

October 1979

William and Mary Bicentennial Commemoration: New Light on the General Court of Colonial Virginia

Frank L. Dewey

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Legal History Commons](#)

Repository Citation

Frank L. Dewey, *William and Mary Bicentennial Commemoration: New Light on the General Court of Colonial Virginia*, 21 Wm. & Mary L. Rev. 1 (1979), <https://scholarship.law.wm.edu/wmlr/vol21/iss1/2>

Copyright c 1979 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

William and Mary Law Review

VOLUME 21

FALL 1979

NUMBER 1

This is the third in a series of four articles commemorating the bicentennial of American legal education, dating from the establishment of the first chair of law and police, occupied by George Wythe, at the College of William and Mary on December 4, 1779. The colonial antecedents to the College's formal relation to professional legal education may be traced to the career of Sir John Randolph, a student at William and Mary, (1705-1713), who then prepared for bar at Gray's Inn, London (1715-1717). Randolph's two sons, Peyton ("The Patriot") and John ("The Tory"), followed his example, first at the College of William and Mary and subsequently at the Middle Temple. His grandson, Edmund, after study at the College on the eve of the Revolution, read for the bar under his father and uncle. The Randolphs and their cousins, Thomas Jefferson and John Marshall, were prototypes of various leaders of legal and political thought in colonial and early post-Revolutionary Virginia whose efforts "Americanized" English legal institutions and thus created a logical need for a new school to teach this "Americanized" law. This series of articles addresses some aspects of law and procedure and legal thought which were the backdrop for the establishment of the first American law school in 1779.

NEW LIGHT ON THE GENERAL COURT OF COLONIAL VIRGINIA

FRANK L. DEWEY*

A study of the materials relating to Thomas Jefferson's eight years of practicing law before the General Court¹ of colonial Virginia

* A.B., Grinnell College; J.D., Harvard Law School. Member, New York and Virginia bars.

1. The General Court was the highest court in the colony, at once an appellate court, a trial court, a court of equity, and a court of law. It met twice a year, in April and October, for sessions of twenty-four working days each. The judges were the members of the governor's

reveals some interesting information about that court. Such information is scarce, as students of colonial Virginia know, because very few records of the court survive.

Among the Jefferson papers in the collection of the Massachusetts Historical Society are copies of the complete General Court ready dockets for April 1771, October 1771, April 1772, and October 1772, as well as partial dockets—limited to Jefferson's own cases—for October 1769, April 1770, October 1770, and April 1774.² With these and other records which Jefferson kept,³ it is possible to follow Jefferson's cases⁴ and reach some conclusions regarding the pace of the court's disposition of its business. In addition, analysis of these materials illustrates the nature of General Court law practice in pre-revolutionary Virginia.

The picture which emerges is that of a court inundated by a heavy caseload. Historians have recognized that the General Court docket was congested,⁵ but they have grossly underestimated the extent of the congestion⁶ and have oversimplified its causes. The cause was

council, chosen, as Jefferson said, "from among the gentlemen of the country, for their wealth and standing, without any regard to legal knowledge." T. JEFFERSON, REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA (1829) (author's preface) [hereinafter cited as JEFFERSON'S REPORTS]. See also 1 W. HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619-325 (1819) [hereinafter cited as HENING'S STATUTES]; 2 D. MAYS, EDMUND PENDLETON, 1721-1803: A BIOGRAPHY 224-48 (1952) [hereinafter cited as PENDLETON]; Rankin, *The General Court of Colonial Virginia: Its Jurisdiction and Personnel*, 70 VA. MAG. HIST. & BIOG. 142 (1962).

2. The ready docket consisted of cases ready for trial or argument. The manuscripts of the Massachusetts Historical Society are not originals but are copies made for Jefferson's use.

3. Jefferson kept a legal diary in his Account Books. Those for 1767-70 and 1773 are in the Library of Congress; those for 1771, 1772, and 1774 are in the Massachusetts Historical Society. Jefferson's Casebook, the manuscript of which is in the Henry E. Huntington Library, San Marino, California, lists the cases numerically. The Casebook is not a complete record because it omits some cases mentioned in the Account Books; and, even as to the included cases, it omits some Account Book information. Other records of Jefferson's practice are mentioned hereafter.

4. A facsimile copy of Jefferson's Casebook is in the archives of the Marshall-Wythe School of Law, College of William and Mary.

