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THE HEIGHT OF SOPHISTICATION: LAW AND PROFESSIONALISM IN THE CITY-STATE OF CHARLESTON, SOUTH CAROLINA, 1670–1775

WILLIAM E. NELSON*

In March 1663, Charles II granted a charter making a group of eight highly placed confidants proprietors of a new colony encompassing what is now most of North Carolina, South Carolina, and Georgia.[1] Virginians had already begun settling the northeast corner of the new colony along the Albemarle Sound, and the proprietors immediately directed one of their number, Sir William Berkeley, who was also governor of Virginia, to establish a government for them.[2] Over the remainder of the 1660s, however, two efforts to establish settlements further

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1. M. EUGENE SIRMANS, COLONIAL SOUTH CAROLINA: A POLITICAL HISTORY, 1663–1763, at 5 (1966) (citing 3 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 187–92 (1937); NORTH CAROLINA CHARTERS AND CONSTITUTIONS, 1578–1698, at 74–104 (Mattie Erma Edwards Parker ed., 1963) [hereinafter CHARTERS AND CONSTITUTIONS]); *see also* ROBERT M. WEIR, COLONIAL SOUTH CAROLINA: A HISTORY 49 (1983) (offering a more recent, often duplicative, and less detailed history of South Carolina, focusing on economic, social, and occasionally legal issues).

2. SIRMANS, *supra* note 1, at 6; *see also* WEIR, *supra* note 1, at 48–49 (recounting the establishment of a government in South Carolina).

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to the south, one by New Englanders and one by colonists from Barbados, failed.[3]

Following the two failures, Sir Anthony Ashley Cooper, who as Earl of Shaftesbury subsequently became Charles II's Lord High Chancellor, assumed management of the proprietorship.[4] With assistance from his personal secretary, John Locke, Lord Ashley made plans for the settlement and government of South Carolina.[5] In devising his plans, Ashley made intelligent use of earlier English experience in settling Atlantic colonies.[6] Although most of his planning went awry, key elements contributed to the early economic success of his South Carolina settlement, and that economic success, in turn, quickly produced one of the most sophisticated legal orders in mainland North America.

In Part I, this Article will discuss Ashley's plans, especially those elements that brought early economic success to his colony. Part II will then turn to the creation of the colony's legal system in the late seventeenth and early eighteenth centuries, while Part III will examine its mid-eighteenth century maturation. Part III will show that the South Carolina legal system, unlike those of Pennsylvania and Virginia, for example, did not attempt to govern large expanses of territory or provide administrative mechanisms ultimately adaptable to governance of a continent; rather, it established law for a tiny city-state centered around Charleston that was closely linked to the Atlantic and especially England. Finally, Part IV will analyze how the pre-Revolutionary crisis of the 1760s and early 1770s transformed South Carolina's law into something more akin to that of the other original thirteen colonies.

I. THE SUCCESS AND FAILURE OF ASHLEY'S PLANS

A. The Fundamental Constitutions

As the expedition that ultimately founded Charleston in 1670 was preparing to set sail from London in the spring and summer of 1669, Ashley and Locke were drafting an instrument for South Carolina's permanent governance.[7] That instrument, the Fundamental Constitutions, sought to balance the power of an aristocracy that would own forty percent of the colony's land against the power of the freemen—common people who owned at least fifty acres of land.[8] The

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3. *See* SIRMANS, *supra* note 1, at 6 (citing LOUISE FARGO BROWN, THE FIRST EARL OF SHAFTESBURY 152–155 (1933); Wesley Frank Craven, *The Southern Colonies in the Seventeenth Century, 1607–1689*, *in* 1 A HISTORY OF THE SOUTH 1, 329–34 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1949); EDWARD MCCRADY, THE HISTORY OF SOUTH CAROLINA UNDER THE PROPRIETARY GOVERNMENT 1670–1719, at 93 (Russell & Russell 1969) (1897)); WEIR, *supra* note 1, at 51.

4. *See* SIRMANS, *supra* note 1, at 6–7 (citing BROWN, *supra* note 3, at 128–34, 150–51).

5. *Id.* at 7.

6. *See id.* at 7.

7. *Id.*

8. SIRMANS, *supra* note 1, at 13; *see* WEIR, *supra* note 1, at 55–56.

colony's aristocrats and elected representatives of the freemen would meet together in a unicameral parliament in which designated agents of the eight proprietors would hold the balance of power between the two groups.[9] Aristocrats also would preside over the colony's judiciary, while adherence to the right of trial by jury would preserve the power of the people.[10]

The Fundamental Constitutions introduced a number of other interesting innovations into South Carolina's law, though most of them, like Ashley's specific plans for a unicameral legislature, which was replaced by a bicameral one in 1691,[11] did not long endure. One innovation sought "[t]o avoid multiplicity of laws, which by degrees always change the Right foundations of the Original Government," by providing that all legislation would automatically expire sixty years after its enactment and "become Null and void."[12] A second innovation prohibited "all manner of comments and expositions" on the Fundamental Constitutions or any common or statutory laws of the colony because such "Comments . . . Serve[d] only to obscure and perplex."[13] A third innovation declared that no one could receive any fee or compensation for rendering legal services.[14] Significant portions of a series of sections did, however, become a permanent part of South Carolina's law[15]: while insisting that all subjects "acknowledge a God, and that God is publicly and Solemnly to be worshipped,"[16] these sections of the Fundamental Constitutions promised that all dissenters, even slaves, would be tolerated and in no way disturbed in their worship.[17] Indeed, the sections reflected a more general policy by the proprietors of encouraging Huguenots and various English dissenters to migrate to their colony.[18]

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9. *See* SIRMANS, *supra* note 1, at 13.

10. *See id.* at 12–13 (citing Letter from Lord Ashley to Maurice Matthews (June 20, 1672), *in* THE SHAFTESBURY PAPERS 398, 399 (Tempus Publishing 2000) (1897)).

11. *See id.* at 51.

12. THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA of 1669, § 72, *reprinted in* CHARTERS AND CONSTITUTIONS, *supra* note 1, at 132, 147.

13. *Id.* § 73, *reprinted in* CHARTERS AND CONSTITUTIONS, *supra* note 1, at 147.

14. *Id.* § 64, *reprinted in* CHARTERS AND CONSTITUTIONS, *supra* note 1, at 145.

15. *Id.* §§ 86–101, *reprinted in* CHARTERS AND CONSTITUTIONS, *supra* note 1, at 148–50.

16. *Id.* § 86, *reprinted in* CHARTERS AND CONSTITUTIONS, *supra* note 1, at 148.

17. *Id.* §§ 93–98, *reprinted in* CHARTERS AND CONSTITUTIONS, *supra* note 1, at 150.

18. *See* Ordination of Clark (July 8, 1683), *in* 1 PROPRIETARY RECORDS OF SOUTH CAROLINA: ABSTRACTS OF THE RECORDS OF THE SECRETARY OF THE PROVINCE, 1675–1695, at 134, 134 (Susan Baldwin Bates & Harriott Cheves Leland eds., 2005) [hereinafter 1 PROPRIETARY RECORDS] (recognizing and recording the ordination of a dissenting clergyman). The government also facilitated worship by dissenters by enforcing trusts that held property for the use of dissenting congregations. *See* Gaillard v. Dunnerville, (S.C. Ch. 1717/18), *in* RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA 1671–1779, at 240, 240 (Anne King Gregorie ed., 1950) [hereinafter RECORDS].

B. The Proprietors' Economic Vision

The Fundamental Constitutions' invitation to dissenters to settle in Carolina was consistent with what appears to be a larger vision of what the proprietors wanted the colony to become. There is no evidence that Ashley and his coproprietors sought to establish a religious utopia either of an Anglican or Puritan sort.[19] Nor did they wish to create a plantation society on the model of Virginia, which had driven the Virginia Company into bankruptcy.[20] On the contrary, their main goal was their own profit.[21] And, the New England colonies, once their Puritanism was disregarded, provided a model for achieving that goal. In New England, families had established farms that produced a surplus of foodstuffs that could be traded to West Indian planters to feed their slaves.[22] South Carolina offered better land for that purpose than eastern New England did, and thus, the proprietors invited families to migrate to the colony and build farms.[23] Two years after its initial settlement, the colony had a population over 400, including some seventy women and sixty children.[24] Charleston meanwhile was establishing itself as a mercantile entrepôt to export South Carolina's surplus.[25]

For a few years, South Carolina had difficulty producing enough food for its own population, and it took a while before the colony produced surpluses for export.[26] But in 1674, only four years after Charleston's settlement, South Carolina had a good harvest, and a treaty with the Westo Indians led to the development of two exports, human flesh and deerskins, which Charleston merchants could sell abroad at large profits.[27] The colony also developed its

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19. *See* JOHN PHILLIP REID, A BETTER KIND OF HATCHET: LAW, TRADE, AND DIPLOMACY IN THE CHEROKEE NATION DURING THE EARLY YEARS OF EUROPEAN CONTACT 34 (1976).

20. *See* RICHARD MIDDLETON, COLONIAL AMERICA: A HISTORY, 1565–1776, at 60 (Blackwell Publishers 3d ed. 2002) (1992).

21. *See* REID, *supra* note 19, at 34; SIRMANS, *supra* note 1, at 6.

22. *See* MIDDLETON, *supra* note 20, at 214.

23. *See* SIRMANS, *supra* note 1, at 22.

24. *Id.* (citing Letter from Joseph Dalton to Lord Ashley, *in* THE SHAFTESBURY PAPERS, *supra* note 10, at 381–82; Letter from Joseph West to Lord Ashley (Mar. 2, 1671), *in* THE SHAFTESBURY PAPERS, *supra* note 10, at 266, 266–67; Locke's Memoranda from 1671, *in* THE SHAFTESBURY PAPERS, *supra* note 10, at 344, 352).

25. *See* REID, *supra* note 19, at 34. For an excellent article on South Carolina's commercial development and Charleston's central role in the colony's commerce, see R.C. Nash, *The Organization of Trade and Finance in the Atlantic Economy: Britain and South Carolina, 1670–1775*, *in* MONEY, TRADE, AND POWER: THE EVOLUTION OF COLONIAL SOUTH CAROLINA'S PLANTATION SOCIETY 74 (Jack P. Greene et al. eds., 2001) [hereinafter MONEY, TRADE, AND POWER].

26. *See* SIRMANS, *supra* note 1, at 21, 23.

27. *See id.* at 23 (citing Meeting re Westoes, 1 J. Grand Council S.C. 53 (Grand Council 1673), *reprinted in* JOURNAL OF THE GRAND COUNCIL OF SOUTH CAROLINA, AUGUST 25, 1671–JUNE 24, 1680, at 64, 64 (A.S. Salley, Jr. ed., 1907) [hereinafter 1 JOURNAL]; Meeting re Westoe Treaty, 1 J. Grand Council S.C. 35 (Grand Council 1672), *reprinted in* 1 JOURNAL, *supra*, at 38, 38; VERNER W. CRANE, THE SOUTHERN FRONTIER 1670–1732, at 16–17 (1928)).

export trade in foodstuffs, especially cattle, and naval stores.[28] Then, in the early eighteenth century, South Carolina developed the staple crops, first rice and later indigo,[29] that provided the long-term basis for its prosperity.[30] By the mid-eighteenth century, it was the richest colony in mainland America; nine of the ten richest men in America whose wills were probated in 1774 lived in Charleston or its immediate environs.[31]

C. The Slave Trade and Other Trade

The Westoes were a large tribe at war with numerous smaller tribes allied with Spain, and they often captured their enemies.[32] Charleston merchants willingly bought the Westoes' captives in exchange for cloth, rum, and especially guns, which would facilitate the capture of even more enemies.[33] The merchants also negotiated trade alliances with other tribes, resulting in the acquisition of even more captives.[34] Although South Carolinians enslaved some of those captives—slavery had been recognized as early as the Fundamental Constitutions as an institution giving masters "absolute Authority over . . . Slaves"[35]—most Indian captives were not kept in the colony if for no other reason than the ease with which they might escape.[36] Instead, most captives were sold into slavery overseas, mainly on West Indian sugar plantations.[37] Trade in Native American captives quickly "reach[ed] commercial proportions,"[38] becoming the "the first profitable branc[h] of the southern Indian trade."[39]

The other profitable branch, which took slightly longer to develop, was trade in deerskins. At first, Charleston merchants sought to buy beaver pelts from the local natives, but southern pelts were not as thick as and could not compete with

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28. SIRMANS, *supra* note 1, at 23; WEIR, *supra* note 1, at 143.

29. *See* S. MAX EDELSON, PLANTATION ENTERPRISE IN COLONIAL SOUTH CAROLINA 52 (2006).

30. *See generally id.* at 53–125 (discussing South Carolina's prosperity due to rice and indigo).

31. WEIR, *supra* note 1, at 213–14.

32. *See* SIRMANS, *supra* note 1, at 22.

33. *See* EDELSON, *supra* note 29, at 31; SIRMANS, *supra* note 1, at 22.

34. *See* EDELSON, *supra* note 29, at 31; SIRMANS, *supra* note 1, at 23 (citing Meeting re Westoes, 1 J. Grand Council S.C. 53 (Grand Council 1673), *reprinted in* 1 JOURNAL, *supra* note 27, at 64, 64; Meeting re Westoe Treaty, 1 J. Grand Council S.C. 35 (Grand Council 1672), *reprinted in* 1 JOURNAL, *supra* note 27, at 38, 38; CRANE, *supra* note 27, at 16–17).

35. THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA OF 1669, *supra* note 12, § 101, at 150.

36. *See* WEIR, *supra* note 1, at 26–27.

37. *See id.*

38. CRANE, *supra* note 27, at 109.

39. REID, *supra* note 19, at 27 (citing 1 ALEXANDER HEWATT, AN HISTORICAL ACCOUNT OF THE RISE AND PROGRESS OF THE COLONIES OF SOUTH CAROLINA AND GEORGIA 78 (The Reprint Co. 1971) (1779); Leonard Bloom, *The Acculturation of the Eastern Cherokee: Historical Aspects*, 19 N.C. HIST. REV. 323, 334 (1942)).

pelts from more northern climates.[40] However, vast herds of deer populated what is now the southeastern United States, and by the end of the seventeenth century, Charleston was exporting an average of almost 50,000 deerskins annually.[41] In the early decades of its settlement, South Carolina "'owed . . . its Subsistance to the Indian Trade,'" which was "'the main Branch of its Traffick'"[42] and the "first big business in the south."[43]

The importance of trade and commerce in the growth of South Carolina cannot be overemphasized. Unlike the Chesapeake and New England, South Carolina did not develop in its early years as an agricultural society. Although Lord Ashley and his fellow proprietors had assumed that agriculture would be the foundation of its economy, the purpose of the farms they had envisioned was to produce surplus foodstuffs that could be traded to the West Indies. By 1700, their vision had, at least to some extent, materialized. But two other sources of trade that they had not anticipated, the sale of Native American captives as slaves in the West Indies and the export of deerskins to England, had made Charleston and the immediately surrounding region a profitable commercial entrepôt. Unlike any other locale on the North American continent, Charleston was tied more closely to other ports in Europe and the West Indies than to the Native American hinterlands on which its merchants' profits mainly depended.

Even when, after 1700, South Carolina developed a plantation economy based on rice and indigo, its social economy persisted in a unique form. As Max Edelson has shown in his outstanding recent book, *Plantation Enterprise in Colonial South Carolina*,[44] South Carolina's rice and indigo plantations were unlike the family farms of New England and the Middle Colonies or the tobacco plantations of the Chesapeake.[45] They were not homes to leading colonial families or even to leading families of localities.[46] Instead, they were factories of sorts, populated almost entirely by black slaves and a handful of white overseer-managers, and engaged in highly specialized production of goods for the Atlantic market.[47] Often, the plantations were parts of tightly integrated commercial enterprises, which were owned and controlled by entrepreneurs who lived in Charleston, its immediate suburbs, or, at times, even London, and who drew

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40. *See* CRANE, *supra* note 27, at 109.

41. *See* REID, *supra* note 19, at 14, 34 (citing JOHN PITTS CORRY, INDIAN AFFAIRS IN GEORGIA, 1732–1756, at 27 (1936); CRANE, *supra* note 27, at 109; William Shedrick Willis, Colonial Conflict and the Cherokee Indians, 1710–1760, at 27–28, 76 (1955) (unpublished Ph.D. dissertation, Columbia University), *microformed on* Reel P900329 (S.C. Dep't of Archives & History)).

42. *Id.* at 34 (quoting CRANE, *supra* note 27, at 110).

43. *Id.*

44. EDELSON, *supra* note 29.

45. *See, e.g.*, *id.* at 113–14 (citing PHILIP J. GREVEN, JR., FOUR GENERATIONS: POPULATION, LAND, AND FAMILY IN COLONIAL ANDOVER, MASSACHUSETTS 223–24 (1970)) (noting the difference in size between South Carolina's plantations and northern farms).

46. *See id.* at 128–29.

47. *See, e.g.*, *id.* at 210–11 (describing a plantation owned by South Carolina planter Henry Laurens).

profit from mercantile as well as agricultural enterprise.[48] It was these entrepreneurs, not men who typically resided on plantations, who played central roles in South Carolina's government, legal system, and politics, which were centered entirely within what was, in effect, a small city-state consisting of Charleston and its environs.

II. CREATING LAW

Law emerged rapidly in response to three needs on the part of Charleston's entrepreneurs. First, they needed law to regulate and police trading with the Indians. Second, South Carolinians required rules and institutions to resolve disputes among themselves. Third, law had important functions to play in managing trade between Charleston and other Atlantic ports.

English law could serve South Carolinians' latter two needs, and, as we shall see, the colony quickly developed a sophisticated legal system that mimicked common law and other English practices. But English law provided no model for regulating the Indian trade, and thus, South Carolina had to develop its own indigenous devices, which bore greater resemblance to modern American administrative law than to anything existing in seventeenth century England.[49]

A. Law for the Indian Trade

Regulating trade with Native Americans involved simultaneously the resolution of disputes, the planning of South Carolina's economic development, and the elaboration of British imperial and diplomatic policy toward, what in 1670 still remained England's principal international rival, Spain. Selling guns to friendly Indians, who would then raid Spain's Indian allies, and buying prisoners who had been captured in a raid would enrich Charleston's merchants and promote South Carolina's economic development; contemporaries fully appreciated that the Indian trade was of "considerable Advantage to this Province, and the want of [it] would be a very great loss to us."[50] But trade with Native Americans could also lead to war with the captives' relatives, if not with Spain itself. Accordingly, the trade had to be controlled.

As early as 1670, and again in 1680, the proprietors had established a commission, over which the governor of South Carolina presided, to address

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48. *See, e.g., id.* at 201–02 (describing Henry Laurens's management of several South Carolina plantations while maintaining a Charleston home as his primary residence).

49. *See* REID, *supra* note 19, at 33.

50. *See* Nicholas Trott, A General Charge to the Grand Juries, for the Province of South Carolina 123, 147 (manuscript in possession of South Caroliniana Library), *in* L. Lynn Hogue, An Edition of "Eight Charges Delivered, at So Many Several General Sessions, & Gaol Deliveries: Held at Charles Town. . . . in the Years 1703. 1704. 1705. 1706. 1707. . . . by Nicholas Trott Esq; Chief Justice of the Province of South Carolina" 190, 206 (June 1972) (unpublished Ph.D dissertation, The University of Tennessee) [hereinafter Hogue].

disputes "'between Christians and Indians.'"[51] Then, in 1677, the proprietors established a monopoly under their control of all trade with the Westoes and the colony's other major trading partner, the Kasihtas.[52] But the monopoly broke down three years later when a war destroyed the Westo tribe, and Charleston merchants opened trade with two other large tribes: the Savannahs and the Yamasees.[53] In 1682, the special commission for hearing disputes was also abolished.[54] For nearly a decade, the government did not regulate trade; however, merchants apparently still needed to obtain permits to transport Indian slaves out of Charleston.[55] It was only in 1690 that the then-governor forbade all commerce with Indians except under his personal direction, but two leading Carolinians promptly disobeyed this order by publicly dispatching a trading party to the Indian country.[56]

A new governor then persuaded the colonial legislature to enact a statute prohibiting trade with all Indians except small coastal tribes, but in 1691, the replacement of the governor set that law aside.[57] Unregulated trade resumed, and fighting broke out between the traders and the Indians.[58] The traders were then ordered to remain in Charleston, and the leaders of tribes under British protection came to the city for a conference, which produced a few years of peace.[59]

Prohibiting the Indian trade or placing it under a proprietary monopoly simply could not work; the trade was too important to Charleston's entrepreneurs, and no proprietary official on the ground had effective power to interfere with the entrepreneurs earning their profits.[60] At the same time, unregulated trade could not continue; it produced disputes that ultimately could escalate into violence and even war, and it impeded British efforts to recruit Indian allies in the ongoing series of wars with France that began in 1689.

Policy took a new and constitutionally ingenious turn in 1707, when the South Carolina legislature enacted a statute creating a commission responsible

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51. REID, *supra* note 19, at 33 (quoting WILLIAM ROY SMITH, SOUTH CAROLINA AS A ROYAL PROVINCE 1719–1776, at 213–14 (1903)).

52. SIRMANS, *supra* note 1, at 33 (citing CRANE, *supra* note 27, at 19).

53. *Id.* at 33–34 (citing CRANE, *supra* note 27, at 19–21).

54. REID, *supra* note 19, at 33 (quoting CRANE, *supra* note 27, at 138).

55. *See* Permit of Capt. John Holland (Oct. 1, 1681), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 47, 47.

56. SIRMANS, *supra* note 1, at 47–48 (citing Letter from Lord Proprietors to Andrew Percivall (Oct. 18, 1690), *in* WILLIAM J. RIVERS, A SKETCH OF THE HISTORY OF SOUTH CAROLINA 412–413 (The Reprint Co. 1972) (1856); *Letters from John Stewart to Wm. Dunlop*, 32 S.C. HIST. & GENEALOGICAL MAG. 1, 11 (1931); *Letters from John Stewart to Wm. Dunlop*, 32 S.C. HIST. & GENEALOGICAL MAG. 81, 105, 107–108 (1931)).

57. *See* SIRMANS, *supra* note 1, at 50.

58. *Id.* at 53 (citing Order re Indian Tribe, 2 J. Grand Council S.C. 23 (Grand Council 1692), *reprinted in* 2 JOURNAL OF THE GRAND COUNCIL OF SOUTH CAROLINA, APRIL 11, 1692–SEPTEMBER 26, 1692, at 31, 31 (A.S. Salley, Jr. ed., 1907) [hereinafter 2 JOURNAL]).

59. *See id.* at 53–54.

