judgment following a jury verdict of guilty only of manslaughter.[424] In Salisbury, the only significant issue concerned the judiciary's power to control juries. In one criminal case, the court dismissed a prosecution after concluding that the evidence was insufficient to support a guilty verdict,[425] while in a civil case, the court, after receiving a verdict, reserved judgment whether particular testimony was properly admitted in evidence and whether it was sufficient as a matter of law to support the verdict.[426] In a third case, a jury was willing to leave an important issue of law to the court when it returned a verdict that the defendant was "guilty of saying the words in the indictment charged against him" but left it to the court to determine whether those words constituted criminal libel.[427]

Filings in western county courts, the dockets of which were similar to those of county courts in the eastern counties, to some degree made up for the paucity of filings in the supreme court. There were fairly numerous civil actions seeking the recovery of small sums of money brought in assumpsit,[428] case,[429] debt,[430] defamation,[431] scire facias,[432]

422. *See* Tew v. Cabe (Sup. Ct. Hillsborough Mar. 1768), *microformed on* North Carolina State Archives, Reel C.204.30001.

423. King v. Hunter (Sup. Ct. Hillsborough Sept. 1768), *microformed on* North Carolina State Archives, Reel C.204.30001.

424. *See* King v. Tyrrel (Sup. Ct. Hillsborough Mar. 1768), *microformed on* North Carolina State Archives, Reel C.204.30001. For other homicide prosecutions, see *King v. Floyd* (Sup. Ct. Salisbury Sept. 1765), *microformed on* North Carolina State Archives, Reel C.207.30001, and *King v. Gordon* (Sup. Ct. Salisbury Nov. 1758), *microformed on* North Carolina State Archives, Reel C.207.30001.

425. *See* King v. Tawnley (Sup. Ct. Salisbury Mar. 1766), *microformed on* North Carolina State Archives, Reel C.207.30001.

426. *See* Howard v. Connell (Sup. Ct. Salisbury Mar. 1769), *microformed on* North Carolina State Archives, Reel C.207.30001.

427. Howard v. Connell (Sup. Ct. Salisbury Mar. 1769), *microformed on* North Carolina State Archives, Reel C.207.30001.

428. *See, e.g.*, Quinn v. McFaddon (Tryon County Ct. 1769), *in* TRYON COUNTY NORTH CAROLINA: MINUTES OF THE COURT OF PLEAS AND QUARTER SESSIONS, 1769–1779 at 14, 14 (Brent H. Holcomb ed., 1994) [hereinafter TRYON MINUTES]; Brandon v. Bartly (Rowan County Ct. 1753), *in* 1 ROWAN MINUTES, *supra* note 382, at 16, 16. For an action of assumpsit in an eastern county, see, for example, *Lenox v. Whismill* (Bertie County Ct. June 1766), *microformed on* North Carolina State Archives, Reel C.010.30001.

429. *See, e.g.*, Sills v. Hamilton (Rowan County Ct. 1762), *in* 1 ROWAN MINUTES, *supra* note 382, at 154, 154; Randall v. Patterson (Tryon County Ct. 1770), *in* TRYON MINUTES, *supra* note 428, at 20, 20. For a writ of case in an eastern county, see, for example, *Simpson v. Chadwick* (Carteret County Ct. June 1771), *microformed on* North Carolina State Archives, Reel C.019.30002.

trespass,[433] and trover.[434] In one unusual case, a woman sued her husband and obtained a bond for good behavior as a result.[435] Defendants in these actions pleaded various forms of the general issue with some sophistication: in debt, for instance, defendants interposed pleas of nil debit,[436] non est factum,[437] not guilty of violating a statute,[438] and no such judgment.[439] Occasionally, there were special pleas in

430. *See, e.g.*, Vause v. Griffith (Rowan County Ct. 1756), *in* 1 ROWAN MINUTES, *supra* note 382, at 63, 63. For a writ of debt in an eastern county, see, for example, *Thomas v. Cannady* (Chowan County Ct. Oct. 1745), *microformed on* North Carolina State Archives, Reel C.024.30000.

431. *See, e.g.*, Cusick v. Kingsbury (Rowan County Ct. 1756), *in* 1 ROWAN MINUTES, *supra* note 382, at 6, 6; *see also* Deposition of Shiles (Orange County Ct. 1754), *in* ORANGE COUNTY, N.C. ABSTRACTS OF THE MINUTES OF THE COURT OF COMMON PLEAS AND QUARTER SESSIONS OF: SEPT. 1752–AUG. 1766, at 10, 10 (Ruth Herndon Shields ed., 1991) [hereinafter ORANGE MINUTES] (stating that deponent, at instigation of defendant in defamation suit, made false statement about plaintiff). For a slander case in an eastern county, see, for example, *Meadows v. Mann* (Carteret County Ct. June 1775), *microformed on* North Carolina State Archives, Reel C.019.30002.

432. *See, e.g.*, Montgomery v. Hall (Orange County Ct. 1763), *in* ORANGE MINUTES, *supra* note 431, at 87, 87; Tool v. Masterson (Rowan County Ct. 1758), *in* 1 ROWAN MINUTES, *supra* note 382, at 86, 86 (issuing writ against sheriff for failure to return bail bond). For a scire facias in an eastern county, see, for example, *Craven v. Arnold* (Chowan County Ct. Apr. 1756), *microformed on* North Carolina State Archives, Reel C.024.30001.

433. *See, e.g.*, Mitchell v. Pearis (Rowan County Ct. 1768), *in* 1 ROWAN MINUTES, *supra* note 382, at 82, 82; Stafford v. Cate (Surry County Ct. Aug. 12, 1772), *in* SURRY MINUTES, *supra* note 382, at 3, 3. For a trespass case from an eastern county, see, for example, *Baker v. Brady* (Chowan County Ct. Oct. 1744), *microformed on* North Carolina State Archives, Reel C.024.30000.