5. See A. MAPP, JR., THE VIRGINIA EXPERIMENT 290 (1974) [hereinafter cited as THE VIRGINIA EXPERIMENT]; Evans, *Planter Indebtedness and the Coming of Revolution in Virginia*, 19 WM. & MARY Q. 511 (1962) [hereinafter cited as *Planter Indebtedness*].

6. Mapp asserts that the time required for a creditor to obtain judgment on a debt was two or three years. THE VIRGINIA EXPERIMENT, *supra* note 5, at 290. Evans said, "[J]udgments sometimes required three or four years." *Planter Indebtedness*, *supra* note 5, at 527. Mapp relied on a statement by Peter Lyons quoted *infra* at text accompanying note 34. His reliance was misplaced, however, because Lyons was commenting on the chancery docket, and actions

not, as one authority has suggested, the volume of lawsuits by creditors against debtors.⁷ In fact, creditor suits accounted for approximately one-third of the total docket.⁸

The reasons for the congestion were more diverse than a colonial affinity for collecting debts. One primary cause for the slowly moving docket was the General Court apparatus. Prior to the time of Jefferson's practice, the last significant modification was the increase, in 1745, of the number of court days per semi-annual session from eighteen to twenty-four.⁹ This single reform¹⁰ proved inadequate to cope with the increase in court business arising from the colony's population growth.¹¹

The small number of General Court lawyers also aggravated the problem of court congestion. When Jefferson came to the General Court bar in 1767, it consisted of Edmund Pendleton, George Wythe, Attorney General John Randolph, Robert Carter Nicholas, Thomson Mason, John Blair, James Mercer, and Richard Bland.¹² Richard Bland's activity was minimal.¹³ Robert Carter Nicholas, who had been treasurer of the colony since 1766, was not taking new cases and required John Blair's assistance to take care of the very large business remaining when he became treasurer.¹⁴ Patrick Henry

by creditors against debtors would normally not be brought in chancery. Even as to chancery suits, Lyons' figure is too low. See notes 34-36 *infra* & accompanying text. Evans does not cite authority for his statement.

7. THE VIRGINIA EXPERIMENT, *supra* note 5, at 290.

8. See notes 37-38 *infra* & accompanying text.

9. 5 HENING'S STATUTES, *supra* note 1, at 319.

10. An attempt in 1748 by the colonial legislature to double the minimum claim cognizable by the court had been vetoed by the crown. 5 HENING'S STATUTES, *supra* note 1, at 467, 469, 568. The jurisdictional amount remained at £10 sterling, or two thousand pounds of tobacco, *id.* at 325, 327, where it had been since 1705. 3 *id.* at 287, 289.

11. Jefferson gives the number of tithables in 1700, 1748, 1759, and 1772 as 22,000; 82,100; 105,000; and 153,000, respectively. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 82-87 (W. Peden ed. 1954). By interpolation it is estimated that the number of tithables in 1745 was approximately 78,000 and in 1771, approximately 149,000. In terms of the general population, the increase was equally significant. In 1710, five years after the jurisdictional amount was set at £10, the population of Virginia approximated 78,280 persons. Sixty years later, the population was 447,016. VIRGINIA STATE LIBRARY, A HORNBOOK OF VIRGINIA HISTORY 8 (1965).

12. No roster of General Court lawyers exists. In this Article, the writer assumes that any of Jefferson's active colleagues would be mentioned in the extensive documents relating to Jefferson's practice.

13. According to one historian, there is no evidence that Bland ever had a large practice. R. Daetwiler, Richard Bland (1968) (unpublished Ph.D. dissertation, U. Wash.). Bland is listed as counsel in two of the cases in JEFFERSON'S REPORTS but is otherwise unmentioned in the Jefferson records.

14. Virginia Gazette, May 21, 1766 & Jan. 1, 1767 (Purdie & Dixon).

joined the General Court bar in 1769, but in 1770, Blair dropped out to become clerk of the governor's council. When Blair left the practice, Nicholas decided that he could not continue, even on a part time basis; after an abortive attempt to turn over his remaining business to Jefferson, he delivered it to Henry¹⁵

Compounding the problem of the relatively small bar was the common practice of employing two attorneys for each side of a dispute. Because each lawyer apparently was allowed to speak as long as he wished, employing more than one attorney increased the time consumed in argument.¹⁶ Inevitably, this practice added to the congested condition of the court.

