

Legal Settlements: Jurisdiction in the English Atlantic, 1603-1643

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## **Abstract**

This dissertation examines the proliferation of English jurisdictions that accompanied and in many ways drove early seventeenth century English Atlantic settlement. It presents a process of jurisdictional definition, refinement, and performance by which the king, his council, and all the proprietors, governors, and planters engaged in Atlantic enterprise established frameworks for government in the king's Atlantic dominions. In establishing English jurisdictions in Atlantic places, these actors both extended England's legal regime to new shores and also integrated places like Barbados and Virginia into the king's composite monarchy. The dissertation seeks to integrate two historiographies that are often held distinct: the story of domestic English legal development and the story of "imperial" legal development. By viewing legal development and English Atlantic settlement through the lens of jurisdiction this study shows that the domestic and the imperial were inextricably intertwined. Yet the novel circumstances of Atlantic settlement prompted significant legal innovation, particularly as the prominent model of colonial government shifted from corporate authority to proprietorial authority. As jurisdiction became commoditized with the introduction of proprietary grants, colonial legal development began to diverge and the possibility of a distinct imperial sphere began to emerge, though it remained nebulous and ill-formed.

*To my parents,  
Jim and Nancy Bibler*

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## Abbreviations

APC	W.L. Grant and James Munro, eds, <i>Acts of the Privy Council of England, Colonial Series, 1613-1680</i> (Nendeln, Liechtenstein: Kraus Reprint LTD, 1966)
CSPC	W. Noel Sainsbury, ed., <i>Calendar of State Papers, Colonial Series, 1574-1660</i> (London: Longman, Green, Longman, and Roberts, 1860)
CSPD	Mary Anne Everett Greene, ed., <i>Calendar of State Papers, Domestic Series, of the Reign of James I. 1623-1625</i> (London: Longman, Brown, Green, Longmans, & Roberts, 1859)
NRS	National Records of Scotland, Edinburgh
TNA	The National Archives, London

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## Introduction

This is a story about jurisdiction. It recounts the proliferation of English jurisdictions that accompanied, and in many ways enabled, English settlement in North America and the Caribbean during the first four decades of the seventeenth century. These jurisdictions, which drew their authority from the fundamental bond of obedience and protection that tied the English king to each of his subjects wherever on the globe they resided, served to integrate the king's new dominions into the larger composite monarchy over which he ruled. Furthermore, because these jurisdictions derived from the king's royal authority, the law that they enclosed was English law. Yet as colonial governors, magistrates, and other delegated authorities judged, they refined and adapted the English legal concepts with which they were familiar to meet the pressing circumstances of geography, climate, economy, and society that they encountered in their new homes. In doing so, they defined new law and new custom, which though they differed from the law to which the king's subjects in England had access, was yet part and parcel of an expanded English legal regime. The following chapters examine the way in which the king, with the support of his Council and the various trading corporations and proprietors to whom he granted control of these Atlantic spaces, along with the thousands of planters and settlers who sought new lives in places like Barbados and Virginia created, defined, and defended jurisdiction and in doing so extended English law across the ocean.

Jurisdiction, as these chapters will demonstrate, accomplishes a great deal. In the context of early Atlantic settlement, jurisdiction was both what marked out a particular Atlantic space as a possession of the English crown and what determined how the laws of England should (or should not) apply in those territories. In this way, jurisdiction enabled the law to see these new



dominions and, by seeing, for the crown to govern the king's subjects who resided there. Yet jurisdiction also demanded that the king's government and the king's laws be flexible, for the rules and procedures that obtained in one jurisdiction did not necessarily hold in another. As new territories became English dominions, and the crown became responsible for overseeing a growing range of jurisdictions, the king and his advisors were often compelled to adapt existing legal remedies or create new judicial procedures to ensure the king's justice reached all his subjects. In this way, jurisdiction was the thing that both distinguished the king's overseas dominions from his other territories, but that also joined those dominions together into a single, coherent, albeit significantly expanded, legal regime. In these ways, jurisdiction served as an engine of expansion, enlarging both the dominions of the English crown and, in doing so, the laws of England.

## **Definitions**

Given the significance of jurisdiction to the early history of England's Atlantic colonies, the question remains: how did jurisdiction accomplish these feats of law and, more fundamentally, what kind of "thing" is jurisdiction? Most simply, jurisdiction is law speaking, *juris dicere*. This etymological definition of jurisdiction connotes both action and authority.<sup>1</sup> As to action, the law speaks through judgment, and in that sense jurisdiction describes a "power to do justice."<sup>2</sup>

Through judgment, moreover, jurisdiction involves itself with the very substance of law by determining what does and does not pertain to law. This feature of jurisdiction stems from the

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<sup>1</sup> Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Abingdon: Routledge, 2012), 4.

<sup>2</sup> This phrase, which provides the title for Bradin Cormac's recent investigation into early modern English literary engagement with jurisdiction, comes from a definition of jurisdiction offered in 1607 by the Jacobean civilian jurist John Cowell. Here, Cowell defines jurisdiction as "a dignity which a man hath by a power to doe Justice in causes of complaint made before him." Quoted in Bradin Cormac, *A Power to do Justice: Jurisdiction, English Literature, and the Rise of the Common Law, 1509-1625* (Chicago: University of Chicago Press, 2007), 5.

fact that all judgment requires interpretation, whether of a set of established precepts or of the more abstract concepts of equity and conscience. Determining how the rules of law or the values of equity apply to a given matter serves to normalize those rules and values and thereby gives them force.<sup>3</sup> In this way, jurisdiction is, as Bradin Cormac suggests, “the precondition for the juridical as such, for the very capacity of the law to come into effect.”<sup>4</sup> In effect, speaking law both inaugurates and defines law.<sup>5</sup>

In speaking law, jurisdiction finds its voice through a range of what Shannaugh Dorsett and Shaun McVeigh have termed “jurisdictional technologies.” Technology used in this sense can be understood as “a practice, device, technique or organizational strategy,” and thus jurisdictional technologies are those practices or strategies “capable of authorizing, changing or altering lawful relations.”<sup>6</sup> Perhaps the most obvious jurisdictional technology is the court or tribunal, the institution in which law’s voice is most frequently heard. Yet courts themselves rely on a range of devices, practices, and strategies to accomplish their work and these in turn comprise further technologies of jurisdiction. As the tangible artifacts of law, these technologies are what allow us to comprehend and engage jurisdiction.<sup>7</sup> In an important way, the technologies that jurisdiction employs are what embody and even define law. For example, early modern

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<sup>3</sup> According to Pietro Costa, whose work on medieval Italian reception of Roman Law Cormac finds useful in constructing his own definitions of jurisdiction, the act of interpretation ensures that jurisdiction does not create legal norms, it merely mirrors existing realities. Thus, “*Iurisdictio* is nothing other than the place in which an informal given comes to be formalized: not changed, but expressed, not created, but mirrored back.” Quoted in Cormac, *Power to Do Justice*, 8.

<sup>4</sup> Cormac, *Power to Do Justice*, 3.

<sup>5</sup> Dorsett and McVeigh, *Jurisdiction*, 11.

<sup>6</sup> Dorsett and McVeigh, *Jurisdiction*, 14.

<sup>7</sup> Not only do courts represent the jurisdictional technology with which we are most familiar, Dorsett and McVeigh argue that the way in which we structure our courts determines both what belongs to law as well as the relative importance of different species of law. Dorsett and McVeigh, *Jurisdiction*, 14-15.

common law procedure depended on a series of closely defined writs to initiate and sustain an action. If a writ could not be found to correspond to a given wrong, then the law had no cognizance of that wrong and the wronged could have no suit. In this example, procedure, a jurisdictional technology expressed through writs, defined the shape and extent of the law.<sup>8</sup>

Identifying the various technologies through which jurisdiction manifests itself helps us track the ways in which law propagates. As I will discuss in the following chapters, a range of jurisdictional technologies, some more obvious than others, defined and refined the English legal regimes that settled in the king's Atlantic dominions. Initially, the king's letters patent (colonial charters) served to establish the outline of an inchoate jurisdiction that described a generalized authority to establish law and provide justice. The franchise holders who accepted this authority rarely provided justice themselves, and thus further technologies were needed to refine this broad jurisdiction and make it effective. Company and proprietary instructions along with gubernatorial and magisterial commissions honed the king's royal authority by empowering governors, councilors, and magistrates to do justice while placing limits on whom and where they could judge. On occasion, franchise holders overstepped their established jurisdiction or disputes arose about jurisdictions, requiring the king and his council to intervene.

When the king used his courts (including his Privy Council) to review the operation of lesser jurisdictions, those courts (and in a sense, jurisdiction itself) became a technology of jurisdiction. The ad-hoc operation of the king-in-council in reviewing and correcting overseas jurisdictions generated novel law that became the foundation for a more carefully defined and elaborated system of colonial oversight. Moreover, the decisions the king and his courts rendered

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<sup>8</sup> Or as J.H. Baker put it, "as far as the courts were concerned, rights were only significant, and remedies were only available, to the extent that appropriate procedures existed to give them form." J. H. Baker, *An Introduction to English Legal History* (London: Butterworths, 2002), 53.

often had the effect of constraining or even destroying jurisdiction. This follows what Robert Cover termed the “jurispathic” quality of the courts.<sup>9</sup> By jurispathic, Cover meant the power of a court to “suppress laws, to choose between two or more laws, to impose upon laws a hierarchy.” In any society, Cover noted, multiple “communities of interpretation” can develop, each with its own norms, norms that have the capacity to carry legal meaning, when combined with action.<sup>10</sup> When multiple norms, and multiple laws, come into conflict it is the job of the court to choose one or the other, an inherently violent process that serves to establish a singular vision of legitimate law.<sup>11</sup>

Such was the case in 1624 when the justices of King’s Bench determined that the leading members of the Virginia Company of London had usurped the king’s authority to govern his subjects in Virginia. Or again in 1628 when Lord Keeper Thomas Coventry settled a dispute between two members of the king’s household over who held title to the island of Barbados. In both of these cases, a judicial decision destroyed one jurisdiction—the Virginia Company’s in the first example and the earl of Montgomery’s in the second—while bolstering others—the king’s and the earl of Carlisle’s. By serving as jurisdictional arbitrators, the king and council, often in conjunction with the king’s other courts, directly shaped government in the Atlantic.

Yet for all the destructive (and constructive) power held by the king and his courts, the experience of authority on the ground often depended on the actions of local authority figures. In the absence of formal institutions and without the aid of the kinds of persuasive legal and civil ceremonies that helped reaffirm structures of power in England, these authority figures regularly

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<sup>9</sup> Robert M. Cover, “The Supreme Court 1982 Term: Foreword: *Nomos* and Narrative,” *Harvard Law Review* 97, no. 1 (Nov. 1983): 1-68.

<sup>10</sup> Cover, “*Nomos* and Narrative,” 42; 1-11.

<sup>11</sup> Cover, “*Nomos* and Narrative,” 40-45. For Cover, the work of the courts is essentially hollow; courts (and by extension the state) do not create law, they can only destroy through interpretation.

used guile and force to accomplish their ends.<sup>12</sup> In this way, even dishonesty and violence became technologies of jurisdiction, and these technologies in turn helped authority figures shape and reshape jurisdiction at the local level by massaging the boundaries of law and authority. Taken together, the various technologies of jurisdiction introduced here supported a process by which the power to do justice was first defined by royal authority, then refined, reviewed, and corrected, and finally put into action by local judges.