434. *See, e.g.*, Mitchell v. Pearis (Rowan County Ct. 1768), *in* 2 ROWAN MINUTES, *supra* note 382, at 82, 82; Stafford v. Cate (Surry County Ct. Aug. 12, 1772), *in* SURRY MINUTES, *supra* note 382, at 3, 3. For a trover case in an eastern county, see, for example, *Adair v. Arthur* (Chowan County Ct. Apr. 1744), *microformed on* North Carolina State Archives, Reel C.024.30000.

435. *See* Pickett v. Pickett (Orange County Ct. 1759), *in* ORANGE MINUTES, *supra* note 431, at 51, 51.

436. *See* Howard v. Douthit (Rowan County Ct. Apr. 24, 1761), *in* 1 ROWAN MINUTES, *supra* note 382, at 127, 127. For a jury verdict in an eastern county that a defendant "is indebted," see *Carothers v. Lovell* (Craven County Ct. Mar. 1758), *microformed on* North Carolina State Archives, Reel C.028.30004. The action in *Carothers* was one to recover a statutory penalty. *Id.*

437. *See* Giles v. Newell (Rowan County Ct. Apr. 22, 1757), *in* 1 ROWAN MINUTES, *supra* note 382, at 73, 73.

438. *See* Nassery v. Wisenhunt (Rowan County Ct. Oct. 15, 1763), *in* 2 ROWAN MINUTES, *supra* note 382, at 16, 16. *But see* Carothers v. Lovell (Craven County Ct. Mar. 1758), *microformed on* North Carolina State Archives, Reel C.028.30004, discussed *supra* note 436. It appears that either a plea of not indebted or a plea of not guilty was an appropriate response to an action of debt seeking to recover a statutory penalty.

439. *See* [Illegible] v. Pitts (Rowan County Ct. Jan. 22, 1757), *in* 1 ROWAN MINUTES, *supra* note 382, at 70, 70.

western county courts, such as pleas of payment[440] and tender,[441] a plea of the statute of limitations,[442] a plea that a defendant was insulted under arms,[443] and, in an eastern county, a plea that a defendant was under coverture.[444]

The county courts also assumed jurisdiction over criminal prosecutions[445] for offenses such as adultery,[446] assault,[447] contempt in open court,[448] extortion,[449] fornication (committed by men[450] as well as

440. *See* Deathridge v. Jones (Rowan County Ct. Oct. 13, 1764), *in* 2 ROWAN MINUTES, *supra* note 382, at 33, 33. For a verdict in an eastern county of nonpayment, see *Parker v. Canady* (Craven County Ct. Apr. 1763), *microformed on* North Carolina State Archives, Reel C.028.30004; *cf.* Tisdale v. Mill (Craven County Ct. Oct. 1766), *microformed on* North Carolina State Archives, Reel C.028.30005 (giving a jury verdict of no accord and satisfaction).

441. *See* McGuire v. Tate (Rowan County Ct. 1757), *in* 1 ROWAN MINUTES, *supra* note 382, at 76, 76–77. For a jury verdict in an eastern county that a defendant did not tender, see *Green v. Slade* (Craven County Ct. Mar. 1768), *microformed on* North Carolina State Archives, Reel C.028.30005.

442. *See* Price v. Rotton (Tryon County Ct. July 1770), *in* TRYON MINUTES, *supra* note 428, at 39, 39. For a jury verdict in an eastern county that a defendant did assume within the statutory limitation period, see *Moore v. Mundine* (Craven County Ct. Jan. 1765), *microformed on* North Carolina State Archives, Reel C.028.30005.

443. *See* Hamelton v. Kingsbury (Rowan County Ct. Oct. 13, 1754), *in* 1 ROWAN MINUTES, *supra* note 382, at 33, 33. The defendant pled generally, with leave to put the special matter of insult in evidence. *Id.*

444. *See* Ellis v. Bryan (Craven County Ct. Mar. 1770), *microformed on* North Carolina State Archives, Reel C.028.30005. The actual entry in the court record was one of a special verdict, not a plea. *Id.*

445. Criminal cases typically were resolved by jury verdicts. But there were occasional guilty pleas. *See* King v. Jones (Rowan County Ct. Apr. 22, 1761), *in* 1 ROWAN MINUTES, *supra* note 382, at 126, 126; *cf.* King v. Kelly (Tryon County Ct. July 1774), *in* TRYON MINUTES, *supra* note 428, at 133, 133 (finding "Defendant Guilty on his own Submission").

446. *See, e.g.*, King v. Whitlow (Tryon County Ct. July 1771), *in* TRYON MINUTES, *supra* note 428, at 74, 74. For an adultery prosecution in an eastern county, see, for example, *King v. Barker* (Perquimans County Ct. Apr. 1740), *microformed on* North Carolina State Archives, Reel C.077.30002.

447. *See, e.g.*, King v. Stevenson (Rowan County Ct. Aug. 5,1772), *in* 2 ROWAN MINUTES, *supra* note 382, at 137, 137; King v. Venables (Surry County Ct. Aug. 1771), *in* SURRY MINUTES, *supra* note 382, at 2, 2. For an assault prosecution in an eastern county, see, for example, *King v. Gashill* (Carteret County Ct. Mar. 1775), *microformed on* North Carolina State Archives, Reel C.019.30002.

448. *See, e.g.*, King v. Pender (Rowan County Ct. Dec. 20, 1753), *in* 1 ROWAN MINUTES, *supra* note 382, at 16, 16; King v. Gordon (Tryon County Ct. Jan. 1771), *in* TRYON MINUTES, *supra* note 428, at 79, 79. For a contempt prosecution in an eastern county, see, for example, *King v. Whitehead* (Edgecombe County Ct. July 1763), *microformed on* North Carolina State Archives, Reel C.037.30002.

