Sources and Interpretations

Knowing When to Fold: Litigation on a Writ of Debt in Mid-Eighteenth-Century Virginia

Turk McCleskey and James C. Squire

ANDREW Anderson's creditors twice sued the Virginia wigmaker in order to recover his overdue debts. The first suit, brought in York County's court by Williamsburg merchants John Blair and John Blair Jr., played out over the span of eight months and seven court sessions. On July 17, 1749, Anderson's attorney requested and received permission to negotiate a settlement, after which, having failed to reach agreement, he entered a plea for his client. The plaintiffs' attorney objected to the plea as an inappropriate response, so Anderson's attorney requested a trial regarding the plea's legal merits and his opponents' objection. On the trial date, however, Anderson's attorney acknowledged the plaintiffs' objection was valid and switched his plea, claiming now that Anderson owed nothing and requesting a jury trial of that fact. The trial was rescheduled for the next session, but when the parties' attorneys appeared in court on March 19, 1749/50, Anderson's lawyer relinquished his second plea and acknowledged the plaintiffs' action. York County's court ruled that the Blairs recover £263:15:3¾ with interest, plus costs.[1]

Compared with the extended maneuvering of that case, Anderson's second suit two years later seems much simpler. When the case was initially

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[1] York County Judgments and Orders (York JO) 1746–1752, 228, 236, 246, 260, 269, 282, 296, microfilm, Library of Virginia (LOV), Richmond.

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called on February 17, 1751/2, Anderson failed to present *special bail*, a person of good standing willing to guarantee both Anderson's future appearance in court and the payment of any adverse judgment of the court. In the absence of special bail, the York County magistrates immediately ordered a conditional judgment in favor of plaintiff Hugh Brown, a sea captain. The conditional decree made Anderson liable for the debt in Brown's declaration, plus costs if Anderson failed to find special bail and enter a plea at the next court. The magisterial threat worked: at the next court session, Anderson avoided the terms of his conditional judgment by settling the case, an accommodation that included paying the plaintiff's costs.[2]

Neither of Anderson's cases was tried before a jury, and for the plaintiffs initiating the suits, each produced a sufficient result. Subtly, however, Anderson or his attorney shaped the outcomes by offering particular responses to plaintiff initiatives. The first case dragged on for seven court sessions before Anderson confessed judgment (that is, formally conceded in court that the debt was just and unpaid). By contrast, Anderson promptly agreed on terms to settle the second case. Possibly the disparate narrative trajectories of the two cases indicate nothing more than a difference in whether Anderson had funds available for restitution. Alternatively, Anderson's behavior can be read as indicating that the two suits represented distinctive legal options.

Either way, to Anderson's lawyer the suits amounted to common variants of *mesne process*, the intermediate procedural steps before trial.[3] The apparently routine back-and-forth of mesne process has been dull fare for some historians. Bruce H. Mann has remarked that confessed judgment, which was as readily enforceable as the verdict from a trial, "ended the litigation and requires no further consideration here."[4] Other scholars, including T. H. Breen and Cornelia Hughes Dayton, have characterized much debt litigation as "a recording device," an administrative step leading to pretrial judgments that enabled creditors to delay execution of "those easily won judgments until they wished to call in the debt."[5] In this interpretation, plaintiffs were essentially banking the results of mesne process against the day when they needed cash.

Other historians have seen something more complex and economically significant in mesne process. After a computerized reconnaissance of county

[2] Ibid., 1752–1754, 11, 21. For special bail, see William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, vol. 3, *Of Private Wrongs* (Chicago, 1979), xix–xx, 287.

[3] Blackstone, *Commentaries on the Laws of England*, 3: 279, 415.

[4] Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill, N.C., 1987), 81.

[5] Cornelia Hughes Dayton, *Women before the Bar: Gender, Law, and Society in Connecticut, 1639–1789* (Williamsburg, Va., and Chapel Hill, N.C., 1995), 91 (quotations), 102; T. H. Breen, *Tobacco Culture: The Mentality of the Great Tidewater Planters on the Eve of Revolution* (Princeton, N.J., 1985), 97.

court orders in Virginia, David Thomas Konig concluded that every step in mesne process "was a calculation within a well-known context of assumption and expectation."[6] Deborah A. Rosen diagrammed "Procedure in New York Courts" from service of process to entry of judgment and graphed the increasing proportion of out-of-court settlements and the rising costs of various outcomes in a losing lawsuit. Rosen also recognized that resolutions of debt suits before trial during mesne process signaled the eighteenth-century commercialization of New York's economy.[7] James Muir explored civil litigation in Halifax, Nova Scotia, from 1750 to 1766, discussing in detail the motives for parties to avoid or accept going to trial.[8] Most importantly, William M. Offutt Jr. argued on the basis of detailed quantitative evidence that uncontested cases and out-of-court settlements amounted to products of "litigants' choices during litigation" and that an analysis of those strategic choices requires one to "begin with the outcome and work backward." Doing just that enabled Offutt to measure the degree of litigant consensus regarding alternative legal procedures. Lawsuits that were "low-intensity, predictable, and routinely dispatched" reflected a socially and economically important acquiescence to the legal system in Quaker communities of the Delaware River valley. From 1680 to 1710, this legal system "confer[red] both legitimacy and concrete advantages on the Delaware Valley's Quaker elite."[9]

As his book title indicated, Offutt credited early Quaker legal reforms and impartial Quaker jurymen and other officials for the peace that prevailed in Delaware Valley colonies. Arguably, however, an underlying foundation of English common law was more important than Quaker procedural revisions in fostering good order among colonists both in and beyond the Delaware Valley. In Virginia, for example, officers of local courts enjoyed social legitimacy and material advantages comparable to those of their Quaker peers to the north but without the benefit of either William Penn's reforms or his religious doctrine. Even in North Carolina, where Regulators rioted against abusive court officers in the 1760s, popular anger focused on dishonest legal officials, not on legal procedures.[10]

[6] David Thomas Konig, "Country Justice: The Rural Roots of Constitutionalism in Colonial Virginia," in *An Uncertain Tradition: Constitutionalism and the History of the South*, ed. Kermit L. Hall and James W. Ely Jr. (Athens, Ga., 1989), 63–82 (quotation, 70).

[7] Deborah A. Rosen, *Courts and Commerce: Gender, Law, and the Market Economy in Colonial New York* (Columbus, Ohio, 1997), 149 fig. A.1 (quotation), 59–73.

[8] James Muir, *Law, Debt, and Merchant Power: The Civil Courts of Eighteenth-Century Halifax* (Toronto, 2016), 68–97.

[9] William M. Offutt Jr., *Of "Good Laws" and "Good Men": Law and Society in the Delaware Valley, 1680–1710* (Urbana, Ill., 1995), 104–6 ("litigants' choices," 104, "low-intensity," 106), 145 ("confer[red]").

[10] James P. Whittenburg, "Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation," *William and Mary Quarterly*, 3d ser., 34,

The scholarship of Konig, Muir, Offutt, and Rosen regarding the significance of intermediate legal procedures before trial invites further exploration of the relationship between mesne process and popular acceptance of governmental authority. Offutt's technique of beginning at the suit's outcome and working backward, now known in game theory parlance as rollback analysis, is especially relevant for revealing the intricate economics of contract enforcement in colonial Virginia. Modern lawyers pay careful attention to rollback analysis of mesne process because an "overwhelming majority of civil cases settle before trial."[11] If the goal of modern litigation is to resolve a dispute without a trial, then the practice has deep colonial roots.

Recognizing these origins has implications that are at once historiographical and methodological. Consider, for example, how this expanded understanding of procedural goals for debt litigation helps resolve an interpretive conundrum in Breen's influential 1985 monograph, *Tobacco Culture*. Having argued that debts among neighbors "could symbolize an enduring friendship between patron and client," Breen nevertheless had to acknowledge that summoning "a neighbor before the local magistrates hardly seems an expression of enduring friendship." Breen's explanation—"the law helped planters to work out their private differences with mutual forbearance"—amounted to a qualitative hypothesis for a quantitative problem.[12] Certainly some debts among peers were material expressions of relationships phrased in terms of friendship and honor, but cultural interpretations of credit contracts comprise only part of a larger story. Beyond the planters and merchants in colonial Virginia who wrote volubly on the subject of debt, many additional voices are discernible in the county court orders. Each lawsuit offers miniature depositions by its participants regarding some of their expectations about the legal system; indeed, the rising alarm over indebtedness expressed by Breen's planters during the 1760s surely owes much of its shrill pitch to their firsthand observations of how mesne process could draw debtors into the paper-thin space between inexorable legal millstones. Analyzing credit contract enforcement in colonial Virginia thus requires quantitative examination of entire court caseloads, not just an investigation centered on planter and merchant correspondence.

The largest single segment of a county's caseload (about 37 percent in one populous county, Augusta) involved litigation of small debts.[13] The next-largest segment (about 29 percent in the same place) consisted of suits

no. 2 (April 1977): 212–38, esp. 229–37; Carole Watterson Troxler, *Farming Dissenters: The Regulator Movement in Piedmont North Carolina* (Raleigh, N.C., 2011), 23–27.

[11] Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, *Game Theory and the Law* (Cambridge, Mass., 1994), 245.

[12] Breen, *Tobacco Culture*, 96–97 ("symbolize," 96, "law," 97).

[13] For the statistical evaluation of this segment, see Tinni Sen, Turk McCleskey, and Atin Basuchoudhary, "When Good Little Debts Went Bad: Civil Litigation on the Virginia Frontier, 1745–1755," *Journal of Interdisciplinary History* 46, no. 1 (Summer 2015): 60–89.

TABLE I
FREQUENCY BY TYPE OF ALL COMPLETED CIVIL LAWSUITS IN AUGUSTA COUNTY, VIRGINIA, 1746–55

	No. by type	*% of all civil suits*
Informal proceedings		
Petition (small debts)[1]	1,376	36.8
Complaint	17	0.5
Motion	4	0.1
Total informal proceedings	1,397	37.4
Proceedings by writ		
Writ of debt[1]	1,075	28.8
Writ of trespass on case, general	484	12.9
Writ of attachment[1]	469	12.5
Writ of trespass assault and battery	85	2.3
Writ of trespass on case, assumpsit[1]	60	1.6
Writ of trespass on case, slander	48	1.3
Writ of ejectione firma	33	0.9
Writ of scire facias	22	0.6
Unspecified writ	10	0.3
Writ of detinue	9	0.2
Writ of trover	5	0.1
Writ of covenant	4	0.1
Total proceedings by writ	2,304	61.6
Total proceedings in chancery	38	1.0
Total all civil suits	3,739	

Sources: Augusta County Order Books 1: 9 through 4: 462, Library of Virginia, Richmond; Augusta County Minute Books, 1745–1749, 1749/50–1755, ibid.

[1] Confirmable debt litigation. At a minimum, debt litigation via petition, writ of debt, writ of attachment, and writ of trespass on case in assumpsit accounted for 2,980 out of 3,739 completed civil suits (79.7 percent).

on a writ of debt (Table I). Taken together, these two types of legal action alone comprised about two-thirds of all civil suits during Augusta County's initial decade.