Although judicial procrastination was not part of the problem,¹⁷ members of the General Court bar were not averse to employing delaying tactics on their client's behalf. On more than one occasion, Jefferson deliberately slowed the court process in order to gain advantage for his client who preferred continued uncertainty to an adverse judgment.¹⁸ The laggard pace at which cases were heard was a multi-faceted problem and not one attributable only to creditor suits.

From an examination of the court ready dockets for 1771 and 1772, a picture of the size and character of the court's business emerges.¹⁹ The following table summarizes that business.

15. Account Book, entry of Oct. 29, 1770; Jefferson's Casebook no. 612 [hereinafter cited as Casebook]; See D. Golladay, *The Nicholas Family of Virginia* 89 (1973) (unpublished Ph.D. dissertation, U. Va.). Gustavus Scott is listed as a General Court lawyer in a notice regarding fee practices, *Virginia Gazette*, May 20, 1773 (Purdie & Dixon) but is nowhere mentioned in the Jefferson documents.

16. Eleven cases, argued during the period of Jefferson's practice, are contained in JEFFERSON'S REPORTS, *supra* note 1. Four more cases are reported in unpublished manuscripts in the collection of Jefferson papers in the Library of Congress. The arguments in some of them are quite long.

17. From the cases which Jefferson reported, unpublished as well as published, it appears that the court wrote no opinions and decided each case immediately after argument.

18. See notes 56-59 *infra* & accompanying text.

19. Copies of the General Court's ready dockets are in the Jefferson Papers collected by the Massachusetts Historical Society.

BUSINESS BEFORE THE GENERAL COURT 1771-72

	April 1771	October 1771	April 1772	October 1772
<i>Chancery Docket</i>				
Appeals				
Brought forward ^a	22	24	23	25
New ^b	6	2	3	4
Suits				
Brought forward	98	95	97	95
New	8	4	—	7

a. Brought forward from the previous docket. Such cases are labeled "references" on the dockets.

b. "New" means on the ready docket for the first time, not that a case was of recent origin.

	April 1771	October 1771	April 1772	October 1772
<i>Criminal Docket</i>				
Pleas of the Crown ^c				
Brought forward	12	9	4	7
New	2	2	5	4
Felonies				
Brought forward	—	—	—	—
New	15	10	9	11
<i>Petitions for Lapsed Lands^d</i>				
<i>Docket</i>				
Brought forward	400	399	354	294
New	48	42	25	52
<i>Common Law Docket</i>				
Appeals				
Brought forward	51	50	58	54
New	17	19	8	19
Actions				
Brought forward	1141	1147	1124	1155
New	92	108	98	81

c. See note 51 *infra* & accompanying text.

d. See notes 52-54 *infra* & accompanying text.

Each docket was divided into twenty-four lists, "first day," "second day," etc., following the statutory scheme which allotted the first five days to chancery cases, including appeals, the sixth day to criminal cases, the seventh day to petitions for lapsed lands, and the remaining days to common law actions and appeals.²⁰ One might suppose that the cases listed on the third day, for example, would

20. 6 HENING'S STATUTES, *supra* note 1, at 325, 328.

be tried or argued on that day; the wording of the statute, enacted in 1753,²¹ indicates that such a procedure was intended; but the intended framework had broken down by Jefferson's time, so far as chancery and common law cases were concerned.

The chancery docket, like the other three dockets, moved cases along according to a set pattern. A new trial case assigned to chancery would begin the process on the fifth day list. After one appearance on the fifth day list, a case would move to the foot of the fourth day list from which it would slowly climb to the top of the first day list. A new chancery appeal began at the base of the third day list and leap-frogged past trial cases as it climbed the lists. In contrast to the requirement that a trial case rest at the top of the first day list in order to receive attention, appeals might be heard while still on the second or third day list.²² A typical chancery case at the trial level would spend five or more years on the ready docket before it was heard.²³ The expedited procedure for appeals generally resulted in final disposition after approximately three years.²⁴ Altogether, about a dozen chancery cases would be heard per session.

The delays in the ready docket system only added to the frustrating delay that a litigant endured. Before a case even reached the ready docket, it passed through various stages of pleading and prep-

21. *Id.*

22. An interlocutory decree handed down in a chancery case on the first day list was retained on the first day list until final disposition. See *Hite v. Fairfax*, Casebook no. 152; *Harding v. Carter*, Casebook no. 536. In other words, some items at the top of the first day list were not candidates for immediate disposition.