The ultimate effect of this process of jurisdictional definition, refinement, and performance was to place bounds upon law. Because of its ability to bound law, jurisdiction is often described in spatial terms: as a “legal space or sphere of competence,” jurisdiction becomes “the tool used to mark one body of law off from another, or the sphere within which one institution has authority to determine an issue from the sphere of another.”<sup>13</sup> In its modern operation, the space that a given jurisdiction delineates is almost always a geographical space. As Richard T. Ford has shown, however, territorial jurisdiction is a relatively recent development. In the early modern period, jurisdiction marked off generic space, social space, or even temporal space just as readily as it did geographic space. Jurisdiction could, in other words, define a power to judge only specific matters of wrong, or wrongs committed by a particular set of people, or wrongs committed during a specified time frame.<sup>14</sup>

When defining the foundational jurisdictions that empowered the king’s delegates to judge in his overseas dominions, the crown often expressed that power as a hybrid of territorially

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<sup>12</sup> For instance, the imposing theater of the annual assizes. For a thorough discussion of the operation of authority in early modern English society, see the introduction to Paul Griffiths, Adam Fox and Steve Hindle eds., *The Experience of Authority in Early Modern England* (New York: St. Martin’s Press, 1996).

<sup>13</sup> Shaunnagh Dorsett, “‘Since Time Immemorial’: A Story Of Common Law Jurisdiction, Native Title And The Case Of Tanistry,” *Melbourne University Law Review* 3 (2002): 34.

<sup>14</sup> Richard T. Ford, “Law’s Territory (A History of Jurisdiction),” *Michigan Law Review* 97 no. 4 (1999): 843-930.

and personally or situationally oriented authority. Thus, the Virginia Company of London had power by its second charter to make and enforce laws that enabled it both to order the operation and administration of the company in London as well as to govern all settlers who might choose to reside in the company's American holdings.<sup>15</sup> The primary purpose of the Company was to manage a trading enterprise that operated out of Virginia, and its authority reflected that purpose. The Company's various charters did define the Company's influence in geographical terms by limiting the areas in which it would enjoy exclusive operation. But the corporation's authority was always defined in relation to its members and never in territorial terms. In the case of this early venture, circumstance, more than any explicit formulation, determined the degree to which geographic space constrained law.

As governors, magistrates, and other authority figures exercised and contested jurisdiction, however, territorial boundaries became fixed. The commissions that the Earl of Carlisle granted to his first three governors in Barbados demonstrate this process of jurisdictional ossification. The first commission, granted to Charles Wolverstone in 1627, did not grant Wolverstone jurisdiction over the entire island, or even over all planters on the island, but only over a specific subset of planters: those sent by a syndicate of London merchants to whom Carlisle had granted a large parcel of land in the island. By 1629, however, Carlisle's commission to his third governor William Tufton granted Tufton authority to do all things necessary "for the ... government defense and maintenance of the said island," thus defining Tufton's jurisdiction in explicitly territorial terms.<sup>16</sup> As law came to define territory in Barbados

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<sup>15</sup> For a detailed examination of the content and import of this charter, see below pp. 34-44.

<sup>16</sup> Gary Puckrein, "The Carlisle Papers," *The Journal of the Barbados Museum and Historical Society* 35 (1978): 306.

and other Atlantic space in this way, these places became more closely integrated into the English composite monarchy.

### **Implications and Context**

Tracing the way in which English jurisdictions emerged in the king's overseas dominions through the processes described above allows us to integrate the legal history of those locations with the legal history of England. Most recent scholarship that has examined English settlement from a legal perspective has focused on concepts of constitutionalism and negotiation, often framed in terms of center and periphery. This focus, I will argue, tends to cut off colonial legal developments from English legal development. As an example, Ken MacMillan's recent work on the subject posits the existence of an *Atlantic Imperial Constitution* that was "largely distinct from the English domestic constitution." For MacMillan, this constitution emerged out of the "functional nature" of the relationship between the "English central government and its Atlantic colonial peripheries." MacMillan calls this relationship (and the constitution which he suggests it engendered) "imperial" because it depended on the king's prerogative and operated essentially without reference to the ancient constitution, "which fundamentally involved the historical common law, parliament, and legislation as guiding legal principles."<sup>17</sup>

MacMillan is certainly correct to stress that oversight of the king's Atlantic dominions rested primarily with the king, aided by his council, and that such oversight depended on the king's prerogative authority. Yet to frame royal colonial administration as distinct from domestic oversight introduces a problematic distinction that had little meaning in the early modern period.

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<sup>17</sup> Ken MacMillan, *The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World* (New York: Palgrave MacMillan, 2011), 1-2.

The Stuarts were head of a composite monarchy composed of numerous distinct dominions, each of which stood in a particular legal relation to the king. This arrangement fostered, and indeed, depended on a significant degree of legal pluralism. Even within the realm of England, different jurisdictions required different rules, procedures, and modes of operation. The same was true throughout the king's varied holdings. The interesting fact of the king's Atlantic dominions was not that they were administered in distinct ways from the king's other dominions, but that their distinctiveness required the creation of new modes of legal thought, or at the very least, a reinterpretation and adaptation of existing rules and procedures. In this way, Atlantic enterprise did not give rise to a new constitutional regime, but instead augmented the multiple legal regime that defined the composite monarchy.

Jurisdiction in this legal regime had one source: the king, in his capacity as God's regent on earth. Lord Chancellor Ellesmere, in his speech before the assembled justices of the realm on the case of the *post-nati* (Calvin's Case), succinctly stated this relationship between God, the king, and the law:

I make no doubt, but that as God ordained kings, and hath given Lawes to kings themselves, so hee hath authorized and given power to kings to give Lawes to their subjects; and so kings did first make laws, and then ruled by their laws, and altered and changed their Lawes from time to time.<sup>18</sup>

In Ellesmere conception, then, it was from god that the power to make law derived, but it was kings who "spoke" the law when they ruled by the laws that they had themselves made and altered. Moreover, kings did all this "for the good of themselves, and their subjects," and indeed

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<sup>18</sup> "The Speech of the Lord Chancellor of England, in the Exchequer Chamber, Touching the *Post-Nati*" in Louis A. Knalfa ed., *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge: Cambridge University Press, 1977), 248.



a king's chief duty was to provide protection, both physical and legal, to his subjects.<sup>19</sup> As we will see more fully developed in the next chapter, this protection arose out of the fundamental bonds of allegiance and obligation that inhered naturally in all who owed the king their allegiance. For this reason, Ellesmere and his fellow justices of the realm concluded in the first decade of James I's reign that the king's protection traveled with the king's subjects, wherever they might venture, even outside the realm. Thus, though the law that operated in Virginia or Avalon may not have been the common law (whose jurisdiction, it is true, depended on a strict procedure that had developed with reference to *English* property), it was the king's law nonetheless.

Moreover, the heavy involvement of the Privy Council in reviewing colonial matters meant that ultimate jurisdiction over the king's overseas dominions rested with one of the chief courts of England: the king-in-council.<sup>20</sup> Though the records of the Privy Council may have in later times been collected and calendared in such a way as to introduce an ahistorical divide between the Council's domestic and colonial work, we should not view that work as necessarily separate. In hearing colonial appeals and deciding upon disputes either arising in the Atlantic or concerning Atlantic territories, the Councilors served the king's justice just as they did when reviewing domestic appeals or appeals from any other of the king's dominions. For this reason, describing the Council's work with relation to the Atlantic colonies as somehow comprising an "Atlantic" or "Imperial" constitution is misleading because, in jurisdictional terms, there was no Atlantic and there was no singular empire. There was instead a collection of dominions each held

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<sup>19</sup> Knalpa, *Law and Politics*, 248.1

<sup>20</sup> Coke, in the fourth volume of his *Institutes of the Laws of England*, sets the "Councel Board or Table" as second only behind the Great Court of Parliament when he lists England's countless courts. Edward Coke, *The Fourth part of the Institutes of the Laws of England, Concerning the Jurisdiction of Courts* (London: 1797).

in a specific relation to one another by the overarching authority of the king and the king's laws.<sup>21</sup>

When viewed as an exercise in jurisdictional review, the work of the Privy Council that MacMillan describes, and which I will also have occasion to examine, was, in a manner, constitutional. We often imagine constitutions as tangible objects; they are the documents that embody the fundamental rules by which our societies are governed. Yet it is perhaps more helpful to view constitutions as actions; that is, as the continual working out of disputes concerning jurisdiction and authority. Daniel Huslebosch hints at such a definition when he defines constitutions as embodying “relationships among jurisdictions and people mediated through highly charged legal terms.”<sup>22</sup> Viewed in this way, as an exercise in jurisdictional wrangling, the juridical work done by the king-in-council regarding the king's overseas dominions did not simply give shape to an Atlantic or imperial constitution. Instead, this work served to situate the king's new dominions within the jurisdictional framework that defined his *imperium*, and in doing so engaged and refined the broader constitution that governed the king's composite monarchy.

Though the judicial work of the king-in-council with regard to colonial oversight helped establish a model for later royal colonial administration, I will argue that much of the actual effort involved in defining and defending law in the king's Atlantic dominions occurred

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<sup>21</sup> For a thorough discussion of the “legal plurality of the king's dominions,” see Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2010), ch. 8.

<sup>22</sup> Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: The University of North Carolina Press, 2005), 7.

locally.<sup>23</sup> As local authorities confronted the many challenges that colonial settlement offered, from interloping foreigners to insubordinate and rebellious planters, they stretched and adapted the limits of their expressed authority. In doing so, they put into effect what had until then been a merely theoretical jurisdiction.

My examination of this process of jurisdictional actualization supports and extends the work of scholars like Jack Greene and Mary Bilder. For Greene, authority in the context of English Atlantic settlement was almost entirely locally focused. Though the central authorities in London had some designs for imperial oversight, these were essentially fantasies as the crown's lack of financial or military resources made it difficult to compel any sort of obedience across the vast distances that separated center from periphery. As a result, settlers in North America and the Caribbean created "new arenas of individual and local power" which engendered within these societies a sense of autonomy.<sup>24</sup> Though Greene is primarily concerned with later developments and while he tends to overstate the degree of separation between central and local authority, his description of locally-oriented power centers, derived from and dependent on the political and legal actions of local authority figures, reveals in general terms the kinds of processes I will examine in this dissertation.

Yet where Greene views political development in the colonies as almost completely outside the supervision of London authorities, Mary Bilder portrays colonial legal development

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<sup>23</sup> On this fact, I am in agreement with MacMillan who argues that the relationship between the crown and the colonies "established precedents for how the overseas empire was later supervised from the center." Macmillan, *Atlantic Imperial Constitution*, 1.

<sup>24</sup> Jack P. Greene, "Transatlantic Colonization and the Redefinition of Empire in the Early Modern Era: The British-American Experience" in Christine Daniels and Michael V. Kenney eds., *Negotiated Empires: Centers and Peripheries in the Americas, 1500-1820* (New York: Routledge, 2002), 271. See also Greene's *Negotiated Authorities: Essays in Colonial Political and Constitutional History* (Charlottesville: University Press of Virginia, 1994), esp. chapters 2 and 3.

as a continuous “conversation” between center and periphery.<sup>25</sup> This conversation, which Bilder argues comprised a coherent administrative enterprise that she terms the “transatlantic constitution,” centered on the policy of non-repugnancy, which held that colonial law could be different from English law as circumstance might necessitate but could not run contrary to it. As litigators and legislators debated how and when the laws of England should apply in the colonies they continually reshaped the legal regime that governed the colonies.<sup>26</sup> While Bilder terms this conversation constitutional, it was in truth a conversation about jurisdiction. And the terms of that conversation were set by the processes examined in this dissertation.

Finally, in examining the way in which personal initiative drove jurisdictional development across the king’s growing dominions this dissertation also engages recent work that examines political development at the intersection of public and private interest. Phil Stern’s work on the East India Company (EIC) is particularly relevant to my own discussion. In his recent book *The Company-State*, Stern argues that the EIC, a joint-stock trading company founded upon similar terms to the Virginia Company of London whose dissolution will be the focus of my second chapter, performed all the functions of an early-modern government, including establishing and executing laws, collecting taxes, treating diplomatically with other states, and waging war. In this way, the company exhibited many of the features of the early-modern state.<sup>27</sup> Yet, as Stern argues, its non-territorial, commercially-focused nature made the

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<sup>25</sup> In arguing for such metropolitan neglect, Greene is perpetuating the kinds of assumptions that MacMillan hopes to challenge with his examination of the crown’s supervisory work.