Aggregated in such extensive quantities, lawsuits offer important evidence about the lives of individual people, but the suits' greater significance lies in their testimony about how Virginia litigants maintained and extended their remarkably stable local governments while pursuing their own economic self-interest. Private strategy and public good converged in Virginia legal proceedings. A decade's worth of outcomes (1746–55) for suits on a writ of debt, some 2,142 cases drawn from five Virginia counties, reveal systemic incentives shaping litigant strategies, a winnowing process that encouraged pretrial resolutions of most suits. Such settlements quietly accomplished two vital socioeconomic functions: legal maneuvers during mesne process reliably upheld credit contracts while at the same time reinforcing popular support for Virginia's county courts, the essential agencies of local government, by perennially delivering reliable justice.[14]

DEBT LITIGATION RECORDS IN MANUSCRIPT COURT ORDER BOOKS from the counties of Augusta, Middlesex, Richmond, Surry, and York share similar format and content despite the economic and social diversity of those counties (Figure I). Clerks of court throughout Virginia were uniformly trained in Williamsburg by the colonial secretary, so their records of court orders typically contained comparable information about suits.[15] The court orders are almost complete from 1746 through the May 1755 court session. In Augusta, Middlesex, Richmond, and Surry Counties, all court order books for this decade survive, as do York County's orders except for the period from November 1754 through May 1755.[16] Despite the six-month gap in one county's records, the relative completeness of the court order books permits a narrative reconstruction for suits on a writ of debt during this decade. The task of assembling the quantitative data is time-consuming but not difficult: notwithstanding the vagaries of eighteenth-century spelling, individual order book entries about lawsuits tend to be easily identifiable because they appear in association with paired litigants, with a particular legal writ, with a certain procedural step, and with the other cases bracketing them on the docket.

[14] Terri L. Snyder pointed out in 1993 "that the county court was a central institution in the colonial South, but we know little about its caseload"; Snyder, "Legal History of the Colonial South: Assessment and Suggestions," *WMQ* 50, no. 1 (January 1993): 18–27 (quotation, 18).

[15] David Thomas Konig, *Courthouse of 1770 Historical Report, Block 19 Building 3*, originally titled *The Williamsburg Courthouse: A Research Report and Interpretive Guide* (Williamsburg, Va., 1987), accessed Nov. 25, 2017, http://research.history.org/DigitalLibrary/view/index.cfm?doc=ResearchReports\RR1218.xml.

[16] Augusta County Order Books (Augusta OB), 1: 9 through 4: 462; Middlesex County Orders (Middlesex OB), 1745–1752, 22, through 1752–1758, 258; Richmond County Order Books (Richmond OB), 11: 524 through 13: 241; Surry County Orders (Surry OB), 1744–1749, 117, through 1753–1757, 214; York County Orders, Wills, and Inventories (York OWI), vol. 19: 391 through 485; York JO, 1746–1752, 1 through 519, and 1752–1754, 11 through 500. As with the York County records, microfilm editions of the other four counties are available at the Library of Virginia, Richmond.

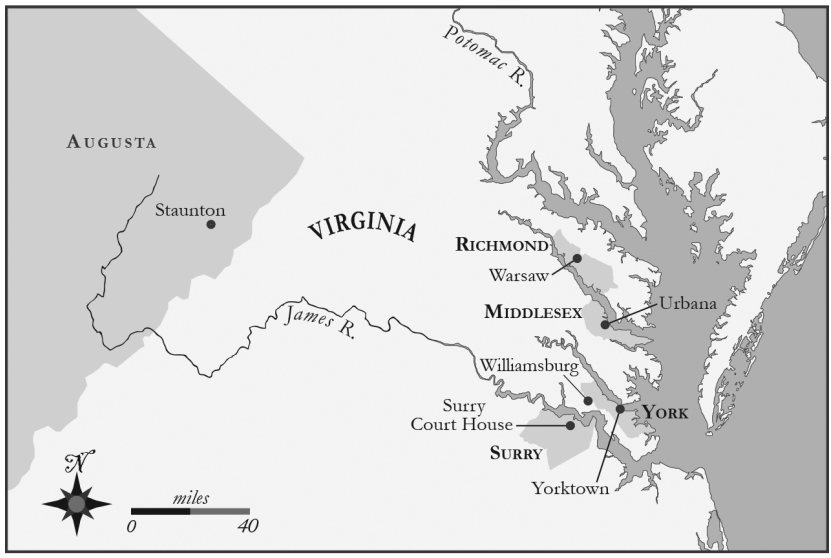

FIGURE I

Map of selected Virginia counties and their courthouses, 1755. Drawn by Rebecca Wrenn. A color version is available on the OI Reader, Project Muse, and JSTOR.

The five study counties were sufficiently distant from each other to have precluded the same lawyers from practicing in all of them. As a result, any similarities in litigation tactics or outcomes cannot be attributed to a handful of attorneys. Taken together, the counties as of June 10, 1755, contained 4,554 tithable (that is, taxable) white males aged sixteen years or older and 4,904 tithable black males and females of the same age cohort; the overwhelming majority of the latter were enslaved. The total of black and white tithables in the study counties amounted to over 9 percent of all Virginia tithables as of June 10, 1755.[17] Enslaved people did not litigate debt suits, but they are enumerated here by way of indicating that the lawsuits in this study shared an economic context with the labor of almost one-tenth of taxable people in Virginia.

[17] The tithable counts discussed in this paragraph appear in "A List of Tithables Sent the Lords of Trade, February 23rd, 1756," in R. A. Brock, ed., *The Official Records of Robert Dinwiddie, Lieutenant-Governor of the Colony of Virginia, 1751–1758. . . .* (Richmond, 1884), 2: 352–53. The table incorrectly labels "White Tithables" as "Males from 18 years and upw'ds," though the data on the table is for males sixteen and up; see "An Act Concerning Tithables," in William Waller Hening, ed., *The Statutes at Large; Being a Collection of All the Laws of Virginia. . . .* (1819; repr., Charlottesville, Va., 1969), 6: 40–44, esp. 6: 40. By Virginia law, tithables were enumerated as of June 10th annually; see "An Act Concerning Tithables," in Hening, *Statutes at Large*, 3: 258–61, esp. 3: 260.

Individually, the five counties represented a range in population size and economic orientation. Augusta had by far the largest white population of any Virginia county, Middlesex had one of the smallest, and Richmond was at the median. York and Surry hovered just above the smallest white quartile, but though Surry's economy was based primarily on tobacco production, York's court oversaw cases involving not only planters but also the urban merchants and artisans of Yorktown and part of Williamsburg. Middlesex and Richmond County planters focused on tobacco, while Augusta County's diversified agricultural economy was tied to Pennsylvania markets as well as eastern Virginia seaports. All counties included retail merchants, some of whom represented much larger Virginia or British firms.[18]

The period from 1746 to 1755 spanned most of two cycles of economic expansion and contraction in British colonial North America. The first cycle ran from a 1745 trough to a 1749 peak, followed by a 1750 trough. The second cycle peaked in 1752 and hit another trough in 1756.[19] The effect of these cycles on litigation appears to have been small. In York County, plaintiffs initiated new suits on a writ of debt in 1749 at the rate of twenty-three cases per one thousand tithables. The following year, the rate was eighteen suits per one thousand, so by that measure, the abrupt economic contraction did not significantly alter the rate of fresh litigation. Similarly, the rate of new suits that were immediately resolved with a single appearance on the docket changed only slightly from eight suits per one thousand tithables in 1749 to six suits in 1750. As for the amount of time needed to resolve suits that continued past their original filing, no clear trend is apparent.[20]

Virginia was at peace during the study period: King George's War was under way in 1746 but the hostilities were far from Virginia, and the May 1755 court sessions occurred just before the disruptive local onset of the Seven Years' War. The duration of this period is sufficiently long to include

[18] For county socioeconomic details, see Robert D. Mitchell, *Commercialism and Frontier: Perspectives on the Early Shenandoah Valley* (Charlottesville, Va., 1977); Darrett B. Rutman and Anita H. Rutman, *A Place in Time: Middlesex County, Virginia, 1650–1750* (New York, 1984); Gwenda Morgan, *The Hegemony of the Law: Richmond County, Virginia, 1692–1776* (New York, 1989).

[19] John J. McCusker, "How Much Is That in Real Money? A Historical Price Index for Use as a Deflator of Money Values in the Economy of the United States," *Proceedings of the American Antiquarian Society* 101, pt. 2 (October 1991): 297–373, esp. 360, table D–1.

[20] Forty-nine suits on a writ of debt were initiated in York County in 1749 and thirty-seven were initiated in 1750. The county contained 2,124 tithables in the former year and 2,051 in the latter; York JO, 1746–1752, 164–385, esp. 278 (for 1749), 376 (for 1750). The annual ratios of new debt suits to tithables thus were 0.023 and 0.018 respectively. Some macroeconomic effects on local litigation can be glimpsed even in frontier counties, however. For example, currency exchange rate fluctuations in Augusta County lawsuits closely tracked rates in the larger North Atlantic economy. See Turk McCleskey and James C. Squire, "Pennsylvania Credit in the Virginia Backcountry, 1746–1755," *Pennsylvania History* 81, no. 2 (Spring 2014): 207–25.

2,142 completed suits on a writ of debt in five counties, a set of cases large enough to warrant high confidence in the statistical findings.[21]

An analysis of credit-default litigation starts with understanding civil procedure, the common law rules for suits to recover unjustly withheld debts. These procedures, which generally applied to creditors and debtors throughout British North America, have been studied quantitatively in Halifax, New England, New York, and the Delaware River colonies but only rarely in Virginia.[22] For mid-eighteenth-century Virginians, litigation over debt involved the same debt instruments (written records of debt) and the same legal procedures defined in a monumental treatise by William Blackstone, *Commentaries on the Laws of England*. Blackstone's *Commentaries* were published in London from 1765 through 1769, more than a decade after and several thousand miles distant from the debt suits in the present study, so legalistic historians might object that drawing upon Blackstone is anachronistic or fails to reflect Virginia's variations in practice. Fortunately, however, a 1748 statute authorizing Virginia's experiment in quarterly courts contained an accounting of procedures that the act did not change.[23] This statutory summary plus details drawn from the court orders indicate that Blackstone's *Commentaries* can be used as the primary guide to mid-eighteenth-century Virginia debt procedures. Additional useful explanations of procedure in the period of this study also can be gleaned from George Webb's *Office and*

[21] By comparison, Offutt's study of Delaware Valley litigation from 1680 to 1710 drew on a total of 2,017 cases filed; see Offutt, *Of "Good Laws" and "Good Men,"* 103.