23. *Davenport v. Riddell*, Casebook no. 414 and *Hanbury v. Claiborne* (not in the Casebook under that name but probably the case listed as *Hanbury v. Dandridge*, Casebook no. 112) together suggest the life-span on the chancery docket for the average case. Jefferson was retained in the first case in May, 1770. It had been pending in Gloucester County, was removed to the General Court by consent, and hence skipped the preliminary stages. Its first appearance on the ready docket was October, 1770. By April, 1771, it had advanced to the fourth day list where it remained through October, 1772. The second case was on the fourth day list in April, 1770, on the third day list for the next three dockets, on the second day list for the next two dockets, and was finally heard in April, 1773. These two case histories, if tacked together, indicate a combined time on the ready docket of five and a half years. This is a conservative figure because it assumes only four appearances on the fourth day list. In comparison, *Woodson v. Pleasants*, Casebook no. 203, remained on the fourth day list for six consecutive dockets.

24. *Fargeson v. Clarke*, Casebook no. 205, was returnable April, 1769. It was on the third day list in April, 1770, the second day list in October, 1770, the first day list for the next three dockets, and was decided in April, 1772. *Dalton v. Lyon*, Casebook no. 120, lasted three years from inception to decision.

aration of written evidence. During these preliminary stages, the case was said to be "at the rules." *Dunbar v. Washington*²⁵ had languished at the rules for 20 years when Jefferson entered the case in December, 1770. A more typical case would be from three to five years old when it first appeared on the ready docket²⁶ and thus eight to ten years old when decided.

These records indicate that Jefferson probably could not have commenced and finished a typical chancery case during his eight years of practice. Generally, those he began, he did not finish; those he finished, he had not begun. One of the cases he finished but did not begin was *Hite v. Fairfax*.²⁷ George Wythe and Jefferson represented Lord Fairfax in this dispute over rights to land in the Fairfax Proprietary. Commenced in 1749, the action was not decided until 1771. The decision, adverse to Lord Fairfax, was appealed to the Virginia Court of Appeals after the Revolution and finally was disposed of in 1786.²⁸

Jefferson, however, did handle some atypical chancery cases from start to finish. He began and completed an amicable suit to authorize a sale of trust lands²⁹ and a few suits to enjoin a county court judgment or action.³⁰ The latter resembled appeals, which were not

25. Casebook no. 492.

26. *Devire v. Daniel*, Casebook no. 8, began in June, 1767, did not appear on the 1771-72 dockets, and hence, was probably still at the rules. The same is true of *Strachan v. Usher*, Casebook no. 100, which Jefferson entered in May, 1768, but which had begun earlier. When Jefferson was retained in *Dickey v. Cabell*, Casebook no. 535, in April of 1771, it was at the rules. When the defendant's death abated the action in April, 1774, it was still at the rules.

27. Casebook no. 152. This dispute evolved out of a characteristic peculiar to colonial governing — two governments unintentionally working against each other. In 1731, Hite obtained an order from the Virginia royal government that permitted Hite and his partners to settle lands in the Fairfax Proprietary. An agent of Lord Fairfax prevented the issue of patents for these lands, and in 1745, Lord Fairfax was awarded title to this and other acreage by the Privy Council in England. After Hite's entreaties to Lord Fairfax failed to resolve the disputed claims to the lands, *Hite v. Fairfax* ensued. Another dispute over the Fairfax Proprietary involving plaintiffs other than Hite eventually led to the famous case of constitutional significance, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). For a more detailed explanation of *Hite v. Fairfax*, see 1 H. JOHNSON, *THE PAPERS OF JOHN MARSHALL* 150-52 (1974).

28. 4 Call's Reports 42. Surely this is the American *Jarndyce v. Jarndyce*.

29. See *Johnson v. Robinson*, Casebook no. 87. In contrast, *Coles v. Coles*, Casebook no. 435, although amicable and commenced in August, 1770, was in the package of unfinished cases turned over to Edmund Randolph in August, 1774.