<sup>26</sup> Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004), 1-5.

<sup>27</sup> Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford: Oxford University Press, 2011), 3.

company a unique entity, a body politic whose character challenges our traditional understandings of empire and the state. Understanding the EIC in this way as a “company state” offers a view of empire in which empire “was constituted by a variety of competing and overlapping political and conditional forms in both alliance and tension with the national state and its claims to coherent and central power.”<sup>28</sup> This is a compelling description of empire and one that captures the dynamics of jurisdictional proliferation in the early English Atlantic.

Stern’s account of the East India Company further demonstrates that, in the early modern period, government and private interest were not necessarily at odds, but were instead often an expression of the same impulse. The Company, he argues, was both a joint-stock corporation that served the interests of its own members while at the same time a public authority that protected the interests of the commonwealth by governing commercial trade. Indeed, the public obligations of this private corporation protected the company’s exclusive right to East Asian trade, even when such monopolies were otherwise illegal.<sup>29</sup> This same elision of public and private interest can be seen in the context of Atlantic settlement as well. On the one hand, the king granted to a corporation or proprietor the authority to provide for the good government of their colonies. Yet at the same time, that authority was itself a form of property in which the franchise holder had an absolute right. As a result, authority became a commodity that could be sold, transferred, or otherwise disposed. Such activities required continual oversight by the crown to ensure that royal authority was not misused but, as we will see in Chapter Four, was not in itself contrary to public or royal interest.

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<sup>28</sup> Stern, *Company State*, 6.

<sup>29</sup> Stern, *Company State*, 50.

## Conclusion

Taken together, the following chapters comprise a systematic examination of the processes of jurisdictional definition described in this introduction. In the first chapter, I examine the royal charters with which the king and his legal councilors authorized and deputed the corporations and proprietors that took on the burden of overseas enterprise to provide justice in his name. When crafting these charters, I will show, the crown drew on established legal forms that had shaped and guided delegated royal authority within England and beyond for centuries. In chapter two, by tracing the dissolution of the Virginia Company, I discuss the way in which the crown used royal courts, specifically King's Bench, to review and correct jurisdictional abuses. Here I argue that the Virginia Company's experience with the courts was consistent with a broader effort by the early Stuarts to oversee and correct franchisal misuse throughout the realm. This reinforces the idea that at this early stage, royal domestic and imperial policy had not emerged as distinct administrative features.

Continuing the theme of royal review of Atlantic jurisdictions, chapter three examines a controversial dispute between the earls of Carlisle and Montgomery concerning the possession of Barbados. The origins of this dispute, and the manner by which the king and his legal advisors resolved it, demonstrate both the challenges the crown faced in defining and defending overseas jurisdictions as well as the way in which private and public interest converged in that process. Finally, in chapter four, I examine the way that local authorities interpreted, adapted, and applied the jurisdictional frameworks they received from the king and his proprietors. The actions of these local authorities, shaped both by local circumstance and their own discretion, gave force and form to royal jurisdiction and laid the foundations for English government at the local level.

## Chapter One: Royal Charters and the Framing of English Atlantic Jurisdiction

In June 1578, Humphrey Gilbert obtained from Queen Elizabeth license “from time to time ... to discover, finde, search out, and view such remote, heathen and barbarous lands, countreys and territories ... as to him ... shall seem good.”<sup>1</sup> Though English west-country fishermen and privateers had been operating in the Atlantic for decades, Gilbert’s grant represented the first royal recognition of the possibility of regular English activity in the Atlantic.<sup>2</sup> In the half-century following Gilbert’s grant, the English crown issued over two dozen letters patent authorizing Atlantic enterprises, in part driven by the relentless writings of promoters like John Dee and Richard Hakluyt, and in part responding to the continued exertions of Spanish and French adventurers in the region.<sup>3</sup> These patents both established England’s claims to the territories in question while also confirming and refining the inherent bonds of allegiance and obligation that tied the king to his subjects, wherever they might reside. In this way, charters served as the legal foundation upon which most English Atlantic settlements rested, and the privileges and

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<sup>1</sup> “Letters Patent to Sir Humfrey Gylberte,” in Francis Newton Thorpe, ed., *The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or Heretofore Forming the United States of America*, vol. 1, *United States—Alabama—District of Columbia* (Washington: GPO, 1909), 49.

<sup>2</sup> For instance, John Cabot, though a Venetian by birth, famously “discovered” Newfoundland in 1497 during an expedition authorized by Henry VII. In the years that followed, English fishermen, especially from west-country ports in Devon and Cornwall, maintained a regular presence in Newfoundland and the Grand Banks. Further south, English privateers like Sir Francis Drake regularly harried Spanish treasure fleets in the Caribbean throughout the latter half of the sixteenth century. For the Newfoundland fishery see, Peter E. Pope, *Fish into Wine: The Newfoundland Plantation in the Seventeenth Century* (Chapel Hill: University of North Carolina Press, 2004), chapter 1. For a discussion of early English privateers, see Harry Kelsey, *Sir Francis Drake: The Queen’s Pirate* (New Haven: Yale University Press, 1998).

<sup>3</sup> The preface to the Calendar of State Papers Colonial contains a list of all the territories for which the crown issued a charter in the period running to 1660. See, *Calendar of State Papers Colonial: America and West Indies, Vol 1: 1574-1660*, viii.

authorities they conveyed gave shape to the prototypical jurisdictions that ultimately came to define English government in those settlements.

Fundamentally, colonial charters like the one that authorized Gilbert's expedition, or those that underpinned the first permanent English settlements in North America at Jamestown, were expressions both of the royal prerogative, and by consequence, of English law. They served as markers of the king's will and were the means by which he granted the patent's holders one or more franchises that enabled them to exercise elements of royal authority within carefully prescribed territorial and situational limits. In their language and form, as well as in their purpose, the charters issued in support of Atlantic enterprise were equivalent in nature and effect to domestic patents. Each issued out of the same body (the Chancery), by the same authority (the king's), and bore the same seal attesting that authority (the Great Seal of England).<sup>4</sup> Furthermore, colonial charters, like many domestic charters, began as petitions to the Privy Council, whose work as a legal clearinghouse that was accessible to any who sought favor or support from the king, served to integrate the judicial administration of all the king's dominions.<sup>5</sup> Recognizing that colonial and domestic grants have the same source and served similar functions allows us to

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<sup>4</sup> MacMillan provides a useful discussion of the chartering process from Privy Council petition to ultimate enrollment and application of the great seal. See Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire* (Cambridge: Cambridge University Press, 2006), 83-85. For a description of the Privy Council's role in the issuance of domestic patents, see H.C. Maxwell-Lyte, *Historical Notes on the Use of the Great Seal of England* (London: His Majesty's Stationery Office, 1926).

<sup>5</sup> For a discussion of the Council's judicial authority, and its involvement in overseeing local government, see Edward Raymond Turner, *The Privy Council of England in the Seventeenth and Eighteenth Centuries, 1603-1784*, vol. 1 (Baltimore: The Johns Hopkins Press, 1927), chapter 7. For a detailed examination of the Council's role in administering the king's overseas dominions see, Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950); Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA: Harvard University Press, 2004); Ken MacMillan, *The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World* (New York: Palgrave-MacMillan, 2001).



understand the range of royal judicial and administrative thinking towards the king's overseas dominions and also provides us the means to identify when that thinking began to shift.

### **Context**

Despite these important legal and administrative implications of the king's colonial charters, recent scholarship on charters tends to view them merely as tools of appropriation, that is, means by which the crown either established or defended already established territorial claims. Because Atlantic charters were letters patent—literally open letters—they were public in nature, and thus available to anyone who might come across them. According to scholars like John Juricek, Patricia Seed, and Ken MacMillan this openness made charters suitable instruments both for establishing English territorial claims and for defending them against the claims of other European powers.

How well the leaders of these other European powers received the message is under debate, however. Juricek and Seed both suggest that the various European courts with Atlantic interests could not have reached any common understanding regarding territorial claims. The reason for this was that each held “culturally distinctive” beliefs concerning the terms of a valid territorial claim.<sup>6</sup> Juricek argues that two types of territorial claims existed: the “preemptive” code and the “dominative” code. Both of these codes required two fundamental elements to make a claim good: discovery and possession. Yet each nation had different definitions of those terms. For instance, the monarchies of Spain and Portugal, whose claims Juricek argues followed the preemptive mode, relied on papal grants to signify both discovery and possession concerning

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<sup>6</sup> Patricia Seed, “Taking Possession and Reading Texts: Establishing the Authority of Overseas Empires,” *William and Mary Quarterly* 49, no. 2 (1992): 191. For a more thorough discussion of Seed's argument concerning European modes of territorial claim-making, see Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640* (Cambridge: Cambridge University Press, 1995).

lands that they did not in fact occupy. The English discounted these claims, arguing that only actual possession, evidenced by improvement, could form a valid claim.<sup>7</sup> For Seed, this insistence on demonstrated improvement derives from common law understandings of possession. Moreover, in the English conception, “the *fact* of ownership create[d] a virtually unassailable *right* to own as well.” These common law claims had no standing in the Spanish, French, or Portuguese legal traditions, and thus the leaders of those nations reckoned them no good.<sup>8</sup>

While MacMillan also believes the crown’s Atlantic charters played a central role in defending English territorial claims, he disagrees with Seed that those claims were based in the common law. In MacMillan’s view, lands like Virginia and the king’s Caribbean holdings were outside the realm of England and thus “outside the jurisdiction of the common law.” Therefore, reasons MacMillan, “another legal system . . . was required to legitimize and oversee” English Atlantic activities. Fortunately, the king’s legal advisors, men like Lord Chancellor Ellesmere and Attorney General Thomas Coventry, were well versed in the civil law, and thus were capable of drafting territorial claims based on the Roman law of possession. Demonstrating proof of first discovery, *res nulliae* (empty, or unclaimed land), and actual possession, royal charters stated English territorial claims in a way that made them intelligible to the “supranational community.”<sup>9</sup>

Though they disagree on the particulars, Juricek, Seed, and MacMillan demonstrate that the crown had a keen interest in defending English territorial claims in the Atlantic. Yet, as important an exercise as this surely was to the king and council, establishing such claims was not

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<sup>7</sup> John Juricek, “English Territorial Claims in North America under Elizabeth and the Early Stuarts,” *Terrae Incognitae* 7 (1975): 9-11.

<sup>8</sup> Seed, “Taking Possession,” 190.

<sup>9</sup> MacMillan, *Sovereignty and Possession*, 33.

the sole or even the major purpose of the charters. Indeed, while the king and his advisors managed to stake out English territorial claims with a few sentences at the beginning of most charters, the bulk of the instrument concerned the rights and responsibilities of the patentees to whom they were granted. Thus, without disregarding the crown's efforts to solidify England's position in the Atlantic relative to other European powers, it should be recognized that the overriding legal significance of the crown's various colonial charters lay in the care the king took to shape and refine the legal bonds that connected him with his subjects residing in those distant and largely unknown lands.