449. *See, e.g.*, King v. Hoyle (Tryon County Ct. Jan. 1775), *in* TRYON MINUTES, *supra* note 428, at 149, 149.

450. *See, e.g.*, King v. Carter (Surry County Ct. Feb. 3, 1771), *in* SURRY MINUTES, *supra* note 382, at 1, 1; *see also* Account of Lawrence (Rowan County Ct. Apr. 1759), *in* 1 ROWAN MINUTES, *supra* note 382, at 103, 103 (reporting bond given by father to

women[451]), petit larceny,[452] profanity,[453] trespass,[454] killing a hog,[455] not appearing for jury duty,[456] passing counterfeit bills,[457] and selling liquor without a license,[458] as well as jurisdiction to commit accused prisoners

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indemnify parish); Bond of Edwards (Orange County Ct. June 1758), *in* ORANGE MINUTES, *supra* note 431, at 43, 43 (requiring father of illegitimate child to give bond). For an eastern case requiring a father to post bond to pay for a midwife and for support of an illegitimate child, see, for example, *Petition of Clary* (Edgecombe County Ct. Oct. 1765), *microformed on* North Carolina State Archives, Reel C.037.30002.

451. *See, e.g.*, King v. Gwin (Surry County Ct. Jan. 23, 1771), *in* SURRY MINUTES, *supra* note 382, at 1, 1; Bond of Holderfield (Wake County Ct. Sept. 1771), *microformed on* North Carolina State Archives, Reel C.099.30001; Motion of Dunn (Rowan County Ct. 1758), *in* 1 ROWAN MINUTES, *supra* note 382, at 88, 88 (ordering servant to serve extra year to compensate master for the birth of an illegitimate child); *cf.* Service of Deormond (Rowan County Ct. 1769), *in* 2 ROWAN MINUTES, *supra* note 382, at 90, 90 (ordering woman to serve extra year for the birth of an illegitimate white child and two extra years for the birth of an illegitimate mixed-race child).

452. *See, e.g.*, King v. Haslep (Tryon County Ct. Jan. 1771), *in* TRYON MINUTES, *supra* note 428, at 77, 77; King v. Rankin (Rowan County Ct. Apr. 19, 1768), *in* 2 ROWAN MINUTES, *supra* note 382, at 77, 77; *see also* King v. Barber (Edgecombe County Ct. Sept. 1762), *microformed on* North Carolina State Archives, Reel C.037.30002 (summarizing alibi evidence during preliminary examination of defendant committed to jail on charge of theft); *cf.* King v. Tawnley (Sup. Ct. Salisbury Mar. 1766), *microformed on* North Carolina State Archives, Reel C.207.30001 (theft); King v. Parker (Sup. Ct. Salisbury Mar. 1765), *microformed on* North Carolina State Archives, Reel C.207.30001 (deceit); King v. Bridges (Rowan County Ct. Jan. 11, 1765), *in* 2 ROWAN MINUTES, *supra* note 382, at 37, 37 (issuing warrants to arrest Bridges and others for horse theft).

453. *See, e.g.*, King v. Tevonhill (Tryon County Ct. 1769), *in* TRYON MINUTES, *supra* note 428, at 11, 11; King v. Sill (Rowan County Ct. Oct. 17, 1758), *in* 1 ROWAN MINUTES, *supra* note 382, at 95, 95; *cf.* King v. Richmond (New Hanover County Ct. Sept. 1767), *microformed on* North Carolina State Archives, Reel C.070.30001 (keeping disorderly house).

454. *See, e.g.*, King v. Felker (Rowan County Ct. Jan. 17, 1769), *in* 2 ROWAN MINUTES, *supra* note 382, at 89, 89; Merritt v. Cooper (Orange County Ct. May 1763), *in* ORANGE MINUTES, *supra* note 431, at 83, 83.

455. *See, e.g.*, King v. Enock (Rowan County Ct. Apr. 22, 1756), *in* 1 ROWAN MINUTES, *supra* note 382, at 56, 56; *cf.* King v. Holwell (Orange County Ct. Aug. 1764), *in* ORANGE MINUTES, *supra* note 431, at 108, 108 (stealing hog).

456. *See, e.g.*, King v. Capshaw (Tryon County Ct. July 1774), *in* TRYON MINUTES, *supra* note 428, at 130, 130; Fine of Potter (Wake County Ct. Mar. 1772), *microformed on* North Carolina State Archives, Reel C.099.30001.

457. *See* King v. Mebane (Orange County Ct. Aug. 1764), *in* ORANGE MINUTES, *supra* note 431, at 108, 108 (held for superior court); King v. Jones (Rowan County Ct. July 13, 1763), *in* 2 ROWAN MINUTES, *supra* note 382, at 9, 9. For a counterfeiting case in an eastern county holding a prisoner for the supreme court, see, for example, *King v. Weaver* (Edgecombe County Ct. Oct. 1763), *microformed on* North Carolina State Archives, Reel C.037.30002.