30. See *Hayes v. Smith*, Casebook no. 64; *Gay v. Marly*, Casebook no. 99. *Trent v. Taylor*, Casebook no. 514, although commenced prior to 1771, was one of the cases turned over to Randolph by Jefferson.

as long-lived as cases at the trial level. Chancery at its most expeditious is represented by two cases in which Jefferson was interested, one in which a wife sued her husband for separate maintenance, and another in which the same woman sued her husband's estate for dower.³¹ Each case was completed from start to finish in about a year.

Jefferson's experience with the life expectancy of chancery cases was not extraordinary. Robert Carter Nicholas, who had taken no new business since 1766,³² still had thirty-five trial cases on the chancery docket in April, 1771.³³ In 1759, Peter Lyons said, "though there are some hundred cases on the docket, we don't try above ten or a dozen in a term so that it is commonly two or three years after a cause is set for hearing before it comes to be tried"³⁴ Lyons' estimate seems low because a docket of 100 cases could not be disposed of in two or three years at the rate of twelve cases per term.

Nevertheless, the twenty-five percent increase in docket size, fifty percent population increase,³⁵ and added case backlog arising from the court's closing during the 1765-1766 Stamp Act crisis³⁶ undoubtedly increased the average docket life of cases brought before the General Court in the early 1770's. This increased docket life is not surprising because court procedures and manpower levels, both

31. Both cases are entitled *Blair v. Blair*, but neither is in the Casebook. The argument in the second case is one of the four unpublished General Court arguments referred to in note 16 *supra*. From this argument, Jefferson's records of the two cases, and the Virginia Gazette, the dates when the cases were begun and completed can be established.

32. See note 14 *supra* & accompanying text.

33. Marginal notations on the docket indicate which cases were Nicholas'. At the time Jefferson was monitoring Nicholas' cases with the idea of taking over his business. See note 15 *supra* & accompanying text.

34. 1 PENDLETON, *supra* note 1, at 236. Lyons' estimate that a case took two to three years to complete can be explained by assuming that he was speaking of appeals. This is a reasonable assumption because as a lawyer with a predominantly county court practice, his practice before the General Court probably was limited to appeals. Although Lyons qualified to practice before the General Court in 1759, he did not practice there regularly until 1774. See MAYS, REP. VA. BAR ASS'N 88 (1926).

35. See note 11 *supra* & accompanying text.

36. The General Court session of October, 1765 was cancelled because of the Stamp Act. THE VIRGINIA EXPERIMENT, *supra* note 5, at 315. The session of April, 1766 was probably cancelled because news of the Act's repeal was not received until May. Governor Fauquier's proclamation of June 9, 1766, reciting the repeal, called on all "magistrates, officers, others" to "proceed on business, and execute the respective duties of their office in the usual course." JOURNALS OF THE HOUSE OF BURGESSSES 1761-65 lxxv (J. Kennedy ed. 1907).

important functions in expediting pending cases, had not changed since 1749.

There were more cases on the common law docket than on the chancery docket, and the process was equally slow, although it is a mistake to attribute the congestion solely to actions by creditors. Of 1,141 common law actions at the trial level on the docket in April, 1771, less than half were actions by creditors against debtors.³⁷ The remainder of the docket consisted of a wide variety of matters; for example, 136 writs of TAB (assault and battery or false imprisonment), 67 writs of ejectment, 65 writs of trespass, and 40 writs of detinue.³⁸

The period between the inception of a common law action and its appearance on the ready docket was short as compared to the time consumed by chancery cases at the comparable stage. Six months or a year ordinarily sufficed,³⁹ although some cases took longer.⁴⁰ Once on the ready docket, however, the common law action moved as slowly as a chancery case.

A case at the trial level started on either the twenty-third or twenty-fourth day list. After one appearance there, a case moved to the lengthy twenty-second day list where it remained for years.⁴¹

37. Under the common law pleading system then in effect, a creditor would use a writ of Debt if the claim was based on a bond, note, or bill of exchange or a writ of Case if the claim was based on a contract or an account. The April, 1771 docket included 318 actions of Debt and 551 actions of Case. Not all actions of Case, however, were actions by creditors. Case was a versatile writ, used for most torts as well as breaches of contract. Among the cases in Jefferson's Casebook, the writ of Case occurs 130 times, and in 89 cases the nature of the claim can be ascertained. In 41, it was slander or libel; in 18, it was some other tort. In 33, the claim was contractual; by deducting 6 claims for damages for failure to perform obligations other than the payment of money, 27 cases remain which may be styled actions by creditors. Jefferson's experience with the writ of Case, applied to the 514 actions of Case on the April, 1771 docket with a liberal allowance for error, would suggest that perhaps 200 were actions by creditors. Adding 200 actions of Case to 318 actions of Debt would mean a total of 518 creditors' actions out of a total of 1,141.