[22] Mann, *Neighbors and Strangers*; Offutt, *Of "Good Laws" and "Good Men"*; Rosen, *Courts and Commerce*; B. Zorina Khan, "'Justice of the Marketplace': Legal Disputes and Economic Activity on America's Northeastern Frontier, 1700–1860," *Journal of Interdisciplinary History* 39, no. 1 (Summer 2008): 1–35; Muir, *Law, Debt, and Merchant Power*. For Virginia's legal similarities to and differences from New England, see David Thomas Konig, "The Virgin and the Virgin's Sister: Virginia, Massachusetts, and the Contested Legacy of Colonial Law," in *The History of the Law in Massachusetts: The Supreme Judicial Court, 1692–1992*, ed. Russell K. Osgood (Boston, 1992), 81–115. County-level quantitative analyses of Virginia indebtedness include Michael L. Nicholls, "Competition, Credit and Crisis: Merchant-Planter Relations in Southside Virginia," in *Merchant Credit and Labour Strategies in Historical Perspective*, ed. Rosemary E. Ommer (Fredericton, N.B., 1990), 273–89; Sen, McCleskey, and Basuchoudhary, *Journal of Interdisciplinary History* 46: 60–89. For skepticism that quantitative analysis of colonial Virginia legal records can offer any significant insights, see William E. Nelson, *The Common Law in Colonial America*, vol. 1, *The Chesapeake and New England, 1607–1660* (Oxford, 2008), 45; Nelson, *The Common Law in Colonial America*, vol. 3, *The Chesapeake and New England, 1660–1750* (Oxford, 2016), 54.

[23] For the processes by which creditors sought remedies for overdue debts, see Blackstone, *Commentaries on the Laws of England*, 3: 270–425. For examples of writs, see ibid., xiii–xxvii, appendix 3. For a detailed discussion of the social and economic implications of assignable debt instruments in eighteenth-century Connecticut, see Mann, *Neighbors and Strangers*, 30–37. For the 1748 statute, see "An Act for Altering the Method of Holding Courts in the Counties of Brunswick, Fairfax, Lunenburg, Frederick, Albemarle, and Augusta," in Hening, *Statutes at Large*, 6: 201–10, esp. 6: 202–7.

Authority of a Justice of Peace, published in Williamsburg in 1736 and used in the county courts during the following two decades.[24]

In every county, debt litigation fell into one of four procedural categories. Small debts of 25 shillings (£1.25) to £5 could be recovered in suits by petition with little legal formality; these encompassed defaults on any type of credit instrument.[25] Suits to recover debts greater than £5 were initiated with formal writs, which included the writ of trespass on case, the writ of attachment, and the writ of debt. Trespass on case was the preferred writ for debts represented by running accounts that involved an implicit unwritten contract, such as those obligations accumulated over time in the account books of merchants, tavern keepers, and artisans repeatedly providing goods or services. In addition to this application, known technically as *trespass on case in assumpsit*, plaintiff creditors also infrequently used writs of trespass on case without assumpsit language to seek damages for overdue written promises of payment. Writs of attachment enabled creditors to seize the property of absconding or unresponsive debtors.[26] Writs of debt applied largely to written, signed, and witnessed obligations to pay a particular amount.

Suits on a writ of debt deserve closer scrutiny for several reasons. First, they were numerous: in mid-eighteenth-century Augusta County, suits on a writ of debt comprised almost 29 percent of all civil litigation and over 36 percent of all debt litigation (Table I). Except for small debt suits, actions on a writ of debt at midcentury were the largest proportion of litigation over credit contracts, and that proportion was expanding. By 1770, Virginians overall reportedly "used the writ of Debt in more than 60% of their court actions for contracts."[27] Additionally, litigation via a writ of debt merits analysis because contemporaries vested the written instruments at issue with considerable cultural significance. Such documents

[24] For a detailed discussion of law books that Virginians possessed, see Warren M. Billings, "'Send us . . . what other Lawe books you shall thinke fitt': Books That Shaped the Law in Virginia, 1600–1860," *Virginia Magazine of History and Biography* 120, no. 4 (2012): 314–39. For additional explanations, see George Webb, *The Office and Authority of a Justice of Peace. . . .* (Williamsburg, Va., 1736). Ten copies of Webb's book were delivered to magistrates in newly formed Frederick County in late 1745. Frederick County Order Book 2, 1745–1748, vol. 1, LOV. Eleven were delivered to Augusta County magistrates in July 1746. Augusta OB, 1: 69–70. See also Halifax County Pleas, Court Orders, no. 1, pt. 2, 1752–1755, p. 429, LOV.

[25] For small debts, see Sen, McCleskey, and Basuchoudhary, *Journal of Interdisciplinary History* 46: 64. For reference, Carter Burwell offered wages of £4 per month to a bricklayer in 1751, a rate of about three shillings per day; Burwell, "The Subscriber being in want of Bricklayers," [Williamsburg] *Virginia Gazette*, Aug. 29, 1751, [3]. Burwell's daily wage was comparable to the three and one-half shillings per day that Landon Carter charged for the hired services of an enslaved brick mason in 1766. Entry for May 4, 1766, in Jack P. Greene, ed., *The Diary of Colonel Landon Carter of Sabine Hall, 1752–1778* (Charlottesville, Va., 1965), 1: 295–96, esp. 1: 295.

[26] For examples of writs and bonds for attachments, plus procedural details, see Webb, *Office and Authority of a Justice of Peace*, 22–29.

[27] Konig, "Virgin and the Virgin's Sister," 113.

typically represented an aggregation of transactions that had been recorded in account books over time, an unbalanced accumulation of financial obligations. Pledging to pay interest, signing a note, and sealing the signature ritually emphasized that, in comparison to account-book records, the debtor was making a stronger commitment to repay. And finally, the notes or bills at issue in suits on a writ of debt were fungible, assignable to other and possibly unknown parties in return for value received. In cash-strapped colonial Virginia, suits on a writ of debt helped police the market for private credit.

Given the significance of written debt instruments, it is unsurprising that procedures and evidentiary rules relating to their litigation were relatively inflexible and outcomes of that litigation were reliably predictable. Indeed, at first glance, suits on a writ of debt almost appear impossible for legitimate plaintiffs to lose. As in other contemporary British jurisdictions, Virginia suits on a writ of debt dealt with financial instruments that comprised prima facie evidence of unfulfilled obligations. Only a handful of common law pleadings applied, and these seemingly afforded defendants little room for legal maneuvering. Once a suit was under way, various motions before trial could prolong the proceedings, but only at a cost. Every administrative step in litigation carried a clerk's fee and some also included a sheriff's fee, all of which were paid by the losing party (Table II). Assignment of both parties' legal costs to the loser, known today as the English rule, gave litigants with a weak case an incentive to settle before trial, especially when the debt was relatively small.[28]

Under English common law, credit obligations enforced with a writ of debt fell into one of three categories: *debts of record*, *debts by specialty*, or *debts by simple contract*. These categories assumed great importance if the debtor died. Executors or estate administrators had to repay debts of record before those owed by specialty, and debts by specialty took precedence over debts by simple contract.[29] In all, out of 2,142 suits on a writ of debt initiated and completed from January 1, 1745/6, to May 31, 1755, only a handful involved debts of record, each seeking execution for a judgment already received. The great majority of suits, then, involved either debts by specialty or debts by simple contract (Table III).

[28] For a discussion of litigation on written debt instruments in eighteenth-century Connecticut, see Mann, *Neighbors and Strangers*, 34–36. For the Delaware Valley, see Offutt, *Of "Good Laws" and "Good Men,"* esp. 87. For the statutory evolution of levying costs, see Blackstone, *Commentaries on the Laws of England*, 3: 399. For a discussion of high court fees in eighteenth-century Massachusetts, see Claire Priest, "Colonial Courts and Secured Credit: Early American Commercial Litigation and Shays' Rebellion," *Yale Law Journal* 108, no. 8 (June 1999): 2413–50, esp. 2424–29; Muir, *Law, Debt, and Merchant Power*, 81.

[29] For credit contracts, see William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, vol. 2, *Of the Rights of Things (1766)* (Chicago, 1979), 464–70, 511–12; for a writ of debt as a remedy for unsatisfied credit contracts, see Blackstone, *Commentaries on the Laws of England*, 3: 153–55.

Table II
Fees for Common Services by Clerks of Court (in Pounds of Tobacco), 1746–55

Activity	*Fee*
Costs associated with initiating a suit (each occurrence): issuing capias, alias capias, pluries capias, attachment, alias attachment, or pluries attachment	10
Recording sheriff's returns on court orders (each occurrence)	10
Recording parties' actions (each occurrence)	
Entering continuance at a party's motion and cost	15
Entering an individual's appearance as special bail for a party	10
Entering parties' agreement to accept arbitration	10
Entering appearance by defendant in person (without an attorney), by a garnishee, or by an attorney for either party	5
Entering demurrer, plea, or joinder	3
Recording court orders (each occurrence): entering orders for capias, alias capias, pluries capias, attachment, alias attachment, pluries attachment, attaching garnishee, arbitration, nonsuit, imparlance, rule to plead, time to answer, conditional judgment, or trial	15
Costs associated with trial (each occurrence)	
Docketing (to be paid only once, per statute)	5
Filing papers and swearing jury and witnesses	30
Recording verdict in a jury trial	10
Costs associated with concluding a suit (each occurrence): entering agreement, dismissal, conditional judgment, judgment by default and order for writ of inquiry, abatement by death of party, or confirmation of judgment	15
Costs associated with enforcing judgment (each occurrence): issuing writ of execution (capias ad satisfaciendum, fieri facias, or scire facias)	15

Notes: Virginia statute established clerk-of-court fees for the period of this study during the February 1745/6 General Assembly session, but the law assumed deep familiarity with the subject and so can be confusing to newcomers. Fortunately, itemized clerk fee records survive for the Frederick County clerk of court, James Wood. Functionally tabulating Wood's fees as above clarifies the statutory record.

Sources: Accounts, Clerk of Court, folders 1744–1746 through 1755, box 4, Records of the Clerk of the Frederick County Court, 1744–1769, James Wood Family Papers, 173 WFCHS, Stewart Bell Jr. Archives, Handley Regional Library, Winchester-Frederick County Historical Society, Winchester, Va.; Robert Rae and William Reddy (Redding?), Fees for Suits, Feb. 19, 1753, item 161, folder 24, box 2, James Wood Collection, 711 THL, ibid.; Fee Lists and Receipts for Fees, 1737–1761, folder 25, box 3, ibid.; William Walter Hening, ed., *The Statutes at Large: Being a Collection of All the Laws of Virginia. . . .* (1819; repr. Charlottesville, Va., 1969), 5: 331–39, 6: 200, 244.

Debts by specialty included instruments that contemporaries interchangeably identified as *bonds*, *penal bonds*, or *penal bills*, by which Virginia litigants meant signed, witnessed, and sealed contracts to repay a specific sum of money either on demand or by a particular date. Penal instruments distinctively included notional penalties for failure to repay, pledging double the amount borrowed in the event the debtor failed to perform the conditions of the bond. Doubled penalties ritually emphasized debtor commitments to repay, but in Virginia, as in the common law realm generally, doubling was not enforced. The suit against Andrew Anderson thus was typical; his £527:10:7 1/2 judgment was discharged by the principal alone (£263:15:3 3/4) plus interest and costs.[30] In every county in this study, judgments for plaintiffs against debtors involving conditional bonds were discharged in full by the undoubled principal plus court costs and interest, with the latter typically calculated from the day payment became overdue.