60. *See* REID, *supra* note 19, at 34.

only to the popularly elected lower house.[61] The legislature charged the commission with enforcing statutory rules against selling rum to Indians or enslaving Native Americans who had not been captured in war.[62] The legislature also empowered the commission to issue additional regulations that it deemed necessary.[63]

The commission's enforcement powers were even more important. It was granted authority to issue licenses to anyone seeking to engage in the Indian trade as well as to deny licenses, following a hearing, to anyone whom it found unfit.[64] Finally, the legislature directed the commission to appoint an agent who would reside among the Native American tribes for at least ten months in every year, where he would possess the jurisdiction of a justice of the peace, resolve disputes among traders or between traders and Indians when the amount in controversy was under £30, and arrest white offenders and remit them to Charleston for trial at common law.[65] The commission also had jurisdiction over appeals from the agent's judgments.[66]

Enforcement of the 1707 act failed, however, when the agent prosecuted the governor's son-in-law for enslaving friendly Indians and stealing 1,000 deerskins, and the governor, in turn, arrested the agent on a "trumped-up charge of treason."[67] It was only in 1711, after the agent had been vindicated by authorities in London and the governor had been removed from office, that the act became effective.[68]

Then, a new problem arose. Carolinians were not the only British subjects who traded with the southern Indians. Virginians did as well, and when South Carolina's governor sought to tax deerskins exported from Carolina by the Virginians, they objected.[69] The Privy Council ruled in their favor, determining that the Indian trade was "Free and Open"[70] to all British subjects and that South Carolina could neither tax nor regulate any but its own residents.[71] Although a Tuscarora war in North Carolina temporarily limited Virginian competition and thus kept South Carolina's regulatory system in place,[72] the system was nonetheless ineffective. South Carolina's Indian agent could not even persuade officials in Charleston to prosecute a trader who had fomented an attack on a Native American village in which nearly all its inhabitants had died.[73] By 1714,

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61. *Id.* at 35.
62. *Id.* at 36.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 39.
68. *See id.* (citing SIRMANS, *supra* note 1, at 93–95).
69. *Id.* at 40 (citing CRANE, *supra* note 27, at 155).
70. *Id.* at 40 (quoting CRANE, *supra* note 27, at 156).
71. *Id.*
72. *Id.* at 41 (citing CRANE, *supra* note 27, at 157).
73. *See id.* at 42–44.

few traders even bothered to procure licenses, and the commissioners doubted whether they had "'suffitient Power to prossecute the same.'"[74] A year later the Yamasee tribe, angered at its victimization at the hands of unregulated traders, captured South Carolina's agent and tortured him to death.[75] War then broke out.[76]

The lower house of the legislature, under the control of an emerging planter class determined to have peace with the Indians, next enacted legislation returning to a public monopoly, which again was under its control rather than under the control of the proprietors.[77] But Charleston merchants objected, and in 1716 the proprietors in London disallowed the act.[78] A 1719 compromise left a public trading company in existence to compete with private traders, but this scheme remained in place only for a few years until South Carolinians rebelled against the proprietors and the crown replaced the proprietorship with a royal governor administering a royal colony.[79]

In short, throughout the proprietary period, South Carolina law failed to address adequately issues arising out of the Indian trade. The core problem was that the common law, which could not function without the backing of a powerful government, had no institutions or procedures for dealing with outsiders, such as Native Americans, who were not part of the legal community; new law had to be created, but the proprietary government was not sufficiently strong to create it. For most of the half century from 1670 to 1720, Charleston merchants and their entrepreneurial allies were the wealthiest and most powerful constituency in the colony, and they could never agree voluntarily to surrender control of their means of livelihood. While fear of Indian attacks might, on occasion, give an emerging planter class an incentive to control the merchants, the planters never possessed enduring power under the proprietorship.[80] As a result, law capable of regulating the Indian trade would have to await a new royal administration.

B. Law for the Resolution of Internal Disputes

Although South Carolinians' English experience offered no guidance for regulating trade with Native Americans, it provided a wealth of precedent for governing their own internal relationships. And, they quickly turned to it.

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74. *Id.* at 49 (citing CRANE, *supra* note 27, at 153; Letter from the Board to the Indian Agent (July 17, 1713), *in* JOURNALS OF THE COMMISSIONERS OF INDIAN TRADE SEPTEMBER 20, 1710–AUGUST 29, 1718, at 47, 47 (W.L. McDowell ed., 1955) [hereinafter JOURNALS OF THE COMMISSIONERS]).

75. *Id.* at 51 (citing MCCRADY, *supra* note 3, at 533–34).

76. *Id.*

77. *Id.* at 78.

78. *See id.* at 124–25.

79. *See id.* at 125–26.

80. *See* REID, *supra* note 19, at 125.

The turn to English experience began with the Fundamental Constitutions of 1669, which promised to establish manor courts,[81] county courts,[82] local precinct courts,[83] itinerant assize courts,[84] and a series of central courts, including a "Palatine's Court" (composed of the senior proprietor and the other seven proprietors),[85] a court to be held by the Chancellor or his Vice Chancellor,[86] the "Justices of the Bench,"[87] a "High Constable's Court,"[88] an "Admiral's Court,"[89] a "Treasurer's Court,"[90] a "High Steward's [C]ourt,"[91] and a "Chamberlain's Court."[92] The Fundamental Constitutions also provided for presentments by grand juries[93] and trials by petit juries of twelve, albeit with nonunanimous verdicts "according to the consent of the Majority."[94] Finally, the Fundamental Constitutions provided for local registries in which people were to record all deeds, leases, judgments, births, deaths, and marriages.[95]

Of course, the colonists did not need all these institutions, and thus, when the governor and his council met in August 1671, they voted to constitute themselves as a single court to resolve all "'difference[s] or quarell[s]'" as "'equity and justice'" required[96] with the combined jurisdiction of all the courts that the Fundamental Constitutions had contemplated would exist.[97] As we shall see, the council sitting as a court almost invariably followed English law in its determination of cases. Part of the oath taken by members of the council was to "'observ[e] . . . the laws of England,'"[98] and an order of the council in 1692 declared that "'the measure and rule of Government . . . Shall be the Lawes of England,'" where "'they Cann be adapted to the use of this Countery as it hath

81. THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA OF 1669, *supra* note 12, § 17, at 136.
82. *Id.* § 55, at 143.
83. *Id.* § 57, at 144.
84. *Id.* § 59.
85. *Id.* § 27, at 137.
86. *Id.* § 34, at 139.
87. *Id.* § 35, at 139–40.
88. *Id.* § 36, at 140.
89. *Id.* § 37.
90. *Id.* § 38.
91. *Id.* § 39, at 140–41.
92. *Id.* § 41.
93. *Id.* § 60, at 144.
94. *Id.* § 63, at 145.
95. *Id.* §§ 74, 77, at 147.
96. Anne King Gregorie, *Historical Introduction* to RECORDS, *supra* note 18, at 5 (quoting Meeting of Governor and Council, 1 J. Grand Council S.C. 6 (Grand Council 1671), *reprinted in* 1 JOURNAL, *supra* note 27, at 3, 3).
97. *See id.* at 9 (quoting 5 COLLECTIONS OF THE SOUTH CAROLINA HISTORICAL SOCIETY 324 (Charleston, S.C. Hist. Soc'y 1897)).
98. James Nelson Frierson, *Legal Introduction* to RECORDS, *supra* note 18, at 20, 21 (quoting MCCRADY, *supra* note 3, at 148).

been practiced from the Begining of the Settlement.'"[99] In 1703, the colony's chief justice announced from the bench that English law would be followed:

> The main Body of the English Laws, as [the] Common Law, & those Statutes [that] are declarative of [the] Common Law, are of force in this Province. And many of [the] particular Statutes of England are here made of force, by a particular Act of Assembly: which together with [the] particular Acts of this Province make [the] Laws thereof.[100]

A statute of 1712 was even clearer: it contained a long list of English statutes declared to be of force in South Carolina and further provided 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 "declared to be of as full Force and Virtue within this Province" as in England.[101] Perhaps it was the presence on the council of Stephen Bull, who had been a lawyer in England, that induced the council to abide by English practices in its adjudication of cases despite the hostility of the Fundamental Constitutions toward attorneys.[102]

In its early days, the council exercised broad jurisdiction, hearing civil cases with juries at common law,[103] sitting as a "court of admiralty,"[104] sitting with a jury as a court of gaol delivery,[105] and giving instructions to grand juries.[106] In 1671, several months after the colony's settlement, the council awarded a laborer

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99. *Id.* at 25 (quoting Order re Laws of England, 2 J. Grand Council S.C. (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 42, 42–43).

100. Nicholas Trott, A Charge Delivered, at the General Sessions, & Gaol Delivery 1, 8 (Mar. 17, 1702/03) (manuscript in possession of South Caroliniana Library), *in* Hogue, *supra* note 50, at 82, 89.

101. Act of Dec. 12, 1712, No. 333, § 5, *reprinted in* 1 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA 1692–1734, at 304, 322 (John D. Cushing ed., 1978) [hereinafter 1 EARLIEST PRINTED LAWS]).

102. *See* Gregorie, *supra* note 96, at 5.

103. *See* Frierson, *supra* note 98, at 24.

104. *Id.* at 22 (citing Order re Lieutenant Colonel John Godfrey, 1 J. Grand Council S.C. 41 (Grand Council 1792), *reprinted in* 1 JOURNAL, *supra* note 27, at 47, 47–48).

105. *See id.* at 22 (citing Order re Special Sessions of Gaol Delivery, 1 J. Grand Council S.C. 54 (Grand Council 1672/73), *reprinted in* 1 JOURNAL, *supra* note 27, at 55, 55).

106. *See id.* at 22 (citing Order to the Grand Jury, 1 J. Grand Council S.C. 43 (Grand Council 1672), *reprinted in* 1 JOURNAL, *supra* note 27, at 49, 49). The council's records contain many references to juries and grand juries. *See* Colony v. Nicklin, 1 J. Grand Council S.C. 42 (Grand Council 1672), *reprinted in* 1 JOURNAL, *supra* note 27, at 47, 47; Petition of Godfrey, 1 J. Grand Council S.C. 49 (Grand Council 1672), *reprinted in* 1 JOURNAL, *supra* note 27, at 49, 49; Motion of Owen, 1 J. Grand Council S.C. 29–30 (Grand Council 1672), *reprinted in* 1 JOURNAL, *supra* note 27, at 31, 31; Colony v. Willoughby, 1 J. Grand Council S.C. 24 (Grand Council 1671), *reprinted in* 1 JOURNAL, *supra* note 27, at 24, 24–25. One order stated that "the infancy of this settlem[ent]" made "the attendance of Juries for the [trial] of [actions] between party and party . . . very bur[d]ensome" and accordingly ruled that litigants must both "make appear[] [to the court] the merit[] of the cause" before a jury would be summoned. Order re Juries, 1 J. Grand Council S.C. 55 (Grand Council 1673), *reprinted in* 1 JOURNAL, *supra* note 27, at 67, 67.

a bushel of corn for his work on another's plantation,[107] and six months later it heard its first "Plea of Debt," where it followed the common law in refusing to dismiss for the plaintiff's failure to plead his religion.[108] During this time the council heard a criminal prosecution for theft of a turkey.[109] At the end of 1672, the council ordered a smith who had failed to repair weapons to remain in custody until he had completed all repairs.[110] On other occasions, it punished runaway servants,[111] released from indentures servants who were wrongly bound,[112] and required masters to teach apprentices a trade.[113] It ordered the payment of mariners' wages[114] and required husbands to support wives with whom they did not cohabit.[115] It also issued orders that were legislative in nature, such as one that made publication of "any false newes or . . . Seditious or Scandalous words tending to the disturbance of the Peace of this Government" punishable by three months imprisonment[116] and heard prosecutions "for Spreading false dangerous and seditious rumours."[117]

One of the more important heads of the council's early jurisdiction was equity. The council issued its first injunction in 1671, only three months after it had been established.[118] Six years later, it issued an injunction against the transportation of fourteen black slaves out of the colony on the ground that they should be held to provide security for a widow's dower.[119] Another petitioner sought enforcement of a trust of goods committed to a decedent from whom the

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107. Donne v. Hughes, 1 J. Grand Council S.C. 10 (Grand Council 1671), *reprinted in* 1 JOURNAL, *supra* note 27, at 6, 7.

108. Thompson v. Owen, (S.C. Grand Council 1671/72), *in* 1 JOURNAL, *supra* note 27, at 29, 29.

109. *See* Colony v. Sceman, 1 J. Grand Council S.C. 15 (Grand Council 1671), *reprinted in* 1 JOURNAL, *supra* note 27, at 13, 13.

110. *See* Order re Archcraft, 1 J. Grand Council S.C. 44 (Grand Council 1672), *reprinted in* 1 JOURNAL, *supra* note 27, at 51, 51.

111. *See, e.g.*, Foster v. Radcliffe, 1 J. Grand Council S.C. 22 (Grand Council 1671), *reprinted in* 1 JOURNAL, *supra* note 27, at 22, 22 (ordering a runaway servant to pay fines and to complete time in servitude).

112. *See, e.g.*, Petition of Kincade (Feb. 13, 1679), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 36 (ordering the release of an indentured servant and payment for his labors).

113. *See* Jones v. Raven, 2 J. Grand Council S.C. 25 (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 34, 34–35.

114. *See* Petition of Mariners, 2 J. Grand Council S.C. 12 (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 16, 17.

115. *See* LaSalle v. LaSalle, 2 J. Grand Council S.C. 12 (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 16, 17.

116. Order of June 21, 1692, 2 J. Grand Council S.C. 30 (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 42, 43.

117. Information Against Poppell, 2 J. Grand Council S.C. 29 (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 41, 41.

118. *See* Gray v. Yeamans, 1 J. Grand Council S.C. 17 (Grand Council 1671), *reprinted in* 1 JOURNAL, *supra* note 27, at 16, 16 (involving a boundary dispute, which the council ultimately resolved by dividing the land between the disputants).

119. *See* Motion of Moore, 1 J. Grand Council S.C. 72 (Grand Council 1677), *reprinted in* 1 JOURNAL, *supra* note 27, at 81, 81.

petitioner had "not take[n] such sufficient proof of the same as is required by the strict rules of the Comon law" and was "therefore altogether remediless."[120] Yet another petitioner sought relief against landowners who had given him permission to build a house on their land but then denied him access.[121]

The council, however, did not sit long as a single court of general jurisdiction. In 1672, it ordered that a Court of Sessions of the Peace be convened,[122] and by 1680, the council had spun off a separate "court of pleas"[123] to hear common law cases, such as "plea[s] of debt"[124] and "plea[s] of trespass."[125] The new court also heard cases in assumpsit.[126] In short, within a few years of South Carolina's settlement, common law courts hearing criminal cases and common law cases under the writ system were sitting in Charleston. And, with the creation of a common law court with civil jurisdiction, the council sitting in chancery assumed power to enjoin suits at common law,[127] except when, as was the rule in England, a matter commenced by a writ, such as assumpsit, had to "be tryed at [] Comon[] Law," at least in the absence of a finding by the chancellor that there "was not a fact tryable there."[128] Finally, in 1712, a separate court of chancery was created with "power to put in Execution . . . so much of the . . . Common Law [i.e., English equity law] . . . as the Lord Chancellor or Lord Keeper of the Great Seal of *Great Britain* may do in the Kingdom of *England*."[129]

South Carolina also observed English legal practice in other respects. Thus, the secretary of the colony issued letters of administration for estates,[130] made a

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120. Scott v. Logan, (S.C. Grand Council 1700), *in* RECORDS, *supra* note 18, at 70, 71–72.

121. Seabrooke v. Bray, (S.C. Grand Council 1702), *in* RECORDS, *supra* note 18, at 79, 79–80.

122. Order re Court of Sessions, 1 J. Grand Council S.C. 41–42 (Grand Council 1671), *in* 1 JOURNAL, *supra* note 27, at 46, 46. On the basis of the location of this entry in the council's minutes, I believe, it should be dated 1672 and that the date of 1671 is a clerical error. For a subsequent order convening a court of sessions, see *Colony v. Lucas*, 1 J. Grand Council S.C. 51 (Grand Council 1673), *in* 1 JOURNAL, *supra* note 27, at 61, 61. An even later order indicates, however, that no separate court of sessions existed in the seventeenth century, but that the council sat as a court of sessions when needed. *See* Order re Court of Sessions, 2 J. Grand Council S.C. 31 (Grand Council 1692), *in* 2 JOURNAL, *supra* note 58, at 44, 44 (ordering "this Court Sitt as a Generall Session of the peace").

123. Rose v. Clay (July 9, 1681), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 46, 46.

124. *Id.*

125. Rose v. Clay and Bull (July 9, 1681), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 46. By 1692, the Court of Common Pleas was meeting for four sessions per year. Order re Common Pleas, 2 J. Grand Council S.C. 5 (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 4, 4.

126. *See* Frierson, *supra* note 98, at 33 (citing Rowlins v. Moore, 2 J. Grand Council S.C. 24 (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 32, 32–33; Rowlins v. Moore, 2 J. Grand Council S.C. 22 (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 29, 29).

127. *See* Dacres v. Danson, (S.C. Grand Council 1700), *in* RECORDS, *supra* note 18, at 67, 67–69; Evans v. Sims, (S.C. Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 27, 27.

128. Rowlins v. Moore, 2 J. Grand Council S.C. 24 (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 32, 32.

129. Act of Dec. 12, 1712, No. 333, § 5, *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 304, 322.

130. *See, e.g.*, Petition of Clifford (Apr. 16, 1683), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 29, 29 (petitioning the court for a letter of administration on another estate). On occasion,

record of nuncupative wills,[131] and entered caveats against estates on the part of principal creditors.[132] The secretary also recorded a construction contract.[133] South Carolina followed English precedent by apprenticing children to learn a trade,[134] although South Carolina may have gone beyond England in permitting people to indenture themselves for life.[135] The existence of African slavery, implied, as we have seen, by the Fundamental Constitutions, is confirmed by a number of cases manumitting black slaves,[136] including, in one instance, a son who had been purchased by his mother.[137]

Finally, South Carolina followed English practice in prosecuting and punishing crime. South Carolina had early on established a separate Court of General Sessions and Gaol Delivery for the province, and it functioned with grand juries, which could act on their own knowledge as well as on the testimony of witnesses, and petit juries.[138] South Carolina had common law rules, such as benefit of clergy, which first-time felons other than murderers

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jurisdiction over the administration of estates involved the council in disputes over the distribution of decedents' wealth. *See* Schenckingh v. Howes, (S.C. Grand Council 1704), *in* RECORDS, *supra* note 18, at 82, 82–83.

131. *See* Will of Dunston (Apr. 2, 1692), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 133, 133.

132. *See, e.g.*, Caveat Against Estate of Robert Hull (Oct. 19, 1688), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 110, 110 (entering a caveat on behalf of a merchant as a principle creditor).

133. *See* Articles of Partnership (Feb. 25, 1686), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 69, 69; *accord* Agreement of Steade (June 23, 1681), *in* 2 PROPRIETARY RECORDS OF SOUTH CAROLINA: ABSTRACTS OF THE RECORDS OF THE REGISTER OF THE PROVINCE, 1675–1696, at 93, 93 (Susan Baldwin Bates & Harriott Cheves Leland eds., 2006) [hereinafter 2 PROPRIETARY RECORDS] (recording a building contract between Steade and Beresford); *cf.* Articles of Agreement (Mar. 26, 1683), *in* 2 PROPRIETARY RECORDS, *supra*, at 164, 164 (reciting an agreement in which a series of neighbors granted land to each other for the construction of a street).

134. *See, e.g.*, Agreement of Philippes (Dec. 10, 1708), *in* 2 PROPRIETARY RECORDS, *supra* note 133, at 196, 196 (recording the apprenticing of a couple's daughter). A youth could even apprentice himself. *See* Apprenticeship of Geurard (Feb. 20, 1683), *in* 2 PROPRIETARY RECORDS, *supra* note 133, at 79, 79.

135. *See* Agreement of English and Midling (Sept. 29, 1682), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 60, 60.

136. *See* Manumission of Hanna (Jan. 20, 1681), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 60, 60. The record also indicates that Hanna had been baptized. Baptism of Hanna (Jan. 20, 1681), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 60, 60. For another instance of manumission, see Manumission of Harry (Feb. 21, 1680), *in* 2 PROPRIETARY RECORDS, *supra* note 133, at 67, 67. For earlier evidence of slavery, see Appointment of Yeamans (Feb. 16, 1676/77), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 31, 31 (distinguishing between "servants" and "Negro slaves").

137. *See* Manumission of Sambo (Aug. 18, 1693), 2 PROPRIETARY RECORDS, *supra* note 133, at 99, 99.

138. *See* Nicholas Trott, A Charge Delivered, at the General Sessions, & Gaol Delivery 55, 59 (Mar. 20, 1705/06) (manuscript in possession of South Caroliniana Library), *in* Hogue, *supra* note 50, at 133, 135–136; Nicholas Trott, A Charge Delivered, at the General Sessions, & Gaol Delivery 1, 9–11 (Mar. 17, 1702/03) (manuscript in possession of South Caroliniana Library), *in* Hogue, *supra* note 50, at 82, 90–93.

routinely invoked.[139] The felonies for which indictments were sought included witchcraft, treason, murder, manslaughter, grand larceny, robbery, burglary, arson, buggery, rape, bigamy, and counterfeiting; defendants convicted of felonies were subject to capital punishment, although most could avoid death by pleading benefit of clergy.[140] Noncapital misdemeanors included petit larceny, perjury, blasphemy, fraud (especially against Native Americans), sedition and defamation, nuisance (especially the keeping of bawdy houses), adultery, bastardy (but not mere fornication),[141] assault, neglect of duty, and neglect of highways.[142]

It seems apparent from the cases that were routinely prosecuted that the function of criminal law was not the preservation of morality, but the elimination of "strife & Contention" and the maintenance of "Peace & Justice."[143] Grand juries were instructed that, without the criminal law, "no man could call any thing his . . . own, if a stronger [man] then him would take it from him" and "Government and Society [could] not be preserved."[144] To so maintain government and society, criminal prosecutions, especially for sedition, were sometimes brought against political opponents,[145] although jurors were told not to act on behalf of "Factious persons" and to do justice for "the small as well as [the] great."[146] One also must not overstate the repressive character of the criminal process. Enforcement of the criminal law was about punishing only those clearly guilty, and hence, jurors were given the standard instruction that

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139. *See* Colony v. Botly, 2 J. Grand Council S.C. 41 (Grand Council 1692), *reprinted in* 2 JOURNAL, *supra* note 58, at 60, 60.

140. *See* Nicholas Trott, A General Charge to the Grand Juries, for the Province of South Carolina 123, 125–41 (manuscript in possession of South Caroliniana Library), *in* Hogue, *supra* note 50, at 190, 191–206.