38. In Mr. Jefferson's practice, detinue invariably involved disputes over slaves.

39. In *Biggs v. Reid*, Casebook no. 452, *Macrae v. Underwood*, Casebook no. 529, *Campbell v. Galbreath*, Casebook no. 584, *Mann v. Goodwin*, Casebook no. 605, and *Jefferson v. Cock-erham*, Casebook no. 646, the cases were on the ready docket after six months. In *Wood v. Holcomb*, Casebook no. 160, and *Simpson v. Crawford*, Casebook no. 524, the period was one year.

40. *Crockwell v. Aldridge*, Casebook no. 89, was at the rules in April, 1768 when Jefferson entered the case and did not reach the ready docket until October, 1771. *Winston v. Ganna-way*, Casebook no. 532, was at the rules in April, 1771 when Jefferson entered the case and was still there in August, 1774.

41. A number of cases which came to Jefferson in 1767 were still on the twenty-second day

Once a case graduated from the twenty-second day list, as approximately 75 cases did each term,⁴² its progress was relatively rapid.⁴³ The time from entry on the docket to decision typically would be six or seven years. This explains why many of Jefferson's common law cases, commenced in 1767, were still unfinished when he left the practice in 1774.

Some cases, however, consumed less time. Pauper cases, for example, a servant suing for freedom, were expedited. In *Howell v. Netherland*,⁴⁴ the plaintiff came to Jefferson in October, 1769; the writ was issued in December; and the case was argued and decided in April, 1770. In *Manly v. Callaway*,⁴⁵ the plaintiff applied to Jefferson in September, 1772; the writ was issued in November; and, a judgment was obtained in October, 1773.⁴⁶ The death of a party, settlement, default, or dismissal for technical reasons prematurely terminated other cases handled by Jefferson. Only a few cases were referred to arbitrators for quick disposition.⁴⁷

Common law appeals, like chancery appeals, had a shorter life expectancy than cases at the trial level.⁴⁸ From inception to conclu-

list in October, 1772. See *Archer v. Dandridge*, Casebook no. 18; *Thompson v. Collier*, Casebook no. 28; *Stockdon v. Brackenridge*, Casebook no. 29; *Madison v. Johnson*, Casebook no. 32; *Hanbury v. Fry*, Casebook no. 38; *Grubbs v. Aldridge*, Casebook nos. 41 & 42; *Lilly v. Riddle*, Casebook no. 45. All but *Hanbury v. Fry*, which was abated by the death of the plaintiff in 1774 while still on the twenty-second day list, were in the package of unfinished cases turned over to Edmund Randolph in August, 1774.

42. Seventy-five cases on the twenty-second day list in October, 1770 were on the seventh day, eighteenth day, nineteenth day, twentieth day, or twenty-first day lists in the April, 1771 docket.

43. See, e.g., *Gordon v. Wythe*, Casebook no. 20. It appeared on the twenty-second day list in October, 1769, in both 1770 dockets, advanced to the seventeenth day list in April, 1771, and to the fourteenth day list in October, 1771 when it was decided. *Ingram v. Parke*, Casebook no. 397, began on the twentieth day list in April, 1770. It appeared in succeeding dockets on the eighteenth, fourteenth, and twelfth day lists before it was heard and decided in October, 1771.

44. Casebook no. 345; JEFFERSON'S REPORTS, *supra* note 1, at 90. See also E. DUMBAULD, THOMAS JEFFERSON AND THE LAW 83-84 (1978); D. MALONE, JEFFERSON THE VIRGINIAN 121-22 (1948).

45. Casebook no. 708.

46. Cf. *Sibyl v. Ashbrooke*, Casebook no. 659 (begun in May, 1772 but not completed when Jefferson turned practice over to Edmund Randolph); *Issac v. Cocke*, Casebook no. 769 (begun in November, 1772 but not completed by termination of Jefferson's practice).