In Virginia, debts on a simple contract consisted overwhelmingly of promissory notes, which contemporaries also referred to as *notes of hand* or *writings obligatory*. These less-formal documents were signed and witnessed but usually bore no seal and lacked the solemnity of doubled payment for default. Like bonds, however, promissory notes were readily enforceable with a suit on a writ of debt. In court, the only evidence a plaintiff needed to present was the instrument. Some promissory notes included an interest penalty if the debt remained unpaid by the due date. The category of simple contract also included accounts and bills of exchange, but these were rare in suits on a writ of debt (see Table III).

Plaintiffs or their attorneys initiated suits on a writ of debt by filing a formulaic written complaint and the original instrument with the county clerk. The clerk drew up a summons, known as a *capias*, which the county sheriff either served directly to the defendant or left at the defendant's residence in the presence of witnesses. Before each court session, the sheriff notified the clerk whether he had served the capias, and the clerk included sheriff reports on the next court session's docket. Defendants might evade service, but plaintiffs could compel skulking defendants to accept service and respond (Table IV). If sheriffs returned the capias as not served, then plaintiffs renewed the summons with an *alias capias*. If that writ also could not be served, then persistent plaintiffs could continue renewing the summons as a *pluries capias*. Typically, however, plaintiffs resorted to the process of *attachment*, a writ authorizing sheriffs to seize defendant property with a value sufficient to cover the debt. Defendants seeking to reclaim their property—that is, to *replevy*—had to appear at court, thus completing the writ's

[30] For Anderson's judgment, see York JO, 1746–1752, 296. For formulaic doubling of penal bonds in Virginia and Britain, see "An Act to Prevent Frivolous and Vexatious Suits: And to Regulate Attorneys Practising in the County Courts," in Hening, *Statutes at Large*, 4: 357–62, esp. 4: 359; Blackstone, *Commentaries on the Laws of England*, 3: 434–35.

TABLE III
KNOWN INSTRUMENTS IN PROCEEDINGS ON A WRIT OF DEBT FOR SELECTED COUNTIES, 1746–55

	Debt of record		*Debt by specialty*		*Debt by simple contract*						
	Execution of judgment		*Penal bill/ bond*		*Promissory note*		*Bill of exchange*		*Account*		
	No.	*% of total*	*No.*	*% of total*	*No.*	*% of total*	*No.*	*% of total*	*No.*	*% of total*	*Total known in study group*
Augusta, 1746–May 1755	3	0.6	328	63.6	183	35.5	—	—	2	0.4	516
Middlesex, 1746–April 1755	1	1.1	53	59.6	29	32.6	6	6.7	—	—	89
Richmond, 1746–May 1755	1	0.6	138	87.9	13	8.3	4	2.5	1	0.6	157
Surry, 1746–May 1755	1	0.5	145	69.0	62	29.5	2	1.0	—	—	210
York, 1746–October 1754	4	1.5	194	71.6	57	21.0	16	5.9	—	—	271
Total known in study group	10	0.8	858	69.0	344	27.7	28	2.3	3	0.2	1,243

Sources: Augusta County Order Books, 1: 9 through 4: 462; Middlesex County Orders, 1745–1752, 22, through 1752–1758, 258; Richmond County Order Books, 11: 524 through 13: 241; Surry County Orders, 1744–1749, 117, through 1753–1757, 214; York County Orders, Wills, and Inventories, vol. 19: 391 through 485; York County Judgments and Orders, 1746–1752, 1 through 519, and 1752–1754, 11 through 500, Library of Virginia, Richmond.

Table IV

Procedures to Induce Defendant Participation in Suits on a Writ of Debt for Selected Counties, 1746–55

	Augusta		*Middlesex*		*Richmond*		*Surry*		*York*		*Study Group*	
	No.	*% of all suits*	*No.*	*% of all suits*	*No.*	*% of all suits*	*No.*	*% of all suits*	*No.*	*% of all suits*	*No.*	*% of all suits*
Repeated service of writ												
Alias capias	328	30.5	11	8.9	5	2.3	28	8.1	53	14.1	425	19.8
Pluries capias	138	12.8	1	0.8	2	0.9	3	0.9	10	2.7	154	7.2
2d pluries capias	42	3.9	1	0.8	2	0.9	1	0.3	3	0.8	49	2.3
≥3d pluries capias	28	2.6	—	—	1	0.5	—	—	1	0.3	30	1.4
Seizure of property												
Attachment	56	5.2	9	7.3	10	4.5	31	8.9	17	4.5	123	5.7
Alias attachment	17	1.6	2	1.6	1	0.5	4	1.2	3	0.8	27	1.3
Pluries attachment	10	0.9	1	0.8	—	—	1	0.3	—	—	12	0.6
Conditional judgment[1]	449	41.8	12	9.7	79	35.7	103	29.7	130	34.7	773	36.1
All suits on a writ of debt[2]	1,075		124		221		347		375		2,142	

Sources: Augusta County Order Books, 1: 9 through 4: 462; Middlesex County Orders, 1745–1752, 22, through 1752–1758, 258; Richmond County Order Books, 11: 524 through 13: 241; Surry County Orders, 1744–1749, 117, through 1753–1757, 214; York County Orders, Wills, and Inventories, vol. 19: 391 through 485; York County Judgments and Orders, 1746–1752, 1 through 519, and 1752–1754, 11 through 500, Library of Virginia, Richmond.

[1] Procedures that plaintiffs could employ, either singly or in combination, to compel defendant participation in lawsuits are shown here in increasing degree of coerciveness. The most severe inducement, conditional judgment, was also the one most frequently employed.

[2] This line enumerates all suits on a writ of debt, figures that are used to calculate percentages in the table.

service. Unserved attachments could be renewed as *alias attachments*, as with the capias.[31]

After defendants accepted service of the capias, they chose whether to repay immediately or to set in motion a series of alternating plaintiff and defendant actions leading to resolution of the case. If defendants settled disputes promptly, the sole official record of the action was a single terse listing in the court order book, annotating the suit as agreed. Defendants choosing not to resolve the issue possessed two options for delay. One stalling tactic was to *pray oyer*, requesting the county clerk to read the debt instrument aloud in court. After hearing the evidence, defendants could consider their response until the next court session. Defendants also could pray leave to *imparl*, or negotiate, until the next court (Table V). Unlike the request for oyer, this motion acknowledged that the plaintiff's action was appropriate and thus further narrowed the range of possible defendant responses by eliminating certain pleas.[32]

When defendants exhausted their short list of delaying techniques, they either settled the suit out of court, forfeited by not appearing to answer the complaint, appeared in court to confess judgment in favor of the plaintiff, or entered a plea responding to the plaintiff.[33] Settlements, again annotated tersely in court orders as agreed, indicated a bargain culminating in at least nominal plaintiff satisfaction. Unfortunately, no records survive of the terms of those negotiated agreements. Some defendants declined to come to terms or plead but instead forfeited through their own inaction, a loss recorded as *judgment by default*. Less expensively, defendants could appear in court and confess judgment in favor of the plaintiff, as Anderson eventually did in the suit by John Blair and John Blair Jr. As with judgment by default, the confessed judgment, which Blackstone described as "absolutely complete and binding," was legally enforceable.[34] For defendants who failed to agree and neither forfeited nor confessed judgment, the sole remaining option was to enter a plea, a formal response to the plaintiff's complaint.

As in all English common law courts, a defendant's choice of plea and a plaintiff's reply to the plea then controlled whether a case could be tried as a legal issue (decided by magistrates) or as a factual issue (decided by a jury). In the former instance, defendants might acknowledge plaintiff facts but deny there was legal cause for action, a plea known as a *demurrer general*. Similarly, plaintiffs could enter a demurrer to a defendant plea on the grounds that, even if true, it did not amount to "a legitimate excuse."[35]

[31] Webb, *Office and Authority of a Justice of Peace*, 22–29.

[32] For imparl, see Blackstone, *Commentaries on the Laws of England*, 3: 301. For oyer, ibid., 299.

[33] County-level tabulated plea details for both judgments and stopped proceedings are available at https://www.jimsquire.com/litigation_details/timeline.html.

[34] Blackstone, *Commentaries on the Laws of England*, 3: 397 (quotation).

[35] Ibid., 3: 314 (quotation).

Table V

Defendant Options to Delay Proceedings on a Writ of Debt for Selected Counties, 1746–55

	Augusta		*Middlesex*		*Richmond*		*Surry*		*York*		*Study Group*	
	No.	*% of all suits*	*No.*	*% of all suits*	*No.*	*% of all suits*	*No.*	*% of all suits*	*No.*	*% of all suits*	*No.*	*% of all suits*
Oyer (read instrument aloud)	118	11.0	11	8.9	11	5.0	15	4.3	3	0.8	158	7.4
Imparl (negotiate)	40	3.7	25	20.2	47	21.3	57	16.4	103	27.5	272	12.7
Further imparl	9	0.8	—	—	1	0.5	1	0.3	2	0.5	13	0.6
All suits on a writ of debt[1]	1,075		124		221		347		375		2,142	

Sources: Augusta County Order Books, 1: 9 through 4: 462; Middlesex County Orders, 1745–1752, 22, through 1752–1758, 258; Richmond County Order Books, 11: 524 through 13: 241; Surry County Orders, 1744–1749, 117, through 1753–1757, 214; York County Orders, Wills, and Inventories, vol. 19: 391 through 485; York County Judgments and Orders, 1746–1752, 1 through 519, and 1752–1754, 11 through 500, Library of Virginia, Richmond.

[1] This line enumerates all suits on a writ of debt, figures that are used to calculate percentages in the table.

Trials of legal issues thus might arise from either defendant plaintiff actions, but in either event, demurrers were tried exclusively before magistrates, not juries. Out of ten verdicts on demurrers general—that is, trials of a legal issue with no jury—plaintiffs won five.[36]

In contrast to trials of legal issues, all disputed factual issues were tried by juries. Some jury trials involved *pleas in denial* of the plaintiff's actions, a general rejection of the complaint. Others involved *pleas in bar*, claims of fact that, if proven, would establish the defendant's compliance with the instrument's terms. Except for rare cases in which plaintiffs demurred to defendant pleas, all pleas in denial or in bar potentially could have proceeded to a jury trial of a factual issue in which both sides presented evidence and arguments. Less frequently, juries also were employed in suits ending in judgment by default, an automatic decision against defendants who refused to plead. Sometimes in default cases a factual question arose concerning the damages owed to the plaintiff, so even though the defendant failed to appear in court, juries were convened on a *writ of inquiry*, an order to the sheriff to sit as judge and try with a jury the amount of damages to be awarded (Table VI).