458. *See, e.g.*, King v. Alexander (Surry County Ct. Feb. 1773), *in* SURRY MINUTES, *supra* note 382, at 4, 4; King v. Robenson (Rowan County Ct. Mar. 20, 1754), *in* 1 ROWAN MINUTES, *supra* note 382, at 20, 20. Of course, the county courts also had jurisdiction over the granting of liquor licenses, which they would refuse to grant in a case, for example, of a tavern keeper who kept "bad rules & unlawful gaming in his house." Motion of Fanning

to the supreme court for trial.[459] Sitting without a jury, the county courts also adjudicated vagrancy cases, a woman was discharged on condition that she "immediately depart this county,"[460] and criminal charges, including major charges such as murder, against slaves, where they imposed whippings even when they found slaves not guilty.[461]

Lawyers typically appeared in these cases,[462] and there were occasional motions on unstated grounds to quash proceedings,[463] to set aside judgments and grant new trials,[464] and to allow appeals.[465] But neither the sophistication of the local bar nor that of the judges should be overestimated. Thus, writs were used quite imprecisely—one suit, for instance, was brought for "Case Debt."[466] And the courts appeared willing to tolerate a good deal of irregularity: in one suit, a verdict rendered by jurors who were not all freeholders and who had not all attended the trial was allowed to stand when a motion to set it aside was withdrawn,[467] while in another case there is no record whether the verdict of a jury that acted like a court of equity in granting rescission of a contract was allowed to stand after the defendant had moved in

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(Cumberland County Ct. Nov. 1762), *microformed on* North Carolina State Archives, Reel C.029.30001.

459. *See, e.g.*, King v. Thompson (Wake County Ct. Sept. 1772), *microformed on* North Carolina State Archives, Reel C.099.30001.

460. King v. Gordon (Orange County Ct. June 1758), *in* ORANGE MINUTES, *supra* note 431, at 43, 43–44.

461. *See* King v. Ned (Bute County Ct. Mar. 1768), *microformed on* North Carolina State Archives, Reel C015.30001

462. *See, e.g.*, License of Avery (Tryon County Ct. Apr. 1769), *in* TRYON MINUTES, *supra* note 428, at 1, 1 (appointing Avery attorney for the crown); License of Fanning (Rowan County Ct. Oct. 16, 1759), *in* 1 ROWAN MINUTES, *supra* note 382, at 107, 107 (authorizing Fanning to practice law); Motion of Ballard (Orange County Ct. 1757), *in* ORANGE MINUTES, *supra* note 431, at 31, 31 (denying motion by defendants' attorney); Creson v. Allin (Surry County Ct. May 12, 1775), *in* SURRY MINUTES, *supra* note 382, at 6, 6 (noting name of attorney).

463. *See, e.g.*, King v. Ridge (Rowan County Ct. Dec. 19, 1753), *in* 1 ROWAN MINUTES, *supra* note 382, at 14, 14; Rounsavil v. McGuire (Rowan County Ct. 1753), *in* 1 ROWAN MINUTES, *supra* note 382, at 8, 8; *see also* King v. Stewart (Rowan County Ct. Dec. 20, 1753), *in* 1 ROWAN MINUTES, *supra* note 382, at 16, 16 (dismissing theft prosecution, "it appearing that the proceedings were illegal").

464. *See, e.g.*, Coulter v. Buchanan (Tryon County Ct. Oct. 1774), *in* TRYON MINUTES, *supra* note 428, at 138, 138; Dunn v. Armstrong (Rowan County Ct. Apr. 21, 1761), *in* 1 ROWAN MINUTES, *supra* note 382, at 125, 125; *cf.* Aron v. Bailey (Rowan County Ct. Mar. 22, 1754), *in* 1 ROWAN MINUTES, *supra* note 382, at 22, 22 (granting new trial, "the verdict of this trial not being agreeable").

465. *See, e.g.*, Rounsavil v. Johnston (Rowan County Ct. July 12, 1754), *in* 1 ROWAN MINUTES, *supra* note 382, at 27, 27.

466. Polk v. Elder (Tryon County Ct. Jan. 1770), *in* TRYON MINUTES, *supra* note 428, at 20, 20.

467. *See* Howard v. Smith (Rowan County Ct. Apr. 25, 1761), *in* 1 ROWAN MINUTES, *supra* note 382, at 128, 128.

arrest.[468] On the other hand, there is one instance of attentiveness to law, where a jury returned a verdict "for the plaintiff if the law be for him," but "if the law be against the plaintiff," it found "the defendant not guilty."[469]

Whatever the level of legal sophistication, two facts are clear. First, the records leave no doubt that western county courts heard only minor cases—civil suits in which monetary recoveries were small and title to land was not at issue and criminal cases that did not involve a penalty of life or limb. Second, the county courts were hostile to outsiders, as evidenced by a court rule that "if any attorney" brought "suit ... in behalf of one out of the county such attorney shall be liable to pay the fees" in the event of "a nonsuit ... [,] verdict against the plaintiff," or default in prosecution.[470] Perhaps, they also displayed favoritism toward residents, as in the case of one "Baptist" who refused to give evidence "on pretense of tenderness of conscience."[471] In any event, the western county courts did not provide forums useful to nonresidents seeking to establish their title to land or to collect debts or to crown officials seeking any substantial legal relief.

B. The Early Riots

As a result, although local communities may have effectively governed themselves, the provincial government lacked the capacity to enforce its law meaningfully in the west. Trouble began as early as 1759, little more than a decade after significant settlement had occurred in the Piedmont,[472] and only five years after the establishment of the supreme courts. Several vigilantes from Granville County seized a land agent who had been taking fees that the vigilantes claimed were illegal.[473] After forcing him to post an alleged bond requiring a future appearance in court, the vigilantes dispersed, but, when several of them were

468. *See* Coulter v. Buchanan (Tryon County Ct. Jan. 1775), *in* TRYON MINUTES, *supra* note 428, at 148, 148.

469. Watkins v. Bridges (Tryon County Ct. Apr. 1770), *in* TRYON MINUTES, *supra* note 428, at 30, 30.

470. Order re Suits by Nonresidents (Rowan County Ct. July 15, 1755), *in* 1 ROWAN MINUTES, *supra* note 382, at 40, 40.

471. Refusal of Howard (Orange County Ct. Mar. 1759), *in* ORANGE MINUTES, *supra* note 431, at 49, 49. There is no record of whether Howard was excused or punished for refusing to testify. *Id.*

472. *See* LEFLER & NEWSOME, *supra* note 6, at 77–78; MERRENS, *supra* note 6, at 53–54.