47. E.g., *Feilden v. Read*, Casebook no. 49. See also *McLure v. Smith*, Casebook no. 103; *McLure v. McGill*, Casebook no. 104; *Key v. Ryan*, Casebook no. 106; *Matthews v. Ryan*, Casebook no. 107; *Bolling v. Bolling*, Casebook no. 489; *Robinson's Case*, Casebook no. 816.

48. See notes 22-24 *supra* & accompanying text.

sion, an appeal might take two years or less.⁴⁹ Supersedeas of a lower court judgment could be even more expeditious.⁵⁰

That Jefferson's experience with the unhurried common law process was typical is verified by examining Robert Carter Nicholas' common law practice. Nicholas, who accepted no new business after 1766, still had over 200 cases on the common law docket in April, 1771. More than one hundred cases still remained on the twenty-second day list. Only one of his cases was an appeal, and that was only twelfth on the eighth day list.

In contrast to the chancery and common law dockets, the criminal calendar experienced a rapid turnover of its caseload. The calendar was in two parts, felonies and "pleas of the crown." The latter were prosecutions for minor offenses such as assault or nuisance. Although brought in the name of the King, a plea of the crown actually was prosecuted by the complainant and his lawyer. The felony cases, kept current, determined when the pleas of the crown would be heard. All felonies would be tried first with the lesser offenses being heard only if the court had time. Pleas of the crown not reached were carried over to the next docket. Judging from Jefferson's records, even those carried over were disposed of relatively quickly because such cases would not be "referred" more than once or twice.⁵¹

Petitions for lapsed lands constituted the seventh day docket. Petitions were of two types, adversary and friendly. The government devised the adversary petition to penalize landowners who for specified periods had been in default of their obligations to "seat and plant" their properties and pay annual quitrents. Such defaults were widespread. The first petitioner to allege and prove such a default was rewarded by a certificate entitling him to ownership on

49. To comply with the letter of the statute, common law actions began on the eighth, ninth, tenth, eleventh, or twelfth day lists depending on the trial court origin. Having made this token gesture to the statutory scheme, cases were moved back, sometimes as far as the twenty-first day list. Progress after that was relatively fast. See, e.g., *Burford v. Philips*, Casebook no. 234 (began on ninth day list in October, 1770 but returned to eighteenth and thirteenth day lists before being decided in October, 1771). See also *Curd v. McCall*, Casebook no. 291; *Syme v. Henry*, Casebook no. 343; *Moore v. Thomas*, Casebook no. 472.

50. See *Holt v. Patterson*, Casebook no. 151 (supersedeas was obtained in October, 1768, and judgment set aside at same term); *King v. Singleton*, Casebook no. 838 (Jefferson initiated supersedeas in March, 1773 and succeeded in October, 1773).

51. See *King v. Rudder*, Casebook no. 748 (carried over once); *King v. Lewis*, Casebook no. 741 (carried over twice).

payment of the required fees.⁵² The adversary petition from inception to certificate would normally take from two to four years.⁵³

Defaulting landowners invented the friendly petition in order to forestall adversary petitions by having a friend be the first to file. A friendly petition could terminate either with a certificate to the petitioner or with dismissal. In most cases both parties, represented by the same lawyer, would want the case to rest on the docket as long as possible. While the case was pending, the owner could safely continue in default. In an attempt to curb this abuse, the General Court adopted a rule which limited the number of times a petition could appear on the ready docket.⁵⁴ Judging from the number of violations, the rule proved difficult to enforce. The time from inception to conclusion of Jefferson's friendly petitions ranged from six months to seven years.⁵⁵

The sluggishness of the General Court system favored defendants and hurt claimants. The death of a party or an important witness would extinguish a plaintiff's rights before he ever reached trial. Similarly, the delays inherent in legal action circumvented creditor's rights. Because prompt enforcement was not available, there was little incentive to pay debts promptly. In *Hyneman v. Fleming*, Jefferson was hired with these instructions: "Appear for defendant

52. 5 HENING'S STATUTES, *supra* note 1, at 408, 424.