At any time after a court ordered a trial of issue but before that moment in a trial when the court called upon the jury to deliver its verdict, either party could forfeit their suit by declining to appear or withdrawing from court. If defendants failed to appear for trial, judgment was entered against them by default. Plaintiffs might also default by leaving the courtroom if after hearing the evidence they belatedly feared an adverse jury verdict. In that case, a judgment of nonsuit was entered in favor of the defendant, who went free and could claim five shillings from the plaintiff to compensate for the false claim. For plaintiffs, the nonsuit option avoided verdicts they expected to lose while preserving the possibility of renewing the action.[37]

As described so far, mesne processes on a writ of debt—that is, proceedings before trial—appear to be lengthy parts of the court's routine daily activity. To modern historians turning the pages of court order books, lawsuits are arranged as a narrative of court proceedings. But that clear narrative trajectory is artificial and misleading. Defendants were not required to attend court unless they were in the sheriff's custody; their lawyers or special bails—persons who formally pledged that, if the defendant neither repaid the debt and costs nor surrendered to debtor's prison, they would do it instead—could and did speak for absent defendants. Plaintiffs likewise could remain aloof; an extreme example in terms of geographic distance was that

[36] For judgments on demurrer general for plaintiffs, see Middlesex OB, 1745–1752, 38, 49; ibid., 1752–1758, 93, 163, 212, 240; Surry OB, 1749–1751, 240. For defendants, see Augusta OB, 1: 51, 81, 106, 213; Middlesex OB, 1745–1752, 41. Trial of a legal issue might also follow a defendant plea in abatement, which protested some technical defect in the writ, such as "misnaming the defendant"; Blackstone, *Commentaries on the Laws of England*, 3: 302 (quotation).

[37] For nonsuit, see Blackstone, *Commentaries on the Laws of England*, 3: 376–77.

Table VI

Jury Trials in Suits on a Writ of Debt for Selected Counties, 1746–55

County	*Jury trials of issue*[1]	*% of all suits*	*Verdicts in favor of plaintiff*	*% of all jury trials*	*Juries on writs of inquiry to determine damages owed*[1]	*% of all suits*	*Total all suits on a writ of debt*
Augusta	34	3.2	25	73.5	27[2]	2.5	1,075
Middlesex	13	10.5	8	61.5	—	—	124
Richmond	6	2.7	3	50.0	—	—	221
Surry	22	6.3	17	77.3	1	0.3	347
York	19	5.1	12	63.2	3	0.8	375
Study group	94	4.4	65	69.1	30	1.4	2,142

Sources: Augusta County Order Books, 1: 9 through 4: 462; Middlesex County Orders, 1745–1752, 22, through 1752–1758, 258; Richmond County Order Books, 11: 524 through 13: 241; Surry County Orders, 1744–1749, 117, through 1753–1757, 214; York County Orders, Wills, and Inventories, vol. 19: 391 through 485; York County Judgments and Orders, 1746–1752, 1 through 519, and 1752–1754, 11 through 500, Library of Virginia, Richmond.

[1] Juries played two roles in suits on a writ of debt. At a trial of the issue, each party presented evidence to a jury, which delivered a verdict in accordance with the facts of the case. More rarely, plaintiffs received judgment without juries by the defendant's confession or default, but courts still found it necessary to convene juries on a writ of inquiry for the purpose of assessing plaintiff damages.

[2] In at least fourteen cases (51.9 percent), the relatively frequent resort to juries on a writ of inquiry for damages in Augusta County was due to the fact that the original debt was denominated in money from other colonies. A jury thus had to determine as a matter of fact the exchange rate with Virginia money; see Turk McCleskey and James C. Squire, "Pennsylvania Credit in the Virginia Backcountry, 1746–1755," *Pennsylvania History* 81, no. 2 (Spring 2014): 207–25, esp. 218–20.

of Andrew Cochrane & Co., a mercantile firm in Glasgow, Scotland, that operated a store in Fredericksburg, Virginia, and, via its attorney, sued four Augusta County debtors in Staunton, Virginia, during the early 1750s.[38]

Until confession, judgment by default, or trial, all mesne proceedings took place in private, presided over by the county's clerk of court during rule day, immediately following a regularly scheduled session of the county court.[39] On rule day, the clerk and a handful of attorneys worked through the docket, advancing the chess pieces of each lawsuit. When necessary, the clerk issued fresh writs to the county sheriff, returnable at the beginning of the next regular court term. Details of suits thus typically did not become public unless the case was tried. The information was not deliberately or even completely secret, since litigants, attorneys, sheriffs, and constables all knew and presumably could talk about who was suing whom, but for the general public, narratives of individual suits unfolded in relative obscurity until judgment.

On trial day, the parties or their attorneys usually appeared when the suit was called and presented their case. Trials of factual issues were heard by juries summoned from among courthouse bystanders, and juries occasionally delivered a verdict without even leaving the courtroom. After the court delivered judgment, losers could ask for an arrest of judgment because of procedural flaws.[40] Courts rarely granted this request, and when they did, if a second jury agreed with the first, no further trials were allowed.[41]

Following judgment, losers of suits usually voluntarily complied fully with the ruling. When they did not, winning parties were entitled to a *writ of execution*—a court order to enforce the verdict by seizing either the defendant or the defendant's property (Table VII).[42] Winners could request a *capias ad satisfaciendum*, a writ ordering the sheriff to arrest the loser until the debt, costs, and damages were satisfied. If losers evaded service of a capias ad satisfaciendum, winners could renew the capias repeatedly. Alternatively, creditors also could obtain a *fieri facias*, a writ of execution ordering the sheriff to seize enough of the loser's property to satisfy the debt. The court would then condemn the property and order the sheriff to sell it. Sheriffs paid complainants the amount of the judgment; if proceeds of the sheriff's sale failed to cover the judgment, the winner was entitled to another writ of execution for the unpaid balance of the debt.[43]

[38] Augusta OB, 3: 394, 398, 493, 4: 32, 93, 120, 150, 227, 357.

[39] Hening, *Statutes at Large*, 6: 205.

[40] In York County, for example, nine jurors served on three jury trials in a row on May 20, 1754; York JO, 1752–1754, 420–22. For examples of filings in arrest of judgment, see Augusta OB, 2: 62; Middlesex OB, 1752–1758, 177, 192; York JO, 1746–1752, 186, 199.

[41] Blackstone, *Commentaries on the Laws of England*, 3: 387. Of 124 jury trials in this study, 2 (1.6 percent) were tried by jury a second time; see Table VI. For second jury trials of same cases, see Richmond OB 12: 310, 383; Middlesex OB, 1745–1752, 345, 371.

[42] For examples of writs of execution described in this and the next paragraph, see Webb, *Office and Authority of a Justice of Peace*, 123–25.

[43] The Library of Virginia's microfilm collection includes records relating to sheriff executions for at least fifteen Virginia counties. These documents represent a significant

Frustrated plaintiffs also sometimes requested special writs of execution known as writs of *scire facias*. This writ could be used to enforce the terms of special bail, to hold accountable a negligent sheriff who let defendants escape, or to recover the defendant's property from a third party. Scire facias also was employed to revive judgments more than a year old.[44] In all their variety, writs of execution on judgment were fungible and occasionally appeared as instruments in fresh suits on a writ of debt.[45]

Once judgment passed, dissatisfied parties could respond to verdicts by filing errors in arrest of judgment, by seeking an *injunction in chancery* to stay execution of judgment, or by requesting permission to appeal to the General Court in Williamsburg. Errors in arrest of judgment were argued by the parties in county courts, either immediately or at a subsequent session. Motions to file a bill of injunction in chancery succeeded when the court agreed the motion concerned a matter of equity, a legal question not readily addressable through statutory law or common law, such as a request to suspend sentence pending the outcome of another suit involving the same parties. Requests to appeal to the General Court likewise required permission of the county court. Complainants seeking injunctions in as well as appellants to the General Court were required to post bond to ensure their prosecution of the suit.

Proportions for outcomes of proceedings on writs of debt in mid-eighteenth-century Virginia fluctuated among counties and from year to year. Such variation is unsurprising given the idiosyncrasies of litigants, lawyers, and officials. Figure II schematically presents those outcomes drawn to scale as a tree whose branches represent annual averages for Augusta,

quantitative legal history research opportunity. At present, however, there is little detailed information about the property sheriffs seized or the public sales that followed. For sheriffs executing judgments via fieri facias, see Blackstone, *Commentaries on the Laws of England*, 3: 417.

[44] Blackstone, *Commentaries on the Laws of England*, 3: 413–17, 421; Webb, *Office and Authority of a Justice of Peace*, 287–88. For examples of writs of scire facias on a recognizance of special bail for a defendant, see Augusta OB, 3: 125; York JO, 1752–1754, 469; for holding a sheriff responsible, see Augusta OB, 4: 434; York JO, 1752–1754, 379. A. G. Roeber incorrectly states that "if a planter grew impatient for payment of a sum after judgment had been made in his favor, the law specified that he wait a year and a day before seeking a writ of *scire facias* to recover the debt"; see Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680–1810* (Chapel Hill, N.C., 1981), 85.

[45] Judgments on a writ of debt in which the instrument was an execution in judgment were indicated in court orders as judgments for principal, a quantity of tobacco representing the original court costs and a lawyer's fee. For example, see *John Carlisle, gent., v. William Miller*, Nov. 30, 1751, Augusta OB, 3: 221, in which a jury on a writ of inquiry found damages of £29:2:4, 89 pounds of tobacco, and 15 shillings, the amount of an attorney fee. The execution from Fairfax County Court on Carlisle's writ of attachment against Miller's estate is contained in Judgment Files, August 1751 to November 1751, Augusta County Clerk of Circuit Court, Staunton, Va. The Fairfax County writ of execution matches the amount of damages and the fifteen-shilling attorney fee and also includes an itemized list of court costs totaling 89 pounds of tobacco. See also Middlesex OB, 1745–1752, 31; Surry OB, 1744–1749, 318.

Table VII
Coercive Enforcement for Executions of Judgment in Proceedings on a Writ of Debt for Selected Counties, 1746–55

Type of judgment and writ of execution	*No. of judgments requiring coercive enforcement*					
	Augusta	*Middlesex*	*Richmond*	*Surry*	*York*	*Study group*
Type of judgment: Jury verdict	34	13	8	21	20	96
writ of execution						
Capias ad satisfaciendum						
Issued only once	–	1	1	3	–	5
Issued only twice	–	–	–	2	1	3
Fieri facias						
Issued only once	–	1	1	7	–	9
Scire facias						
To revive judgment	–	1	–	1	–	2
For execution against special bail or sheriff	1	–	–	2	–	3
Total executions enforced on jury verdicts	1	3	2	15	1	22
Enforcements as % of jury verdicts	2.9	23.1	25.0	71.4	5.0	22.9
Type of judgment: Demurrer	4	5	–	1	–	10
writ of execution						
Capias ad satisfaciendum						
Issued ≥ 3 times	–	–	–	1	–	1
Total executions enforced on demurrers	–	–	–	1	–	1
Enforcements as % of demurrers	–	–	–	100.0	–	10.0
Type of judgment: Confession	151	51	62	83	161	508
Enforcement used to execute						
Capias ad satisfaciendum						
Issued only once	–	–	3	13	41	57
Issued only twice	–	–	2	1	5	8
Issued ≥ 3 times	–	–	–	–	1	1
Fieri facias						
Issued only once	–	–	2	14	10	26
Issued only twice	–	–	–	1	2	3
Scire facias						
To revive judgment	5	3	3	1	–	12
For execution against special bail or sheriff	7	–	–	–	1	8
For execution against estate executors	1	–	–	–	–	1
Defendant jailed immediately	1	1	1	2	7	12

TABLE VII (*continued*)