473. *See* POWELL, *supra* note 347, at 150.

arrested and jailed, friends broke into the jail and released them.[474] No further prosecutions transpired.

The next riot occurred in 1765, when a group of squatters in disguise attacked and beat four surveyors who, on behalf of an absentee landowner, were mapping out the land on which the squatters had settled.[475] Governor William Tryon issued a proclamation calling for the identification and prosecution of the squatters, but nothing happened.[476] In the same year, a school teacher was sued for a small debt and responded by writing "An Address to the People of Granville County," in which he pilloried lawyers, court clerks, and sheriffs and accused them of taking unlawful fees that increased the charges of litigation.[477] His pamphlet led to a petition to the General Assembly, but that petition was ignored.[478] The next year, the January term of the Rowan County court for unstated reasons had to be postponed: all but two theft prosecutions[479] were continued to the April term.[480]

Enter the North Carolina Regulators.[481] In 1767 people in the Hillsborough vicinity had sought to create formal machinery by which protests could be conveyed to the provincial government, but officials had blocked their progress. Then, at the beginning of April 1768 they founded the Regulator Association "with the intention of 'regulating' their own affairs."[482] A few days later a Regulator refused to pay taxes, to which the sheriff responded by seizing his horse and preparing to sell it.[483] Fellow Regulators promptly tied up the sheriff, rescued the horse, and threatened a prominent local judge.[484] The judge called up the local militia, but when few responded to his call, he sought help from Governor Tryon.[485]

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474. *Id.*
475. *Id.*
476. *Id.*
477. *Id.*
478. *Id.* at 151.
479. *See* King v. McKinny (Rowan County Ct. Jan. 16, 1766), *in* 2 ROWAN MINUTES, *supra* note 382, at 51, 51; King v. Knottery (Rowan County Ct. Jan. 16, 1766), *in* 2 ROWAN MINUTES, *supra* note 382, at 51, 51.
480. *See* Order Postponing Causes on Reference, Trial and Appearance Docket (Rowan County Ct. Jan. 16, 1766), *in* 2 ROWAN MINUTES, *supra* note 382, at 51, 51.
481. *See generally* PAUL DAVID NELSON, WILLIAM TRYON AND THE COURSE OF EMPIRE: A LIFE IN BRITISH IMPERIAL SERVICE 70–89 (1990) (giving a history of Tryon's involvement with the North Carolina Regulators).
482. *Id.* at 71.
483. *Id.*
484. *Id.*
485. *Id.*

In July, Tryon marched into Hillsborough at the head of a militia force from three counties, but the Regulators made it plain they still intended not to pay taxes.[486] By September the Regulators had assembled a force of some 800 men to disrupt the forthcoming Hillsborough sitting of the supreme court, but Tryon had twice that number.[487] Ultimately the Regulators simply went home, and the court met.[488]

C. *Open Rebellion*

Agitation continued for the next two years, but without violence.[489] Then in September 1770, the Regulators burst into the Hillsborough supreme court session, seized and beat a lawyer, dragged the assistant attorney general and one of the judges into the street, and demolished the judge's house. Other leading citizens, including the presiding judge, fled town.[490]

The legislature responded by enacting a statute permitting the attorney general to obtain indictments against and prosecute rioters in any supreme court in the colony or in a specially convened court.[491] This legislation meant that, if Regulators could be captured, they could not count on protection from local juries or on being rescued by local friends.[492]

Next Tryon attempted to catch them.[493] In the spring of 1771, he gathered an army to bring the west to its knees, and on May 16, 1771, Tryon's force of 1,300 militiamen defeated 2,500 Regulators in the Battle of the Alamance. He pardoned all but a handful of leaders and spent the next two months chasing after the leaders and seizing their property.[494]

In the view of the leading scholar of the Regulator War, Tryon "restore[d] the western counties of North Carolina to a semblance of the king's peace."[495] But he did not restore the rule of law. According to extant colonial court records, the Salisbury supreme court never met

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486. *Id.* at 73.
487. *Id.* at 74–75.
488. *Id.* at 73–75.
489. *Id.* at 75–77.
490. *Id.* at 78.
491. An Act for preventing Tumultuous and riotous Assemblies, and for the more speedy and effectually punishing the Rioters, and for restoring and preserving the public peace of this Province (Dec. 5, 1770), *in* 25 STATE RECORDS, *supra* note 339, at 519a, 519a-d.
492. *Id.*
493. NELSON, *supra* note 481, at 81.
494. *Id.* at 81–85.
495. *Id.* at 85.

after 1770 and the Hillsborough court met only briefly in March and September of 1772.[496] Although county courts throughout the west continued to meet, they had, as we have seen, little law enforcement capacity. They were allowed to function only because they offered important services to local interests: they supervised the building and maintenance of infrastructure, such as roads[497] and mills,[498] and provided a mechanism through which local people could make a permanent record of important transactions, such as land sales,[499] slave sales,[500] contracts,[501] guardianships,[502] apprenticeships,[503] administrations

496. This statement is based on an examination of extant supreme court records.

497. *See, e.g.*, Motion of Forsyth (Tryon County Ct. July 1770), *in* TRYON MINUTES, *supra* note 428, at 40, 40; Order re Road (Rowan County Ct. Oct. 22, 1755), *in* 1 Rowan Minutes, *supra* note 382, at 45, 45; *cf.* Order to Work on Road (Orange County Ct. May 1763), *in* ORANGE MINUTES, *supra* note 431, at 81, 81. For an example of a ferry license in an eastern county, including the setting of rates, see *Prayer of Hussey* (Hyde County Ct. June 1765), *microformed on* North Carolina State Archives, Reel C.053.30001. Jurisdiction over the building of infrastructure included the power to condemn land by eminent domain. *See* Appointment of Holt (Orange County Ct. Aug. 1763), *in* ORANGE MINUTES, *supra* note 431, at 87, 87 (authorizing a committee "to lay out, value, and condemn one acre of land belonging to Henry Eustice McCullock" on one side of a river and "also another acre on the opposite side of the said river[,] the property of Robert Nugent, and that the said McCullock have liberty to erect a water grist mill").