Scholars who have examined the constitutional implications of the charters have done so generally from an imperial point of view. For instance, Mary Bilder, Christopher Tomlins, and MacMillan have all framed these documents as instruments of empire, in some way distinct from (though informed and affected by) the domestic legal experience. For Bilder, the charters' flexible language concerning the creation of law in places like Rhode Island formed the basis of a "transatlantic constitution" that defined relations between England and its Atlantic colonies.<sup>10</sup> Tomlins takes a slightly different view, noting that charters served as an argument of sorts, a means by which the crown and Atlantic entrepreneurs could demonstrate the viability, legitimacy, and legality of a particular overseas society. In this sense, Tomlins argues, charters effectively shaped the lands with which they were concerned into English territory.<sup>11</sup> MacMillan, like Bilder, argues for the existence of a transatlantic, imperial constitution, and goes so far as to suggest that the legal arguments developed by the crown in order to defend English claims to

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<sup>10</sup> Bilder, *Transatlantic Constitution*, introduction.

<sup>11</sup> Christopher Tomlins, "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century," *Law and Social Inquiry* 26 (2001): 316-17.

Atlantic territories (arguments deployed in the king's charters) became the "legal foundations of Empire."<sup>12</sup>

Framing charters as imperial documents, however, removes them from the domestic English legal context that produced them. This in turn obscures a fundamental feature of early modern English royal administration: the basic equivalency of the domestic and imperial spheres. As noted above, domestic and imperial grants both drew from the same overarching, fundamental jurisdiction—the king's—to give force to locally-oriented government in regions, and situations, where the king could not assert his authority directly. As we will see, the ability of the king's jurisdiction to extend beyond England's borders was under much debate following the ascension of James VI of Scotland to the English throne in 1603. Of particular interest to contemporary legal minds was the status of the king's non-English subjects; for example, would the king's Scottish subjects enjoy the same liberties and legal protections as his English subjects? By examining in some detail the arguments offered in *Calvin's Case*, a famous inquiry into the nature of subjecthood that settled the relationship between the new king and his Scottish subjects, I will show how early modern English legal minds conceived of jurisdiction's operation in a complex, composite monarchy.

Though it did not bear directly on the king's overseas dominions, scholars often turn to this case when discussing the legal foundations of empire. Historians are especially drawn to Sir Edward Coke's report of the case, in which Coke presented a taxonomy of sorts of the king's different possessions, and suggested a series of rules to determine the status of English law in each. Ultimately, this focus on what was a minor and tangential element of Coke's argument is

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<sup>12</sup> MacMillan, *Sovereignty and Possession*, chapter 3. When MacMillan speaks of the "legal foundation of Empire," he refers both to the charters themselves, but more importantly, to the mixture of Roman law, natural law, and English common law ideas that they expressed.

misleading, as it places too much significance on archaic distinctions that had no real force in shaping law in places like Barbados or Virginia. The true import of the justices' decision rests instead on the notion that the fundamental bonds of allegiance and protection that tied subject to king and which defined the king's ultimate jurisdiction did not depend on location. As we will see, this feature of the royal prerogative ensured a baseline of privilege and justice throughout the king's dominions. Royal charters of the type I will discuss in the following pages extended and refined this base jurisdiction, and in doing so laid the ground work for royal administration in the Atlantic and beyond.

As we will see, two forms of colonial charter characterized most overseas settlements in the early Stuart period: corporate and proprietary. With the first, the king incorporated a group of individual adventurers into a company and made them responsible for overseeing the government and the commercial operation of a given settlement. These corporations differed little from similar bodies existing in England, which English monarchs had authorized and managed for centuries. Incorporation had the advantage of flexibility, longevity and continuity (as the corporation could not perish, though its individual members might). Moreover, corporations had successfully overseen expansive commercial enterprises with operations extending beyond the realm of England for decades. In many ways, the first English endeavors in the Atlantic world extended the practices and impulses that sustained trading operations like the Muscovy and Levant companies and the Merchant Adventurers.<sup>13</sup> The charters they sought from the king likewise followed the form, and included much of the same language, of those that authorized these established trading companies. And because they served commercial

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<sup>13</sup> Sir Percival Griffiths has shown, through a detailed history of over a dozen Elizabethan and early Stuart trading companies, that what he calls the "plantation companies" were an offshoot of the same mercantile impulse that drove the establishment of continental trading companies. See, Sir Percival Griffiths, *A Licence to Trade: The History of the English Chartered Companies* (London: Ernest Benn Limited, 1974), especially Part Three.

enterprises, corporate charters tended to establish privileges and jurisdictions related to trade and commerce; a corporation existed to meet a particular end, after all, and its charter (and the authority it conveyed) reflected that purpose.

As the commercial focus of the Atlantic settlements shifted, however, from trade to agriculture, so too did the judicial and administrative requirements of potential Atlantic entrepreneurs. With this new interest in productive agriculture supported by a permanent labor base, property in overseas land became the focus of those who sought royal charters. Thus, by the mid-1620s a new form of charter appeared by which the king granted large parcels of his overseas dominions to individual grantees, whom he named Lord Proprietor of the territory in question. With these grants in land came an expansive franchise that conveyed authority far exceeding that offered to colonial corporations.<sup>14</sup> As I will demonstrate, changing political as well as commercial motivations drove this shift from corporate governance to individual, proprietary control. On the one hand, the emergence of the proprietary grant reflected the crown's interest in promoting the king's prerogative rights by regularizing and streamlining local authorities. On the other, as land became more valuable with the emergence of large scale tobacco and sugar production, employing a traditional tenant-lord relationship allowed for more efficient oversight of both the land and the tenants needed to work it.

Interestingly, these proprietary charters had no clear parallel in the domestic English experience. Certainly, the tenures created by the grant were rooted in traditional English practice. For instance, each proprietor held his lands *in capite* by knight's service, a long-standing feudal tenure with roots in the distribution of land that followed the Norman Conquest. And, as we will

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<sup>14</sup> For an overview of this transition from trade-based, corporate colonial endeavor to a more agriculturally focused enterprise, see Tomlins, "Legal Cartography," 337-344.

see, proprietary privileges were expressed with reference to a well-known domestic institution: the county palatine of Durham, whose Bishop enjoyed an almost regal authority in his bishopric that operated independently of royal oversight. Yet these domestic parallels were waning in significance at the time the proprietary charters developed. Knight's service had long since lost its original, martial purpose and the obligations associated with it had likewise declined, while the independence of Durham had dwindled dramatically over the course of the sixteenth century.<sup>15</sup>

Moreover, no shift from corporate to proprietary administration occurred within England, as it did in the Atlantic context. Throughout the Stuart period, corporations continued to govern the same boroughs, universities, and parsonages they had overseen for centuries, and no English corporate franchise ever became a proprietary holding.<sup>16</sup> For these reasons, while proprietary charters extended some English traditions, and were still very much expressions of English law, the emergence of this new form suggests a change in attitude by the king and his advisors regarding the purpose, utility, and the judicial standing of the king's overseas dominions. Significantly, the legal and administrative practices employed by the crown to oversee these dominions likewise shifted, as we will see in Chapter Three.

Ultimately, it is difficult to recover how aware contemporaries were of the distinctions I have outlined between corporate and proprietary charters. Yet understanding contemporary attitudes towards these instruments, and the different governmental and administrative systems they engendered, is necessary to explain why proprietary government grew to supplant corporate

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<sup>15</sup> On Knight's Service and the Bishopric of Durham, see below pp. 28.34.

<sup>16</sup> That is not to say that individual franchises did not exist in England; they certainly did and always had. No borough corporation, nor any association comparable to a colonial enterprise, ever became the property of a single individual.

control as the primary means of regulating colonial enterprise in this period. On the one hand, the terms themselves are largely modern creations, though contemporaries certainly spoke of corporations and proprietors in reference to colonial governments. On the other hand, it does seem that the emergence of the proprietary form beginning around 1620 was driven mainly by individual grantees with colonial ambitions who recognized the benefits that came with sole control of a given territory and its administration. Thus tracing the development of royal colonial letters patent reveals a growing recognition on the part of the king, his council, and those involved in overseas enterprise that the king's Atlantic dominions were jurisdictionally and administratively distinct from his other dominions and required new modes of legal and administrative thinking to govern them.

### *Calvin's Case*

Before examining in more detail the way in which the crown defined and refined its relationship with the king's overseas dominions, we must first establish the legal status of those subjects who chose to reside outside the realm. In the early modern legal mind, personal status, that is the legal standing of an individual in relation to the law, followed a simple dichotomy: an individual was either alien born or a subject of the king.<sup>17</sup> Subjects of the king, whether natural born or created through legal action, enjoyed the full protection of the king and his justice. So too did aliens in amity with the king, though with some restrictions (for instance aliens of any kind could not sue for property within England). Though the rights, liberties, and obligations of subject and alien

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<sup>17</sup> As Keechang Kim has shown, this binary understanding of personal status, though firmly entrenched by the beginning of the seventeenth century, represented a fairly recent development in the early modern conception of subjecthood. For a thorough discussion, see Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge: Cambridge University Press, 2000), esp. chapters 6 and 8.



were well understood, contemporary jurists were less certain when it came to answering one fundamental question: what made an individual a subject or an alien?

This question of the legal standing of the king's subjects born or living outside of England was under much debate in the early years of James' reign, given the peculiar circumstance of a Scottish king gaining the English throne. Though James wished for a closer union of his two kingdoms along all lines—legal, social, and economic—many in England did not believe it desirable (or even possible) to unite two such disparate nations.<sup>18</sup> The issue came to a head, legally speaking, in 1607 when all the king's justices met to hear the case of Robert Calvin, a young Scot who had sued for relief in King's Bench after the unlawful seizure of some lands he claimed to hold by inheritance within England. The case, which Edward Coke described as “the longest and weightiest that ever was argued in any court” for its focus on the essentials of subjecthood and allegiance, has become central to many discussions of the legal foundations of England's Atlantic colonies.<sup>19</sup>

The essential question in *Calvin's Case* was deceptively simple: was Calvin an alien or a subject of the English king? If an alien, he would be disabled from suing for relief in the common pleas, and thus his suit against the plaintiffs should be dismissed. All parties agreed that the matter turned on the question of allegiance, though the opposing sides offered very different definitions of this quality. The attorneys arguing the case for the defendants focused on the king's dual political capacities: James, King of England, they held, should be reckoned distinct

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<sup>18</sup> For an overview of the challenges to the Scottish union, see Mark Kishlansky, *A Monarchy Transformed: Britain 1603-1714* (London: Penguin Books, 1996), chapter 3.

<sup>19</sup> *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present*, William Cobbet, Thomas Bayly, and T.B. Howell eds., vol. 2 1603-1627 (London, 1809), cols. 611-612.

from James, King of Scotland, and as such the subjects of one should be alien to the other. Furthermore, because Calvin was born in the Kingdom of Scotland and thus not “inheritable to the laws of England,” he could not be considered a subject of the English king.<sup>20</sup> Coke, whose opinion fell in line with the majority of the justices, disagreed, stating that allegiance stemmed from the law of nature, which was “parcel of the law of England.”<sup>21</sup> Furthermore, the subject owed allegiance to the personal body of the king, rather than to his political body. Allegiance, after all, defined a reciprocal bond of obedience and protection. It would be impossible, Coke argued, for the subject to offer his fidelity to the king’s immaterial, unseen, and immortal political body. By the same reasoning, only the physical person of the king could protect and defend his subjects.<sup>22</sup> Thus, when two crowns vest in one individual, the subjects of one became subjects of both. Ultimately, Coke’s reasoning prevailed, and the justices found in favor of Calvin.

Though Calvin’s Case had little immediate political or social impact within England, the decision and the arguments supporting it have occupied scholars for centuries. For American legal scholar Polly Price, Coke’s formulation of subjecthood based on personal allegiance to the body of the king, had implications far beyond the case of Robert Calvin.<sup>23</sup> The decision, Price argues, ultimately became the basis of a common law rule that defined subjecthood and citizenship with reference to territory. This notion of *jus soli* took root both within England and

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<sup>20</sup> *State Trials*, 2 col. 611.

<sup>21</sup> *State Trials*, 2 col. 632.