141. The Act against Bastardry did not make sexual intercourse between a couple criminal if no pregnancy resulted, and it did not punish newlyweds if they had a child less than nine months after their marriage. *See* Act against Bastardy, No. 213 (1703), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 164 *passim*.

142. *See* Nicholas Trott, A General Charge to the Grand Juries, for the Province of South Carolina 123, 150–52 (manuscript in possession of South Caroliniana Library), *in* Hogue, *supra* note 50, at 190, 214.

143. *See* Nicholas Trott, A Charge Delivered, at the General Sessions, & Gaol Delivery 89, 106 (Mar. 19, 1706/07) (manuscript in possession of South Caroliniana Library), *in* Hogue, *supra* note 50, at 164, 178.

144. *Id.*

145. *See* Hogue, *supra* note 50, at 11 (citing RECORDS IN THE BRITISH PUBLIC RECORD OFFICE RELATING TO SOUTH CAROLINA 1701–1710, at 51–55, 67–69 (1947) [hereinafter BRITISH PUBLIC RECORD]) (reporting on a prosecution of Trott for alleging that the governor did not have a lawful commission from the proprietors or approval from the Crown); *see also* REID, *supra* note 19, at 39 (discussing an Indian trade agent's prosecution of the governor's son-in-law).

146. Nicholas Trott, A Charge Delivered, at the General Sessions, & Gaol Delivery 55, 63–64 (Mar. 20, 1705/06) (manuscript in possession of South Caroliniana Library), *in* Hogue, *supra* note 50, at 133, 139–40.

they "ought rather to acquit ten Guilty persons then [sic] to condemn one Innocent."[147]

Existing scholarship assumes that no lawyers practiced in South Carolina between the colony's founding and the end of the 1690s.[148] But that assumption seems incorrect. A record from the early 1680s shows that Stephen Bull, an English trained attorney and member of the council, acted "by the direction of John Stevenson . . . [and] Margarett," his widow, in seeking letters of administration for Stevenson's estate,[149] while a caveat of 1692 directed that no action be taken in regard to administration of an estate without notice to the "principal creditor . . . or his proctor."[150]

In any event, it is clear that the arrival in 1699 of Nicholas Trott, "an English lawyer of great learning,"[151] led to the emergence of a strong legal profession,[152] and over the next two decades, at least seven lawyers practiced in the colony.[153] And, with the rise of the profession, law practice in South Carolina assumed a level of sophistication, complexity, and technicality unsurpassed in mainland British North America.

In the Court of Common Pleas, for example, common law pleading and the writ system blossomed by the early years of the eighteenth century. In addition to writs of debt,[154] trespass,[155] and assumpsit,[156] there were actions of account,[157] covenant,[158] detinue,[159] ejectment,[160] replevin,[161] and trover,[162] as well as *qui tam*

147. Nicholas Trott, A Charge Delivered, at the General Sessions, & Gaol Delivery 55, 88 (Mar. 20, 1705/06) (manuscript in possession of South Caroliniana Library), *in* Hogue, *supra* note 50, at 133, 163.

148. *See* Frierson, *supra* note 98, at 21, 36.

149. Petition of Bull (Mar. 6, 1682/83), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 29, 29.

150. Estate of Mathews (Mar. 4, 1692), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 30, 30.

151. Gregorie, *supra* note 96, at 6.

152. *See* Frierson, *supra* note 98, at 36.

153. *See* RECORDS, *supra* note 18, at 88 n.28 (citing COMMISSIONS AND INSTRUCTIONS FROM THE LORD PROPRIETORS OF CAROLINA TO PUBLIC OFFICIALS OF SOUTH CAROLINA, 1685–1715, at 190, 250 (A.S. Salley, Jr. ed., 1916); MCCRADY, *supra* note 3, at 459).

154. *See* Hayle v. Rogers, (S.C. Ct. Com. Pl. 1704), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1A (S.C. Dep't of Archives & History).

155. *See* Baker v. Novice, (S.C. Ct. Com. Pl. 1705), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1C (S.C. Dep't of Archives & History).

156. *See* Hutchinson v. Cary, (S.C. Ct. Com. Pl. 1705), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1B (S.C. Dep't of Archives & History).

157. *See* Eve v. Litten, (S.C. Ct. Com. Pl. 1704), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1A (S.C. Dep't of Archives & History).

158. *See* White v. Davies, (S.C. Ct. Com. Pl. 1718), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 11B (S.C. Dep't of Archives & History).

159. *See* Cockfield v. Butler, (S.C. Ct. Com. Pl. 1718), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 11B (S.C. Dep't of Archives & History).

160. *See* Holdfast v. Haynes, (S.C. Ct. Com. Pl. 1718), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 11B (S.C. Dep't of Archives & History).

161. *See* Wragg v. Boyden, (S.C. Ct. Com. Pl. 1719), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 12B (S.C. Dep't of Archives & History).

actions.[163] Defendants knew how to interpose the proper defensive general issue; for instance, defendants would assert "did not assume" to a writ of assumpsit,[164] "owes nothing" to a writ of debt,[165] and "not guilty" to a writ of trespass.[166] Defendants also used demurrers with some frequency and effect to raise issues of law; for example, one defendant in 1704 unsuccessfully interposed a demurrer to an assumpsit action "that the Consideration as laid in the Plaintiff's Declaration [was] insufficient."[167] Plaintiffs could also use demurrers to challenge the legal sufficiency of defendants' pleas.[168] Other demurrers addressed matters of form such as whether a plaintiff had adequately pleaded all the elements of a statutorily created cause of action.[169]

The use of special pleading was even more important than demurrers in the development of South Carolina law. *Hill v. Moore*[170] provides an example. *Hill* was an action for breach of contract in which the defendant pleaded an accord and satisfaction, to which the plaintiff replied that the defendant failed to perform the terms of the accord and satisfaction.[171] The parties thereby framed a narrow issue, on which a jury found for the plaintiff.[172] Unlike a jury verdict under the general issue, which might have constituted a judgment on any number of grounds, the decision in *Hill* made two points clear to anyone, including the jurors, who knew of the case: (1) that, as a matter of law, an accord and satisfaction constituted a good defense and (2) that the defendant, as a matter of fact, had not performed it.[173] *Hunt v. Harvey*,[174] which was a suit for failure to return a boat, likewise did not result in a vague verdict under the general issue.[175]

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162. *See* Litten v. Murrey, (S.C. Ct. Com. Pl. 1704), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1A (S.C. Dep't of Archives & History).

163. *See* Whitaker v. Burnham, (S.C. Ct. Com. Pl. 1720), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 15A (S.C. Dep't of Archives & History).

164. Litten v. Eve, (S.C. Ct. Com. Pl. 1703), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box, 1A (S.C. Dep't of Archives & History).

165. Stevens v. Milner, (S.C. Ct. Com. Pl. 1704), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1A (S.C. Dep't of Archives & History).

166. Baker v. Novice, (S.C. Ct. Com. Pl. 1705), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1C (S.C. Dep't of Archives & History).

167. Cary v. Shane, (S.C. Ct. Com. Pl. 1704), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls Box, 1A (S.C. Dep't of Archives & History).

168. *See* Berrisford v. Smith, (S.C. Ct. Com. Pl. 1714), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 5A (S.C. Dep't of Archives & History).

169. *See* Wright v. Cochran, (S.C. Ct. Com. Pl. 1715), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 6A (S.C. Dep't of Archives & History).

170. (S.C. Ct. Com. Pl. 1720), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 16A (S.C. Dep't of Archives & History).

171. *Id.*

172. *Id.*

173. *See id.*

174. (S.C. Ct. Com. Pl. 1717), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 9A (S.C. Dep't of Archives & History).

175. *See id.*

When the defendant pleaded specially that he did return the boat, the jury only had to find whether he returned it, and it found in his favor.[176]

As we have seen, instead of replying to a special plea, a party could interpose a demurrer and thereby raise the issue of the plea's sufficiency as a matter of law.[177] Thus, in *Crewes v. Martin*,[178] a case regarding a suit to recover money due on account, the defendant pleaded a colonial statute that was enacted "for the Encouragement of the better Settlement of South Carolina" and that barred any action to recover a debt contracted by any migrant to South Carolina before his arrival in the colony.[179] By his demurrer to the plea, the plaintiff tested the legal sufficiency of the statutory policy.[180] Unfortunately, one of the parties died before the court could rule on the demurrer, and the action was abated by the death.[181]

One should note the connection between special pleading and legislation—special pleading empowers legislatures. In a jurisdiction without special pleading, it is often impossible to know whether a jury honored legislatively created law or resolved a case on some other ground. Similarly, it is impossible for a legislature, when deciding whether to enact a law, to predict whether juries will follow its law. But, in a jurisdiction with special pleading, courts will give statutes effect unless judges, in ruling on demurrers, determine that they will not. Thus, the people will know whether statutory law is being followed, and legislatures can be reasonably confident that judges, unless they give good reasons to the contrary, will follow it.

In addition to the rules of pleading, the Court of Common Pleas, by the early decades of the eighteenth century, developed a number of other technical and legalistic, though in some instances useful, practices. An important practice was the common recovery, which was used as a device to bar entails.[182] Most practices, however, involved the collection of debts.

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176. *Id.* For other examples of special pleadings leading to narrow jury verdicts, see *Dallamare v. Hall*, (S.C. Ct. Com. Pl. 1721), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 16B (S.C. Dep't of Archives & History); *Governor v. Le Noble*, (S.C. Ct. Com. Pl. 1713), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 4A (S.C. Dep't of Archives & History). *See also* Holbeatch v. Hart, (S.C. Ct. Com. Pl. 1719), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 14A (S.C. Dep't of Archives & History) (reporting that the defendant pleaded the statute of limitations, but unfortunately the files do not indicate how the plaintiff responded to this plea); Cattle v. Browne, (S.C. Ct. Com. Pl. 1717), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 9A (S.C. Dep't of Archives & History) (reporting that the defendant pleaded payment of a judgment, but the plaintiff's response to the plea is unknown).

177. *See* Berrisford v. Smith, (S.C. Ct. Com. Pl. 1714), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 5A (S.C. Dep't of Archives & History).

178. (S.C. Ct. Com. Pl. 1704), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1A (S.C. Dep't of Archives & History).

179. *Id.*

180. *Id.*

181. *Id.*

182. *See* Holdfast v. Haynes, (S.C. Ct. Com. Pl. 1718), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 11B (S.C. Dep't of Archives & History). The use of the common recovery

By the turn of the century, default judgments were already commonplace in suits to recover indebtedness, but South Carolina had developed a cumbersome, though theoretically sound, prodebtor policy that obstructed the process. When a creditor sued in debt, which theoretically lay only to recover a fixed sum of money, a debtor's default led to immediate entry of a judgment.[183] But if a creditor sued in case, on an account or even on a promissory note or bill of exchange, default led only to a writ of inquiry, which summoned a jury in a subsequent term to ascertain the creditor's damages.[184] The procedure was theoretically sound since the writ of case was available to recover unliquidated debts, but it helped debtors by automatically postponing judgment for several months and ensuring a jury trial in every instance in which a debtor had not executed a sealed instrument or made other appropriate arrangements upon receipt of credit. For example, at the time of receiving credit, a debtor could appoint an attorney to confess judgment of a specified amount against him on some future specified date and thereby obviate issuance of a writ of inquiry.[185] It is also noteworthy that, at a very early date, the South Carolina bar began using printed forms, such as bonds with blank spaces to be filled with appropriate names, dates, and amounts, which made it easier for creditors to procure the execution of instruments and streamlined the debt collection process.[186]

The courts imported a similar level of sophistication, complexity, and technicality into South Carolina's chancery practice. The South Carolina Court of Chancery exercised its jurisdiction actively,[187] especially by its frequent injunction of proceedings at common law.[188] The Court of Chancery was also

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persisted throughout the eighteenth century. *See* Right v. Thrustout, (S.C. Ct. Com. Pl. 1773), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 98A (S.C. Dep't of Archives & History).

183. *See* Gale v. Moore, (S.C. Ct. Com. Pl. 1704), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1A (S.C. Dep't of Archives & History).

184. *See* Loughton v. Masters, (S.C. Ct. Com. Pl. 1720), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 15A (S.C. Dep't of Archives & History); Peronneau v. Sanders, (S.C. Ct. Com. Pl. 1704), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1A (S.C. Dep't of Archives & History).

185. *See* Wright v. Hillden, (S.C. Ct. Com. Pl. 1712), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 2D (S.C. Dep't of Archives & History).

186. *See* Godin v. Wright, (S.C. Ct. Com. Pl. 1714), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 11A (S.C. Dep't of Archives & History) (providing an early example of a printed bond); *see also* Gibbon v. Monk, (S.C. Ct. Com. Pl. 1723), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 19A (S.C. Dep't of Archives & History) (reporting an early example of a form declaration that had been prewritten by a scribe and apparently sold to an attorney who merely had to fill in the blanks but did not bother to do so).

187. *See* Frierson, *supra* note 98, at 53–54; Gregorie, *supra* note 96, at 6.

188. *See, e.g.*, Smith v. Beresford, (S.C. Ch. 1720), *in* RECORDS, *supra* note 18, at 260, 260–66 (seeking stay of execution of common law judgment enforcing bond); Miller v. Hill, (S.C. Ch. 1717), *in* RECORDS, *supra* note 18, at 229, 229–31 (seeking reduction of damages awarded by common law jury for an assault); Moore v. Godin, (S.C. Ch. 1716), *in* RECORDS, *supra* note 18, at 136, 136–39 (seeking relief from a contract, the performance of which was made difficult by war); Harvey v. Greene, (S.C. Ch. 1714), *in* RECORDS, *supra* note 18, at 103, 103–05 (enjoining suits on notes and bonds); Holmes v. Schenckingh, (S.C. Ch. 1712/13), *in* RECORDS, *supra* note 18, at 95, 95–96

asked to interfere with common law proceedings in other cases. For instance, in *Godin v. Wright*,[189] an administratrix pleaded that she had no assets to administer, and the petitioners sought her testimony in chancery, where she could be cross-examined under oath.[190] Chancery also became involved in probate proceedings, often addressing complex issues in the distribution of decedents' estates.[191] On other occasions, chancery enforced the equity of redemption of a mortgage[192] or enforced a trust.[193] In one instance, it did so on behalf of a French Huguenot church and minister.[194]

In resolving its cases, the court often used complex and sophisticated procedures. In one case, a petitioner needed to recommence proceedings involving his wife because, as a result of their marriage, earlier proceedings had been abated.[195] In another case, a respondent pleaded a defense of laches.[196] Case files contained not only petitions and answers, but replications and rejoinders as well.[197] In addition, litigants filed exceptions—the equivalent of demurrers—to pleadings, declared those pleadings "uncertain Short and Triffling with this Honourable Court and . . . alltogether Evasive," and demanded that their opponents submit "more full certain and direct Answer[s]."[198] Finally, there were depositions, interrogatories, reports of masters in chancery, and exceptions to those reports.[199]

In short, by roughly 1720, when the Carolina proprietorship came to an end and was replaced by a provisional royal government, South Carolina had developed a sophisticated legal profession and legal system. The system included common law courts and a chancery court operating on the basis of the

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(enjoining a suit on a bond). For other common law actions stayed by equity, see *Prioleau v. Villeponteux*, (S.C. Ct. Com. Pl. 1706), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 2A (S.C. Dep't of Archives & History); *Benoist v. Villeponteux*, (S.C. Ct. Com. Pl. 1706), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 2A (S.C. Dep't of Archives & History); *Hailes v. Edwards*, (S.C. Ct. Com. Pl. 1704), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 1A (S.C. Dep't of Archives & History); Bond of Malloch (Feb. 20, 1684), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 66, 66.

189. (S.C. Ch. 1717/18), *in* RECORDS, *supra* note 18, at 245, 245–47.

190. *Id.* at 247.

191. *See* Murray v. Nairne, (S.C. Ch. 1717), *in* RECORDS, *supra* note 18, at 237, 237; Will of Rede, (S.C. Ch.), *in* RECORDS, *supra* note 18, at 161, 161 (undated decision); Fuller v. Dean, (S.C. Ch. 1716), *in* RECORDS, *supra* note 18, at 144, 144.

192. *See* Yorkson v. Buckley, (S.C. Ch. 1719), *in* RECORDS, *supra* note 18, at 254, 254–55.

193. *See* Meggott v. Bailey, (S.C. Ch. 1719), *in* RECORDS, *supra* note 18, at 256, 256–57; Burnham v. Codner, (S.C. Ch. 1717), *in* RECORDS, *supra* note 18, at 231, 231–32.

194. *See* Gaillard v. Dunnerville, (S.C. Ch. 1717/18), *in* RECORDS, *supra* note 18, at 240, 240–41.

195. Canty v. Dewes, (S.C. Ch. 1717), *in* RECORDS, *supra* note 18, at 239, 239.

196. *See* Cattle v. Bull, (S.C. Ch. 1718/19), *in* RECORDS, *supra* note 18, at 249, 251–52.

197. *See* Wright v. LeBrasseur, (S.C. Ch. 1717), *in* RECORDS, *supra* note 18, at 208, 217, 226.

198. Hawett v. Moore, (S.C. Ch. 1716), *in* RECORDS, *supra* note 18, at 163, 178.

199. *See* Brown v. Wright, (S.C. Ch. 1716/17), *in* RECORDS, *supra* note 18, at 178, 184–201. *See generally* Gregorie, *supra* note 96, at 13–14 (discussing the history and procedure of recording these proceedings).

common law and English chancery law. The system may have been somewhat technical and complex and thus, needlessly expensive, but it provided adequate forums in which South Carolinians could resolve their disputes.

C. Law for the Atlantic Trade

South Carolina's legal system also provided mechanisms for facilitating and regulating the colony's Atlantic trade. In large part, the same courts and institutions that handled domestic matters also dealt with overseas matters. For example, the court of common pleas heard actions by officials for enforcement of Parliament's Navigation Act,[200] rejecting claims that it lacked jurisdiction.[201] There was, however, one additional, albeit only occasional, player on the Atlantic scene—the Court of Admiralty.

The main way that the legal system facilitated trade was to be open to litigation involving parties from and transactions occurring in other Atlantic locales. There were actions at law, for example, involving a bond executed in Antigua[202] and rice shipped to London.[203] There was also a chancery suit brought by a merchant from Jamaica[204] and another suit to sort out the affairs of a deceased Charleston merchant who had "carried on . . . very great and Extraordinary affaires of Merchandizing and other trading and dealings abroad beyond the Seas to the port of London . . . and to the Island of Barbados and Jamaica and else where."[205]

Courts also resolved disputes between South Carolinians bearing on the ocean trade. Thus, in one suit between a mariner, perhaps seeking payment of wages, and general creditors of a vessel, a jury gave a verdict in favor of the creditors.[206] In another case, in which a vessel "for want of due repara[ti]on, . . . remain[ed] altogether useless and unprofittable," the chancery

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200. *See, e.g.*, Governor v. Splatt, (S.C. Ct. Com. Pl. 1719), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 14A (S.C. Dep't of Archives & History) (hearing a case to enforce Parliament's Navigation Act); Queen Anne v. Audus, (S.C. Ct. Com. Pl. 1714), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 5A (S.C. Dep't of Archives & History) (hearing another action to enforce Parliament's Navigation Act). The Court of Vice Admiralty also heard actions by officials for the enforcement of Parliament's Navigation Act. In one case, it condemned a vessel owned by Huguenots from New York on the ground that, even though naturalized, the Huguenots were not English subjects. SIRMANS, *supra* note 1, at 62. The decision, however, was reversed by the proprietors. *Id.*

201. *See* Wigg v. Swaddle, (S.C. Ct. Com. Pl. 1714), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 5A (S.C. Dep't of Archives & History).

202. Motte v. Perrie, (S.C. Ct. Com. Pl. 1712), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 2D (S.C. Dep't of Archives & History).

203. Combes v. Dean, (S.C. Ct. Com. Pl. 1713), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 4A (S.C. Dep't of Archives & History).

204. *See* Mears v. Valentine, (S.C. Ch. 1701), *in* RECORDS, *supra* note 18, at 75, 75.

205. Hart v. Gerish, (S.C. Ch. 1713), *in* RECORDS, *supra* note 18, at 89, 89.

206. *See* Charlton v. Hales, (S.C. Ct. Com. Pl. 1715), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 6A (S.C. Dep't of Archives & History).

court directed that it be "repaire[d], fitt out and load[ed]" and dispatched to Barbados and that the proceeds of the voyage be "disposed of . . . towards satisfac[ti]on" of the owner's creditors.[207] Another somewhat more commonplace case was a suit for breach of a contract to sell pitch that was apparently for shipment overseas.[208] Finally, the colony adopted a procedure for convening a special court on behalf of a plaintiff who was about to depart from the province and could not wait for the court to meet in its regular term.[209]

Various institutions of the colony also developed substantive rules to facilitate commerce and trade. The colony's naval officer opined that a vessel could not "'be seized and condemned'" for "'want of Form'" in its papers; at most "'security'" could be required "'to produce a Register in better form.'"[210] The Privy Council ultimately upheld his opinion.[211] The Court of Sessions regulated the hiring of seamen and the conditions of their stay in port[212] as well as the weighing and processing of goods for export.[213] Other courts routinely relied on the custom of merchants in resolving commercial cases.[214]

In addition, the law facilitated commerce by permitting men who were going to sea to appoint agents,[215] including their wives,[216] to manage their affairs while

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207. Order re Ketch of Gray and Partners, 1 J. Grand Council S.C. 54 (Grand Council 1673), *in* 1 JOURNAL, *supra* note 27, at 65, 65.

208. *See* Kinloch v. Chicken, (S.C. Ct. Com. Pl. 1718), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 11B (S.C. Dep't of Archives & History); *see also* Colleton v. Woodman, (S.C. Ct. Com. Pl. 1714), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 5A (S.C. Dep't of Archives & History) (reporting a suit for breach of contract to deliver goods on a vessel).

209. *See* Petition of Simpson, WPA Statewide Historical Project No. 165-33-7999 (S.C. Ct. Com. Pl. 1765) (unpublished typescript, on file with S.C. Dep't of Archives & History). This procedure was vitally needed. Consider, for example, *McKerroll v. Ford*, WPA Statewide Historical Project No. 165-33-7999 (S.C. Ct. Com. Pl. 1763) (unpublished typescript, on file with S.C. Dep't of Archives & History), where the defendant, who had been arrested at the outset of the suit, remained in jail even after the plaintiff left the colony when the case did not proceed in the usual course. *Id.* On motion, the court finally released the defendant. *Id.* For the legislation creating the court, see Act Confirming and Establishing the Ancient and Approved Method of Drawing Juries, No. 543, § 36 (1713), *reprinted in* 2 THE EARLIEST PRINTED LAWS OF SOUTH CAROLINA 1692–1734, at 25, 37–38 (John D. Cushing ed., 1978) [hereinafter 2 EARLIEST PRINTED LAWS].