498. *See* Motion of Gardner (Rowan County Ct. Apr. 20, 1758), *in* 1 ROWAN MINUTES, *supra* note 382, at 89, 89 (recording grist mill as public mill). For an example in an eastern county of an authorization of a grist mill, granted after the miller had made payment for land on the opposite bank, see *Petition of Hill* (Bute County Ct. Feb. 1768), *microformed on* North Carolina State Archives, Reel C.015.30001, and *supra* note 497.

499. *See, e.g.*, Deed from Cowan to Porter (Tryon County Ct. Apr. 1772), *in* TRYON MINUTES, *supra* note 428, at 91, 91; *see also* Mortgage of Hill (Rowan County Ct. Jan. 14, 1764), *in* 2 ROWAN MINUTES, *supra* note 382, at 21, 21; Examination of Boggan, (Orange County Ct. Mar. 1757), *in* ORANGE MINUTES, *supra* note 431, at 30, 30 (wife "examined about a deed"); Deed from Osburn and Wife to Graicy (Rowan County Ct. Mar. 20, 1754), *in* 1 ROWAN MINUTES, *supra* note 382, at 18, 18 (specifying separate examination of wife). For a deed recorded in an eastern county, see, for example, *Deed from Squire to Emory* (Hyde County Ct. June 1748), *microformed on* North Carolina State Archives, Reel C.053.30001 (Native American deed). For an authorization in an eastern county to examine a wife in connection with her consent to a deed, see, for example, *Order Appointing Boyd* (Chowan County Ct. Mar. 1775), *microformed on* North Carolina State Archives, Reel C.024.30008.

500. *See, e.g.*, Sale from Havener to Ramsour, (Tryon County Ct. Apr. 1769), *in* TRYON MINUTES, *supra* note 428, at 6, 6; Sale from Prestwood to Gray (Orange County Ct. Sept. 1755), *in* ORANGE MINUTES, *supra* note 431, at 18, 18; *cf.* Sale from Boone to Craige, (Rowan County Ct. Apr. 18, 1767), *in* 2 ROWAN MINUTES, *supra* note 382, at 67, 67 (sale of cow). For an example of a slave sale recorded in an eastern county, see *Sale from Nelson to Grainger* (New Hanover County Ct. July 1771), *microformed on* North Carolina State Archives, Reel C.070.30001. For an example of a case directing sale of slave and division of proceeds among claimants to estate, see *Order re Sale of Harry* (Chowan County Ct. Apr. 1758), *microformed on* North Carolina State Archives, Reel C.024.30001.

501. *See, e.g.*, Agreement between Shepperd and Allen (Surry County Ct. Oct. 2, 1772), *in* SURRY MINUTES, *supra* note 382, at 4, 4; *see also* Oath of Green (Rowan County

of estates,[504] and the like,[505] including records that individuals' ears had been bitten off in fights and not cut off pursuant to any court judgment.[506]

But the county courts proved unable to perform important governmental functions. In Tryon County in 1770, for example, the court postponed receiving a final report from the sheriff on the annual tax collection because over one-fifth of taxpayers had "absconded out of

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Ct. Mar. 30, 1765), *in* 2 ROWAN MINUTES, *supra* note 382, at 40, 40 (recording payment of note). For an example of a contract recorded in an eastern county, see *Agreement between Freeman and Everard* (Craven County Ct. June 1741), *microformed on* North Carolina State Archives, Reel C.028.30002.

502. *See, e.g.*, Motion of Dunn (Tryon County Ct. Jan. 1770), *in* TRYON MINUTES, *supra* note 428, at 24, 24; Petition of Deacon (Rowan County Ct. Apr. 27, 1755), *in* 1 ROWAN MINUTES, *supra* note 382, at 37, 37. For an appointment of a guardian in an eastern county, see, for example, *Prayer of Wright* (New Hanover County Ct. Jan. 1773), *microformed on* North Carolina State Archives, Reel C.070.30001.

503. *See, e.g.*, Apprenticeship of Baltrip (Rowan County Ct. May 10, 1770), *in* 2 ROWAN MINUTES, *supra* note 382, at 110, 110; Apprenticeship of Lane (Rowan County Ct, July 16, 1757), *in* ORANGE MINUTES, *supra* note 431, at 31, 31; *see also, e.g.*, Motion of Underhill re Service of Alexander (Rowan County Ct. 1755), *in* 1 ROWAN MINUTES, *supra* note 382, at 41, 41 (ordering discharge of apprentice because of master's ill usage); Motion of Neill (Rowan County Ct. Dec. 19, 1753), *in* 1 ROWAN MINUTES, *supra* note 382, at 15, 15 (ordering servant who ran away for thirteen months to serve two additional years). For a discharge of an apprentice for ill treatment an eastern county, see, for example, *Yarnohea v. Brown* (Edgecombe County Ct. Sept. 1758), *microformed on* North Carolina State Archives, Reel C.037.30002.