<sup>22</sup> *State Trials*, 2 cols. 624-632.

<sup>23</sup> Polly Price, “Natural Law and Birthright Citizenship in *Calvin’s Case* (1608),” *Yale Journal of Law & the Humanities* 9, no. 1 (Winter, 1997): 73-146.

its colonies (and former colonies), and lasted into the modern age.<sup>24</sup> The major innovation in Calvin's Case, Price contends, was the way in which Coke and his fellow justices merged continental, civil law ideas of birth right status with English common law notions of allegiance and obedience.

Critically, Coke held that an individual's status was "vested by birthright" by the law of nature, which, as we have seen, Coke argued was part of English law.<sup>25</sup> Though natural law established when a person's status formed, it did not provide any clues as to what criteria ought to define that status. For Price, Coke addressed this difficulty by asserting that "persons born in territories acquired by an English sovereign 'in blood and by descent' were natural subjects in England."<sup>26</sup> The upshot of this definition of subjecthood was that such status would henceforth be awarded "solely by the criteria of birth within a territory," as Price argues.<sup>27</sup> Yet in the passage Price quotes, Coke does not speak explicitly of subjects in relation to the territory of their birth (however it might have come to the king). Instead, Coke sought only to establish that subjects owed their allegiance to the king's personal body, and not to the king's "politick capacity ..., that is, to his crown or kingdom distinct from his natural capacity."<sup>28</sup>

Thus, while Price's analysis certainly introduces time as a factor in determining allegiance, she does not convincingly show that place had any bearing on the justices'

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<sup>24</sup> Price, "Calvin's Case," 145; 77n13. Price discusses at length the various readings of Calvin's Case that early United States Supreme Court justices offered in defining American citizenship, noting that "courts in the United States firmly grasped Calvin's Case and used it precisely to define the relationship of allegiance owing by birth." Price also notes that the United Kingdom abandoned *jus soli* only in 1981.

<sup>25</sup> Price, "Calvin's Case," 116.

<sup>26</sup> Price, "Calvin's Case," 114. Only the inner quotes are Coke's words, the rest is Price's addition.

<sup>27</sup> Price, "Calvin's Case," 143.

<sup>28</sup> Price, "Calvin's Case," 114. *State Trials*, 2 col. 624.

understanding of allegiance and subjecthood.<sup>29</sup> In fact, just the opposite was true, as Coke, along with Roger Bacon and Lord Chancellor Ellesmere, effectively removed place as a consideration when determining an individual's legal subject status. Coke, for instance, argued that "it is '*nec coelom, nec solum*,' neither the climate nor the soil, but '*ligeantia*' and '*obedientia*' that make the subject born." And because "ligeance, and faith and truth ... are qualities of the mind and soul of man," they "cannot be circumscribed within the predicament of *ubi*."<sup>30</sup> Ellesmere likewise suggested that the political boundaries that marked one territory off from another had no effect on subjecthood, asking "shall a foote breadth, or an inch breadth of ground make a difference of birth-right of subjects borne under one kinge?" Ellesmere took the point even further, suggesting that "where there are not certen bounds or limits knowne at all, but an imaginary partition wall, by a conceipted fiction in Lawe," the subject's allegiance to his king is not affected.<sup>31</sup>

This formulation of allegiance, as a mental rather than a physical quality, implies that subject status did not require birth within the political boundaries of a particular kingdom. In fact, in Ellesmere's view, the bonds of allegiance and protection that defined subjecthood were what transformed land into political territory. To show this, Ellesmere gave the hypothetical example of "a king of subjects without land in possession," a situation that might occur if "a king and his subjects bee driven out of his kingdome." In this case, though neither king nor subject

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<sup>29</sup> Price, "*Calvin's Case*," 116-117. Because an individual's status was vested at birth, Coke contended that the king's Scottish subjects born after his ascension to the English throne were natural subjects in England, while their parents, born before that event were not. Thus, even though by 1607 when the case reached the Exchequer chamber, both the anti-nati and the post-nati owed allegiance to the same king, the laws of nature assured that only those born after a specific time would be considered English subjects.

<sup>30</sup> *State Trials*, 2 col. 617.

<sup>31</sup> "The Speech of the Lord Chancellor of England, in the Eschequer Chamber, touching the *Post-Nati*" in Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge: University Press, 1977), 246.

possess any territory, “yet notwithstanding hee continueth still king over those subjects, and they are still bound unto him by their bond of allegiance, wheresoever hee and they bee.” Ellesmere concluded by suggesting that it was these bonds of allegiance that defined territory and made good a king’s claim, for “there can not bee a king of land without subjects.” Such a situation would lead only to rule over the beasts (“*imperium in belluas*”).<sup>32</sup> Thus not only was subjecthood not tied to territory in the arguments offered in Calvin’s Case, the bonds of allegiance and obligation that defined subjecthood in fact *created* territory and gave force to a king’s political territorial claims.

This non-territorial definition of subjecthood has significant implications when considering the legal status of the king’s subjects who sought to establish American settlements. Not only did the king’s subjects enjoy the full protection of justice while they remained within his allegiance, this protection was, according to Coke, “general over all his dominions and kingdoms, as well in time of peace by justice, as in time of war by the sword.”<sup>33</sup> By removing themselves from the realm and taking residence across the ocean, the king’s subjects did not lose their rights as Englishmen nor were they forced to accept any diminished capacity. Subjecthood, and the reciprocal bond of allegiance out of which it arose, established a kind of encompassing legal net that covered all the king’s subjects.

This connection between King and Subject overrode any local variation in law or custom. Whether born in England, Ireland, Guernsey, or Virginia, any individual who offered their faith

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<sup>32</sup> Knafla, *Law and Politics*, 246-247.

<sup>33</sup> *State Trials*, 2 col. 623.

and allegiance to the English king could seek his justice. Lord Chancellor Ellesmere made this point perfectly clear in his speech before the justices:

All the king's subjects ... borne in all his Dominions ... are bound to him by one bond of Faith and Allegiance: And in that, one is not greater nor lesser than an other: nor one to bee preferred before another: but all to bee obedient alike; and to be ruled alike; yet vnder seuerall Lawes and Customes.<sup>34</sup>

Thus, all were unified in their shared legal relationship with the king. In this way, the king's basic obligation to provide justice to all his subjects, no matter their location, established an overarching, fundamental jurisdiction in all matters of justice pertaining to his subjects. From this fundamental royal jurisdiction, expressed by means of the royal prerogative, arose the subordinate jurisdictions that would define law and government in his overseas dominions.

Despite the fundamental legal unity of all the king's subjects, scholars often interpret Calvin's Case, and particularly Coke's arguments, in such a way as to frame the colonial legal experience as distinct from the domestic. Much of the focus on what scholars often call the "imperial constitution" stems from an overemphasis on certain assumed limitations of the common law. One fundamental problem of much colonial American constitutional history is, according to Ken MacMillan, the confounding fact that "newfound lands were outside of the realm of England and, therefore, outside the jurisdiction of the common law and the ordinary prerogative."<sup>35</sup> Not only were these lands beyond the reach of the common law, they were essentially without law from the moment of their acquisition. This meant, as MacMillan argues, that it was "up to the king to decide whether to introduce his own body of laws (*lex coronae*) ... or to extend English law (*lex terrae*) into the conquered territories by formally uniting the realms

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<sup>34</sup> Knafla, *Law and Politics*, 237.

<sup>35</sup> MacMillan, *Sovereignty and Possession*, 33.

together.”<sup>36</sup> The fact that the crown chose not to unify its new acquisitions with the realm of England meant that the king was required to administer them through application of his absolute prerogative. This leads MacMillan to conclude that Roman law (which he equates with the king’s absolute prerogative), rather than the English common law, formed the “legal foundations of Empire.”

MacMillan’s understanding of the legal status of newly acquired territories follows the brief formulation on the legal status of conquered territories that Coke offered in his report on Calvin’s Case. In discussing why the law holds infidels to be “perpetual enemies” to the king, Coke noted that an important distinction existed between the “conquest of a Christian kingdom, and the conquest of an infidel kingdom.”<sup>37</sup> In the first case, the conquering monarch may alter existing laws at his pleasure, though the laws of the conquered territory remained in force until he did so. In the second case, the laws of the infidel kingdom were immediately made void, and that land would remain without law until the conquering king should offer new law. For MacMillan, Coke viewed the king’s newly acquired Atlantic dominions to be conquered infidel kingdoms, and thus without law from the moment of their acquisition. It was for this reason, as MacMillan concludes, that royal charters “authorized holders to make law,” in a way “consistent with Coke’s formulation in Calvin’s Case regarding conquered infidel realms.”<sup>38</sup>

Yet this emphasis on the limitations of the common law, and thus its inability to serve as the legal foundation for constitutional authority outside the realm of England, represents a bit of a red herring. As we will see, royal patent holder’s ability to make laws and ordinances was not

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<sup>36</sup> MacMillan, *Sovereignty and Possession*, 33.

<sup>37</sup> *State Trials*, 2 col. 638.

<sup>38</sup> MacMillan, *Atlantic Imperial Constitution*, 25-26.

limited to situations involving “conquered infidel realms.” Many domestic patent holders held such authority, and the ability to make law was so common that some commenters believed it to be inherent in all communities. Thus the king and his legal advisors were not following Coke’s views on conquered realms when drafting colonial charters. Instead they simply followed established English tradition.

Ultimately, the justices who ruled in favor of the *post-nati* in Calvin’s Case affirmed a widely held notion that the king’s legal protections travelled with his subjects.<sup>39</sup> The significance of the case stemmed from the careful and exhaustive manner by which justices like Coke, Bacon, and Ellesmere demonstrated this fact. The timing of their arguments, expressed only months after the issuance of the first Virginia charter, has assured Calvin’s Case a place of honor in the halls of American constitutional thought. Yet despite the critical legal foundation that Calvin’s Case established, more work was necessary to define the relationship between the king and his overseas dominions, as well as the subjects who resided there.

For this, the king and his legal advisors crafted detailed letters patent that each contained a set of carefully articulated rights and responsibilities to be enjoyed by their holder. With these charters the crown elaborated and strengthened the inchoate jurisdictional framework that arose out of the natural connection between king and subject. The remainder of this chapter will examine several representative charters in depth, in order to demonstrate the king’s attitude toward his Atlantic holdings. In doing so, I will argue that the early Stuart kings held a holistic and consistent understanding of governance in which all the king’s dominions fit easily and without prejudice.

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<sup>39</sup> Price, “*Calvin’s Case*,” 84.



### **The Corporate Model: Virginia, 1606-1609**

The first Atlantic charter associated with any lasting territorial settlement came in 1606 with James I's grant to a group of merchants and courtiers who planned to settle a plantation in Virginia. These men, the charter explained, had been "humble suitors" to the king, seeking "Licence, to make Habitation, Plantation, and to deduce a colony of sundry of our People into that part of America commonly called VIRGINA." The king agreed and granted the group a relatively limited license to operate in Virginia. The charter established two separate endeavors, efficiently named the First Colony and the Second Colony, and gave each leave to settle distinct plantations on the coast of America. The charter carefully detailed the boundaries of each colony, and commanded that none of the king's other subjects should attempt to "plant or inhabit" those regions without license from the newly established colonies. To maintain order within the colonies, each would have two governing councils comprised of thirteen men, one to sit in London and one in Virginia.<sup>40</sup>

While the king granted the two councils in Virginia authority to "govern and order all Matters-and Causes" which should arise in the colonies, they were to do so "according to such Laws, Ordinances, and Instructions, as shall be, in that behalf, given and signed" by the king. Moreover, while each colony enjoyed the exclusive right to operate in the territory assigned to it, the charter did not contain a direct grant of any lands. Instead, the king agreed to provide future grants of land to "such Persons ... as the Council of that Colony ... shall ... nominate and

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<sup>40</sup> "The First Charter of Virginia – 1606," in Francis Newton Thorpe, ed., *The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or Heretofore Forming the United States of America*, vol. 7, *Virginia—Wyoming—Index* (Washington: Government Printing Office, 1909), 3783-89.

assign,” but only after “petition in that behalf be made.”<sup>41</sup> Thus the settlers did not directly control the disposition of the lands on which they’d be given license to settle. Instead, the direction of the colonies’ affairs remained firmly in the king’s hands.<sup>42</sup> The purpose of this charter clearly was to establish a carefully regulated commercial enterprise, and conveyed only the limited authority necessary for the patent holders to pursue their mercantile ends.