210. Hogue, *supra* note 50, at 10 (quoting BRITISH PUBLIC RECORD, *supra* note 145, at 49).

211. *See id.* (citing BRITISH PUBLIC RECORD, *supra* note 145, at 50). *See generally* JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 145–46 (photo. reprint 1965) (1950) (recounting the proceedings until the opinion was upheld).

212. *See* WILLIAM SIMPSON, THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, OF HIS MAJESTY'S PROVINCE OF SOUTH-CAROLINA 220–24 (photo. reprint 1972) (1761).

213. *See id.* at 211–17.

214. *See, e.g.*, Carruthers v. Doming, (S.C. Ct. Com. Pl. 1739) (typescript in possession of S.C. Dep't of Archives & History) (relying on the custom of merchants).

215. *See* Appointment of Trott (Oct. 10, 1678), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 34, 34.

216. *See* Appointment of Walker (Oct. 10, 1685), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 88, 88; *cf.* Appointment of Scott (Apr. 29, 1695), *in* 2 PROPRIETARY RECORDS, *supra* note 133, at 193, 193 (appointing wife as husband's agent in Carolina where she was moving). *But see* Stobo v. Kinloch, S.C. Ch. Minutes Book, 1721–1736, at 26 (Ch. 1722), *reprinted in* RECORDS, *supra* note 18, at 299, 299.

they were away. And, if a man failed for seven years to return and appeared to have died, his wife would be treated as single and would be free to remarry.[217] The colony also provided for uncomplicated naturalization of Protestant immigrants simply upon their taking an oath of allegiance.[218] Among those naturalized was Mordecai Myers, a man "professing the Jewish religion."[219]

Finally, South Carolina was a pioneer in making it easier for mercantile entrepreneurs to use and record written documents needed for commercial transactions. From the earliest times, South Carolina courts accepted as "firme and good" documents duly authenticated by officials of other British colonies.[220] In addition, the secretary of the colony recorded contracts into which merchants and shipowners had entered,[221] depositions of voyage events,[222] and formal protests entered when weather or other circumstances prevented voyages from proceeding as planned.[223] The colony also was one of the first to use printed shipping documents with blank spaces that users could complete.[224] As a result of these and other practices, it quickly developed functioning markets in which entrepreneurs could transact business to "the best Markett & advantage" at "customary" rates.[225]

As South Carolina's economy matured, piracy—a crime seen as "destructive of all trade and commerce"[226]—imperiled its prosperity. At the outset of the

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217. *See* Nicholas Trott, A General Charge to the Grand Juries, for the Province of South Carolina 123, 141–42 (manuscript in possession of South Caroliniana Library), *in* Hogue, *supra* note 50, at 190, 206.

218. *See* Instructions re Naturalization (Apr. 12, 1693), *in* 2 PROPRIETARY RECORDS, *supra* note 133, at 99, 99.

219. Naturalization of Myers, J. S.C. Ct. Gen. Sess. 145 (Ct. Gen. Sess. 1772), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History).

220. Will of Yeamans, 1 J. Grand Council S.C. 64 (Grand Council 1675), *reprinted in* 1 JOURNAL, *supra* note 27, at 77, 77; *cf.* Renunciation of Dower by Mary Ogilvie to Joseph Huchins (Feb. 1769), *in* SOUTH CAROLINA COURT OF COMMON PLEAS, RENUNCIATIONS OF DOWER, 1767–1774, at 28 (S.C. Dep't of Archives & History) (reflecting where Lord Mansfield's signature authenticates the renunciation).

221. *See* Bond of Wright (Feb. 21, 1683/84), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 81, 81; Charter Agreement Between Middleton and Mathews (July 18, 1679), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 34, 34.

222. *See* Deposition of Drummond (Mar. 24, 1685/86), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 98, 98.

223. *See* Protest of Pettitt (Mar. 24, 1691/92), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 30, 30 (protesting the severe winds and the vessel's pilot); Protest of Cardour (June 15, 1686), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 99, 99–100 (protesting the interference in a journey by another party); Protest of Dodson (June 9, 1686), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 96, 96 (protesting the lack of a pilot for his voyage).

224. *See* Borners v. Whitmarsh, (S.C. Ct. Com. Pl. 1713), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 4B (S.C. Dep't of Archives & History).

225. Wishart v. Ellicott, (S.C. Ct. Com. Pl. 1714), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 4B (S.C. Dep't of Archives & History).

226. The Trials of Major Stede Bonnet (Oct. 28, 1718), *in* 15 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS

colony's history, pirates had contributed to its support.[227] Beginning as privateers in the mid-seventeenth century wars mainly against Spain, early pirates had often obtained provisions in South Carolina ports, where they had paid in cash and developed friendly commercial relationships as a result.[228] But, as South Carolina's exports grew in value, pirates began to plunder the colony's trade, and when, in 1699, they seized three of the colony's vessels, nine pirates were captured, tried, and condemned to death.[229] Then in 1718, South Carolina became a principal target when a group of pirates blockaded Charleston, seized departing ships, and held passengers for ransom.[230] A joint Virginia–South Carolina fleet captured the pirates, however, and their capture led to the most famous trial in early South Carolina history—the trial of Stede Bonnet for piracy.[231]

The trial took place in the Court of Vice Admiralty,[232] of which Nicholas Trott, the chief justice of the colony, was judge.[233] It mattered little, though, that the trial occurred in admiralty rather than at common law because the court followed common law procedure: there were grand jury indictments and adversary proceedings before a petit jury.[234] Two attorneys represented the crown, and the alleged pirates represented themselves.[235] But the trials appear to have been fair. Of the more than fifty men who were indicted, one pleaded guilty,[236] and the jury found over forty guilty.[237] All of the guilty were sentenced to death.[238] But Judge Trott instructed the petit jury that just as "the guilty ought not to be acquitted," so "the innocent must not be condemned,"[239] and the jury found four men not guilty because they had acted under "Constraint and Fear."[240]

FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1231, 1234 (T.B. Howell ed., London, 1812) [hereinafter COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON].

227. *See* Shirley Carter Hughson, *The Carolina Pirates and Colonial Commerce, 1670–1740*, 12 JOHNS HOPKINS U. STUD. IN HIST. & POL. SCI., May–July 1894, at 5, 13–14.

228. *See id.* at 13.

229. *See id.* at 44–45 (citing 1 HISTORICAL COLLECTIONS OF SOUTH CAROLINA 127 (B.R. Carroll ed., AMS Press 1973) (1836) (explaining that only 7 of the 9 were actually executed)); *cf.* Colony v. Seabroke, 2 J. Grand Council S.C. 37 (Grand Council 1692), *in* 2 JOURNAL, *supra* note 58, at 54, 54 (noting prosecution for "unlawfull correspondence & comerce w[ith] pyratts").

230. SIRMANS, *supra* note 1, at 124.

231. *See id.* at 124–25.

232. The Trials of Major Stede Bonnet (Oct. 28, 1718), *in* COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON, *supra* note 226, at 1231, 1231.

233. *Id.*

234. *See id.* at 1242, 1247.

235. *See id.* at 1242, 1247, 1257–59.

236. *See id.* at 1239–40, 1264.

237. *See id.* at 1285.

238. *See id.* at 1290.

239. *Id.* at 1263.

240. *Id.* at 1285.

III. MATURING LAW

With the execution of the pirates, Nicholas Trott was at the pinnacle of his career during the winter of 1718–1719.[241] After arriving in South Carolina as a young lawyer in 1699,[242] Trott was instrumental in building a learned legal profession and in giving the colony a sophisticated legal system. He had risen to become chief justice, which at the time made him the only common law judge in the colony, as well as the dominant member of the court of chancery,[243] and he had presided over the most important trial in the colony's history.[244] But a year later he was out of office.[245]

His downfall was the result of the colony's factional politics, in which he had been an avid player. Religion was one cause of factionalism.[246] As of 1700, approximately half of South Carolina's white population consisted of Presbyterians, Baptists, Quakers, and other sectaries.[247] Adherents of the Church of England also amounted to about half the population.[248] During the colony's early decades, these various Protestants lived together with little discord, and religion played almost no role in the colony's politics.[249] But, after 1700, the Anglicans formed an alliance with a small group of French Huguenots,[250] and with Nicholas Trott as one of their leaders,[251] they became a disciplined majority.

After excluding dissenters from the legislature's lower house by requiring all members to take an oath that they conformed to the Anglican church and had not taken communion in any other church for a year,[252] the legislature adopted "An Act for the Establishment of Religious Worship . . . according to the Church of England."[253] In addition to creating territorial parishes and providing for the building of churches, the appointment of Anglican ministers, and the building of houses for such ministers, the Act, as subsequently amended, provided for

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241. *See* Hogue, *supra* note 50, at 24–25.

242. *Id.* at 8.

243. *See* WEIR, *supra* note 1, at 106.

244. *See* Hogue, *supra* note 50, at 25.

245. *See id.* at 26 (citing MCCRADY, *supra* note 3, at 656); *see also* WEIR, *supra* note 1, at 106 (noting Trott's removal by the crown).

246. *See* SIRMANS, *supra* note 1, at 76.

247. *Id.* at 76–77.

248. *Id.* at 77. In 1710, the dissenters constituted 57.5% of the population, and Anglicans constituted only 42.5%. *See* WEIR, *supra* note 1, at 210.

249. *See* SIRMANS, *supra* note 1, at 76–77.

250. *See id.* at 77. Some 500 Huguenots had migrated to South Carolina near the end of the seventeenth century. WEIR, *supra* note 1, at 64.

251. *See* SIRMANS, *supra* note 1, at 79.

252. *Id.* at 87.

253. Act for the Establishment of Religious Worship in this Province, According to the Church of England, No. 260 (1706), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 197, 197, *amended by* Further Additional Act to an Act for the Establishment of Religious Worship in this Province, According to the Church of England, No. 295 (1710), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 231, 231.

funding out of the colony's treasury and for the creation of a powerful, colony wide religious commission.[254] The colony also gave Anglican ministers exclusive jurisdiction to perform marriages.[255] A few years later, the legislature also adopted a law for observation of the Sabbath; it prohibited labor, sports, travelling, selling of merchandise, and serving of liquor on Sunday and required attendance at services of either an Anglican or a dissenting church.[256] The essentials of these laws remained on the books throughout the colonial period; however, no evidence exists as to the extent of their enforcement. Perhaps because of nonenforcement, religion ceased to be a salient political issue by mid century.[257]

Economic issues also created divisions, mainly between merchants who made their living largely through trade and planters who sought to establish a new staple industry in areas outside Charleston.[258] Merchants, as we have seen, wanted freedom to trade with Native Americans, while planters wanted the trade regulated in order to restrain merchants' behavior and thereby preserve the peace and protect outlying agricultural land.[259] Merchants, who had to pay bills from overseas correspondents, wanted a reliable money supply of fixed value acceptable to those correspondents; planters, in contrast, favored policies of inflation through printing of money.[260] Other potentially divisive issues also existed.[261]

South Carolina's proprietors had allied themselves with the hard-money Charleston merchants[262] and the proponents of Anglican establishment. Perhaps the alliance could have survived over time, but two events in the 1710s with which the proprietors dealt badly—the Yamasee War of 1715 and the pirate

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254. Act for the Establishment of Religious Worship in this Province, According to the Church of England, No. 260, §§ 7–15 (1706), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 197, 200–01, *amended by* Further Additional Act to an Act for the Establishment of Religious Worship in this Province, According to the Church of England, No. 295, § 1 (1710), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 231, 232.

255. *See* SIRMANS, *supra* note 1, at 88. The Privy Council disallowed the legislation, but the legislature promptly reenacted it without the provisions excluding dissenters from office and creating the religious commission. WEIR, *supra* note 1, at 79–80; *see* SIRMANS, *supra* note 1, at 88–89.

256. Act for the Better Observation of the Lord's Day, Commonly Called Sunday, No. 331, §§ 1–6 (1712), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 298, 298–300. Earlier, the council had prohibited drinking in public houses during the time of divine service. *See* Order re Observation of the Lords Day, (S.C. Grand Council 1692), *in* 2 JOURNAL, *supra* note 58, at 42, 44; *cf.* Order to Show Cause, J. S.C. Ct. Gen. Sess. 53 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History) (ordering a minister to show cause why he did not preach a sermon during the divine service for the opening of the court session).

257. *See* SIRMANS, *supra* note 1, at 225, 231–33.

258. *See id.* at 110.

259. *See supra* Part II.A.

260. *See* SIRMANS, *supra* note 1, at 108–10, 145–46.

261. *See id.* at 145.

262. *See id.* at 116.

blockade of 1718—undermined them.[263] Both events required South Carolina to undertake expensive military operations for which the proprietors offered practically no funding.[264] The mostly Anglican planters were eager to fund the Yamasee War with paper money, and the proprietors' appointees in Charleston had little choice but to agree.[265] Likewise, the Charleston merchants had no other options for funding the naval expedition that captured the pirates.[266] As a result, all factions came to hold the proprietary government in obloquy.[267] In 1719, South Carolinians rebelled, overthrew the proprietary government, and petitioned the crown to make South Carolina a royal colony.[268]

Though the transition to royal government took a decade to complete, it was remarkably successful. Under two governors, Francis Nicholson (1721–1725) and Robert Johnson (1730–1735), the crown established one of the most sophisticated and, at least for its limited purposes, the most effective legal order on the North American continent. Three factors contributed to the law's success. First, the two governors were able to establish a polity dedicated mainly to serving the needs of South Carolinians rather than to maximizing the fees of placemen or the revenues of the crown. Second, because they received support from the crown that no proprietary governor had ever enjoyed, they were significantly stronger than any of their predecessors had been. Third, they were able to build new alliances based on emerging economic conditions that transcended the old factional splits of the proprietary era.

A. Law for the Indian Trade

When Francis Nicholson arrived in South Carolina in 1721, he immediately abolished public trade with Native Americans and restored fully the privileges of private traders, subject only to one of the many varied administrative schemes with which South Carolina had experimented over the preceding decades.[269] Private traders under the 1721 scheme were subject to the jurisdiction of commissioners of trade, a group of merchants and planters who were expected to make two visits per year to each of four trading posts at the edge of the Indian country.[270] While there, the commissioners would hear and adjudicate disputes among traders and between traders and Indians.[271] The problem was that often

263. *See id.* at 116, 125.
264. *See id.*
265. *See id.* at 116–17.
266. *See id.* at 124–25.
267. *See id.* at 125.
268. *See id.*
269. REID, *supra* note 19, at 126.
270. *Id.* at 126, 130–31 (citing Report of the House Committee (Feb. 9, 1723), *in* COMMONS JOURNAL 1722–1724, *microformed on* Commons House Journals, No. 6 (S.C. Dep't of Archives & History); SMITH, *supra* note 51, at 215).
271. *Id.* at 131 (citing Report of the House Committee (Feb. 9, 1723), *in* COMMONS JOURNAL 1722–1724, *microformed on* Commons House Journals, No. 6 (S.C. Dep't of Archives & History)).

the commissioners arrived at the trading posts on uncertain schedules, at times when potential disputants already had left, or never at all.[272] None of these difficulties, however, should have been surprising: the British practice of governing through the use of part-time elites was not an effective means of ensuring a regular governmental presence under difficult conditions on the frontier.

What the Indian frontier required was a knowledgeable, professional bureaucrat, and in 1723, at Nicholson's request, the legislature enacted a law (which remained in effect for most of the remainder of the colonial period) providing such a bureaucrat.[273] The 1723 act placed the Indian trade under the control of a single commissioner, who had authority to enact regulations, to issue or deny licenses to anyone seeking to engage in the Indian trade, and to reside among the Native American tribes, where he would fully and finally resolve disputes among traders or between traders and Indians without any appeal.[274]

To understand why the 1723 act worked, whereas previous laws had failed, it is necessary to understand how the act differed from its predecessors. It is also necessary to appreciate how Nicholson, as governor, and the trade commissioner he appointed made use of the three factors noted above in constructing a stable regulatory scheme.

John Phillip Reid has observed that the 1723 act was most similar to an earlier 1707 act that created a single Indian agent to police the Indian trade.[275] But, according to Reid, there were important differences between the two measures.[276] The 1723 commissioner had much more power than the 1707 agent did: the 1707 agent was responsible to a commission sitting in Charleston, which issued regulations and licenses and to which appeals from judgments in the field could be taken.[277] The 1723 commissioner, in contrast, possessed final, plenary power to regulate, license, and adjudicate.[278] Moreover, the 1707 commission had been responsible only to the legislature, and its agent had gotten into trouble when he had prosecuted the governor's son-in-law and the governor had ordered the agent's arrest.[279] The 1723 commissioner, in contrast, had the backing of both the governor and the legislature.[280]

At this point, the three factors noted above also come into play. For decades, the Indian trade had been a political football kicked around by competing interest groups: the merchants and the planters. The 1723 act is best understood, however, as a public-regarding effort to provide the entire colony of South

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272. *See id.*
273. *See id.* at 132.
274. *See id.* at 132–33.
275. *See id.* at 132.
276. *Id.* at 132–33.
277. *See id.* at 133.
278. *Id.*
279. *See id.* at 39.
280. *See id.* at 132.

Carolina with something it needed—a system of trade regulation under expert, rather than interest-group, management. The office of trade commissioner became an important one, filled by knowledgeable South Carolinians rather than by placemen from England.[281] Moreover, the office was filled through a process of compromise: the lower house of the legislature nominated the commissioner after planters and merchants had agreed on a candidate, but the governor ultimately appointed him.[282]

Most significantly, perhaps, the trade commissioner had royal support. Beginning in the Nicholson administration, the British army stationed small garrisons at trading posts (which also served as frontier forts), and the trade commissioner had statutory authority to summon traders to appear before him and to call out a detachment of up to ten army horsemen "'to march into any nation of Indians and apprehend . . . [any] disobedient trader or person residing among the Indians.'"[283] In short, public-regarding legislation reflective of political compromise and ultimately enforced by coercive military power provided South Carolina with the law it had long needed, bureaucratic in nature, for regulating its important Indian trade.

B. Law for White Subjects

When royal governors replaced proprietary ones in 1721, South Carolina already had in place a sophisticated, learned legal profession and legal system with a common law court and a chancery court operating on the basis of the common law and English chancery law. This body of law had served adequately to resolve disputes among South Carolinians and between South Carolina entrepreneurs and their commercial partners elsewhere in the Atlantic world.[284] The new governors did nothing immediate to change the law, but over the next four decades, the law did change in subtle fashions, producing the most centralized and one of the most learned legal orders on the North American continent.

Pleading, for example, grew increasingly technical. A common mechanism for seeking dismissal of a suit was a demurrer alleging a variance between two essential documents, such as the declaration and the writ[285] or the declaration

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281. *See id.* at 133–34.

282. *See id.* (citing Additional Act to an Act Entituled An Act for the Better Regulating of the Indian Trade, By Appointing Commissioners for that Purpose, No. 487 (1723), *reprinted in* 3 THE STATUTES AT LARGE OF SOUTH CAROLINA 229 (Thomas Cooper ed., Columbia, 1838)).

283. *Id.* at 127, 157 (quoting Additional Act to an Act Entituled An Act for the Better Regulating of the Indian Trade, By Appointing Commissioners for that Purpose, No. 487, § 8 (1723), *reprinted in* 3 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 282, at 231).

284. For an example of a case involving a long-distance commercial relationship, see *Scott v. Evans*, (S.C. Ct. Com. Pl. 1759), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 50A (S.C. Dep't of Archives & History).

285. *See, e.g.*, Young v. Boillatt, (S.C. Ct. Com. Pl. 1760), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 49B (S.C. Dep't of Archives & History) (seeking dismissal because of a

and the underlying note or bond.[286] Other grounds for seeking dismissal included that a litigant had died[287] or that a writ was erroneously made returnable before the chief justice of the court rather than "Our Justices."[288] Other demurrers raised more substantive issues, such as a failure to plead a legal or valuable consideration in a suit on a promise[289] or a failure to plead all the statutory prerequisites to assignment of a bond.[290]

Litigants used demurrers in the process of special pleading. In some cases, through a series of pleas and replies, they would frame a narrow issue of fact that a jury would then resolve.[291] More often, one of the litigants would file a demurrer to a plea thereby challenging the plea's legal sufficiency and raising an issue of law for decision by the court.[292] Special pleading became a very precise

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variance between the declaration and the writ); Beamer v. Norton, (S.C. Ct. Com. Pl. 1723), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 20A (S.C. Dep't of Archives & History) (alleging a material variance between the declaration and an original document); *cf.* Durand v. Guichard, Ct. Ch. Minutes Book, 1737–1766, at 54, 58 (S.C. Ch. 1745 & 1747), *reprinted in* RECORDS, *supra* note 18, at 402, 402–03, 408 (reporting variance between chancery order and decree as initially drafted).

286. *See, e.g.*, Kennan v. Trusler, (S.C. Ct. Com. Pl. 1753), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 36A (S.C. Dep't of Archives & History) (requesting dismissal over a manifest variance between the declaration and the bond); King v. Gibbons, (S.C. Ct. Com. Pl. 1723), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 19A (S.C. Dep't of Archives & History) (finding a manifest variation involving a written obligation); *cf.* McColloch v. Hume, (S.C. Ct. Com. Pl. 1767), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 70A (S.C. Dep't of Archives & History) (finding a variance between the language of a bond and the language in a replication describing the bond).

287. *See* Bagby v. Ex'rs of Bagby, Ct. Ch. Minutes Book, 1737–1766, at 174 (S.C. Ch. 1764), *reprinted in* RECORDS, *supra* note 18, at 529, 529; Porter v. Drake, Ct. Ch. Minutes Book, 1721–1736, at 90, 90 (S.C. Ch. 1731), *reprinted in* RECORDS, *supra* note 18, at 359, 359.

288. Canty v. Cartwright, (S.C. Ct. Com. Pl. 1733) (typescript in possession of S.C. Dep't of Archives & History).

289. Glen v. Bullock, (S.C. Ct. Com. Pl. 1751), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box ST1291 (S.C. Dep't of Archives & History).

290. *See* Stocks v. Main, (S.C. Ct. Com. Pl. 1723), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 20A (S.C. Dep't of Archives & History); *cf.* Dicks v. Deftem, Ct. Ch. Minutes Book, 1721–1736, at 86 (S.C. Ch. 1731), *reprinted in* RECORDS, *supra* note 18, at 355, 355 (overruling demurrer that petitioner failed to plead complaint in sufficient detail).