Total executions enforced on confessions	14	4	11	32	67	128
Enforcements as % of confessions	9.3	7.8	17.7	38.6	41.6	25.2
Type of judgment: Default	325	20	66	81	90	582
writ of execution						
Capias ad satisfaciendum						
Issued only once	–	–	5	12	24	41
Issued only twice	–	–	2	4	3	9
Issued ≥3 times	–	–	–	1	2	3
Fieri facias						
Issued only once	–	1	2	9	10	22
Issued only twice	–	–	1	1	3	5
Issued ≥3 times	–	–	–	1	–	1
Scire facias						
To revive judgment	7	–	1	–	1	9
For execution against special bail or sheriff	3	–	–	1	–	4
For execution against/ estate executors	1	–	2	–	–	3
Defendant jailed immediately	–	1	–	–	–	1
Total executions enforced on defults	11	2	13	29	43	98
Enforcements as % of defaults	3.4	10.0	19.7	35.8	47.8	16.8
Type of judgment: Plaintiff nonsuit	18	5	15	109	5	152
writ of execution						
Capias ad satisfaciendum						
Issued only once	–	–	1	–	–	1
Total executions enforced on nonsuits	–	–	1	–	–	1
Enforcements as % of plaintiff nonsuits	–	–	6.7	–	–	0.7
Total all coercive enforcements	26	9	27	77	111	250
All judgments in county	532	94	151	295	276	1,348
All coercive enforcements as % of all judgments in county	4.9	9.6	17.9	26.1	40.2	17.3

Sources: Augusta County Order Books, 1: 9 through 4: 462; Middlesex County Orders, 1745–1752, 22, through 1752–1758, 258; Richmond County Order Books, 11: 524 through 13: 241; Surry County Orders, 1744–1749, 117, through 1753–1757, 214; York County Orders, Wills, and Inventories, vol. 19: 391 through 485; York County Judgments and Orders, 1746–1752, 1 through 519, and 1752–1754, 11 through 500, Library of Virginia, Richmond.

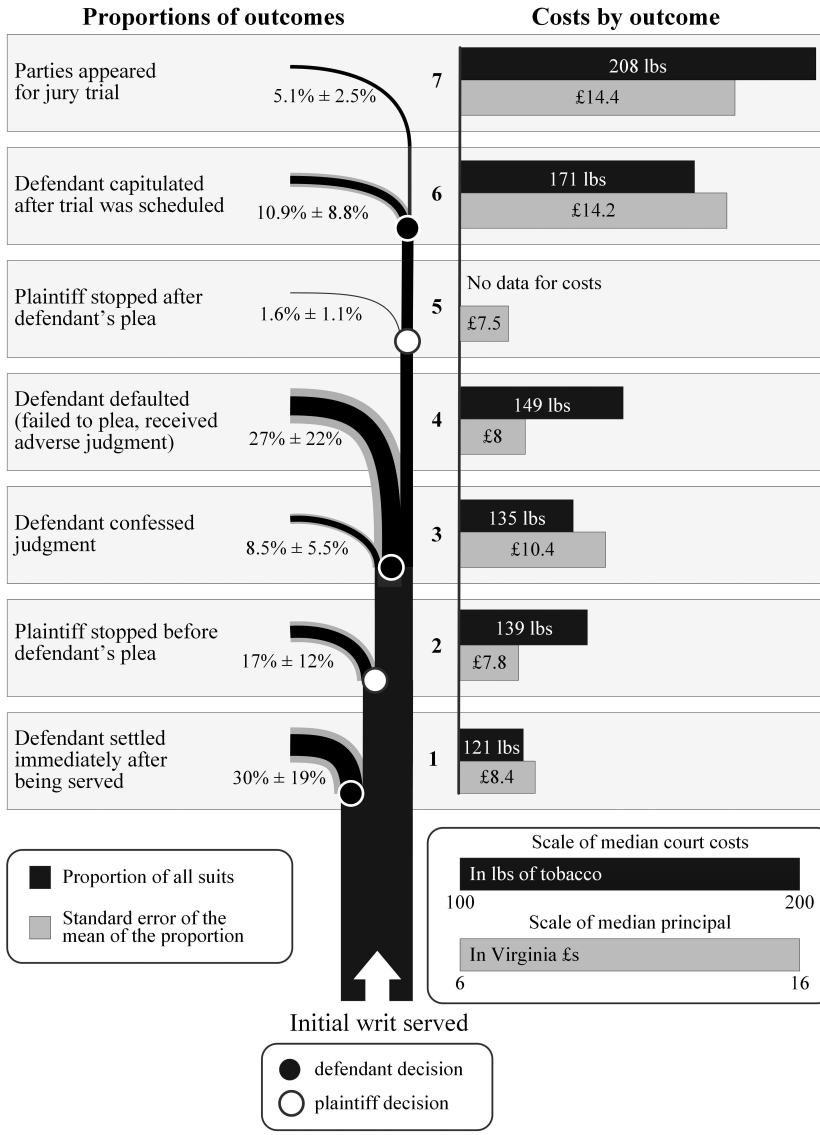

FIGURE II

Tree of annual outcomes of suits on a writ of debt, 1746–1755.

Figure II

This decision tree compares incentives for plaintiffs and defendants during mesne process—the intermediate steps in lawsuits—and the likelihood that a suit would end in various outcomes. After the first step, indicated at the base of the tree as "Initial writ served," defendants and plaintiffs alternately responded to each other's moves. The darker branches of the tree represent for each outcome an annual arithmetic average for the five counties in the study group, Augusta, Middlesex, Richmond, Surry, and York Counties. The branches are drawn to scale as a percentage of the 2,142 total initiated suits in this study. The lighter bark on the branches represents the standard error of the mean for those averages; the narrower it is, the more closely the values were grouped across different counties. The percentages at the end of the tree branches provide value labels for each average and standard error.

Steps

1. About 30 percent of suits on a writ of debt were settled immediately on terms that are undocumented, but the bargains presumably were acceptable to the plaintiff. In the remaining 70 percent of all suits, defendants and plaintiffs did not promptly agree on settlement terms.

2. Sometimes initial delays by defendants were followed by plaintiffs stopping the suit. Possible reasons for plaintiffs to halt proceedings included belated agreements or recognition that the suit would be fruitless. In around 53 percent of all suits, plaintiffs persisted in seeking restitution.

3. When plaintiffs persisted, defendants had three options: confess judgment, default, or enter a plea. If defendants doubted they could win a trial, they sometimes confessed judgment to reduce their court costs or to obtain plaintiff consent for a brief delay in execution of judgment.

4. If defendants refused to enter a plea, the court delivered judgment in default against them. Defendants entered pleas in only 18 percent of all suits, moving a step closer to trial.

5. After defendants entered a plea but before a trial date was assigned, plaintiffs had few reasons to stop their suit. Motives for this rare outcome included belated agreements or death of the plaintiff. In approximately 16 percent of all suits, plaintiffs pressed on toward trial.

6. Defendants capitulated just before trial for various reasons. Some may have received a last-minute financial transfusion. Others chose to abscond. Alternatively, pressure from the plaintiff's own creditors may have encouraged settlement on terms more favorable to the defendant.

7. Defendants with larger debts were more likely to delay repayment as long as possible, but given that plaintiffs won over 69 percent of jury trials, most defendants could not reasonably expect a favorable verdict.

Middlesex, Richmond, Surry, and York Counties. In any given year, each tree branch might be more or less wide, a statistical shimmer quantified in the diagram as one standard error of the mean for those averages and indicated by lighter shading beside the darker average. The smaller the standard error relative to the average, the more closely annual values grouped with each other. Given the relatively tight distribution of outcomes across the five counties, litigants in each locale appear to have understood and consistently applied the legal rules and strategic options by which they resolved suits on a writ of debt.

On average, about 30 percent of defendants settled with their creditors immediately after being served with the initial capias. Most debtors, however, chose to draw out the proceedings at least a little longer. Of these, close to 17 percent of plaintiffs decided to stop their suit before defendants entered a plea. Plaintiffs' motives for dropping complaints included a belated bargain with debtors, death of a party, acceptance that debtors had absconded, or acknowledgment of their complaint's weakness.[46]

Sooner or later, the remaining debtors either confessed judgment, accepted judgment by default, or entered a plea. In an average of 8.5 percent of suits, defendants confessed judgment, a choice that sometimes helped them persuade plaintiffs to stay execution of the judgment for a few court sessions.[47] Roughly 27 percent defaulted, automatically accepting a binding judgment against them either because they saw no point in persevering with a plea or because the plaintiff would not accept their proffered terms for settling the case via confessed judgment. For almost 18 percent of suits, debtors entered a plea. In response, plaintiffs voluntarily stopped a bit more than 1 percent of actions, apparently motivated by similar reasons as their earlier stoppages, either settling with the defendant or perceiving the impossibility of pursuing the suit. Only about 16 percent of all suits were scheduled for trial, and in approximately two out of every three of those (nearly 11 percent of all suits), defendants capitulated before trial.

Typically, a little over 5 percent of all suits on a writ of debt went to a jury trial, and the results of those jury trials suggest why so many defendants chose not to proceed. Plaintiffs prevailed in approximately 69 percent of the ninety-four jury trials of issues, the contests over facts (see Table VI). Plaintiffs with a legitimate case thus reasonably could expect to win a jury trial.[48] By contrast, defendants with a weak case had little chance of win-

[46] Offutt, *Of "Good Laws" and "Good Men,"* 102, 119.

[47] The median duration of stays of execution in exchange for confessions of judgment in the five counties was sixty-nine days.

[48] Results of jury trials of the issue in other financial causes would have reinforced this expectation. In York County, for example, seventy-six assumpsit suits went to a jury trial of issue during this period. In seventy out of those seventy-six cases (92.1 percent), juries found for plaintiffs. See York OWI, 19: 409–97; York JO, 1746–1752, 35–513, 1752–1754, 2–491. The comparable proportion for Augusta County assumpsit trials in this

ning a jury trial, and, having lost it, they tended to fare badly on appeal. Defendants filed errors in arrest of judgment following thirteen jury verdicts, of which the courts awarded judgment to the defendant in only four cases (almost 31 percent). Defendants also filed a small number of injunctions in chancery to stop adverse judgments, and though most outcomes of such motions are unknown, the scarcity of defense motions suggests that defendants rarely won. Similarly, five defendants appealed to the General Court, compared to three plaintiffs, but the outcomes of their appeals also are unknown due to the destruction of General Court records.[49] Strong incentives inhibited appeal by either party: plaintiffs who lost a General Court appeal had to pay the original judgment and costs, plus fifty shillings; defendants who lost an appeal were liable for the original judgment and costs and had to "pay the Plaintiff 15 *per Cent.* upon the principal Sum, Costs and Damages recovered by the first Judgment."[50]

Having lost their case, most defendants appear to have voluntarily complied with the verdict and offered a restitution that plaintiffs found acceptable. Occasionally, however, defendants did not pay. In response, plaintiffs obtained coercive writs or a defendant's immediate confinement when enforcing judgment for 22 out of 96 suits with jury verdicts (almost 23 percent), 128 out of 508 confessed judgments (over 25 percent), and 98 out of 582 judgments by default (about 17 percent).[51] Plaintiffs' willingness to seek official execution of judgment meant that defendants could not reasonably expect that plaintiffs would allow them to ignore an adverse outcome (see Table VII).