In 1609, prompted perhaps by the somewhat vague and unsettled nature of this first charter, the principal backers of the Virginia enterprise petitioned the king for “a further enlargement of [their previous] Grant, Privileges, and Liberties.” Specifically, the promoters asked the king to incorporate their association into a joint-stock trading company.<sup>43</sup> The king complied, and issued a second charter on May 23, 1609 that established a new legal entity: The Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony in Virginia.<sup>44</sup> The charter also ensured that the newly incorporated company would enjoy an expanded franchise, greatly increasing its authority to govern both its operations in London and its settlements in Virginia.

The directors’ choice to seek incorporation, and the king’s support in granting it, was significant not only for what it accomplished (a substantial increase in the directors’ authority in Virginia) but for how it accomplished that end, namely the creation of a corporation. The reasons to seek corporate status were many in this period. For one, corporations were well understood

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<sup>41</sup> “First Charter of Virginia,” 3784.

<sup>42</sup> “First Charter of Virginia,” 3785.

<sup>43</sup> “Second Charter of Virginia – 1609,” in Thorpe, *Federal and State Constitutions*, 7:3795. As the records of the Privy Council for James’ reign prior to 1613 perished in a fire, no copy of this petition exists. The quotation comes from the charter itself.

<sup>44</sup> “Second Charter of Virginia – 1609,” 3795.

legal entities with a long history of operation both in and out of the realm. Furthermore, all the major foreign trading companies of the time, including the Levant Company and the Muscovy Company, were incorporated in much the same way as the Virginia Company.<sup>45</sup> The list of associations that regularly enjoyed corporate status included not only foreign trading companies but also boroughs and towns, universities, almshouses, hospitals, parsons, deans, even the king himself. Corporate charters of all types were increasing in popularity at the time the directors of the company sought their new charter. According to Phil Withington, during the sixteenth century the number of incorporated boroughs within England shot from thirty-eight to 130. This trend continued into the Stuart period, with over forty cities and boroughs seeking corporate status in the two decades of James' reign.<sup>46</sup> The corporate form, therefore, provided a ready-made and well-understood mode of association for the directors of the Virginia Company as they sought to increase their control over the territories in which they'd settled and to refine their privileges.

Given the popularity of corporate governance in England's cities, boroughs, and foreign trading companies, it is important to understand what benefits corporations provided both to their members and to the crown. One major attraction of corporate status derived from its basic definition, namely that a corporation was a "body politick that indureth in perpetuall succession."<sup>47</sup> This essential feature of any corporation assured a level of continuity and also flexibility as members could come and go, but the liberties, obligations, and interests of the

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<sup>45</sup> For a discussion of these two companies, including the circumstances of their incorporation, see Griffiths, *Licence to Trade*, chapters 2 and 3.

<sup>46</sup> Phil Withington, *The Politics of Commonwealth: Citizens and Freemen in Early Modern England* (Cambridge: Cambridge University Press, 2005), 18.

<sup>47</sup> William Sheppard, *Of corporations, fraternities, and guilds ... With forms and presidents, of charters of corporation* (London: 1659), 1.

association continued indefinitely. This was especially attractive in a purely commercial enterprise like the Virginia Company, which required the concerted effort (and wealth) of a number of individuals to succeed. This flexibility was especially apparent in a joint-stock company such as the kind that the Virginia Company charter created. Each member in a joint-stock company ventured only a set amount (for which they would be responsible and no more), and as such the entire project did not rest on the success or failure of one individual or one voyage.

A second significant benefit of the corporate form was that the law reckoned corporations to be much like a real person in certain regards, though they possessed no physical form. This property of corporations meant they were able to act in most manners just as any other of the king's natural subjects. For instance, they could take and possess lands and could sue and be sued in any of the king's courts.<sup>48</sup> In this way, the legal protections available to all the king's natural subjects were likewise available to his corporate subjects.

Along with the basic features inherent to all corporations, namely their legal personhood and perpetual succession, each corporation existed to meet a particular need or to pursue a specific end. For that reason, the king further endowed his corporations with a range of rights and franchises that allowed them to succeed in that goal. Perhaps the most significant of those rights was the ability to establish laws, councils, and courts in order to govern the internal behavior of the corporation's members as well as its external dealings. The overriding need for good government informed the formulation of James' 1609 grant to the Virginia Company. Here the king declared that "the good and prosperous Success of the said Plantation, cannot but chiefly

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<sup>48</sup> For a discussion of the personhood status of early modern corporations see Paul D. Halliday, *Dismembering the Body Politic, Partisan Politics in England's Towns, 1650-1730* (Cambridge: University Press, 1998), chapter 2.

depend next under the Blessing of God, and the Support of our Royal Authority, upon the provident and good Direction of the whole Enterprise by a careful and understanding council.”<sup>49</sup> To that end, James established a council comprised of the principal promoters of the venture and headed by a treasurer that would reside in London and collaborate with the king in governing the affairs of the company.

Councils like the one established by the Virginia Company charter were a common feature of other corporate charters as well. The Muscovy Company charter, for instance, established a board of twenty-eight counsellors and advisors who assisted the company’s governor.<sup>50</sup> The East India Company, formed nine years prior to the Virginia Company, likewise had a committee of twenty-four men established by charter.<sup>51</sup> Governing councils were not limited to foreign trading companies, however. The mayors, bailiffs, and burgesses of Leicester,<sup>52</sup> Kingston,<sup>53</sup> and dozens of other urban corporations constituted a kind of governing council, as did the master and assembly that most hospital corporations possessed or the provost and fellows of a university. All such bodies were councils charged with the governance of their associations.

Councils such as these served often as the functional infrastructure of government within the locality and helped integrate local communities into the broader national political and

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<sup>49</sup> “Second Charter of Virginia,” 7:3796.

<sup>50</sup> Richard Hakluyt, *The Principal Navigations, Voyages, Traffiques & Discoveries of the English Nation*.... (London: J.M. Dent, 1910), 1: 320.

<sup>51</sup> Panchanandas Mukherji, ed. *Indian Constitutional Documents (1600-1918)* (Calcutta: Thacker, Spink, 1918) 1:3.

<sup>52</sup> “Charter of James I, April 17, 1609” in Helen Stocks, ed., *Records of the Borough of Leicester: Being a Series of Extracts from the Archives of the Corporation of Leicester*, vol. 4, 1603-1688 (Cambridge: University Press, 1923), 80.

<sup>53</sup> “Charter of Edward IV” in George Roots, *The Charters of the town of Kingston upon Thames: translated into English with occasional Notes* (London: 1797), 54.

economic sphere. As Withington argues, the increase in corporate grants discussed above coincided with a period of intense commercial expansion and social dislocation. Many boroughs sought corporate status as a means to regulate their burgeoning local economies through fairs, markets, and other means. By ensuring stability within their local communities, and settling consistent and fair economic policies in relation to the borough or cities local produce, the councils that oversaw these corporations helped integrate their communities into the larger political body of the nation.<sup>54</sup> In this sense, the Virginia Company experience was little different. Through their commercial activities, the company helped integrate Virginia into both the broader English economy but also into England's growing political sphere. The establishment in 1611 of a local council residing in Virginia extended this process directly to the colonial territory, strengthening the endeavors' integration into the nation's political life that much more.<sup>55</sup>

Of course, to be fully effective council members required the ability to make and enforce laws, and indeed such privileges can be found in the Virginia Company's 1609 corporate charter. The wording of this important clause reads much like similar grants found in most corporate charters. The king, for the "good of the Adventurers and inhabitants" of the plantation, granted the treasurer and council license "to make, ordain, and establish all Manner of Orders, Laws, Directions, [and] Instructions ... fit and necessary for and concerning the Government of the said Colony and Plantation." The only limit on this license was that "the said Statutes, Ordinances and Proceedings as near as conveniently may be, be agreeable to the Laws, Statutes,

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<sup>54</sup> Withington, *Politics of the Commonwealth*, 32-35. Withington offers a further discussion of the critical role corporations played in integrating the locality into the larger national economic and political spheres in his later work on contemporary ideas of society. See, Phil Whithington, *Society in Early Modern England, The Vernacular Origins of Some Powerful Ideas* (Cambridge: Polity Press, 2010), 217-221.

<sup>55</sup> Provisions for this local council appear in a third charter, granted to the company in 1611. This was essentially a clarifying charter that established the rules and procedures by which the Company was to elect officers and hold courts. "Third Charter of Virginia – 1611-1612," in Thorpe, *State and Federal Constitutions*, 7:3802-3810

Government, and Policy of this our Realm of England.”<sup>56</sup> Once again, similar license to make laws and ordinances for the government of the corporation can be found in almost all corporate charters. Edward IV, in a charter issued to the townsmen of Kingston-upon-Thames in 1470, granted the corporation the right to “make and ordain within that town ordinances and statutes” “from time to time, for the whole-some regulation and government of that town.”<sup>57</sup> Likewise, Elizabeth’s grant to the Society of Weavers of Newberry included a license to “make Lawes and Ordinances agreeable to reason and not in any wise contrary and repugnant to the Lawes and Statutes of the Realm.”<sup>58</sup> Similar licenses appear in charters granted to hospitals, universities, and trading companies.<sup>59</sup>

In all of these cases, the purpose for this license to make law is clear: such ordinances were required for the good government of the corporation. This was, in fact, so fundamental to the nature of a corporation that William Sheppard, a mid-century expert on corporations, believed that it was “not necessary” for a license of this type “to be inserted in the Charter; For by the very Act of Incorporating, this power is given.”<sup>60</sup> A line of reasoning found in Coke’s report on the Chamberlain of London’s Case suggests that the right to make laws to ensure good government may in fact have been inherent to all communities, whether incorporated or not. At question in the case was whether the Mayor and Aldermen of London could make laws

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<sup>56</sup> “Second Virginia Charter,” 7:3796.

<sup>57</sup> Roots, “Charter of Edward IV,” 54

<sup>58</sup> Sheppard, *Corporations*, 100. Sheppard takes this clause from the Weavers Society charter.

<sup>59</sup> Thomas Sutton had the right to establish laws to govern his poor-relief hospital, “the same [being] requisite for the well-ordering and government of the poor.” See 5 Co. *Rep* 30. Both the Muscovy Company and the Levant Company charters included license to make laws very similar to the Virginia Company’s license. For the Muscovy Company charter see Hakluyt, *Principal Navigations*, 323.

<sup>60</sup> Sheppard, *Corporations*, 82.

restricting the sale of wool in the capital. In determining the issue, Coke found that the “inhabitants of a Town without any Custome may make Ordinances or By-laws for the reparation of the Church, or a high way, or any such thing which is for the general good of the publick.”<sup>61</sup>

Sheppard’s definition of corporate authority, and Coke’s reasoning in the Chamberlain of London’s case suggests that even if no express license existed to support the right (whether by grant or prescription), townsmen were able to establish laws to ensure the public good of the community. Yet, while each community enjoyed an inherent right to establish law for the good government of their association, this license was not without limit. As noted above, the king required that all laws and ordinances created by the Virginia Company must be “as near as conveniently may be” agreeable to the laws of England. As Mary Bilder has shown, this limiting clause, which regularly appears negatively as “may not be repugnant to the laws of England,” appears in all colonial charters. According to Bilder, the inherently vague nature of this non-repugnancy clause formed the foundation of a kind of transatlantic constitution. By constantly negotiating the terms of repugnancy, colonists and the crown clarified the limits of government in England’s Atlantic territory.<sup>62</sup>

As central as Bilder and others have found this non-repugnancy clause to the relationship between royal center and Atlantic periphery, many domestic charters also contained similar language of non-repugnancy. For instance, non-repugnancy restrictions appear in Elizabeth’s grant to the Newberry Society of Weavers quoted above, as well as in the statute authorizing Thomas Sutton’s London hospital.<sup>63</sup> The non-repugnancy clause was so common that Sheppard

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<sup>61</sup> 5 Co. Rep 63.