291. *See* Bull v. Buckle, (S.C. Ct. Com. Pl. 1770), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 86B (S.C. Dep't of Archives & History). At least with the permission of the court, however, a defendant could join a special plea to a plea of the general issue, *see* Mottatt v. Shinner, (S.C. Ct. Com. Pl. 1769), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 84A (S.C. Dep't of Archives & History), with the result that the case would not be narrowed for the jury.

292. *See, e.g.*, Rolleston v. Harvey, (S.C. Ct. Com. Pl. 1770), *microformed on* S.C. Ct. Com. Pl. Judgment Books 1767–71 (WPA transcripts), Box ST1292 (S.C. Dep't of Archives & History) (reporting a demurrer challenging the sufficiency of a plea where the contested goods and chattels had already been returned); Niven v. Bell, (S.C. Ct. Com. Pl. 1753), *microformed on* S.C. Ct. Com. Pl. Judgment Books 1749–60 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History) (reporting a demurrer challenging the sufficiency of a plea where the alleged debt had already been satisfied); King v. Scott, (S.C. Ct. Com. Pl. 1723), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 20A (S.C. Dep't of Archives & History). The court's sustaining of a demurrer did not necessarily result in judgment in a case; the court might give the losing party the opportunity to

art: the court would sustain a demurrer, for example, to a plea that a defendant paid a debt in full before the due date when the plea failed to allege specifically both the amount that was due and the amount that was paid.[293] Likewise, the court would reject pleas if they were dilatory[294] or frivolous.[295]

The 1741 case of *Hext v. Executors of Jenys*[296] illustrated the precision required in special pleading, where the court of common pleas wrote a nine-page opinion citing over ten English authorities.[297] The case began as an action of debt on a bond for £300 sterling with a condition that if the debtor paid £150 sterling plus interest[298] or its equivalent in local currency by a specified date, the bond would be void.[299] The defendant executors came into court and tendered £1080 in local currency, which they alleged to be the equivalent of £150 plus the interest then due.[300]

The court found the tender procedurally insufficient.[301] The pleadings, it noted, did not raise a triable issue of fact for the jury concerning whether the amount tendered in local currency was equivalent to the amount due in sterling, and the court had no jurisdiction to determine that fact.[302] The defendants, it said, should have sought relief from the penalty of the bond in chancery, which would have framed a proper issue and remitted the case to a jury in common pleas for resolution of that issue.[303] The court agreed to resolve the case only because the parties had submitted it to the judges as arbitrators; thus, it directed the defendants to pay £1414.11s.10d in local currency.[304]

As noted above, special pleading was important to the ability of legislatures to ensure that their statutes were enforced. Thus, in 1732, Parliament made land and slaves liable for the payment of decedents' debts, and the court enforced that statute in numerous cases in South Carolina. When executors or administrators

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plead in response. *See* Raper v. Prioleau, (S.C. Ct. Com. Pl. 1757), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 44A (S.C. Dep't of Archives & History); Dyson v. Parriss, Ct. Ch. Minutes Book, 1721–1736, at 92 (S.C. Ch. 1731/32), *reprinted in* RECORDS, *supra* note 18, at 360, 360.

293. *See* Hume v. Hepworth, Charleston County Clerk of Court Minutes, 1739–40, at 21 (S.C. Ct. Com. Pl. 1739) (S.C. Dep't of Archives & History).

294. *See* Heywood v. Hope, (S.C. Ct. Com. Pl. 1767), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 70A (S.C. Dep't of Archives & History); *cf.* MacKenzie v. Maxwell, (S.C. Ct. Com. Pl. 1761), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 53A (S.C. Dep't of Archives & History) (ruling "out of Court" a case in which a rule to argue a demurrer was obtained "irregularly" apparently because the case was pending too long on the court's docket).

295. *See* Ferguson v. Harvey, (S.C. Ct. Com. Pl. 1762), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 55B (S.C. Dep't of Archives & History).

296. (S.C. Ct. Com. Pl. 1741), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 26A (S.C. Dep't of Archives & History).

297. *Id.*

298. The state rate of interest was 10%. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

pleaded specially that they had no assets, creditors pleaded the 1732 Act, the executors or administrators demurred, and the court invariably overruled their demurrers. This process of special pleading thereby ensured, as Parliament wished, that creditors would receive their due.[305]

Creditors devoted a huge amount of legal energy in the mid-eighteenth century to debt collection, where a great deal of highly specialized law emerged. One specialized procedure permitted creditors to attach assets of absent debtors found in the hands of third parties.[306] Another procedure, created by statute and

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305. *See, e.g.*, Price v. Bellinger, (S.C. Ct. Com. Pl. 1760), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 49B (S.C. Dep't of Archives & History) (involving a creditor pleading the 1732 act); Michie v. Adm'r of Barrie, (S.C. Ct. Com. Pl. 1749), *microformed on* S.C. Ct. Com. Pl. Judgment Books 1749–60 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History) (involving a creditor pleading the 1732 act); *cf., e.g.*, Holmes v. Wickham, Charleston County Clerk of Court, Record of the Proceedings in the Court of Common Pleas, 1745–46, at 204 (S.C. Ct. Com. Pl. 1746) (S.C. Dep't of Archives & History) (reporting a plea that executor had no assets; a replication that assets may come into executor's possession in the future; and a demurrer and judgment that creditor can collect judgment only out of such possible future assets). There were hundreds of cases like *Holmes v. Wickham*. A more unusual case was *Wooddrop & Deursian v. Administrators of Hartley*, (S.C. Ct. Com. Pl. 1759), *microformed on* S.C. Ct. Com. Pl. Judgment Books (WPA transcripts), Box 67 (S.C. Dep't of Archives & History), where the court granted writs of execution against an administrator and widow for selling a decedent's chattels and converting the proceeds to their own use. Special pleading was also used in *McGilvray v. Blundy*, (S.C. Ct. Com. Pl. 1754), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 37A (S.C. Dep't of Archives & History), where a debtor pleaded that he would setoff against a debt the sum due on an account owed him, as permitted by a provincial statute. The same result could be reached by pleading the general issue and providing notice of an intention to introduce an account as a setoff. *See* Pinckney v. Middleton, (S.C. Ct. Com. Pl. 1767), *microformed on* S.C. Ct. Com. Pl. Judgment Books 1767–71 (WPA transcripts), Box ST1292 (S.C. Dep't of Archives & History).

306. *See, e.g.*, Scott v. Evans, (S.C. Ct. Com. Pl. 1759), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 50A (S.C. Dep't of Archives & History) (attaching assets in the hands of a third party). The basic procedure required third parties to testify as to the assets of the debtor in their possession and to hold, *see, e.g.*, Aiton v. Rose, (S.C. Ct. Com. Pl. 1760), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 54A (S.C. Dep't of Archives & History) (involving third party in possession of debtor's assets), pay over, *see, e.g.*, Knox v. Dargan, (S.C. Ct. Com. Pl. 1767), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 69A (S.C. Dep't of Archives & History) (ordering third party to pay over funds to satisfy a debt), or, if ordered, sell the assets for the creditor's benefit, *see* Scranton v. Gale, (S.C. Ct. Com. Pl. 1768), *microformed on* S.C. Ct. Com. Pl. Judgment Books (WPA transcripts), Box 70 (S.C. Dep't of Archives & History). But third parties might also plead that they had no assets, *see, e.g.*, Scott v. Pratt, (S.C. Ct. Com. Pl. 1759), *microformed on* S.C. Ct. Com. Pl. Judgment Books (WPA transcripts), Box 67 (S.C. Dep't of Archives & History) (pleading by a third party that they had no assets in their possession), that the debtor owed them more than they owed the debtor, *see* Merckley v. Ragnous, (S.C. Ct. Com. Pl. 1756), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 43A (S.C. Dep't of Archives & History), or that the assets belonged to some other person, *see, e.g.*, Savage v. Wraxall, (S.C. Ct. Com. Pl. 1756), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 43A (S.C. Dep't of Archives & History) (assigning assets to another "in Consequence of a Commission of Bankruptcy"). Disputed issues of fact ultimately would go to a jury. *See* Aubert v. Stott, (S.C. Ct. Com. Pl. 1768), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 76B (S.C. Dep't of Archives & History). A third party who failed to comply with the procedure would have a judgment entered against him for the amount of any assets claimed by the creditor to be in his possession. *Cf.* Gordon v. Green, (S.C. Ct. Com. Pl. 1767), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box

serving as a substitute "for want of a Statute of Bankruptcy,"[307] provided relief from imprisonment for insolvent debtors who assigned whatever assets they possessed to their creditors.[308] A third procedure provided for setting aside judgments in favor of one creditor obtained in fraud of other creditors.[309]

Nonetheless, debt collection was a difficult business. Often, it was impossible for a creditor to "get any more from [a debtor's] effects."[310] Typically, the best course for the creditor was to compromise; thus, one lawyer advised his creditor client to "give [his debtor] a Discharge" out of hope that "his Friends might be induced to advance one or two hundred pounds sterling for him."[311] Of course, judges also made efforts to encourage litigants to resolve debtor–creditor litigation through settlement.[312]

Along with the escalating technicality and sophistication in the law came an increase in the power of the legal profession. Judges, perhaps intuiting that they would benefit from growth in the profession's power, on the whole facilitated it. Thus, judges sought to upgrade the profession as well as the dignity of judicial proceedings by regulating lawyers' attire[313] and prohibiting street noise that could disturb the court's sittings.[314] Until 1768, lawyers had a monopoly over the drafting of important legal instruments, such as renunciations of dower[315] and

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78A (S.C. Dep't of Archives & History) (vacating such a judgment against a third party who had mistakenly rather than intentionally failed to appear).

307. Letter from Peter Manigault to Isaac King (Sept. 6, 1771), *in* PETER MANIGAULT LETTERBOOK 1763–73 (Manigault Papers, S.C. Hist. Soc'y).

308. *See, e.g.*, Grimber v. Campbell, (S.C. Ct. Com. Pl. 1756), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 42A (S.C. Dep't of Archives & History) (assigning debtor assets to creditor); *cf.* Crockett v. Stuart, (S.C. Ct. Com. Pl. 1769), *microformed on* S.C. Ct. Com. Pl. Judgment Books (WPA transcripts), Box ST1292 (S.C. Dep't of Archives & History) (reporting where a debtor who had assigned his book accounts to a creditor sought their return after the creditor died without making any effort to recover the accounts). There is no record of the disposition of *Crockett v. Stuart*. In turn, legislatures passed laws to restrict actions against resident debtors. *See* Act for Preventing the Desertion of Insolvent Debtors, No. 478 (1722), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 458, 458–61.

309. *See* Peronneau v. Peronneau, (S.C. Ct. Com. Pl. 1769), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 84A (S.C. Dep't of Archives & History); *cf.* Gadsden v. Ralph, (S.C. Ct. Com. Pl. 1758), *microformed on* S.C. Ct. Com. Pl. Judgment Books (WPA transcripts), Box 67 (S.C. Dep't of Archives & History) (granting motion to set aside mortgage as fraudulent when creditor failed to appear and testify as to amount actually due on mortgage).

310. Letter from Peter Manigault to Isaac King (Oct. 27, 1770), *in* PETER MANIGAULT LETTERBOOK 1763–73 (Manigault Papers, S.C. Hist. Soc'y).

311. *Id.*

312. *See* Richardson v. Bissett, (S.C. Ct. Com. Pl. 1755), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 39B (S.C. Dep't of Archives & History).

313. *See* Rule for Attire of Lawyers, (S.C. Ct. Com. Pl. 1762), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 58A (S.C. Dep't of Archives & History).

314. *See* Order re Drums & Bells, (S.C. Ct. Com. Pl. 1765), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 64A (S.C. Dep't of Archives & History).

315. *See* Rule re Renunciation of Dower, (S.C. Ct. Com. Pl. 1768), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box ST1291 (S.C. Dep't of Archives & History) (abolishing lawyers' monopoly over drafting such renunciations as "inconvenient and productive of unnecessary expense"). For an example of a renunciation of dower, see Mrs. Cristina Dwight to Rev. Alexander

attorney warrants authorizing confessions of judgment for debt.[316] In addition, the judiciary took care to protect the colony's legal records,[317] which were essential to lawyers' practice. The Court of Common Pleas also allowed lawyers to commence their own personal litigation by bill rather than writ without the need of any pledges for seasonable prosecution of the same.[318]

More important was the judiciary's recognition that lawyers were essential to the fair and effective adjudication of disputes under law. Judges routinely granted attorneys' requests for additional time to prepare for trial and produce witnesses,[319] to take depositions when witnesses could not come to court,[320] or to hear them immediately when they were present in court.[321] They were also prepared to appoint lawyers, even in civil cases, to represent litigants who established their inability to pay for an attorney.[322] And, to monitor fact-finding and thereby retain control over the law in their own and the bar's professional hands, judges subjected juries to tight control.

Gordon (Apr. 24, 1741) (unpublished typescript, on file with the South Carolina Historical Society, Pringle-Garden Family Papers, Box 1).

316. *See* Saxby v. Hurst, (S.C. Ct. Com. Pl. 1751), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 31A (S.C. Dep't of Archives & History).

317. *See* Brisbane v. Lingard, (S.C. Ct. Com. Pl. 1767), *microformed on* S.C. Ct. Com. Pl. Civil Journals 1749–60 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History).

318. *See* Russ v. Trewin, Charleston County Clerk of Court Minutes 1739–40, at 37 (S.C. Ct. Com. Pl. 1739) (S.C. Dep't of Archives & History).

319. *See, e.g.*, Groom v. Murphy, (S.C. Ct. Com. Pl. 1764), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 60A (S.C. Dep't of Archives & History) (granting additional time to litigants); Beale v. Wright, (S.C. Ct. Com. Pl. 1760), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 49A (S.C. Dep't of Archives & History) (granting party leave to correct pleadings).

320. *See* Cleland v. Foissine, Ct. Ch. Minutes Book, 1737–1766, at 139 (S.C. Ch. 1757), *reprinted in* RECORDS, *supra* note 18, at 489, 489 (ill witness); Wilkinson v. Bassett, Ct. Ch. Minutes Book, 1721–1736, at 9 (S.C. Ch. 1721/22), *reprinted in* RECORDS, *supra* note 18, at 282, 282 (woman with a young child); *cf.* King v. Caine, J. S.C. Ct. Gen. Sess. 48 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box AD0721 (S.C. Dep't of Archives & History) (witness for defendant about to leave South Carolina); Snow v. Blaire, Ct. Ch. Minutes Book, 1721–1736, at 84 (S.C. Ch. 1730/31), *reprinted in* RECORDS, *supra* note 18, at 354, 354 (witnesses about to leave South Carolina).

321. *See* Porter v. Peterson, Ct. Ch. Minutes Book, 1721–1736, at 37 (S.C. Ch. 1724), *reprinted in* RECORDS, *supra* note 18, at 310, 310.

322. *See* Laird v. Adams, (S.C. Ct. Com. Pl. 1769), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 82A (S.C. Dep't of Archives & History); Donnen v. Carne, Ct. Ch. Minutes Book, 1737–1766, at 166 (S.C. Ch. 1763), *reprinted in* RECORDS, *supra* note 18, at 522, 522; Scott v. Fidling, Ct. Ch. Minutes Book, 1721–1736, at 2 (S.C. Ch. 1721), *reprinted in* RECORDS, *supra* note 18, at 271, 271; Petition of Odus, (S.C. Ct. Com. Pl. 1714), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 4B (S.C. Dep't of Archives & History). For appointments to represent indigent defendants in criminal cases, see *King v. Irwin*, J. S.C. Ct. Gen. Sess. 141 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box AD0721 (S.C. Dep't of Archives & History); *King v. Griffin*, J. S.C. Ct. Gen. Sess. 16 (Ct. Gen. Sess. 1769), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box AD0721 (S.C. Dep't of Archives & History). For legislation mandating the appointment of counsel in felony cases, see Act Confirming and Establishing the Ancient and Approved Method of Drawing Juries, No. 543, § 43 (1731), *reprinted in* 2 EARLIEST PRINTED LAWS, *supra* note 209, at 25, 40–41.

Thus, naturalized foreigners who did not understand English were excused from service on juries.[323] Unlike Pennsylvania, which accommodated the need to involve foreign, mainly German, communities in the legal system,[324] South Carolina kept juries totally under Englishmen's control. Of course, no one could serve on a jury in a case in which either he[325] or a relative[326] was a party or in which he was otherwise "interested in the event of th[e] cause."[327] Juries had to be properly sworn.[328] And, if a jury either failed to consider evidence or ruled on the basis of improper evidence, the court would set aside its verdict and grant a new trial.[329]

Judges not only monitored jury fact-finding but also totally controlled the potential power of juries to find law. Often, juries cooperated by returning special verdicts that resolved only issues of fact and left the court free to determine the legal significance of those facts.[330] But, even when juries tried to exercise greater freedom, judges kept them under tight control. As early as 1734, a motion was made in arrest of judgment on the ground that a jury had failed to address all the issues presented by the pleadings.[331] Judges also appear to have kept rein over evidence that a jury could hear, permitting the introduction only of evidence relevant to the issues raised by the pleadings.[332] And, the Court of

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323. *See* Application of Mayer, (S.C. Ct. Com. Pl. 1759), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 48A (S.C. Dep't of Archives & History).

324. *See* William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 59 SMU L. REV. 3, 26 (2006).

325. *See* Lloyd v. Gaillard, (S.C. Ct. Com. Pl. 1760), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 50A (S.C. Dep't of Archives & History).

326. *See* Pringle v. Boone, (S.C. Ct. Com. Pl. 1764), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 59A (S.C. Dep't of Archives & History).

327. Mollichamp v. Harvey, (S.C. Ct. Com. Pl. 1761), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 53A (S.C. Dep't of Archives & History).

328. *See* LaFontain v. Thorp, (S.C. Ct. Com. Pl. 1758), *microformed on* S.C. Ct. Com. Pl. Judgment Books 1749–60 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History).

329. *See* Pendergrass v. Langley, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 66A (S.C. Dep't of Archives & History).

330. *See, e.g.*, Right v. Day, (S.C. Ct. Com. Pl. 1759), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 47B (S.C. Dep't of Archives & History) (focusing on the legal issues while the jury decided the factual questions); Campbell v. Lorimer, (S.C. Ct. Com. Pl. 1758), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 46A (S.C. Dep't of Archives & History).

331. *See* Scott v. Walker, Charleston County Clerk of Court Minutes 1733–34, at 238 (S.C. Ct. Com. Pl. 1734) (S.C. Dep't of Archives & History).

332. *See* Ferguson v. Harvey, (S.C. Ct. Com. Pl. 1762), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 55B (S.C. Dep't of Archives & History); *accord* Lessee of Green v. Curry, (S.C. Ct. Com. Pl. 1769), *microformed on* S.C. Ct. Com. Pl. Civil Journals 1754–69 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History) (objecting to the admission of a deed containing the word "Seal" rather than the maker's actual seal). Chancery also passed on issues of the admissibility of evidence. *See* Ogilvie v. Ward, Ct. Ch. Minutes Book, 1770–1774, at 86 (S.C. Ch. 1774), *reprinted in* RECORDS, *supra* note 18, at 625, 625; Williams v. Loyer, Ct. Ch. Minutes Book, 1770–1774, at 20 (S.C. Ch. 1771), *reprinted in* RECORDS, *supra* note 18, at 589, 589–93; *see also* Maine v. Logan, (S.C. Ct. Com. Pl. 1759), *microformed on* S.C. Ct. Com. Pl. Judgment Books 1749–60 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History) (reporting where a defendant in an action of debt moved successfully for the court's permission to withdraw a plea of

Common Pleas granted motions for new trials when verdicts were "against Evidence[,] Contrary to Law[] and the Directions of the Court" or when damages were excessive.[333] In one case, the court even set aside the verdict and granted judgment on the law for a defendant.[334]

The result was a legal order under the tight control of the bench. Moreover, it was a completely centralized system. In the 1720s, Governor Nicholson and others proposed to establish courts to hear civil cases outside Charleston,[335] but in 1726, the Privy Council disallowed revised legislation creating such courts.[336] As a result, the Court of Common Pleas in Charleston remained the only court in the colony with jurisdiction over civil, common law adjudication until 1772.[337] Individual justices of the peace heard misdemeanors not requiring a jury trial and petty debt cases, but the justices never met together as county courts of sessions.[338] Outlying regions did not even have their own sheriffs: the provost marshal for the entire colony served all writs and executed all judgments,[339] and the chief justice of the colony and his associate judges sitting in the colony-wide Court of Sessions in Charleston appointed local constables.[340]

"non est factum" and substitute a plea of "nil debet"). In *Maine v. Logan*, there would have been no reason for the defendant to seek to substitute one form of pleading the general issue for another unless evidence he planned to introduce was admissible under one but not the other.

333. Hazzard v. Wood, (S.C. Ct. Com. Pl. 1761), *microformed on* S.C. Ct. Com. Pl. Civil Journals, 1754–69 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History); *see also* Laurens v. Roupell, (S.C. Ct. Com. Pl 1768), *microformed on* S.C. Ct. Com. Pl. Civil Journals, 1754–69 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History) (denying motion for new trial because it was not made timely); McGregor v. Holliday, (S.C. Ct. Com. Pl. 1765), *microformed on* S.C. Ct. Com. Pl. Civil Journals, 1754–69 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History) (postponing consideration of motion for new trial).

334. *See* Crokatt v. Laurence, (S.C. Ct. Com. Pl. 1757), *microformed on* S.C. Ct. Com. Pl. Civil Journals, 1754–69 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History); *cf.* Allen v. Beale, (S.C. Ct. Com. Pl. 1759), *microformed on* S.C. Ct. Com. Pl. Civil Journals, 1754–69 (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History) (setting aside default judgment on the law).

335. *See* SIRMANS, *supra* note 1, at 142–44, 159–60, 166.

336. *See* Act for the Better Settling of the Courts of Justice, No. 540 (1726), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 540, 540–41. Of course, the Privy Council heard appeals from civil judgments as well as passing on legislation. *See, e.g.*, Ogilvie v. Ward, Ct. Ch. Minutes Book, 1770–1774, at 86 (S.C. Ch. 1774), *reprinted in* RECORDS, *supra* note 18, at 625, 625.

337. *See* WEIR, *supra* note 1, at 276–77 (noting that the legislature did not pass the act creating circuit courts until its 1767–1768 session).

338. *See* SIRMANS, *supra* note 1, at 251; *see also* Act for the Speedy Recovery of Small Debts, No. 457 (1721), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 424, 424–25, *amended by* Additional Act to an Act for the Trial of Small and Mean Causes, No. 530 (1726), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 533, 533–34 (giving justices the power to hear claims for small debts); SIMPSON, *supra* note 212, at 67–70, 124, 126–27 (providing directions for justices in hearing cases, including those that do not exceed "the sum, of Twenty pounds").