504. *See, e.g.*, Inventory of Estate of Brown (Rowan County Ct. Aug. 9, 1769), *in* 2 ROWAN MINUTES, *supra* note 382, at 96, 96; *see also* Appointment of Whitworth (Orange County Ct. Mar. 1753), *in* ORANGE MINUTES, *supra* note 431, at 4, 4 (appointing principal creditor as administrator); Probate of Nuncupative Will of Bishop (Rowan County Ct. Mar. 20, 1754), in 1 ROWAN MINUTES, *supra* note 382, at 19, 19. For an appointment of an administrator in an eastern county, see, for example, *Appointment of Howard* (Cumberland County Ct. Apr. 1757), *microformed on* North Carolina State Archives, Reel C.029.30001.

505. *See, e.g.*, Certification of Presbyterian Congregation of Catheys Settlement (Rowan County Ct. Aug. 14, 1770), *in* 2 ROWAN MINUTES, *supra* note 382, at 112, 112 (registering building as church); Certification of Winbaryer (Rowan County Ct. Nov. 14, 1769), *in* 2 ROWAN MINUTES, *supra* note 382, at 100, 100 (certifying that accusation that Michael Beam had intercourse with his daughter was false); Petition of Eller (Rowan County Ct, Jan. 20, 1758), *in*1 ROWAN MINUTES, *supra* note 382, at 85, 85 (petition to have record made of documents contained in pocket book lost by petitioner); Oath of Cline (Rowan County Ct. July 16, 1755), *in* 1 ROWAN MINUTES, *supra* note 382, at 42, 42 (naturalization); Oath of Cargdel (Orange County Ct. Mar. 1753), *in* ORANGE MINUTES, *supra* note 431, at 4, 4 (stating that one Davenport was "reputed a tattler and disturber where he lived in Virginia"). For an example of licensing of a religious institution in an eastern county, see *Petition of Thomas* (Edgecombe County Ct. Sept. 1759), *microformed on* North Carolina State Archives, Reel C.037.30002 (licensing Baptist meeting house).

506. *See, e.g.*, Certificate of Nickston (Rowan County Ct. Feb. 10, 1775), *in* 3 ROWAN MINUTES, *supra* note 382, at 4, 4; Application of Carrel (Tryon County Ct. Oct. 1770), *in* TRYON MINUTES, *supra* note 428, at 39, 39.

said County or [were] insolvent."[507] In Rowan in 1770, the sheriff reported he collected almost nothing "[o]wing to a Refractory disposition of a Sett of People calling them selves Regulators refusing to pay any Taxes"; their refusal, in turn, produced a race to the bottom in which "many well disposed people neglect[ed] to discharge their public dues."[508] In 1769, the sheriff had reported for the tax year 1765 that, out of some 2800 taxpayers, 292 were "listed twice" or had run away, while another 838 were "insolvents, or insurgents, mob, or such who refuse to pay their taxes," while for the tax year 1766, there were 1833 "delinquents ... Insolvents, or Insurgents, Mob, or Such who Refuse to pay there Taxes ...."[509] Indeed, conditions were so bad in Rowan County by 1769 that the man chosen as sheriff could not obtain a performance bond, not because "his Friends ... Doubted ... his Integrity or honesty," but because of the "Confused State & Present Disturbances Together with the Scarcity of Circulating Money."[510] Two years later, Regulators were still refusing to take the oath of allegiance in support of the colony's government.[511]

D. The Failure of Law and Government in the West

In sum, Tryon's victory at Alamance established no more than the fact that an army with superior weapons, at least in a pitched battle, could capture and kill some of its enemies. But when the bulk of the enemies simply disappeared into the countryside, the army could not govern them. At most, it could wreak havoc on the countryside.

Elites needed law to rule Britain's North American colonies, and in North Carolina, the rule of law broke down. Coercive power alone does not suffice to enforce the law. What the North Carolina experience demonstrates is that there are at least two preconditions beyond the coercive power of government to the effective functioning of law.

First, there is a need for legal infrastructure—obviously courthouses and jails, but also trained, educated, and hardworking lawyers and judges, readily accessible books in which professionals can

507. Report of Tagert (Tryon County Ct. Oct. 1770), *in* TRYON MINUTES, *supra* note 428, at 49, 49.

508. Report of Allison (Rowan County Ct. Aug. 18, 1770), *in* 2 ROWAN MINUTES, *supra* note 382, at 114, 114.

509. Report of Lock (Rowan County Ct. Nov, 15, 1769), *in* 2 ROWAN MINUTES, *supra* note 382, at 101, 101.

510. Report of Allison (Rowan County Ct. Aug. 12, 1769), *in* 2 ROWAN MINUTES, *supra* note 382, at 99, 99.

511. *See* Refusal of Wood (Rowan County Ct. Aug. 10, 1771), *in* 2 ROWAN MINUTES, *supra* note 382, at 126, 126.

find the law[512] and record their proceedings, and means to communicate their doings to the public at large. When that infrastructure exists, as it did in the early eighteenth century on the banks of the Albemarle and as it would again in the third quarter of the century in the regions along the Carolina coast, it becomes possible for a government to rule by law. When it is missing, as it was in western North Carolina prior to the American Revolution, where one county clerk prior to 1763 merely kept documents but did not record them,[513] and another clerk was ordered in 1774 to move the court's records to his own residence, apparently because they were not safe where they were being stored,[514] it becomes difficult for a legal system to function effectively.

Second, the governed and their governors need to feel a sense of connection with and mutual loyalty toward each other. Connection and loyalty—that is, a sense of community—can arise or be nurtured in many ways: through sharing a common heritage,[515] through engaging together in a common enterprise,[516] or through patronage and economic ties.[517] When political leaders act in an overtly partisan fashion either by punishing enemies or by favoring friends, they can destroy that faith.