53. For cases taking less than two years, see *Galaspy v. Montgomery*, Casebook no. 30; *Paulin v. Lowry*, Casebook no. 31; *Wilson v. Williams*, Casebook no. 644. For cases taking two years, see *Pleasants v. Carner*, Casebook no. 4; *Clarke v. Coffee*, Casebook no. 14; *Stone v. Burnley*, Casebook nos. 627 & 628; *Moore v. Moore*, Casebook no. 652. For cases taking more than two years but less than three, see *Lasky v. Morris*, Casebook no. 424; *Fretwell v. Burton*, Casebook no. 442. For cases taking three years, see *Dalton v. Morris*, Casebook no. 198; *Biby v. Denton*, Casebook no. 202; *Greenlee v. Peteat*, Casebook no. 222; *Blackwell v. Moody*, Casebook no. 329; *Randolph v. Harrison*, Casebook no. 482. For cases taking more than three years but less than four, see *Ragon v. Cane*, Casebook no. 54; *Compton v. Clarke*, Casebook no. 175; *Greenless v. Gray*, Casebook no. 177; *Biby v. Norrell*, Casebook no. 287; *Blevins v. Nance*, Casebook no. 466. For cases taking five and one half years, see *Calvard v. Thompson*, Casebook no. 164; *Douglas v. Poague*, Casebook no. 142 (begun in 1768 but still pending in August, 1774). Some cases were disposed of in a year or less, but they probably were collusive.

54. Letter from John Blair, Deputy Auditor to Governor Fauquier (May 20, 1767) (attached to letter from Governor Fauquier to Earl of Sherburne, May 20, 1767) (Virginia Colonial Records Project microfilm, Colonial Williamsburg Foundation, to Williamsburg, Va.).

55. Terminated by certificate: *Hughes v. Johnson*, Casebook no. 161 (six months); *Turpin v. Turpin*, Casebook no. 242 (three years). Terminated by dismissal: *Meriwether v. Meriwether*, Casebook no. 19 (approximately three years); *Wilson v. Lewis*, Casebook no. 301 (approximately three years); *James v. Turpin*, Casebook no. 468 (approximately three years); *Fry v. Fry*, Casebook nos. 10 & 11; *Meriwether v. Meriwether*, Casebook no. 2 (seven years).

and protract the matter. He acknowledges the debt."⁵⁶ In *Scott v. Webb*, Jefferson wrote in his account book, "Note the def. does not deny the acct. but being piqued by the pl. will keep him out as long as he can."⁵⁷

In *Nelson v. Willis*, Jefferson's college friend, Francis Willis, Jr., was sued in Debt in the Gloucester County Court by two members of the governor's council and the clerk of the General Court.⁵⁸ There were five separate actions. Jefferson's account book entry of April, 1768 noted, "Appear for Willis and use every dilatory"⁵⁹ The cases were promptly removed to the General Court by habeas corpus.⁶⁰ The five cases appeared on the twenty-second day list of every docket from October, 1769 until April, 1774, when they were dismissed. It is uncertain whether Willis paid his creditors anything for the dismissal. He may have, because Jefferson, who did not charge Willis a fee, was paid ten pounds by William Nelson on October 17, 1772, "for attending his business in Willis' affairs."⁶¹

Thus, a claimant who entered the colonial judicial system at the General Court level had to have a large measure of patience. If his patience ran short, he was left with two alternatives: he could seek an out of court settlement, or he could pursue the matter in arbitration. With defendants having time as an ally, the claimant's weakened bargaining position made settlement unenticing. And judging from Jefferson's practice, arbitration was equally unpopular.

One might suppose that the structural and administrative problems apparent in the colonial system of justice would have led to public discussion, criticism, and pressures for reform. In fact, critics seem to have been few. Peter Lyons was one. He concluded in 1759, "I don't know what method can be fallen upon for expediting the business, unless the present constitution could be alter'd, which it is to be fear'd will not happen in our days."⁶² The changes made soon after independence may signify what Jefferson and his contempo-

56. Casebook no. 396.

57. Casebook no. 572.

58. Casebook no. 84. The two members of the governor's council were William Nelson and Richard Corbin. Benjamin Waller was the clerk of the General Court.

59. Account Book, entry of April 9, 1768.

60. Habeas corpus implies custody, but it is not clear whether Willis was in actual or technical custody.

61. Account Book, entry of October 17, 1772.

62. See note 34 *supra* & accompanying text.

aries thought were the principal weaknesses of the colonial court system. Chancery and common law functions were put in separate courts,⁶³ and the judges of both courts became full-time professionals.

63. The High Court of Chancery sat for two 18-day sessions per year. The revamped General Court sat for two 24-day sessions. For each court, the jurisdictional threshold remained at £10. 9 HENING'S STATUTES, *supra* note 1, at 389, 401.