Mesne process on a writ of debt amounted to what in game theory scholarship is called a game with sequential moves. Many disciplinary hedges separate game theory from the usual pastures of early American historians, but in this instance it reveals how Virginians thought about their contests over credit contracts.[52] Litigation, like chess, involved two parties

period is 84.6 percent verdicts for plaintiffs (twenty-two out of twenty-six trials). Augusta OB, 1: 9 through 4: 439.

[49] Filing errors in arrest of judgment: Augusta OB, 1: 237, 269, 2: 50, 62, 541, 602, 3: 237, 278, 4: 63, 127, 315, 442, 488; Middlesex OB, 1745–1752, 427, 438; Surry OB, 1753–1757, 178; York JO, 1746–1752, 199. Motions for injunction in chancery: Augusta OB, 1: 303, 2: 308, 574, 615, 3: 454, 460, 4: 383; Middlesex OB, 1752–1758, 93, 179; York JO, 1746–1752, 199, 468, 469, 516; York JO, 1752–1754, 116. Requests for appeal to General Court: Augusta OB, 1: 84, 174, 2: 390, 3: 379, 4: 291; Middlesex OB, 1745–1752, 328; Middlesex OB, 1752–1758, 63; York OWI, 19: 436.

[50] Webb, *Office and Authority of the Justice of the Peace*, 11 (quotation). For comparable incentives in the New York Supreme Court, see Rosen, *Courts and Commerce*, 68–72.

[51] By contrast, out of 152 plaintiff nonsuits in five counties, a defendant sought a capias ad satisfaciendum to recover his costs in only a single case; Richmond OB, 12: 385.

[52] For sequential moves, see Avinash Dixit and Susan Skeath, *Games of Strategy*, 2d ed. (New York, 2004), 20. For examples of game theory analysis regarding other early American issues, see John Vincent Nye, "Game Theory and the North American Fur

who moved in turn and responsively, so every aspect of mesne process, including out-of-court settlement, implicitly expressed litigants' expectations for their legal system. In a game theory analysis, the parties' strategic expectations can be discovered by working backward from the conclusions of suits to the creation of the contested debts.[53]

To illustrate this approach, consider a fictitious legal proceeding involving a creditor, Peter Punctilio, and a debtor, Darius Dreadnaught, both reasonable people with competent attorneys who were adversaries in a suit on a writ of debt, *Punctilio v. Dreadnought*. In their case, Dreadnaught was cast in judgment for £14:8:0 plus court costs of 208 pounds of tobacco, the median debt principal and median court costs for the study period. The outcome gave Dreadnaught two choices: to satisfy the judgment plus costs immediately or to persist in the same refusal that brought on the lawsuit initially. If Dreadnaught declined to satisfy the debt, then plaintiff Punctilio could have the defendant's personal property seized and sold in execution, adding the cost of a writ and a sheriff's fee to the original trial costs. Dreadnaught's less expensive option therefore was prompt payment of the judgment and trial costs.

In a game theory analysis, Dreadnaught's optimal choice after trial illuminates Punctilio's decision to attend trial. As the plaintiff, Punctilio could have chosen before trial to give up the suit, to accept a discounted offer, or to persevere. If Dreadnaught truly had not paid a legitimate debt and if Punctilio was not pressed for money, then Punctilio had every reason to pursue judgment. In this case the plaintiff's persistence was rewarded with an execution against Dreadnaught, but even if Punctilio had assessed that the defendant was unable to satisfy the judgment and its costs at that time, going to trial was still Punctilio's best option. If in the future Dreadnaught eventually found himself able to satisfy his creditors, then Punctilio's judgment would have priority over judgments in subsequent suits brought against Dreadnaught by any plaintiff.

Given that Punctilio's best option before trial was to press on, Dreadnaught's choices before trial were either to capitulate (by confessing judgment or defaulting without trial) or to continue in the likelihood of losing the case at even greater expense. On average, capitulation would have incurred 171 pounds of tobacco in court costs, 37 pounds of tobacco less than the average cost of a trial. Given this financial incentive to concede, trials probably signaled that straitened but reasonable debtors were either

Trade: A Comment," *Journal of Economic History* 48, no. 3 (September 1988): 677–80; Fraser D. Neiman, "The Lost World of Monticello: An Evolutionary Perspective," *Journal of Anthropological Research* 64, no. 2 (Summer 2008): 161–93. Offutt's discussion of litigant strategies used rollback analysis but did not explicitly identify it as a game theory model. See Offutt, *Of "Good Laws" and "Good Men,"* 104.

[53] Baird, Gertner, and Picker, *Game Theory and the Law*, 244–51; Offutt, *Of "Good Laws" and "Good Men,"* 100–145.

delaying to obtain last-minute financial transfusions or hoping that pressure from plaintiffs' own creditors might allow defendants to offer an acceptable last-minute bargain.[54]

Outcomes that Dreadnaught and Punctilio faced before trial in turn informed their decisions with regard to a plea, as rollback analysis can reveal. Once Dreadnaught entered a plea, Punctilio had every reason to persevere toward trial. Indeed, as Figure II indicates, approximately ten plaintiffs chose this course for every one who stopped the case after the defendant's plea. As Dreadnaught considered whether to plead, therefore, he confronted the overwhelming likelihood that Punctilio would be undeterred by a plea. Consequently, Dreadnaught faced three possibilities: enter a plea (with the near certainty that Punctilio would persevere to trial, win it, win an appeal if Dreadnaught made one, and obtain a coercive execution), confess judgment, or default. If Punctilio would consent to delay execution, then, on average, confession was Dreadnaught's least expensive option. Plaintiffs infrequently agreed to delay execution, but in those cases in which they did, confession temporarily relieved defendants at a lower cost than persevering to trial (Table VIII).

For Punctilio, Dreadnaught's decision to enter or not enter a plea hung over any private discussion they might have had about resolving the case. If Punctilio was short of money and Dreadnaught could have immediately repaid some of the debt, then Punctilio might have consented to settle for an intermediate amount. But a solvent Punctilio had the upper hand in that negotiation, because he could rely on the coercive enforcement of judgment that accompanied each of Dreadnaught's three options. Punctilio's advantages in turn informed Dreadnaught's decision whether to offer a settlement somewhat earlier, after briefly delaying by requesting oyer (a formal reading of the instrument) and by offering to imparl (to negotiate). Dreadnaught's bargaining position thus was as strong as it ever could be immediately after he was served with a summons, before exercising any stalling tactics. His best prospect of a favorable deal with Punctilio was to bargain promptly before starting down the road toward trial and adverse judgment. Immediate settlement also would have produced the lowest minimum, median, or maximum court costs for Dreadnaught (Table IX).

It is important to recognize with reference to Figure II that though nearly half the cases (around 47 percent) settled early—before judgment—all outcomes of mesne process derived from individual choices made in

[54] The latter possibility is strongly suggested by James Muir's study of debt litigation in mid-eighteenth-century Halifax, Nova Scotia. Using "logistic regression analysis of debt on account actions," Muir found that for claims of more than £20 Halifax money, "the size of the claim [was] the most important factor" in explaining why defendants persisted to trial rather than accepting pretrial settlements. Defendants apparently bargained for discounts that offset the larger court costs associated with delaying settlement. See Muir, *Law, Debt, and Merchant Power*, 236 n. 7 ("logistic"), 81 ("size").

Table VIII
Plaintiff Consent to Delay Execution in Proceedings on a Writ of Debt for Selected Counties, 1746–55

Litigation outcome	*Augusta*	*Middlesex*	*Richmond*	*Surry*	*York*	*Study group total*	*Total all suits*	*% of all suits*
Defendant settled immediately	25	1	4	4	7	41	649	6.3
Plaintiff stopped before defendant's plea	–	–	–	–	–	–	363	–
Defendant confessed before plea	3	–	5	–	4	12	183	6.6
Defendant defaulted without plea	–	–	1	–	–	1	569	0.2
Plaintiff stopped after plea	–	–	–	–	–	–	34	–
Defendant capitulated just before trial	3	–	2	1	4	10	234	4.3
Parties appeared for trial	–	4	–	–	–	4	110	3.6

Sources: Augusta County Order Books, 1: 9 through 4: 462; Middlesex County Orders, 1745–1752, 22, through 1752–1758, 258; Richmond County Order Books, 11: 524 through 13: 241; Surry County Orders, 1744–1749, 117, through 1753–1757, 214; York County Orders, Wills, and Inventories, vol. 19: 391 through 485; York County Judgments and Orders, 1746–1752, 1 through 519, and 1752–1754, 11 through 500, Library of Virginia, Richmond.

Table IX
Court Costs per Outcome (in Pounds of Tobacco), 1746–55

Litigation outcome	*No. of suits with costs recorded*	*Minimum costs*	*Median costs*	*Maximum costs*	*Mean costs*	*Standard deviation of costs*
Defendant conceded immediately	33	52	121	164	120	26
Plaintiff stopped before defendant's plea	3	107	139	280	175	–
Defendant confessed before plea	7	109	135	213	144	37
Defendant defaulted before plea	53	95	149	356	156	46
Plaintiff stopped after plea	–	–	–	–	–	–
Defendant conceded just before trial	21	116	171	380	196	79
Parties appear at trial	17	116	208	411	221	68

Notes: Costs are for Augusta, Middlesex, Richmond, Surry, and York Counties. For monetary comparison, lawyer fees in suits on a writ of debt in the county courts were fixed by Virginia statute at 15 shillings or 150 pounds of tobacco per suit; William Waller Hening, *The Statutes at Large; Being a Collection of All the Laws of Virginia. . . .* (Richmond, Va., 1819; repr., Charlottesville, Va., 1969), 5: 344.

Sources: Augusta County Order Books, 1: 9 through 4: 462; Middlesex County Orders, 1745–1752, 22, through 1752–1758, 258; Richmond County Order Books, 11: 524 through 13: 241; Surry County Orders, 1744–1749, 117, through 1753–1757, 214; York County Orders, Wills, and Inventories, vol. 19: 391 through 485; York County Judgments and Orders, 1746–1752, 1 through 519, and 1752–1754, 11 through 500, Library of Virginia, Richmond.

light of a handful of remote judgments at trial. Trials occurred in only a tiny proportion of suits, but game theory proponents argue that predictable trial results influenced every pretrial litigant decision from service of the original capias to any other option subsequently available to the parties involved.[55]

At first glance, historians may find this economic model of human behavior too constraining, perhaps feeling that not every litigant would have possessed perfect knowledge of trial outcomes. In practice, however, both plaintiffs and defendants relied heavily on lawyers to conduct their cases, so the outcomes reflected formal training and extensive experience. Even in remote Augusta County, eleven attorneys were licensed to practice before 1755.[56] They represented plaintiffs in at least 473 out of 1,075 total suits on a writ of debt (about 44 percent) during the study period, and a systematic review of manuscript judgment files in the office of the county's Clerk of Circuit Court would likely expand that proportion substantially. As an example, before the November 1749 court, the sheriff of Augusta served capiases to initiate six new suits on a writ of debt. Three defendants immediately settled with the plaintiff and consequently retained no attorney. Each remaining defendant engaged a lawyer, and each lawyer maneuvered his suit through mesne process to reach an outcome short of trial.[57]

Indeed, the reliable results of rare trials even shaped which credit instrument Punctilio and Dreadnaught agreed to employ for recording their contested contract. Imagine the moment at which Dreadnaught first incurred a financial obligation to Punctilio. Perhaps Punctilio was a merchant, but he could just as easily have been a yeoman, a rural artisan, an urban tavern keeper, a junior militia officer, a county gentleman, or a colonial grandee.[58]

[55] Baird, Gertner, and Picker, *Game Theory and the Law*, 245.