<sup>62</sup> Bilder, *Transatlantic Constitution*, 1-5.



included it in the model charter he appends to his history of corporations. Yet even though his template includes the clause, Sheppard again found it “idle & to no purpose,” because any laws made by a corporation that run contrary to English law were already “void by the very common law.”<sup>64</sup>

Clearly, the right to establish laws for the good government of a community, and the limitation that those laws should not be repugnant to the laws of England, were not exclusive to the Atlantic context. Moreover, the regularity with which the king granted his domestic franchise holders the ability to craft and enforce law puts to rest the notion that the unsettled status of the king’s Atlantic dominions meant that those territories required special treatment. The right to establish law found in most colonial charters was not simply “consistent with Coke’s formulation” regarding conquered infidel kingdoms, as MacMillan argues. Instead, such grants were necessary features of English governance that allowed the king to fulfill his obligations of protection and justice in situations where he could not physically do so.<sup>65</sup> And though particular laws or processes might differ from place to place, the justice done by the king’s franchise holders was the king’s justice, as many early modern jurists held.<sup>66</sup>

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<sup>63</sup> Sheppard, *Corporations*, 24-5, 100.

<sup>64</sup> Sheppard, *Corporations*, 82.

<sup>65</sup> John Spelman, in his 1519 reading of *quo warranto* given at Grey’s Inn, explained this essential feature of English governance. Spelman first noted that “the governance of justice resides solely in the king’s person.” Yet, “because its preservation is so great a task that [the king’s] own person does not suffice, it is requisite that he should commit the administration of justice to some persons beneath him.” Spelman continues, explaining the various means by which the king could transfer the administration of justice, included by royal letter patent. See, *John Spelman’s Reading on Quo Warranto delivered in Gray’s Inn (Lent 1519)*, J.H. Baker ed. (London: Selden Society, 1997), 120.

<sup>66</sup> According to Louis Knafla, for instance, Ellesmere believed that “the monarch was personally involved in the making of all law.” Even decisions rendered by the king’s justices could be considered the product of the king’s personal authority, as the “judges were empowered by the King to execute his legal privileges in the courts of law.” See, Knafla, *Law and Politics*, 73.

It was this fact that gave the Virginia Company charter its significance. By following the form of the domestic corporate charters that preceded it, the charter used the common law language of franchise and privilege to define the governmental structures that would take root across the Atlantic. This not only allowed for the seamless integration of Virginia into the broader English legal and political order, it also provided the crown the tools necessary to review that government using standard common law procedures, as we will see in the following chapter.

Ultimately, the familiarity and flexibility of the corporate model appealed to many of the promoters and adventurers who sought to establish the first English settlements in the Atlantic. Along with the Virginia Company of London, the London and Bristol Company whose interests ran to Newfoundland (1610) and the Somers Island Company in Bermuda (1615) sought incorporation from James in the first decades of the seventeenth century.<sup>67</sup> And like the Virginia Company, these associations were largely focused on trade and commerce, an enterprise for which the joint-stock formula was well-suited. As was the case with domestic borough and city corporations, the struggle to maintain unity in the corporate community dogged these overseas associations throughout this period. It was for this reason, as I will discuss in more depth in the following chapter, that the crown, and particularly the king's courts, became steadily more involved in regulating, reforming, and ultimately dissolving, these corporations. Under the weight of these regulations, and recognizing the emerging reality that the wealth of North America and the Caribbean lay not in trade with its peoples but in the produce of its lands, aspiring Atlantic adventurers sought new forms of legal control that valued land over flexibility in trade. This new focus on land and agricultural production required a new form of charter that

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<sup>67</sup> For the Bristol and London Company Charter see, D. W. Prowse, *A History of Newfoundland from the English, colonial, and Foreign Records* (Belville, Ontario: Mika Studio, 1972), 122-25. For the Somers Island Company Charter, see J.H. Lefroy, *Memorials of the Discovery and Early Settlement of the Bermudas or Somers Islands, 1515-1685* (London: Longmans, Green, and Co., 1887-79), 1: 83-99.

eschewed the corporate format in favor of a more personal, and more substantial, grant of authority.

### **The Proprietary Grants: Avalon and the Caribbees**

The first of example of this new kind of charter appeared in April 1623 when James issued letters patent to George Calvert that covered the Avalon Peninsula in Newfoundland. Calvert's Avalon charter differed significantly from the corporate charters that had come before it.

Whereas the corporate charters created a legal entity composed of a number of individuals who collectively managed the affairs of the colony, the Avalon charter vested control of the territories in question in one man. As sole proprietor of the territories granted him, Calvert enjoyed significant authority over both the land he held and the people who resided there. As such, Calvert's charter (and the many other grants that followed its form) represents a shift in the crown's approach to governance in the Atlantic.

Initially, Calvert's Avalon charter looks no different from the Virginia Company charter. It begins with the same greeting from the king (thereby establishing the authority of the grant) and continues by explaining the reason for the gift. In this case, James asserts that Calvert, "excited by a laudable and pious zeal to enlarge the extents of the Christian world, and therewithal of our Empire," intended to establish a "very great and ample Colony of the English nation" in a certain "country of Ours situate in the west part of the World." James, approving of his subject's pious ends, then grants to Calvert "All that entire portion of Land situated within our Country of Newfound Land," the boundaries of which the charter lays out in some detail.

This conveyance included all the soil, woods, rivers, fish, and mines found within the region. So far, Calvert's grant follows the earlier corporate grants almost to the letter.<sup>68</sup>

The major innovation in Calvert's charter concerns the rights and privileges Calvert would enjoy in connection with his lands. The most significant of these grants imbues Calvert with almost regal qualities. Following a grant of all the patronage and advowsons of any churches that might be established in the region, James next conveys to Calvert "all and singular the like and as ample Right jurisdictions privileges prerogatives Royalites, Liberties, Immunities, and Franchises whatsoever ... as any Bishop of Durham ... hath at any time heretofore had, held, used, or enjoyed." This Bishop of Durham clause has drawn a great deal of attention from scholars and is worth examining in some detail.

The County Palatine of Durham had a long history of autonomy within the kingdom of England. Though properly an English county, Durham had its own courts and administrative systems. The king's common law writs did not run to Durham, though his prerogative writs did. Overall, the Bishop of Durham represented an almost royal figure in his county; as one fourteenth century lawyer put it, "he is as king there."<sup>69</sup> Durham's autonomy reached its peak in the fifteenth century, and over the course of the sixteenth, the Tudor monarchs regular impinged his liberties and reduced his franchise. Thus by the time of Calvert's grant in the 1620s, though the Palatinate remained, the Bishop had lost most of his temporal jurisdiction.<sup>70</sup> Why then did James appropriate this model when establishing Calvert's proprietary?

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<sup>68</sup> The Avalon Charter is printed in full in J. Thomas Scharf, *History of Maryland, from the earliest period to the present day* (Baltimore: J.B. Piet, 1879), 34-40.

<sup>69</sup> Quoted in Gaillard Lapsley, *The County Palatine of Durham: A Study in Constitutional History* (Cambridge, MA: Harvard University Press, 1924), 1.

<sup>70</sup> Lapsley, *Palatine of Durham*, 1-2.

Scholars have advanced several theories concerning the Bishop of Durham clause found in Calvert's grant and those that followed. According to Viola Barnes, the king invested Calvert with this ample authority for two reasons: to offload the cost of defending his new world territories, and to gain revenue through taxation. To the first point, Barnes argues that the crown had "abdicat[ed] all responsibility for defence and expense in extending his jurisdiction to the New World." To take up the slack, he "bestowed upon promoters ... almost regal power and authority, as his predecessors in England had done to the palatine lord who protected his lands against the Irish, Scotch, and Welsh."<sup>71</sup> MacMillan agrees with Barnes' interpretation, using very similar language: "In exchange for abdicating all responsibility for the defense and maintenance of these overseas colonies ... the king was willing to award the patentees regalian powers."<sup>72</sup> This interpretation follows the notion that the king had little interest (or ability) to defend and support his overseas holdings. Instead he dumped the responsibility onto certain of his magnates, who he favored with spectacular privileges to offset the burden. This also supports a common argument that in considering his new world holdings, the king and his advisors sought to create a pseudo-feudal system, replete with outdated tenures and administrative forms.

This notion that the king endowed men like Calvert with significant authority and autonomy in order that they might accomplish what he was either incapable or unwilling to do is not especially convincing. On the one hand, it is not entirely clear that the Bishop of Durham's exceptional authority had any connection with a responsibility to defend the king's northern borders. Gaillard Lapsey, who wrote one of the few book-length histories of the Palatinate, argues that scholars often held that the Palatinate had its origins in a grant by William the

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<sup>71</sup> Viola Barnes, "Land Tenure in English Colonial Charters of the Seventeenth Century" in *Essays in Colonial History Presented to Charles McLean Andrews* (New Haven: Yale University Press, 1931), 22-3.

<sup>72</sup> MacMillan, *Sovereignty and Possession*, 97.

Conqueror with the express purpose of defense. Yet no such grant from the Conqueror exists. In fact, no original grant of any kind can be found establishing the Durham franchise. Instead, the Bishops regularly claimed that they held their franchise by prescription. Lapsley argues, then, that the autonomy and authority of the Bishop developed slowly during the centuries surrounding the Norman invasion and that they arose to meet no specific purpose.<sup>73</sup>

Moreover, if the king truly did seek a bulwark against native attack or foreign invasion in his Atlantic dominions, why did earlier grants not follow this form? Settlers in Virginia struggled constantly to defend their habitations from native attacks, yet the king never created a palatinate in Virginia. And in any case, all colonial charters, regardless of their form, had provisions for the defense of the plantation.<sup>74</sup>

A more likely explanation for the adoption of the proprietary model with its Bishop of Durham clause is that it reflected a new interest among potential colonial promoters: namely control over territory. Calvert's grant treats territory quite differently from the Virginia charter. Whereas the Virginia Company held its land "as of [the king's] manor of East Greenwich, in free and common socage," Calvert held his land "in capite by Knights service." This meant that Calvert held his land directly from the king, and as such had certain responsibilities to the king for it. In Calvert's case, these proved minimal: he was required to provide the king a white horse whenever he visited Avalon as well as one fifth of all precious metals Calvert might mine in the region. Other Atlantic proprietors had heavier obligations. The Earl of Carlisle, for instance, had to pay the crown one hundred pounds per year in rents on his proprietary of the Caribbee Islands.

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<sup>73</sup> Lapsley, *Palatine of Durham*, 13-18.

<sup>74</sup> The first Virginia Charter, for instance, included the following grant: "That they ... shall and lawfully may from Time to Time and at all Times for ever hereafter, for their several Defence and Safety, encounter, expulse, repel, and resist by Force and Arms ... all and every such Person and Persons whatsoever as (without the special Licence of the said Treasurer and Company and their Successors) shall attempt to inhabit within the said several Precincts and Limits of the said Colony and Plantation." See, "First Virginia Charter," 7:3786-87.