339. *See* SIMPSON, *supra* note 212, at 112–13. For the relevant legislation, see Act Confirming and Establishing the Ancient and Approved Method of Drawing Juries, No. 543 (1731), *reprinted in* 2 EARLIEST PRINTED LAWS, *supra* note 209, at 25, 25–62.

340. *See* SIMPSON, *supra* note 212, at 84–85.

The Court of Chancery, which was put on an explicit statutory footing in 1721 with the governor of the colony as its presiding officer,[341] subjected the centralized Court of Common Pleas sitting in Charleston to firm supervision. Chancery continued its old practices of presiding over the administration of estates,[342] supervising guardians,[343] enforcing the equity of redemption to mortgages,[344] implementing trusts,[345] and enjoining actions at law.[346]

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341. *See* Act for Establishing a Court of Chancery in This His Majesty's Province of South Carolina, No. 460 (1721), *reprinted in* 1 EARLIEST PRINTED LAWS, *supra* note 101, at 437, 437–39; Frierson, *supra* note 98, at 53.

342. *See* Petition of Ex'rs of Godin, Ct. Ch. Minutes Book, 1737–1766, at 79 (S.C. Ch. 1749), *reprinted in* RECORDS, *supra* note 18, at 429, 429; Stanyarn v. Seabrook, (S.C. Ch. 1725), *in* RECORDS, *supra* note 18, at 321, 321–22; *see also* Saunders v. Stewart, Ct. Ch. Minutes Book, 1721–1736, at 91 (S.C. Ch. 1731/32), *reprinted in* RECORDS, *supra* note 18, at 359, 359–60 (holding a devise valid and a remainder over void). *But cf.* Alston v. King, Ct. Ch. Minutes Book, 1721–1736, at 20 (S.C. Ch. 1722), *reprinted in* RECORDS, *supra* note 18, at 294, 294 (remitting parties to their remedy in probate).

343. *See* Petition of Caw, Ct. Ch. Minutes Book, 1737–1766, at 68 (S.C. Ch. 1748), *reprinted in* RECORDS, *supra* note 18, at 418, 418; Petition of Kays, Ct. Ch. Minutes Book, 1721–1736, at 27 (S.C. Ch. 1722), *reprinted in* RECORDS, *supra* note 18, at 300, 300–01; *see also* Petition of Lamboll, Ct. Ch. Minutes Book, 1721–1736, at 107 (S.C. Ch. 1735/36), *reprinted in* RECORDS, *supra* note 18, at 382, 382 (directing the clearing of new land for the benefit of wards); Beresford v. Armiger, Ct. Ch. Minutes Book, 1721–1736, at 92 (S.C. Ch. 1731/32), *reprinted in* RECORDS, *supra* note 18, at 361, 361–62 (directing deposit of money for benefit of a ward); *cf.* Petition of Kimberly, Ct. Ch. Minutes Book, 1721–1736, at 61 (S.C. Ch. 1726), *reprinted in* RECORDS, *supra* note 18, at 332, 332 (petitioning to declare man a lunatic).

344. *See* Martini v. Ex'rs of Lloyd, Ct. Ch. Minutes Book, 1737–1766, at 248 (S.C. Ch. 1765), *reprinted in* RECORDS, *supra* note 18, at 548, 548; Cartwright v. Meek, Ct. Ch. Minutes Book, 1737–1766, at 70 (S.C. Ch. 1748), *reprinted in* RECORDS, *supra* note 18, at 420, 420; Kennard v. Moore, Ct. Ch. Minutes Book, 1721–1736, at 41 (S.C. Ch. 1724), *reprinted in* RECORDS, *supra* note 18, at 314, 314.

345. *See* Petition of Bell, Ct. Ch. Minutes Book, 1737–1766, at 67, 74 (S.C. Ch. 1748), *reprinted in* RECORDS, *supra* note 18, at 417, 417–18, 424; Clarke v. Simpson, Ct. Ch. Minutes Book, 1737–1766, at 66 (S.C. Ch. 1747), *reprinted in* RECORDS, *supra* note 18, at 415, 415–16; *cf.* Weekley v. Rhett, (S.C. Ch. 1721), *in* RECORDS, *supra* note 18, at 271, 271 (seeking imposition of trust of moneys fraudulently obtained). For an example of a trust established as part of a marriage settlement, see Indenture between Benjamin Garden, Amelia Godin, Stephen Bull, and William Lennox (Jan. 16, 1765) (unpublished indenture typescript, on file with the South Carolina Historical Society, Pringle-Garden Family Papers, Box 1).

346. *See* Stone v. Logan, Ct. Ch. Minutes Book, 1737–1766, at 157 (S.C. Ch. 1762), *reprinted in* RECORDS, *supra* note 18, at 509, 509; Snow v. Blair, Ct. Ch. Minutes Book, 1721–1736, at 83 (S.C. Ch. 1730/31), *reprinted in* RECORDS, *supra* note 18, at 352, 352; Delamare v. Blake, Ct. Ch. Minutes Book, 1721–1736, at 55 (S.C. Ch. 1726), *reprinted in* RECORDS, *supra* note 18, at 327, 327; Godin v. Guerard, Ct. Ch. Minutes Book, 1721–1736, at 11 (S.C. Ch. 1721/22), *reprinted in* RECORDS, *supra* note 18, at 284, 284. But it would not grant injunctions if petitioners had an adequate remedy at law, *see* Stobo v. Kinloch, Ct. Ch. Minutes Book, 1721–1736, at 31 (S.C. Ch. 1723), *reprinted in* RECORDS, *supra* note 18, at 304, 304, if the balance of equity favored petitioners, *see* Green v. Browne, Ct. Ch. Minutes Book, 1721–1736, at 77 (S.C. Ch. 1728/29), *reprinted in* RECORDS, *supra* note 18, at 346, 346, or against enforcement of default judgments, *see* Smith v. Beresford, Ct. Ch. Minutes Book, 1770–1774, at 3 (S.C. Ch. 1721), *reprinted in* RECORDS, *supra* note 18, at 276, 276.

But it also became much more intrusive than it had been in the past. Thus, it determined priority among creditors,[347] supervised the balancing of accounts,[348] framed issues for adjudication in the common law courts,[349] and gave relief to litigants who could not obtain it at common law because their witnesses' interest in the outcome prevented them from testifying.[350] It took jurisdiction over disputes between husbands and wives that required orders of support.[351] It, rather than common pleas, decided whether to issue writs prohibiting debtors from leaving the colony.[352] It was even prepared to enjoin waste rather than remit a landowner to an action at law for damages for the waste.[353] In the end, as one lawyer argued, "the Court of Chancery . . . had a Concurrent Jurisdiction in many Cases with the Court of Law."[354] However, chancery would not require a respondent to answer to a claim that might subject him to a penalty at common law.[355] Nor would it issue an injunction ex parte or in the absence of seasonable notice to the respondent.[356] And, recourse to chancery was "attended with a greater expense."[357]

Enforcement of administrative law and criminal law through the Court of Sessions, which, like common pleas and chancery, sat only in Charleston and

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347. *See* Blakie v. Kincaid, Ct. Ch. Minutes Book, 1770–1774, at 42 (S.C. Ch. 1771), *reprinted in* RECORDS, *supra* note 18, at 600, 600–01 (appointing receiver to collect and pay assets and pay creditors equally); Cattell v. Skene, Ct. Ch. Minutes Book, 1737–1766, at 63 (S.C. Ch. 1747), *reprinted in* RECORDS, *supra* note 18, at 415, 415 (involving litigation over administration of estate).

348. *See* Smith v. Trapier, Ct. Ch. Minutes Book, 1737–1766, at 145 (S.C. Ch. 1758), *reprinted in* RECORDS, *supra* note 18, at 495, 495–96.

349. *See* Hall v. Rhett, Ct. Ch. Minutes Book, 1721–1736, at 20, 23 (S.C. Ch. 1721 & 1722), *reprinted in* RECORDS, *supra* note 18, at 275, 275, 297.

350. *See* Hall v. Rhett, Ct. Ch. Minutes Book, 1721–1736, at 29 (S.C. Ch. 1722), *reprinted in* RECORDS, *supra* note 18, at 302, 302.

351. *See* Lowndes v. Lowndes, Ct. Ch. Minutes Book, 1721–1736, at 111 (S.C. Ch. 1736), *reprinted in* RECORDS, *supra* note 18, at 381, 381–82; Taveroon v. Taveroon, Ct. Ch. Minutes Book, 1721–1736, at 54, 56, 59 (S.C. Ch. 1726), *reprinted in* RECORDS, *supra* note 18, at 326, 326–330.

352. *See* Richards v. Mullryne, Ct. Ch. Minutes Book, 1737–1766, at 160 (S.C. Ch. 1762), *reprinted in* RECORDS, *supra* note 18, at 515, 515–16; Wragg v. Cooper, Ct. Ch. Minutes Book, 1737–1766, at 48 (S.C. Ch. 1742/43), *reprinted in* RECORDS, *supra* note 18, at 396, 396 (denying writ when plaintiff had several years to bring suit and had not).

353. *See* Dry v. Weekley, Ct. Ch. Minutes Book, 1721–1736, at 19 (S.C. Ch. 1722), *reprinted in* RECORDS, *supra* note 18, at 293, 293; *cf.* Bassett v. Wilkinson, Ct. Ch. Minutes Book, 1721–1736, at 15 (S.C. Ch. 1721/22), *reprinted in* RECORDS, *supra* note 18, at 287, 287 (dividing slaves of decedent immediately so that they could be put back to work before planting time).

354. Dering v. Elliott, Ct. Ch. Minutes Book, 1770–1774, at 46 (S.C. Ch. 1772), *reprinted in* RECORDS, *supra* note 18, at 602, 602–03 (argument of counsel).

355. Baker v. Moore, Ct. Ch. Minutes Book, 1721–1736, at 53 (S.C. Ch. 1726), *reprinted in* RECORDS, *supra* note 18, at 326, 326 (claim of usury).

356. *See* Trott v. Parris, Ct. Ch. Minutes Book, 1721–1736, at 106 (S.C. Ch. 1735), *reprinted in* RECORDS, *supra* note 18, at 377, 377–78. For legislation and court rules requiring notice, see Order of Sept. 8, 1762, *in* RECORDS, *supra* note 18, at 512, 512–13; Frierson, *supra* note 98, at 54.

357. Letter from Peter Manigault to John Delahous (Mar. 2, 1772), *in* PETER MANIGAULT LETTERBOOK 1763/73 (Manigault Papers, S.C. Hist. Soc'y).

was presided over by the chief justice of the colony, was nearly as centralized.[358] Except in prosecutions against slaves, where they could even impose a penalty of death,[359] local justices of the peace had almost no power.[360] Until 1772, they did not even routinely examine prisoners arrested for crime.[361]

Juries, however, possessed greater power than they did in common pleas. The most important power was that of the grand jury to begin each term of court by presenting the grievances of the community. Typical grievances included such matters as the poor condition of roads, the neglect of patrol duty, the prevalence of immorality, and the excessive number of liquor licenses.[362] But there were other complaints, such as one that "sufficient regard [was] not had to the Character of those men who are entrusted with the Commission of the Peace," specifically to a particular Indian trader who had been appointed as a justice.[363] Another grand jury objected to the large number of vagrants who were allowed to beg,[364] while a third grand jury objected to a neighbor "keeping a vicious bull dog to the great terror & danger" of his neighbors.[365] A fourth grand jury presented a more significant grievance against "the common practice of committing persons to jail on the most trivial accusations and groundless suspicions, by which conduct the liberties of the people are invaded and the expenses of Government increased."[366]

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358. For legislation establishing the Court of Sessions, see Act Confirming and Establishing the Ancient and Approved Method of Drawing Juries, No. 543, § 30 (1731), *reprinted in* 2 EARLIEST PRINTED LAWS, *supra* note 209, at 25, 36.

359. *See* Robert Olwell, *"Practical Justice": The Justice of the Peace, the Slave Court, and Local Authority in Mid-Eighteenth-Century South Carolina*, *in* MONEY, TRADE, AND POWER, *supra* note 25, at 256, 256–57.

360. *See* SIMPSON, *supra* note 212, at 67–70, 124, 126–27. They did, however, have jurisdiction over the poor. *See id.* at 199–207.

361. In that year, the Court of Sessions directed them to do so. *See* Order of May 11, 1772, J. S.C. Ct. Gen. Sess. 191 (Ct. Gen. Sess. 1772), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History) (giving directions on how to process offenders).

362. *See* Grievances of Grand Jury of Jan. 15, 1770, J. S.C. Ct. Gen. Sess. 42 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History). Liquor licenses were granted by local justices of the peace. *See* SIMPSON, *supra* note 212, at 253–55.

363. *See* Grievances of Grand Jury of Jan. 20, 1772, J. S.C. Ct. Gen. Sess. 169 (Ct. Gen. Sess. 1772), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History).

364. *See* Grievances of Grand Jury of Feb. 16, 1773, J. S.C. Ct. Gen. Sess. 223 (Ct. Gen. Sess. 1773), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History).

365. Grievances of Grand Jury of Apr. 17, 1769, J. S.C. Ct. Gen. Sess. 5 (Ct. Gen. Sess. 1769), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History).

366. *See* Grievances of Grand Jury of Oct. 20, 1772, J. S.C. Ct. Gen. Sess. 203 (Ct. Gen. Sess. 1772), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History).

The justices appear to have taken these presentments seriously, individually disposing of every one in every term.[367] For example, they referred the grievance about excessive commitments to the attention of all the individual magistrates.[368] One grand jury, however, was not fully satisfied, and it presented "a very great grievance that the Presentments of the Grand Jury are so little taken notice of as to be [looked on] as a mere matter of form."[369] The court did not respond.[370]

Grand juries also had power to refuse to return indictments,[371] while petit juries, of course, could return general verdicts of not guilty[372] or guilty only of a lesser offense.[373] Juries also could recommend mercy.[374] Otherwise, the judiciary was in charge. The court would set aside jury verdicts if they were against the law or evidence and "the express direction of the court"[375] or if "no judgment [could] legally be given upon that Verdict."[376] In addition, attorneys subjected jurors to peremptory challenges[377] and challenges for cause if they were "having

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367. *See* Disposition of Grievances of Grand Jury of Feb. 15, 1774, J. S.C. Ct. Gen. Sess. 274 (Ct. Gen. Sess. 1774), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History).

368. *See* Disposition of Grievances of Grand Jury of Oct. 20, 1772, J. S.C. Ct. Gen. Sess. 209 (Ct. Gen. Sess. 1772), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History).

369. Grievances of Grand Jury of May 18, 1773, J. S.C. Ct. Gen. Sess. 240, 242 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

370. *See* Disposition of Grievances of Grand Jury of May 18, 1773, J. S.C. Ct. Gen. Sess. 245 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

371. *See, e.g.*, King v. Lynn, J. S.C. Ct. Gen. Sess. 73 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History) (reporting where a jury returned with no bill or indictment).

372. *See, e.g.*, King v. Reeves, J. S.C. Ct. Gen. Sess. 164 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History) (returning verdict of not guilty).

373. *See, e.g.*, King v. Merchant, J. S.C. Ct. Gen. Sess. 250 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History) (returning verdict of guilty of "manslaughter" but not murder).

374. *See, e.g.*, King v. Fust, J. S.C. Ct. Gen. Sess. 50 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History) (convicting defendant of murder).

375. King v. Roberts, J. S.C. Ct. Gen. Sess. 39 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History); King v. Kelly, J. S.C. Ct. Gen. Sess. 10 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

376. King v. Griffin, J. S.C. Ct. Gen. Sess. 65 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

377. *See* King v. Haly, J. S.C. Ct. Gen. Sess. 149 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History); King v. Williams, J. S.C. Ct. Gen. Sess. 148 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

some difference with" any of the jurors.[378] The court would dismiss indictments if the names of the grand jurors were not contained therein.[379]

The Court of Sessions heard numerous cases involving familiar crimes such as arson,[380] assault,[381] burglary,[382] failing to appear for jury duty,[383] forgery,[384] horse stealing,[385] jail break,[386] larceny,[387] maintaining a disorderly house,[388] perjury,[389] receiving stolen goods,[390] robbery,[391] and the unlicensed sale of liquor.[392] Death was the penalty in many cases;[393] however, the death penalty was tempered by benefit of clergy[394] and royal pardons.[395] The court also

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378. King v. Lewis, J. S.C. Ct. Gen. Sess. 257 (Ct. Gen. Sess. 1773), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

379. King v. Manly, J. S.C. Ct. Gen. Sess. 132 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History). The court would also dismiss indictments for other technical defects, such as a mistake in the name of the defendant. *See* King v. Martin, J. S.C. Ct. Gen. Sess. 26 (Ct. Gen. Sess. 1769), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

380. King v. Williams, J. S.C. Ct. Gen. Sess. 148 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

381. *See* King v. Abrahams, (S.C. Ct. Gen. Sess. Mar. 25, 1765) (unpublished S.C. Ct. Gen. Sess. decision, on file with the South Carolina Historical Society, Pringle-Garden Family Papers: Legal Papers 1765–1845).

382. *See* King v. Loller, (S.C. Ct. Gen. Sess. Mar. 25, 1765) (unpublished S.C. Ct. Gen. Sess. decision, on file with the South Carolina Historical Society, Pringle-Garden Family Papers: Legal Papers 1765–1845).

383. *See* Fine for Defaulted Grand and Petit Jurors, J. S.C. Ct. Gen. Sess. 33 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

384. *See* King v. Griffin, J. S.C. Ct. Gen. Sess. 65 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

385. *See* King v. Reeves, J. S.C. Ct. Gen. Sess. 297 (Ct. Gen. Sess. 1774), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

386. *See* King v. Moore, J. S.C. Ct. Gen. Sess. 6 (Ct. Gen. Sess. 1769), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

387. *See* King v. Collins, J. S.C. Ct. Gen. Sess. 14 (Ct. Gen. Sess. 1769), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

388. *See* King v. Caine, J. S.C. Ct. Gen. Sess. 48 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

389. *See* King v. Lewis, J. S.C. Ct. Gen. Sess. 273 (Ct. Gen. Sess. 1774), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

390. *See* King v. Pilkinton, J. S.C. Ct. Gen. Sess. 166 (Ct. Gen. Sess. 1772), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

391. *See* King v. Sparkman, J. S.C. Ct. Gen. Sess. 257 (Ct. Gen. Sess. 1773), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

392. *See* King v. Gray, J. S.C. Ct. Gen. Sess. 166 (Ct. Gen. Sess. 1772), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

393. *See, e.g.*, King v. Smith, J. S.C. Ct. Gen. Sess. 312 (Ct. Gen. Sess. 1775), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History) (forgery); King v. Irvin, J. S.C. Ct. Gen. Sess. 155 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History) (murder).

394. *Compare* King v. Cummings, J. S.C. Ct. Gen. Sess. 88 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History) (allowing the benefit of clergy), *with* King v. Powell, J. S.C. Ct. Gen. Sess. 87 (Ct. Gen.

mitigated the harshness of the law in imprisonment cases when, for instance, it released a convicted defendant who was "unable to pay his fees" and had "suffered a long confinement."[396]

Litigants brought another body of cases to police the conduct of minor officials, such as constables,[397] road commissioners,[398] and the Charleston market commissioners.[399] A more unusual prosecution was for "malpractice" by a magistrate for "act[ing] partially in a complaint made to him."[400] But the judges also protected their subordinates. Thus, the court dismissed one complaint against a magistrate when the court found it "frivolous and vexatious, and without good foundation,"[401] while a defendant was made to "crave[] the pardon of the Court" for insulting a grand jury "for their having thrown out a Bill of Indictment preferred by him."[402]

South Carolina also punished bastardy, albeit differently than other colonies. In an effort to protect the public fisc rather than to punish sin, South Carolina was harsher on men than most other colonies and easier on women.[403] Women would only be prosecuted for having a child out of wedlock,[404] and even then, they would be discharged if no prosecutor or witness against them appeared.[405]

Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History) (denying the benefit of clergy).

395. *See* King v. Watson, J. S.C. Ct. Gen. Sess. 7 (Ct. Gen. Sess. 1769), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

396. King v. Gordon, J. S.C. Ct. Gen. Sess. 133 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

397. *See, e.g.*, King v. Briggs, J. S.C. Ct. Gen. Sess. 114 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History) (finding the defendant guilty of contempt because he "had grossly insulted the Capt. Of the Watch without any cause . . . [and] ordered that his name be immediately struck off the list of Constables . . . for his said contempt").

398. *See, e.g.*, King v. Parnor, J. S.C. Ct. Gen. Sess. 41 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History) (involving a case brought "for not keeping the . . . roads in proper repair").

399. *See* King v. Comm'rs of Mkt. in Charleston, J. S.C. Ct. Gen. Sess. 134 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History). A detailed discussion of the rules for regulating the Charleston market appears in SIMPSON, *supra* note 212, at 132–38.

400. King v. Remington, J. S.C. Ct. Gen. Sess. 132 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

401. King v. Poro, J. S.C. Ct. Gen. Sess. 29 (Ct. Gen. Sess. 1769), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

402. King v. Mottet, J. S.C. Ct. Gen. Sess. 102 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

403. *Cf.* SIMPSON, *supra* note 212, at 41–42 (discussing various punishments for men, such as weekly payments to "the commissioners of the poor, or the church-wardens of Charlestown," as well as fines, imprisonment, and public whippings).

404. *See id.* at 40.

405. *See* King v. Fairchild, J. S.C. Ct. Gen. Sess. 151 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History). Of course, this was the normal rule in most criminal prosecutions. *See* King v. Mottet, J. S.C. Ct. Gen.

However, a man accused by the mother of being the father would be "adjudged the reputed father . . . , notwithstanding his denial," unless the chief judge of the sessions court upon a bench trial found him innocent.[406] The reputed father had no right to a jury trial, as he did in most other colonies. Moreover, if the mother was a servant, the father would have to compensate her master.[407] All things considered, the Court of Sessions appears to have enforced the criminal law effectively in Charleston and its immediate environs.

In short, civil litigation and criminal law enforcement in colonial South Carolina were under the total control of a small group of men sitting at the apex of a city-state in Charleston—the governor of the colony sitting as chancellor, an English placeman appointed as chief justice of the colony,[408] and a small number of others, mainly lawyers, sitting as associate jurists.[409] Jurors—the representatives of outlying localities—had no jurisdiction over the law and limited power even to find facts in the Court of Common Pleas, and the Court of Common Pleas itself was subject to routine interference by the Court of Chancery, which sat without a jury.