The formal legal system failed in western North Carolina because the people of that region had little connection with or loyalty to the colony's government in the east.[518] North Carolinians never participated together in a common enterprise: if any sense of community existed in the small, early eighteenth-century colony along the banks of the Albemarle, that sense probably was destroyed when Governors Everard and Burrington politicized the law during the 1720s and 1730s. By using the courts to favor friends and punish enemies, Everard and Burrington shattered the rule of law, deprived litigants of unbiased,

512. The court in Rowan County purchased English law books as early as 1753. *See* Order to Purchase Books (Rowan County Ct. Dec. 19, 1753), *in* 1 ROWAN MINUTES, *supra* note 382, at 14, 14 (ordering purchase of "Nelson's Justices, Cary's Abridgment of the Statutes, Godolphin's Orphans Legacy, and Jacob's Law Dictionary").

513. *See* Order to Nash (Orange County Ct. Aug. 1763), *in* ORANGE MINUTES, *supra* note 431, at 87, 87 ("Ordered that Francis Nash collect all the documents and writings belonging to the clerks since the commencement of this county, and record them in books bought for that purpose.").

514. *See* Order to Osborn to Remove Records (Rowan County Ct. Aug. 3, 1774), *in* 2 ROWAN MINUTES, *supra* note 382, at 157, 157.

515. *See* NELSON, *supra* note 5, at 49–65 (discussing the role of Puritanism in the development of the Massachusetts Bay colony).

516. *See generally* Nelson, *supra* note 168, at 3 (discussing the development of the Pennsylvania colony).

517. *See generally* WARREN R. HOFSTRA, THE PLANTING OF NEW VIRGINIA: SETTLEMENT AND LANDSCAPE IN THE SHENANDOAH VALLEY (2004) (discussing the settlement of the Shenandoah Valley through economic models).

518. *See supra* Part III.

consistent, and impartial adjudication, and thereby undermined any sense of community. Conflict in the 1740s over moving the colony's capital from Edenton to New Bern served only to continue the factionalism of earlier decades, just at the time the west was beginning to be settled. Despite the efforts of some fair-minded men to restore faith in the rule of law, the legal system never fully recovered.

The lack of a common heritage among the people of the colony also impeded the development of any sense of connection and loyalty. Indeed, North Carolina had some of the sharpest ethnic and religious cleavages anywhere in British North America.[519] Although a few immigrants from Scotland and the continent settled in the eastern counties, that part of the colony was settled mainly by people from tidewater Virginia and England.[520] Over time, the east, as well as North Carolina's governing elite, retained a largely English ancestry and an established Anglican church,[521] which was reflected in an ethic of deference to leaders atop a hierarchical authority structure. The western counties, in contrast, were settled by three different groups, all moving south from Pennsylvania—Quakers, Scotch Highlanders and Scotch-Irish Presbyterians, and Germans, some Lutheran and some pietistic.[522] Not only were the settlers of the west different from those of the east in religion and often ethnicity, they also lived under a different social structure—essentially communitarian instead of hierarchical. Habits of deference to those atop a hierarchy were thus less prevalent.

Nor did substantial economic and patronage ties exist between the two sections. The absence of ties went back to the crown's purchase of Carolina in 1729 from its proprietors.[523] One of those proprietors, Lord Granville, refused to sell his share of the property to the king, with the result that he was left with title to vast tracts of land in northwestern North Carolina.[524] The Quakers, Presbyterians, and Germans who subsequently moved down from Pennsylvania acquired their land titles mainly from Granville,[525] not from the North Carolina colonial

519. *See* READY, *supra* note 165, at 59–64.

520. *See* MERRENS, *supra* note 6, at 21–23; POWELL, *supra* note 347, at 56, 69–72.

521. *See* POWELL, *supra* note 347, at 73–74, 78, 80, 122–24.

522. *See* MERRENS, *supra* note 6, at 53–68; *see generally* ROBERT W. RAMSEY, CAROLINA CRADLE: SETTLEMENT OF THE NORTHWEST CAROLINA FRONTIER, 1747–1762 (1964) (discussing the ethnic backgrounds of settlers of western North Carolina).

523. *See supra* note 223 and accompanying text.

524. *See* POWELL, *supra* note 347, at 84–86, 93–94.

525. *See, e.g.*, List of ten grants from Granville (Rowan County Ct. Oct. 18, 1758), *in* 1 ROWAN MINUTES, *supra* note 382, at 96, 96. Grants from Granville are recorded on sixty of the 158 pages of the first volume of the Rowan County court minutes. *See* 1 ROWAN MINUTES, *supra* note 382, at 166 (indexing references to Granville).

government. That government accordingly had no stake in defending the western settler's titles, and the settlers had no reason for loyalty to the government, either out of obligation for land received from and subject to defense by the colonial administration or out of hope that loyalty might be rewarded with further grants in the future.

In effect, western North Carolina already constituted an entity independent of the British Empire when the American Revolution broke out in 1775–1776. Little, if any, sense of connection with or loyalty to the royal government existed among the people of the region, nor were significant economic or patronage ties in place. The writ of the supreme courts no longer ran in the western counties, and county courts, perhaps along with other informal, communal legal institutions, functioned at local sufferance only to the extent they provided services that local people needed and wanted. While the crown could dispatch an army to the west, that army could not govern once it arrived; it could only maraud.

CONCLUSION

Thus, the British governor of North Carolina already faced in 1770 what the British would soon face everywhere in America (and what foreign imperial powers have always faced throughout history)—the inability to govern through pure coercion. Arms and armies are mechanisms only of destruction; government of an Anglo-American sort requires the rule of law and lawyers to administer it. And when the rule of law and the sense of community on which law is dependent collapses, a new community with new law and new loyalties must be created, as it was throughout America in the aftermath of independence.