[56] Attorneys licensed to practice in Augusta County before 1755 included Benjamin Pendleton, John Nicholas, and William Wright (Augusta OB, 1: 7), Gabriel Jones (ibid., 1: 24), Thomas Chew (ibid., 1: 29), Walker Vaughan Ellis (Augusta County Minute Book, 1746–1747, n.p., Sept. 18, 1746, microfilm, LOV), William Russell (ibid., n.p., May 21, 1747), John Harvie (ibid., n.p., Aug. 19, 1747), James Porteus (ibid., n.p., Aug. 20, 1747), William Battersby (ibid., n.p., Aug. 15, 1753), and Walter Patterson (Augusta OB, 4: 10).

[57] For November 1749 immediate settlements, see Augusta OB, 3: 38, 48; for November 1749 new suits with mesne process, see Augusta OB, 2: 482, 541, 3:38, 40, 48, 50, 72, 84.

[58] A statistical analysis of litigant status in suits on a writ of debt would be so complicated and lengthy as to require a separate venue. William M. Offutt Jr. employed chi-square probability tests to explore effects of litigant attributes on outcomes of all forms of completed Delaware Valley cases, 1680–1710; Offutt, *Of "Good Laws" and "Good Men,"* 112–45. Tinni Sen, Turk McCleskey, and Atin Basuchoudhary employed an mlogit model to explore the effects of type of debt, litigant attributes, and senior magistrate identity in Augusta County suits by petition to recover small debts from 1746 to 1755; Sen, McCleskey, and Basuchoudhary, *Journal of Interdisciplinary History* 46: 60–89. Both studies reported that while some attributes showed statistical significance with regard to overall outcomes, many did not; both demonstrated that at trial, all courts were inclined to enforce contracts regardless of attributes. The latter finding reinforces the importance

Whatever the difference in their social rank, Punctilio and Dreadnaught's initial exchange of value for credit inaugurated a series of bargains over time. Punctilio recorded each transaction, perhaps in a daybook, copying Dreadnaught's accounts, as well as those of other debtors, from the daybook to a formal ledger. On the left page of the ledger, Punctilio recorded Dreadnaught's debits, typically signified "Dr." for debtor at the top of the page, and on the right page, Punctilio inscribed "Cr." (Contra), signifying Dreadnaught's credits for cash paid, services rendered, or goods assigned.[59] Punctilio's account of Dreadnaught's exchanges established a written record but not a contract because Dreadnaught assumed a series of obligations without explicitly signing an instrument for them. Eventually, Punctilio requested Dreadnaught to convert his unpaid balance into a witnessed contractual obligation that was more readily enforceable in court.[60] The two parties agreed to formalize Dreadnaught's debt with either a sealed specialty (typically a penal bond, per Table III) or a less formal unsealed promissory note.

Punctilio and Dreadnaught's Virginia contemporaries preferred penal bonds over promissory notes by a ratio of about 2.5 to 1 (see Table III). But whose choice was that? David Thomas Konig speculated that the prevalence of bonds in Virginia suits reflected a pro-debtor legal environment because a sealed bond protected debtors such as Dreadnaught from punitive damages.[61] Konig correctly identified Dreadnaught's incentive to sign a bond, but he overlooked the fact that someone in Dreadnaught's situation could not insist upon his choice of instrument. If Dreadnaught wanted to obtain credit from Punctilio in the future, then Dreadnaught had to accept Punctilio's choice of instrument in the present.[62] After all, Punctilio had the option of demanding prompt payment for any account balance and could have immediately initiated suit to coerce such payment if Dreadnaught refused to convert the current account to an instrument of Punctilio's choice. Given that sealed bonds offered Punctilio a high likelihood of

of rollback analysis in suits on a writ of debt. In eighteenth-century Halifax, where "almost half of all plaintiffs and almost a third of defendants were drawn from commercial occupations" large and small, increased litigant experience seems to have been an especially important element encouraging people to decide not to default, as Muir discovered via logistic regression analysis; Muir, *Law, Debt, and Merchant Power*, 7 (quotation), 81, 236–7 n. 9.

[59] For an Augusta County client's ledger-style debits and credits, see "Account with James Patton," in David John Mays, ed., *The Letters and Papers of Edmund Pendleton, 1734–1803* (Charlottesville, Va., 1967), 1: 10 (quotations). For a 1766 set of instructions about maintaining such records, see Jacob M. Price, ed., "Directions for the Conduct of a Merchant's Counting House, 1766," *Business History* 28, no. 3 (July 1986): 134–50, esp. 142–45.

[60] Konig, "Virgin and the Virgin's Sister," 112.

[61] Ibid., 114.

[62] For the declining frequency of book debt in Connecticut by the early eighteenth-century, see Mann, *Neighbors and Strangers*, 28–30.

recovering principal plus an interest penalty, it appears that Punctilio preferred certain recovery to possible punitive damages. Moreover, a sealed bond was fungible, and Punctilio could assign it to his own creditors.[63] And finally, if Dreadnaught died with the debt unpaid and Punctilio won a judgment to recover on a specialty, his claim would take priority over any judgments on Dreadnaught's simple contracts with other creditors.[64]

At Punctilio's initiative but with Dreadnaught's consent, creditor and debtor started down a path that reliably led to either repayment or enforcement. Not every debtor and creditor in colonial Virginia was as reasonable or as well advised as Punctilio and Dreadnaught, and the records of their decisions now offer few clues about relative individual wisdom or irrationality. But regardless of whether real litigants such as wigmaker Andrew Anderson made erratic choices or sound ones, Figure II reveals that, collectively, colonial Virginia's plaintiffs and defendants were highly predictable.

Creditors and debtors such as Punctilio and Dreadnaught acted from individual motives when they recorded credit contracts as specialties. Later, if they litigated over those specialties with a writ of debt, their mesne processes likewise reflected unique circumstances and individual choices. But individual creditors and debtors drawing up specialties and, when necessary, suing on a writ of debt also helped resolve a paradox permeating local courtrooms throughout the eighteenth-century realm of English common law. Jurist William Blackstone acknowledged the problem in 1768:

> Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his [a party's] counsel, or even in the opinion of by-standers, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination [of the court] as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress.[65]

On the one hand, communities wanted their courts, officials, and jurors to do right, in the sense of being objectively impartial. On the other hand, however, communities expected the outcome of a trial to appear subjectively fair.[66]

[63] In 178 out of the 2,142 study cases (8.3 percent), plaintiffs were assignees, not original creditors.

[64] Blackstone, *Commentaries on the Laws of England*, 2: 511–12.

[65] Blackstone, *Commentaries on the Laws of England*, 3: 390.

[66] For a related tension with regard to criminal and nonfinancial civil cases in early national and antebellum North and South Carolina, see Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill, N.C., 2009).

Blackstone's paradox was especially important in Virginia and other colonies where, in addition to adjudication, county courts played an executive role in local governance. The same justices of the peace who heard all manner of civil litigation also decided where roads should go and who should maintain them, whether or not to approve mill sites or to build bridges at public expense, and a host of other issues over which rural neighbors might well disagree.[67] Historians have long assumed that magisterial authority in these matters derived from the accretion across generations of elite social status with its many trappings, but however true this might have been in long-settled rural neighborhoods, the explanation falters in remote and vulnerable new settlements such as Augusta County, west of the Blue Ridge Mountains.[68]

The comprehensive record of civil litigation in Augusta County during its first decade includes no significant procedural divergence from records of contemporary Chesapeake Bay counties in their second century. Somehow, despite the absence of a traditional elite, frontier magistrates rapidly established their authority, conducting business in the same manner as their eastern counterparts. In newly settled places such as Augusta County, government seems to have worked because the governed wanted it to work. Justices of the peace were selected, not elected, so popular acquiescence to magisterial authority necessarily derived from a source other than voter approbation.[69] Blackstone's paradox suggests an alternate wellspring for Virginia's demonstrable sociopolitical stability: popular willingness to accept magisterial authority in any one particular aspect of its purview depended on popular satisfaction with the court's cumulative record of decisions in all spheres. Court rulings in small or simple things consequently assumed great social significance. In Augusta County, the most common civil suits were by petition to recover small debts and the second most common suits were by writ of debt (see Table I). Because these comprised nearly two-thirds of all civil suits, and because most debt suits were resolved during mesne process, a substantial majority of all court litigation involved no contention or even direct confrontation.[70] Such a high ratio of socially unobjectionable court

[67] Richard Lyman Bushman, "Farmers in Court: Orange County, North Carolina, 1750–1776," in *The Many Legalities of Early America*, ed. Christopher L. Tomlins and Bruce H. Mann (Williamsburg, Va., and Chapel Hill, N.C., 2001), 388–413, esp. 388–402.

[68] Charles S. Sydnor, *Gentlemen Freeholders: Political Practices in Washington's Virginia* (Williamsburg, Va., and Chapel Hill, N.C., 1952), 78–93; Rhys Isaac, *The Transformation of Virginia, 1740–1790* (Williamsburg, Va., and Chapel Hill, N.C., 1982), 131–35; Albert H. Tillson Jr., *Gentry and Common Folk: Political Culture on a Virginia Frontier, 1740–1789* (Lexington, Ky., 1991), 64–77.

[69] Turk McCleskey, *The Road to Black Ned's Forge: A Story of Race, Sex, and Trade on the Colonial American Frontier* (Charlottesville, Va., 2014), 82–87, 175–76.

[70] For the finding that "the Augusta County court consistently provided unbiased judgments, enforcing legitimate [small debt] contracts fairly," see Sen, McCleskey, and Basuchoudhary, *Journal of Interdisciplinary History* 46: 84.

outcomes proportionally shrank the chances that on any given day frustrated spectators would denounce the magistrates for injustice.

From at least the mid-eighteenth century into the early nineteenth, procedural rules for the writ of debt remained stable, evolving only slightly in Virginia.[71] Their durability provides circumstantial evidence of ongoing popular approval of county court authority. Litigant activity during mesne process in suits on a writ of debt contributed vitally to public acceptance of magisterial rule, just as William M. Offutt Jr. found much earlier in the Delaware Valley. Incentives for pretrial resolutions produced settlements so reliably that most trials of issues involved only the defendant's manifest failure to repay. On the rare occasion when a case actually reached trial, magistrates enforced the unfulfilled contract in an uncontroversial and routine manner. Across mid-eighteenth-century Virginia, a high volume of open-and-shut debt litigation thus continually bolstered popular perceptions that elite-dominated county courts, the unelected agencies of local governance, were both fair and just.

[71] St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States. . . .* (Philadelphia, 1803), 4: 35–74, appendix.