A well-trained, professional bar acted hand in hand with the bench. After 1721 no one was permitted to practice in South Carolina unless he had been admitted and sworn in by the justices in Charleston,[410] who, in turn, stated that they would admit only men who had become members of one of the Inns of Court in London and had "kept eight terms [in] commons."[411] The first native South Carolinian to be admitted under this rule, Charles Pinckney, was in fact educated in England;[412] however, many who were subsequently admitted were not.[413] Nonetheless, an extraordinary number of South Carolina lawyers did

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Sess. 102 (Ct. Gen. Sess. 1771), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0039 (S.C. Dep't of Archives & History).

406. SIMPSON, *supra* note 212, at 41.

407. *Id.* at 43.

408. On the tendency to appoint Englishmen rather than South Carolinians to high legal offices in the eighteenth-century colony, see Gregorie, *supra* note 96, at 12.

409. *See* Rule re Practice of Law, Ct. Ch. Minutes Book, 1770–1774, at 70 (S.C. Ch. 1770), *reprinted in* RECORDS, *supra* note 18, at 579, 579 (prohibiting judges of the Court of Chancery from acting as solicitors in cases before the court).

410. Act for Establishing County and Precinct Courts, No. 473, § 29 (1721), *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 166, 173 (David J. McCord ed., 1840).

411. Letter from William Henry Drayton to Chief Justice Gordon and Justice Cosslett of His Majesty's Court of Common Pleas (Oct. 3, 1774), *in* 1 DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION, 1764–1776, at 41, 44 (R.W. Gibbes ed., The Reprint Co. 1972) (1855). A lawyer could not practice in chancery until he was admitted as a solicitor by that court. *See, e.g.*, Petition of Guerard, Ct. Ch. Minutes Book, 1737–1766, at 68 (S.C. Ch. 1763), *reprinted in* RECORDS, *supra* note 18, at 523, 523 (admitting petitioner as a solicitor after "having taken the usual Oath of a Sollicitor").

412. RECORDS, *supra* note 18, at 345 n.34 (citing MCCRADY, *supra* note 3, at 473–74).

413. *See, e.g.*, Petition of Graeme, Ct. Ch. Minutes Book, 1737–1766, at 177 (S.C. Ch. 1764), *reprinted in* RECORDS, *supra* note 18, at 533, 533 (admitting petitioner as a solicitor after having "served as a Clerk for five Years to David Graeme Esquire his Majesty's Attorney General for this Province"). South Carolina colonial court records are exceptionally well preserved, but gaps do

attend the Inns of Court: fifty-three South Carolina law students came to England prior to 1776, which comprised nearly one-third of the total from all of the North American colonies.[414]

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. In 1761, William Simpson, an associate justice of the Court of Sessions, published the first legal treatise written in America—*The Practical Justice of the Peace and Parish-Officer, of his Majesty's Province of South Carolina.*[415] It was not a brilliant book, but it was well organized, and it copiously cited relevant English precedents and South Carolina statutes. Undoubtedly, it was authoritative in its time. Along with briefs submitted in ongoing litigation[416] and opinions such as the previously discussed *Hext v. Executors of Jenys*,[417] *The Practical Justice* convincingly demonstrated the proficiency of South Carolina's bench and bar.

The South Carolina legal profession fully appreciated its learning and sophistication, as was evident in the treatment it accorded to Charles Shinner, who arrived in the colony in 1761 following his appointment by the crown as the colony's chief justice.[418] Because Shinner was, in the words of the local press, an "'Irishman of the lowest Class'" who,[419] unlike many members of the Charleston bar, had not received his education at the Inns of Court,[420] he was so "Contemptible in the Eyes of the Carolinians"[421] that he was never invited to join the prestigious St. Cecilia Society, to which nearly every judge and lawyer in

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exist, and it is most likely that no entry exists for some men who joined the bar. Thus, it is impossible to know the number of lawyers who did not receive English educations.

414. *See* E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT (1924) (providing a list and brief biographies of each American member). Jones reports that 236 American attended the Inns of Court before 1815, of whom 74 were from South Carolina. Jones's lists reveal that 61 of the 236 and 21 of the 74 joined the Inns from 1776 onward. That leaves 53 South Carolinians out of a total of 175 Americans for the years before 1774, with the South Carolinians constituting 30.3% of the total.

415. SIMPSON, *supra* note 212.

416. *See, e.g.*, McPherson v. Ex'r of Roberts, (S.C. Ct. Com. Pl. 1773), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 91A (S.C. Dep't of Archives & History) (containing various motions and notices submitted by the parties); Order of Sept. 8, 1762, (S.C. Ch. 1762), *in* RECORDS, *supra* note 18, at 512, 512–13 (providing rules about the preparation and submission of briefs); Thomas Waties Papers, *microformed on* Reel 1225a, Case Nos. 398, 466, 472, 523, 547; Reel 1229a, Case Nos. 1375, 1413; Reel 1230a, Case Nos. 1442, 1447 (South Caroliniana Library) (providing other examples of undated but probably pre-Revolutionary briefs, notes of briefs, and transcripts of legal arguments of counsel).

417. (S.C. Ct. Com. Pl. 1741), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 26A (S.C. Dep't of Archives & History).

418. *See* THE CAROLINA BACKCOUNTRY ON THE EVE OF REVOLUTION: THE JOURNAL AND OTHER WRITINGS OF CHARLES WOODMASON, ANGLICAN INTINERANT 292 n.97 (Richard J. Hooker ed., 1953) [hereinafter THE CAROLINA BACKCOUNTRY].

419. *Id.* n.96 (citing A. Marvel, Letter to the Editor, S.C. GAZETTE & COUNTRY J., May 6, 1766, at 3).

420. Memorandum on Chief Justice Charles Shinner, *in* THE CAROLINA BACKCOUNTRY, *supra* note 418, at 291, 291.

421. *Id.* at 293.

Charleston belonged.[422] Indeed, his knowledge of the law was so weak in the view of locals that he found it necessary to bring two "valuable and Sensible Gentlemen of the Law" with him to provide the legal knowledge he personally lacked.[423] Even with these gentlemen's help, Shinner's courtroom was still the scene of "Disputes, Altercations, and Debates [between] Him, the Barristers, and Crown Officers."[424] The judges and lawyers of Charleston, in short, could not work with and defer to a man who, unlike them, had not attained the same level of professionalism as all but England's very best had attained.

C. Law of Slavery

The learning and sophistication of South Carolina's bench and bar was grounded on the prosperity of the colony. By the mid-eighteenth century, that prosperity, in turn, rested almost entirely on slavery. During the first three decades of the century, for example, when Carolina's rice exports increased some sixty-fold, twice as many Africans were brought into the colony as white immigrants arrived voluntarily.[425]

South Carolina's law of slavery was, in large part, copied in 1696 from the code of Barbados.[426] Before that time, slavery was recognized,[427] but there was much ambiguity in the law: one apparently white man, for example, was permitted to indenture himself into servitude "during the whole term[] of his [natural] life,"[428] while at the same time suit lay "for the wrongful detaining of a Negro girl."[429] But the 1696 statute, which was enacted on the theory that Africans possessed "barbarous, wild, savage, [n]atures," made it clear that any blacks, mulattos, and Indians who were at any time sold as slaves, and only blacks, mulattos, and Indians, were in fact slaves, as were their descendants.[430]

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422. *See* NICHOLAS MICHAEL BUTLER, VOTARIES OF APOLLO: THE ST. CECILIA SOCIETY AND THE PATRONAGE OF CONCERT MUSIC IN CHARLESTON, SOUTH CAROLINA, 1766–1820 app. 4 at 273–78 (2007) (providing a list of the members of the St. Cecilia Society from 1766 to 1820).

423. Memorandum on Chief Justice Charles Shinner, *supra* note 420, at 293.

424. *Id.*

425. *See* EDELSON, *supra* note 29, at 97 (citing PETER A. COCLANIS, THE SHADOW OF A DREAM: ECONOMIC LIFE AND DEATH IN THE SOUTH CAROLINA LOW COUNTRY 1670–1920, at 66 tbl.3–3, 82 tbl.3–13, 83 tbl.3–14 (1989)).

426. *See* SIRMANS, *supra* note 1, at 65.

427. *See, e.g.*, THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA OF 1669, *supra* note 12, § 101, at 150 ("Every Freeman of Carolina shall have absolute Authority over his Negro Slaves.").

428. Agreement of Midling (Sept. 29, 1682), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 60, 60.

429. Bond of Skelton (Mar. 28, 1682/83), *in* 1 PROPRIETARY RECORDS, *supra* note 18, at 36.

430. Act for the Better Ordering of Slaves, Governor Archdale's Laws, at 60 (1696) (S.C. Dep't of Archives & History), *quoted in* SIRMANS, *supra* note 1, at 65; *accord* Act for the Better Ordering and Governing of Negroes and Slaves, No. 314 (1712), *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 410, at 352, 352 (using same language).

Unlike Virginia, where the status of a child followed that of its mother,[431] a child in South Carolina became a slave if either of the child's parents was a slave.[432]

In many respects, the slave law of South Carolina was unusually harsh. Slaves, in effect, were treated as less than human: a white person who intentionally murdered a slave was not subject to the death penalty but merely to a fine of £700 current money if the killing was intentional and only £350 if the killing occurred in "a sudden heat or passion, or by undue correction."[433] South Carolina's iniquitous approach did, however, have a positive impact: whites were convicted of killing slaves both intentionally[434] and in the heat of passion[435] and were appropriately fined.[436]

Slaves guilty of crimes against whites, by contrast, received severe treatment. Any homicide by a slave, except by accident or in defense of one's owner, was punished by death, as was the burning not only of houses but even of naval stores, stacks of grain, or any other commodity or produce of the colony.[437] Slaves accused of crimes did not receive jury trials but were simply tried before local magistrates.[438] Of course, slaves could not testify against whites but only against other slaves;[439] however; a free mulatto could testify against whites.[440] Runaways were especially brutalized: three slaves caught attempting to escape to Florida, for example, were castrated.[441]

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431. *See* Act XII, Negro Womens Children to Serve According to the Condition of the Mother (1662), *reprinted in* 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 170 (William W. Hening ed., New York, 1823).

432. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 46 (1996) (citing Act for the Better Ordering and Governing of Negroes and Slaves, *supra* note 430, § 1, at 352).

433. Act for the Better Ordering and Governing of Negroes and Other Slaves in this Province, No. 670, § 27 (1740), *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 410, at 397, 402, 411.

434. *See, e.g.*, King v. Setterwhite, J. S.C. Ct. Gen. Sess. 105 (Ct. Gen. Sess. 1771), *microformed on* Journal of the S.C. Ct. Gen. Sess. 1769–1776, Reel ST0339 (S.C. Dep't of Archives & History) (reporting the trial of a white man accused of "murder of a negro man slave").

435. *See, e.g.*, King v. Dunn, J. S.C. Ct. Gen. Sess. 110 (Ct. Gen. Sess. 1771), *microformed on* Journal of the S.C. Ct. Gen. Sess. 1769–1776, Reel ST0339 (S.C. Dep't of Archives & History) (reporting the trial of a white man accused of killing a slave in a "sudden heat of passion").

436. *See* MORRIS, *supra* note 432, at 169 (citing S.C. GAZETTE & COUNTRY J., Oct. 31, 1769) (discussing fines for crimes against slaves).

437. Act for the Better Ordering and Governing of Negroes and Other Slaves in this Province, *supra* note 433, §§ 15–17, at 402.

438. *Id.* § 9, at 400.

439. *See* MORRIS, *supra* note 432, at 184.

440. *See, e.g.*, Mayrant v. Williams, Ct. Ch. Minutes Book, 1737–1766, at 170 (S.C. Ch. 1764), *reprinted in* RECORDS, *supra* note 18, at 526, 526 (reporting an argument of counsel that "Defendant [was] a free Mulattoe").

441. *See* SIRMANS, *supra* note 1, at 66.

On the other hand, the law made some efforts to "restrain[]" masters "from exercising too great rigor and cruelty over" their slaves.[442] Masters could be fined for imposing excessive punishments, such as cutting out a slave's tongue or putting out an eye, and the person who had been in charge of a brutalized slave was presumed guilty unless the slave's owner took an oath denying guilt.[443] Masters were required to feed and clothe slaves adequately[444] and might be prosecuted for requiring slaves to work on Sunday.[445] Although a reputed slave claiming to be free could not bring his own suit, the Court of Common Pleas would appoint a guardian to sue on his behalf.[446]

Above all, the economic interests of the master class were protected. A slave could be hired out to work for another free person, as long as his or her master received the full compensation, and a slave could trade, buy, or sell goods with his or her master's permission and a license.[447] Efforts were made to compensate masters for slaves executed for crime because otherwise the loss "would prove too heavy for the owners" and they would be "discouraged" from "detect[ing] and discover[ing] the offences of their negroes,"[448] and the death penalty was imposed on any one found guilty of stealing another's slaves.[449] None of these rules should be surprising given that the whole point of slavery was to enable planters to make money and that slaves were valuable economic assets that had to be preserved as long as it was feasible to do so.

In sum, South Carolina's law of slavery had more in common with the law of the British West Indies than that of the mainland colonies to the north. Likewise, much of the rest of its law differed from that of its northerly neighbors. Although South Carolina shared the common law with the other colonies, its law by the mid-eighteenth century had reached a consistently higher level of technicality, complexity, and sophistication than most. South Carolina

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442. Act for the Better Ordering and Governing of Negroes and Other Slaves in this Province, *supra* note 433, at 397.

443. *Id.* § 38, at 410–11.

444. *Id.* § 38, at 411.

445. *See, e.g.*, King v. Shrewsbury, J. S.C. Ct. Gen. Sess. 47 (Ct. Gen. Sess. 1770), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–1776, Box ST0039 (S.C. Dep't of Archives & History) (imposing a fine on a man for employing slaves on Sunday).

446. *See, e.g.*, Austin v. Stanyarne, (S.C. Ct. Com. Pl. 1759), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls (WPA transcripts), Box ST1291 (S.C. Dep't of Archives & History) (allowing a guardian to be admitted for a "Negro man"). *But see* Petition of Clarinda, (S.C. Ct. Com. Pl. 1765) (on file with S.C. Dep't of Archives & History) (hearing of a petition on behalf of a black slave claiming freedom by virtue of escape from Florida when it was under Spanish rule).

447. Act for the Better Ordering and Governing of Negroes and Other Slaves in this Province, *supra* note 433, § 36, at 410.

448. Act for the Better Ordering and Governing of Negroes and Slaves, *supra* note 430, § 16, at 358. In 1714, a new slave act repealed this wording. *See* Additional Act to an Act Entitled "An Act for the Better Ordering and Governing Negroes and All Other Slaves," No. 344, §§ 4–5 (1714), *reprinted in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 410, at 365, 366.

449. *See, e.g.*, King v. Griffin, J. S.C. Ct. Gen. Sess. 207 (Ct. Gen. Sess. 1772), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–1776, Box ST0039 (S.C. Dep't of Archives & History) (sentencing a man to death for stealing another man's slave).

lawyers prided themselves more than most other colonials on their Englishness—on their education at the Inns of Court, on the precision with which they copied English practices, and on their English legal learning.

One also does not get the sense that South Carolinians used the courts, as New Englanders sometimes did, to obstruct English interests.[450] Nor does one see the development of a creole legal ideology like that in New York.[451] Carolinians, as observed by others, were "more attached to the Mother Country" than northerners and "fond almost to excess of British manners and customs."[452] Although considerable tension had existed during the proprietary regime between local residents and the proprietors as each strove to maximize their profits from the colony—tension that resulted in the overthrow of the proprietary governor in 1719 and his replacement by royal governors thereafter[453]—the new governors ruled wisely. On the whole, they did not try to skim excessive lucre from the colony[454] but instead cooperated with local elites, even if they sometimes had to ignore London's instructions, to make the colony as prosperous as possible.[455] With the governor, other royal officials, and the local bar cooperating, the legal system functioned smoothly.

South Carolina law also differed from colonies like Massachusetts, Pennsylvania, and Virginia in another important respect. The law did not reach into a hinterland of settled communities as far as 150 miles from the capital; in essence, the writ of South Carolina's courts ran only in a tiny city-state centered in Charleston. Every court sat in the capital: all lawyers resided there, all legal business was transacted there, and all suits were filed, heard, and decided there. Prior to the 1770s, South Carolina had no circuit courts or local courts organized in a hierarchical structure with appeals to a central court in the capital. In short, it had no legal mechanisms, such as those that were developing in the Chesapeake and the North, for extending the reach of law across the continent.

This limited reach was possible because of the pattern of residence in the colony. South Carolina was small.[456] As late as 1750, it had only 25,000 white inhabitants,[457] and nearly everyone possessing significant political or economic power resided in Charleston or its immediate environs. That was certainly true of royal officials as well as South Carolina's lawyers and merchants. But it also was

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450. *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 31–35 (1975).

451. *See* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 84–96 (2005).

452. WEIR, *supra* note 1, at 127.

453. *See* SIRMANS, *supra* note 1, at 103–28.

454. *See, e.g.*, *id.* at 165 (describing Governor Johnson's fiscal policy and noting that he "elected to put the colony's welfare first").

455. *See id.* at 138, 286.

456. WEIR, *supra* note 1, at 205.

457. *Id.* As late as 1790, the white population of the low country, the principal area settled in 1750, was only 28,644. *Id.* at 209.

true of the colony's planters, who lived only part of the year on their plantations and also maintained homes in Charleston where they lived much of the year. Families often intermarried, and everyone who mattered knew everyone else.[458] The small city-state of Charleston and its surrounding area, according to one Carolinian, was "'our little world.'"[459] As a result of this pattern of residence, there was little demand for breaking up the highly centralized judiciary that conducted all legal business in Charleston.

Thus, if a war for independence had broken out in 1760, it is not clear that South Carolina lawyers would have had enough in common with their compatriots to the north to have joined in rebellion. Events, legal decisions, and legal developments in the next fifteen years, however, would change and bring South Carolina's law more into line with that of the other mainland colonies.

IV. AMERICANIZING LAW

Parliament's passage of the Stamp Act destroyed established patterns of cooperation between royal and local leaders.[460] Most South Carolinians, like other Americans, thought the Stamp Act imposed unjust taxation without representation.[461] But would the courts become involved in the constitutional debate? Because of the stubbornness of Chief Justice Charles Shinner, the placeman from Ireland appointed directly by imperial officials in London, the courts did become involved, and the bench and bar fractured in a fashion that never fully healed.

Even earlier, however, trouble had been simmering. The South Carolina Court of Common Pleas had been invited in the 1760 case of *Watson v. Williams*[462] to hold an act of the South Carolina legislature void as violative of the colony's charter, which the court understood to be the colony's constitution.[463] The legislature allegedly violated the charter provision that prohibited passing laws repugnant to the laws of England by enacting a local statute that required administrators to pay creditors of a decedent equally, whereas the common law allegedly permitted them to prefer some creditors over others.[464] It was conceded that even English courts could not hold an act of Parliament void.[465] But counsel, in arguing for a declaration of voidness,

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458. *See id.* at 122–23.

459. *Id.* at 217. *See generally* Edward Pearson, *"Planters Full of Money": The Self-Fashioning of the Eighteenth-Century South Carolina Elite*, *in* MONEY, TRADE AND POWER, *supra* note 25, at 299 (providing an excellent discussion about South Carolina's lowland, planter-merchant elite).

460. *See* WEIR, *supra* note 1, at 294–95.

461. *See id.* at 296.

462. (S.C. Ct. Com. Pl. 1759), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Reel ST1291 (S.C. Dep't of Archives & History).

463. *Id.*

464. *Id.*

465. *Id.*

observed that the Privy Council could hold a colonial statute void if a colonial legislature exceeded the bounds of its colonial charter in enacting the law, and he urged the South Carolina court to rule as the Privy Council would rather than face the burden of its judgment being reversed.[466] Alternatively counsel contended that, even if the court did not invalidate the South Carolina statute, the court should construe it literally, rather than equitably, in a fashion that would not apply to the administrator in the pending case.[467]

The Court of Common Pleas gave three responses in an extensive opinion by Associate Justice James Michie, who had opposed enactment of the law when he had been a legislator but had no difficulty reaching the opposite result on the bench.[468]

First, the court gave the statute a broad and equitable, rather than limited, construction that resulted in it being applicable in the pending case.[469]

Second, it held that, although a colonial legislature could not enact a law repugnant to the law of England, it could adopt statutes modifying that law.[470] Its holding rested on the fact that parliamentary enactments that had not been incorporated into the common law did not apply in the colonies, unless a colony was specifically named in the act or Parliament otherwise so specified.[471] Thus, a colonial statute contrary to parliamentary legislation would not be repugnant to English law because the English statute had no force for purposes of colonial law.

But what if a colonial statute were contrary to the common law? Here the court held that colonial legislatures needed power to modify the common law and noted that the Privy Council frequently had upheld their power to do so.[472] Otherwise, given that Parliament almost never legislated for the colonies, the common law would become a sort of constitutional law beyond legislative revision no matter what mischiefs it might cause.

Colonial legislatures, in short, could modify the common law, but they could not abrogate it—an imprecise but critical distinction. The court thereupon ruled the South Carolina legislation a modification, not an abrogation, of the common law and therefore not repugnant to English law.[473] Thus, the statute was not unconstitutional as beyond the legislature's power.

Third, the court declared that, even if the act were repugnant and unconstitutional, it could not grant relief.[474] It continued:

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466. *Id.*
467. *Id.*
468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.*
473. *Id.*
474. *Id.*

> For if this Court has a power of judging whether the laws which the General Assembly may make are void or not, they have a power superior to the General Assembly. But this is a power which I conceive this Court has not. . . . The plantations are limited and dependant governments, they have power to make laws, and the King has reserved to himself & his Privy Council a right of judging those laws[;] and till the King thinks fit to repeal them they continue their full force and obligation. This power of repealing the King has reserved to himself alone with the advice of his Privy Council. But if the courts of America had a power to adjudge them void it would anticipate the King's judgment and would be two powers of repealing, which is inconsistent with the nature of our Constitution[;] this would be for the courts jus dare & not dicere; it is easy to see the consequence of those arguments. For if this Court has a power to adjudge our laws to be void, . . . everything will be left to precarious & arbitrary will & pleasure.[475]

Only a colonial legislature "in the first & his Majesty in his Privy Council in the last instance were the judges" of repugnancy and hence unconstitutionality.[476]

Justice Michie's nine-page opinion for a unanimous court in *Watson v. Williams*, with citations to English authorities, the laws of other colonies, and Privy Council practice, was remarkable for its learning and wisdom.[477] It reached the right result: colonial legislatures needed power to enact statutes modifying the common law to keep abreast of changing conditions on the ground. But it contained an analytical inconsistency, reflective, in turn, of the analytical inconsistency of the imperial constitution.

Justice Michie stated in dictum the common English view that courts could not declare legislative acts void because such declarations would make them superior to the legislature.[478] Only the legislature in the first instance and the Privy Council in the last could pass on the issue of the legislature's power.[479] This dictum could have fully resolved the *Watson* case on its own, but Michie did not allow it to do so. Rather he addressed at length the scope of the South Carolina act and the issue of whether it merely modified English law or was repugnant to it.[480]

Sound political considerations required him to do so. Like the United States Supreme Court today, the Privy Council needed help from inferior courts in interpreting provincial laws; the council simply lacked the resources to get the

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475. *Id.*
476. *Id.*
477. *Id.*
478. *Id.*
479. *Id.*
480. *Id.*

intended meaning of those laws correct. Undoubtedly, the South Carolina court also wished to signal to the Privy Council the view of local elites and the local bar that the South Carolina statute constituted a beneficial modification of the common law. Adjudicating the meaning and validity of the statute, however, necessarily implied that the court had power to hold it unconstitutional or at least to limit its meaning to avoid constitutional difficulties. What, otherwise, was the point of drawing the line between modification and repugnancy and determining on which side of the line this statute fell? Herein lay the opinion's analytical inconsistency.

It was the nascent structure of federalism in the eighteenth-century British empire that forced the court into this inconsistency. As long as the Privy Council subjected colonial judgments to review (exempting them from review would have made colonial judiciaries independent sovereigns rather than dependent participants in the imperial system), colonial judges had to address the issues that might later reach the Privy Council. Judges could not simply ignore issues because cases might never go up to the council or might go up on inadequate records. Someone had to decide, in ongoing litigation in the first instance, whether a colonial statute was repugnant to the law of England, and only colonial judges could do it. Most litigants lacked resources to carry their cases to England, and the Privy Council would have lacked resources to process them if many more cases had materialized.[481] Therefore, colonial courts needed to have jurisdiction to address repugnancy issues, and with jurisdiction came power to find statutes repugnant and hence unconstitutional and void. At times, courts had to be superior to legislatures.

Watson v. Williams was never appealed to the Privy Council,[482] and thus it is not surprising that it failed to settle the issue of judicial power to invalidate legislation. Indeed, four years later a commentator in the South Carolina Gazette argued the following:

> [I]f an act of assembly is passed, which is repugnant . . . and contrary to the great charter of English liberty, it is *ipso facto* void in itself, without 'a repeal' and will not 'bind all' or any 'of the inhabitants of the province, as far as it goes,' or in any manner whatever.[483]

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481. Litigants rarely made claims that colonial legislation was repugnant to English law, and when they did, colonial courts easily disposed of them. But, if the effect of pleading repugnancy had been to stay local proceedings and transfer them to London, litigants would have repeatedly made the claims, using them simply as weapons to stop litigation in its tracks. Thus, colonial courts had to possess jurisdiction to adjudicate repugnancy claims.

482. *See* SMITH, *supra* note 211, at 586–92 (discussing the case extensively without reporting appeal).

483. S.C. GAZETTE & COUNTRY J., Dec. 10, 1764, at 2, *quoted in* SMITH, *supra* note 211, at 592.

As this commentator appears to have recognized, inconsistencies between the idea of legislative supremacy and concepts of rights and constitutional limitations simply were built into the British imperial constitution.

Six years after the *Watson* case, another of those inconsistencies arose in litigation before the South Carolina Court of Common Pleas—this time in a politically salient case. In search of tax revenue, Parliament adopted the Stamp Act in 1765.[484] Among other things, the Act required tax stamps to be affixed to all court papers in the colonies, including writs used to commence litigation.[485] When opponents of the Act ensured that the stamps were not distributed or even available in Charleston, judges and other court officers were forced either to violate the Stamp Act by accepting unstamped documents or to stop processing cases. The South Carolina court, "being of opinion that no business can [be] proceeded upon until such stamped paper can be procured," initially took the latter approach and adjourned its November 1765 term.[486]

At the February 1766 term, however, matters began to come to a head. Thomas Bee, the attorney for the plaintiff in the case of *Jordan v. Law*,[487] informed the court that he had served a rule to plead on John Rutledge, the defendant's attorney, and that the time for pleading had long expired.[488] Attorney Bee then moved for judgment, and the following ensued:

> Mr. Rutledge said he had no manner of objection[.] Mr. Manigault of Counsel with the Plaintiff then spoke very fully in support of the motion as did also Mr. Pinckney, Mr. Parsons and Mr. Rutledge who tho' not concerned for the Plaintiff in this particular cause said they were concerned as Counsel in a great variety of Causes of a similar nature.[489]

Only the province's Attorney General spoke in opposition to Bee's motion.[490] In view of the "particular circumstances which they [were] now in and the steps" then being taken "to obtain a repeal of the Stamp Act," the court was "unanimously of opinion . . . that no positive determination be given upon the point, but that the same be postponed until the next" term.[491]

At the April 1766 term, Bee again moved for judgment. The nub of Bee's argument was that the Magna Carta declared it a wrong "to delay or deny Justice to the Subject" and that, because of the impossibility of obtaining stamps, the

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484. WEIR, *supra* note 1, at 294.

485. *See id.*

486. *See* Order Adjourning Court, (S.C. Ct. Com. Pl. 1765), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

487. (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

488. Bench Order in Jordan v. Law, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

489. *Id.*

490. *Id.*

491. *Id.*

Stamp Act had that effect.[492] Accepting this argument, the Court of Common Pleas, by a 4–1 vote, ordered that judgment be entered.[493] The majority also directed that "the process of this Court be issued out in the usual manner to any person who shall require and apply for the same, [t]hat there may no longer be a complaint that Justice is either denied or delayed."[494]

Chief Justice Charles Shinner, the Irishman for whom, as we have seen, the local bar had no respect, dissented. He argued, in essence, that it was not impossible as a matter of law to obtain stamps: the same people who were petitioning the judges to keep the courts open had also conspired with others to make stamps unavailable.[495] "[N]o man," he concluded, should "avail himself of his own wrong,"[496] and he as a judge could not "deny the legislative power of King, Lords and Commons of Great Britain over the colonies in America."[497] Chief Justice Shinner, in his words, "revere[d] our happy constitution" and was unwilling "to transgress in any instance against a fundamental rule of law."[498]

A month later, when common pleas met again, Justice Lowdnes filed an opinion on behalf of the four-judge majority.[499] The majority had hoped that the chief justice would withdraw his dissent and not "set . . . up the Judgment of one Judge in opposition to that of the rest of the whole Bench, thereby inverting the well known Order of Judicial determinations, and establishing . . . a precedent that the Minority shall conclude the majority."[500] But Chief Justice Shinner did not withdraw it and, indeed, went further and directed the officers and ministers of the court to obey his ruling rather than that of the majority.[501] Therefore, the majority thought it necessary to file a ten-page opinion recording its reasoning.[502]

The foundation of the majority's reasoning was a finding that, because of the unavailability of stamped paper, compliance with the Stamp Act was impossible.[503] The majority was unwilling to "presume[]," as had the Chief Justice, "that the suitors of this Court [were] instrumental in causing the necessity which ha[d] been so prejudicial to themselves."[504] It continued:

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492. Jordan v. Law, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History) (Shinner, C.J., dissenting) (summarizing the argument of counsel).

493. Bench Order in Jordan v. Law, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

494. *Id.*

495. Jordan v. Law, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History) (Shinner, C.J., dissenting).

496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.* (majority opinion).

500. *Id.*

501. *Id.* (Shinner, C.J., dissenting).

502. *Id.* (majority opinion).

503. *Id.*

504. *Id.*

> Whatever cause this may be owing to, the effect and Consequences are the same; If no business is to be done without Stamp paper, and it is absolutely impossible for the Court to procure Stamp paper, the Interference is, that the Stamp Act in such an Exigency would oblige the Courts of Law to be shut up, all business to be remitted and the administration of Law and Justice to be suspended; Can it be presumed that Parliament meant any such thing or is there one word in the Act from the first to the last page of it that gives the least countenance to such an interpretation[?] Could the Parliament intend by this law to abrogate and repeal all precedent Acts of Parliament, to unhinge the Constitution of the Colonies, to unloose the hands of Violence and [o]ppression, to introduce Anarchy and Confusion amongst us, and to reduce us to a state of Outlawry? For to be without Law, and to want the means of dispensing the law is one and the same thing; Yet all these Consequences unavoidably result from the Position that no business can be done at all events, without Stamp paper.[505]

In view of "the impossibility . . . of complying with the Act," the majority concluded that, at least as construed by the chief justice, the Stamp Act was inapplicable.[506] Because "no power can oblige to Impossibilities,"[507] the court, with an obvious reference to *Dr. Bonham's Case*,[508] concluded that the Act "enjoin[ed] a thing impossible to be performed" and was therefore "repugnant and against reason and common right, [and] my Lord Coke says is void."[509] Although the opinion did not actually state that the Stamp Act was unconstitutional, it came close to doing so and, at the very least, construed the Act so as to avoid any constitutional difficulties.

Having answered the chief justice, the majority next turned to the court's clerk. From the outset, the clerk, Dougal Campbell, had sided with the chief justice; in April 1766, he had "humbly beg'd leave to decline paying obedience to the directions of this Court" to enter the judgment in *Jordan v. Law*.[510] "[F]rom particular tenderness and indulgence on account of his hitherto dutiful and diligent behavior in Office," however, the Court did not punish Campbell and merely appointed a replacement, William Mason, as acting clerk.[511]

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505. *Id.*

506. *Id.*

507. *Id.*

508. (1610) 77 Eng. Rep. 646, 652 (K.B.) ("[T]he common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.").

509. Jordan v. Law, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

510. Bench Order in Jordan v. Law, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

511. *See id.*

Apparently Campbell did not permit Mason to act in his stead. In his view, "the Stamp Act did not allow him to pay obedience to the directions of the Court."[512] Accordingly, Campbell refused both to enter the judgment in *Jordan v. Law* and to issue writs.[513] He also refused to issue a venire to summon a jury for the May 1766 term.[514] Collectively his acts resulted in "the prevention of justice, and in all probability the total loss of many just demands."[515]

Chief Justice Shinner spoke on Campbell's behalf and then "quitted the Bench."[516] Thereupon the court expressed its shock at the clerk's behavior, which it found "inconsistent with and repugnant to the very idea of that subordination which as a ministerial officer he owe[d] to the Court" and a "total inversion of all Law, Order, Decency, and Decorum."[517] It found Campbell guilty of "endeavoring to wrest from the Court (to whom of right it appertains to construe the laws) their proper Jurisdiction" and fined him £100.[518] Upon learning from Campbell that the chief justice was still refusing to sign or seal writs, the court also appointed the senior associate justice, Robert Pringle, to act in the chief justice's place.[519]

By the spring of 1766, the Stamp Act had produced a dissolution of the bonds of subordination and authority in South Carolina.[520] Charlestonians, acting out of a conscientious belief in the unjustness of the Act, had prevented royal officials from distributing stamps and thus enforcing the Act.[521] The majority of the Court of Common Pleas, conscientiously concluding that the Act together with the unavailability of stamps had resulted in an unconstitutional closure of the courts, declined to obey the law.[522] Meanwhile, the chief justice and the court clerk, conscientiously concluding that their duty required obedience to Parliament, refused to execute the judgment of the court.[523] Where, as a result, did authority lie other than in the individual consciences of men and in the raw power of whoever possessed superior military might to impose their conscientious view on others? Certainly, authority no longer lay in customary patterns of subordination. As one historian has observed, the crisis "seriously jeopardized the connection between Britain and the colonies[, and] [t]hereafter each side became increasingly suspicious of the other."[524]

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512. Jordan v. Law, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

513. *Id.*

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.*

518. *Id.*

519. *Id.*

520. *See* WEIR, *supra* note 1, at 298–99.

521. *See id.* at 295.

522. Jordan v. Law, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

523. *Id.* (Shinner, C.J., dissenting).

524. WEIR, *supra* note 1, at 299.

With Parliament's repeal of the Stamp Act, South Carolina officials tried, with some success, to restore cooperation between supporters and opponents of the Act and, through cooperation, subordination and authority. One step was to regularize proceedings that had occurred during the pendency of the Stamp Act. On the motion of a member of the bar, for example, plaintiffs' attorneys, who previously had ten days after a defendant entered a bail bond to take the necessary steps to procure assignment of that bond, were given ten additional days after the court granted the motion.[525]

Another step was for the clerk, Dougal Campbell, to make peace. In a petition to the court, he pleaded that he was "unfeignedly sorry for his having incurred the censure and displeasure of this Honorable Court."[526] He "humbly beg[ged] leave to assure your Honors" that no other event in his life had "ever occasioned him more real concern and uneasiness" and asked that his conduct "not be construed into any intended contempt or disrespect."[527] Noting that, as a result of the closure of the courts, he had received no fees or other income and thus could not pay his fine, he petitioned the court "to regard his circumstances with an eye of tenderness and compassion."[528] The court, "being of opinion that the Clerk's late conduct proceeded rather from an Error in Judgment rather than any Contempt or want of respect for the Authority of the Court," reduced his fine to £10.[529] Several months later, the Privy Council remitted the fine entirely.[530]

Chief Justice Shinner, however, persisted in his disagreements with his colleagues and thus remained a problem. In the summer of 1766, for instance, he proposed a new rule for swearing juries summoned on writs of inquiry—the procedure used to determine a plaintiff's damages in assumpsit following a defendant's default.[531] But two associate justices sitting with him objected and ordered that juries "be sworn . . . in the usual manner, which was done accordingly."[532] Finally, in May 1767, the Governor suspended the chief justice from office,[533] and in November, when the removal apparently had been finalized, the court ordered that his fees be paid over to the associate justices.[534]

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525. *See* Motion of Parsons, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

526. Petition of Clerk, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

527. *Id.*

528. *Id.*

529. *Id.*

530. Minutes of Privy Council, Sept. 1766, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

531. *See* Order re Swearing of Juries, (S.C. Ct. Com. Pl. 1766), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

532. *Id.*

533. *Cf.* Order re Write of Venire, (S.C. Ct. Com. Pl. 1767), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History) (noting chief justice's absence).

534. *See* Orders re Chief Justice, (S.C. Ct. Com. Pl. 1767), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

Still, authority and subordination could not be restored fully. The Court of Common Pleas would no longer automatically obey the bidding of imperial authorities. Thus, when a new customs collector tried in 1767 to enforce customs regulations more strictly, mobs and an "avalanche" of suits by local merchants confronted him and forced him to leave the colony.[535] His departure, in turn, led to a suit and judgment against his subordinate, which the subordinate was unable to pay.[536] The subordinate received protection from the Court of Admiralty, but that led only to a pamphlet war between a leading merchant and the admiralty judge, who ultimately lost his judicial post.[537]

Similarly, in 1769, when the attorney general applied for writs of assistance on behalf of royal customs officials, the court, wishing first to consult with an absent justice, refused to issue them.[538] Instead, the court directed the attorney general "to inform the Custom House Officers . . . that whenever any matter occurred in the execution of their duty that made the aid of any of the Judges necessary they wou'd be ready on proper, Special, application to give them the fullest Assistance."[539]

Judges became involved in yet another battle resulting from a vote in the lower house of the legislature that granted a gift to John Wilkes in appreciation of his support for Englishmen's rights.[540] The vote produced several years of conflict between the lower house and the council, which was determined to prevent delivery of the gift.[541] In 1773, a protest against the council's actions appeared in the *South Carolina Gazette*,[542] to which the council responded by arresting its printer, Thomas Powell.[543] Two local justices of the peace, who happened to be members of the lower house, promptly released Powell on habeas corpus.[544]

Meanwhile, order had collapsed in the hinterlands.[545] Especially with the victory in the Cherokee War of 1760–1761 and the departures of France from Mississippi and Spain from Florida as a result of the Seven Years War, obstacles to the settlement of the South Carolina backcountry diminished and population growth accelerated.[546] Population nearly doubled between 1760 and 1770,

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535. WEIR, *supra* note 1, at 299–300.

536. *Id.* at 300.

537. *See id.* at 300–01.

538. *See* Application of Att'y Gen., (S.C. Ct. Com. Pl. 1769), *microformed on* S.C. Ct. Com. Pl. Civil Journal (WPA Transcript), Box ST1291 (S.C. Dep't of Archives & History).

539. *Id.*

540. WEIR, *supra* note 1, at 305.

541. *Id.* at 306–07.

542. John Drayton & William Henry Drayton, *Protest*, S.C. GAZETTE & COUNTRY J., Aug. 30, 1773, at 3, 3.

543. WEIR, *supra* note 1, at 310.

544. *Id.* at 311.

545. *See* BROWN, *supra* note 3, at 3–4.

546. *See id.* at 3, 18.

increasing from under 20,000 in 1760 to some 35,000 a decade later in tiny clusters of dwellings without any institutional structures.[547]

The writs of the courts sitting in Charleston did not effectively run to so many people scattered throughout a vast countryside, sometimes more than one hundred miles away. Beginning in the summer of 1766, a crime wave broke out in areas distant from Charleston, with thefts, assaults, and even kidnappings of young women.[548] It culminated the next summer in a series of brutal robberies.[549]

The legal system's response to this crime spree was, and could only be, ineffective.[550] Few criminals were captured, and even those who were apprehended rarely received serious punishment.[551] Five men who were convicted of burglary or horse stealing in the March 1767 term of general sessions received death sentences, but the new Governor, wishing to begin his term of office with a show of leniency, pardoned them.[552] Only one backcountry criminal was punished at that term, with a mere whipping for petty larceny.[553]

As a result, local people took the law into their own hands and, over several months in the fall of 1767, organized some one thousand men into a quasi-militia to pursue and punish criminals.[554] They called themselves Regulators.[555] When the Governor issued a proclamation ordering them to disperse, they ignored it.[556] Instead, they sent a list of demands to the provincial assembly, the main demands being an entreaty for the establishment of county courts in the regions beyond Charleston and the selection of sheriffs for each county to replace the colony-wide provost marshal.[557] They also sought the enactment of laws for the punishment of idleness and vice and reform of legal procedures to reduce the expense and complexity of litigation.[558] Meanwhile they ignored the authority of the courts sitting in Charleston and obstructed service of their process.[559] For three years, the Regulators defied the authority of the Charleston government.[560]

The government in Charleston, on the other hand, tried to accommodate the Regulators. In 1768, it adopted legislation establishing circuit courts for the colony as well as sheriffs for every county, thereby fulfilling the Regulators'

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547. *See id.* at 18, 182 n.13.
548. *Id.* at 34–35.
549. *Id.* at 35.
550. *See id.* at 38.
551. *See id.*
552. *Id.*
553. *Id.*
554. *Id.* at 39.
555. *Id.*
556. *Id.* at 39.
557. *See id.* at 41–42 (citing The Remonstrance: "We Are Free-Men–British Subjects–Not Born Slaves" (Nov. 7, 1767), *in* THE CAROLINA BACKCOUNTRY, *supra* note 418, at 213–33).
558. *See id.* at 42.
559. *Id.* at 51.
560. *See id.* at 52.

main demands.[561] But at the end of the year, the King, at the Privy Council's recommendation, disallowed the legislation.[562]

Not until the summer of 1769 did the legislature enact and the Governor sign a new circuit court act.[563] It established six districts outside Charleston, provided for gubernatorial appointment of sheriffs in Charleston and each of those districts, and stipulated that the justices of common pleas and general sessions would hold a joint session of those courts in each of the six districts twice every year.[564] It became the practice for two justices to attend each circuit session.[565] The King assented to the act in November 1769.[566] Local sheriffs were appointed in 1772, and the circuit courts held their first sessions in the fall of that year.[567] The system of local courts, common to most of the British colonies in North America from the seventeenth century onward, had finally taken hold in South Carolina as well.

Meanwhile, minor law reforms also had begun to occur. The use of printed forms in debt collection cases became routine,[568] thereby making debt collection cheaper and credit more readily available. It became clear, although it often may have been true earlier as well, that a party who lost a ruling on a demurrer would not be thrown out of court; he could routinely amend his pleadings upon payment of his opponent's costs.[569] And the courts became quite flexible in allowing lawyers to negotiate partial settlements by limiting issues a jury would decide even when pleading rules did not technically permit such limitation.[570]

In this fashion, South Carolina's new and untested legal system, which had begun to hearken to the voice of the people, marched forward toward Revolution. By the time the April 1776 grand jury presented its grievances, the people, who had grown accustomed through the Stamp Act and subsequent crises and the Regulator Movement to rejecting hierarchy, subordination, and authority, had come to understand that the "powers of government . . . were

561. *Id.* at 75–76.
562. *Id.* at 81.
563. *Id.* at 98.
564. Circuit Court Act of 1769, *reprinted in* BROWN, *supra* note 3, app. B at 148–58.
565. BROWN, *supra* note 3, at 99.
566. *Id.* at 98.
567. *Id.* at 109.
568. *See* Owens v. Chambliss, (S.C. Ct. Com. Pl. 1773), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 96A (S.C. Dep't of Archives & History); Owens v. Chambliss, (S.C. Ct. Com. Pl. 1772), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 93A (S.C. Dep't of Archives & History); Lindo v. Furman, (S.C. Ct. Com. Pl. 1772), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 93A (S.C. Dep't of Archives & History).
569. *See* Ready v. Howell, (S.C. Ct. Com. Pl. 1772), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 93A (S.C. Dep't of Archives & History).
570. *See* Right on Demise of Pitcock v. Snow, (S.C. Ct. Com. Pl. 1773), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 99A (S.C. Dep't of Archives & History).

originally derived from themselves for the protection of their rights."[571] They were no longer prepared to accept what had been obvious only sixteen years earlier—that the "plantations [were] limited and dependant governments" under the sway of the Parliament, the King, and the Privy Council.[572] "[T]ho ever submissive to the just mandates of legal authority," South Carolinians now found "intolerable to the spirit of a people born and nurtured in the arms of freedom . . . the unjust, evil and diabolical acts of the British Parliament."[573]

In the spring of 1776, undermined by a decade of recurring legal crises, the city-state of Charleston died. And, America was born.

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571. Grievances of the Grand Jury, Apr. 23, 1776, J. S.C. Ct. Gen. Sess. 341 (Ct. Gen. Sess. 1776), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History).

572. Watson v. Williams, (S.C. Ct. Com. Pl. 1760), *microformed on* S.C. Ct. Com. Pl. Judgment Rolls, Box 48A (S.C. Dep't of Archives & History).

573. Grievances of the Grand Jury, Apr. 23, 1776, J. S.C. Ct. Gen. Sess. 342 (Ct. Gen. Sess. 1772), *microformed on* Journal of S.C. Ct. Gen. Sess. 1769–76, Box ST0339 (S.C. Dep't of Archives & History).