Because Calvert and the other proprietors like Carlisle, held in capite, they could dispose of their lands in ways the Virginia Company could not. For instance, Calvert's grant authorized him to "incorporate towns into Burroughes, and Burroughes into Cittyes." This surpassed the Virginia Company's abilities, as a corporation could not form other corporations. Along with the ability to establish boroughs and cities, Carlisle's grant also included a license to establish new forms of tenure. In both cases, the king also made the proprietor's respective holdings (Avalon in Calvert's case and the Caribbees in Carlisle's) into provinces so that they "may flourish amongst other parts of the Earth." Clearly, territory mattered in these grants.

Control over the people who residing in these proprietary provinces mattered as well. Like the Virginia Company, Calvert could make laws and ordinances for the good government of his provinces. But here again Calvert's grant differed substantially from the Virginia Company's. Perhaps the greatest difference was that Calvert had the power to enforce his laws "by imposition of penaltyes, imprisonment and any other coercion, yes if it be needful ... by taking away member or life." This coercive power, though not unknown in other contexts, was quite substantial and indicated an interest in maintaining control not only over the land of Avalon but its people as well.<sup>75</sup> Calvert could also establish all manner of courts, appoint justices of the peace, and do any other thing needful for the maintenance of peace and good order in his province.

Taken together, the magnification of Calvert's rights and responsibilities relative to his lands and the people resident there suggests a new direction for colonial enterprise. As discussed above, the Virginia Company was interested in trade and commerce, which required only a

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<sup>75</sup> The College of Physicians in London had the right to imprison, though as Coke found in *Dr. Bonham's case*, because their patent did not make them judges nor grant them a court, but gave "an authority only to do it," any imprisonment might be challenged. 8 Co. *Rep.* 121.

passing connection with the territory in which the company had authority to settle. In Calvert's grant, and those that followed like Carlisle, the interest seems to have become permanent and expansive settlement. This makes sense considering the end of these proprietary establishments. For instance, Carlisle's interest in the Caribbees from the outset was the tobacco that they produced. Successful cultivation required not only land but labor, and Carlisle's charter gave him ample authority to manage both.

While a desire for more control in disposing the lands conveyed by these proprietary grants may have inspired aspiring proprietors to seek such charters from the king, this does not fully explain the crown's decision to satisfy the king's suitors. One explanation for this shift in crown policy comes down to court politics. The well-known political struggles between the king and his parliament that characterized the 1620s seem to have influenced not only the crown's choice of suitable proprietors but also the language of the charters themselves. While the corporate charters necessarily diffused authority among a number of individuals who might each have held competing interests and theories on governance, the proprietary charters vested one individual with almost regal authority. This authority, as outlined above, follows quite closely the king's own prerogative rights. At a time when both James and Charles sought to solidify and elaborate their royal prerogative powers, it is significant that each would grant to their nobles to exercise such royal powers as the right to create titles, establish corporations,<sup>76</sup> offer pardons, and even impose capital punishments. In this sense, it is possible to argue that the proprietary grants that became so popular in the later years of James' reign and continued into the early years of his son's (including the ten years of Charles' personal rule), contained within them a

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<sup>76</sup> Along with the right to incorporate boroughs and cities as highlighted above, the Earl of Carlisle, by his grant of the Caribbees, had "free power and authority of conferring and giving Graces, Honours, and Dignities ... with whatsoever Titles."



formulation of royal authority that mirrored the Stuart kings' own understanding of their rights and responsibilities to the realm.

## **Conclusion**

With the shift from incorporation as the basic mode of overseas governance to proprietary control, the crown signaled a change in attitude towards the administration of the king's overseas dominions. As we will see in the coming chapters, the proprietary model allowed the king and his advisors more flexibility and indeed more oversight over the activities of the king's proprietors. Yet with all of its charters, whether corporate or proprietary, domestic or colonial, the crown established a baseline of authority that defined how law could and should operate in the king's dominions. This fundamental authority, as we have seen, depended on the inherent bond of obligation and protection that connected the king to all his subjects. This bond, as the justices in Calvin's Case determined, held as strongly for the king's subjects in England as it did for the king's subjects in Scotland and, by extension, anywhere in the world.

Charters not only defined the relationship between the king and his overseas subjects, they also provided the foundation for royal oversight and review of those subjects. As we will see in the next chapter, the franchises and liberties that established the Virginia Company and provided it the authority to govern its operations in London and in Virginia by right belonged to the king. This meant that if the Company were ever to abuse those privileges, or misuse those franchises, the king would be within his rights to examine and even revoke them, as occurred in November 1623 when James's attorney general brought an information in the nature of *Quo Warranto* against the company in King's Bench. Charters did much more than establish English claims to Atlantic territories, or demonstrate the viability of a proposed commercial enterprise. They were instead the means by which the crown first conceived, then established, and

ultimately reviewed the king's overseas dominions as a legal and political entity. Without charters, and the jurisdictional frameworks they established, there would be no law in England's Atlantic settlements, and without law, there would be no English Atlantic settlements at all.

## **Chapter Two:** ***Quo Warranto* and the Demise of Corporate Colonial Governance**

On May 24, 1624 the justices of the Court of King's Bench determined, on an information in the nature of *Quo Warranto*, that Nicholas Farrer, Sir Edwin Sandys, and twenty eight other members of the Virginia Company of London were guilty of usurping "over the king" various liberties, franchises, and privileges by which they claimed to manage the affairs of the king's subjects in Virginia. As such, the court ordered that the said liberties, franchises, and privileges "be now seized into the hands of ... the king" and that the defendants should be "excluded from all use and claim of the same."<sup>1</sup> This was the final act in a months' long investigation into the affairs of the company by the king's council. The episode began with a private complaint against Sandys' leadership and culminated in the company's rejection of an amended charter that would have dramatically limited the size of its governing body. Faced with the company's intransigence concerning the proposed amendments, the council utilized the best and most efficient remedy the crown had for franchisal review: the courts. With a positive judgment for the king, the council was able to revoke the company charter and begin the work of reorganizing Virginia's governmental structure. Thus ended a fifteen year experiment in the corporate management of England's first permanent settlement in North America.

Despite the dramatic outcome, the dissolution of the Virginia Company could not have come as a surprise to contemporary Londoners, especially among those with connections to the court and the growing community of investors and adventures with interests in America. Reports recounting the mounting hardships facing the colonists in Virginia spread widely in the years

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<sup>1</sup> Susan Myra Kingsbury, ed., *The Records of the Virginia Company of London* (Washington: Government Printing Office, 1923), 4:397-398.

preceding the revocation of the charter, and news of a devastating massacre of over three hundred English settlers was likely still fresh in the minds of many when the proceedings began in November 1623.<sup>2</sup> Tensions within the company's leadership only exacerbated the settlers' troubles in Virginia and added to the sense of mounting disaster that awaited the enterprise. The antagonism between competing parties within the company grew heated enough, in fact, to draw comparisons to the famously quarrelsome Guelphs and Ghibellines of medieval Italy. Faction and discord had become so rampant that one observer advised "if the society be not dissolved soon, or remodeled, worse effects may follow than the whole business is worth."<sup>3</sup> Given the tens of thousands of pounds already sunk into the enterprise by its hundreds of members, not to mention the thousands of settlers who had already ventured their lives in furtherance of the colony, the company's troubles had become almost a national concern.<sup>4</sup>

It is unsurprising then that the crown chose to act, and to act decisively, in order to rectify the growing disorder that ravaged the Virginia Company. Yet, as I will demonstrate in the following pages, the king's action, suggested by his council and implemented by his Attorney General Thomas Coventry, did not amount to an attack on the Virginia Company's rights and privileges. Instead, the *quo warranto* proceedings against the Virginia Company are best viewed as an internally motivated effort to engage royal authority in order to stem discord and promote efficient government within the company and, by extension, Virginia itself. Indeed, the fact that

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<sup>2</sup> Karen Ordahl Kupperman, *The Jamestown Project* (Cambridge, MA: Belknap Press of Harvard University Press, 2007), 307-313.

<sup>3</sup> *CSPC*, 1:51.

<sup>4</sup> Though it is difficult to determine exactly how much investors had expended on the Virginia enterprise, W.R. Scott's study of the Company's finances put the number at nearly £67,000. See, W.R. Scott, *Constitution and Finance of English, Scottish, and Irish Joint-Stock Companies to 1720*, vol. 2, *Companies for Foreign Trade, Colonization, Fishing and Mining* (New York: Peter Smith, 1951), 258.

Coventry chose to proceed against only a handful of individual company members by way of information—a criminal procedure—suggests that the case against Sandys and his supporters was narrowly focused and intended only to quash corporate faction.

That this effort towards internal reorganization and reform aligned with royal interests and was inherently political, as we will see, does not differentiate the Virginia Company's experience from that of other, domestic, corporations who faced similar royal scrutiny in this period. Nor should this episode lead historians to view the company's dissolution as a unique exercise in imperial administration that was distinct from "normal," domestically focused methods of royal jurisdictional oversight. Indeed, as Catherine Patterson has recently demonstrated, *quo warranto* proceedings litter the rolls of King's Bench in the early Stuart period. From 1603 to 1640, Patterson found, over two thirds of all the king's borough corporations (129 out of 171) faced *quo warranto* proceedings, and the king's justices heard hundreds more against individual franchise holders.<sup>5</sup> Even though many of these actions ended in dismissal or a favorable judgment for the defendant, *quo warranto* proved an attractive, flexible judicial maneuver offering benefits to both king and subject.

Given the important role *quo warranto* played in the general administration of the kingdom, its use by the crown in reviewing the Virginia Company is certainly intriguing. In many ways, the Virginia Company's experience with *quo warranto* differed little from that of the numerous domestic corporations whose privileges and authority likewise fell under the king's scrutiny in this period. As was the case in many of the actions involving urban corporations that Patterson examined, the Virginia Company case began as an internal effort to engage royal

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<sup>5</sup> Catherine Patterson, "Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts" *English Historical Review* 120, no 488 (2005): 884.

authority when company member and London alderman Robert Johnson presented a petition against Sandys to the Privy Council in March, 1623. And while the Virginia case is somewhat rare for having reached a final judgment,<sup>6</sup> this judgment came only after months of negotiation between the Privy Council and the company's prominent leaders, during which the latter proved unwilling to concede any changes to their governmental structure.

Of course, though similar in many of its particulars to *quo warranto* actions involving domestic franchises, the Virginia case was unique in that it concerned a joint-stock company involved in overseas trade and colonization. Though numerous foreign-trading companies arranged on a joint-stock basis operated by royal charter at this time, it seems none ever faced royal review through the courts using *quo warranto*.<sup>7</sup> Yet while the overseas focus of the Virginia Company's economic activity, and the locus of its jurisdictional claims, distinguished it from the domestic corporations who faced similar royal review in this period, none of the parties involved disputed the legitimacy of the *quo warranto* proceedings. And when Johnson brought his petition against Sandys to the Privy Council, the lords of the Council and the king's legal officers clearly found no need to innovate or search for new forms of law or proceeding to review the Company's jurisdiction.

The significance of the Virginia *quo warranto* case stems not so much from how the king and his advisors proceeded against the company, therefore, but from the shift in administrative practice and in royal attitude towards the king's overseas dominions that this event signaled. In

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<sup>6</sup> Patterson found that of the 178 actions brought against urban corporations in this period, only five ended in judgment for the crown. Patterson, "Quo Warranto," 885.

<sup>7</sup> The only similar instance of colonial franchisal review occurred fifty years later, in 1684, when Charles II revoked the charter of the Massachusetts Bay Company with a writ of *scire facias*. Sir Percival Griffiths, *A Licence to Trade: The History of English Chartered Companies* (London: Ernest Benn Limited, 1974), 198-99.

broad strokes, the case against the Virginia Company fits squarely within a contemporary trend of royal franchisal review that Patterson describes. The company's corporate structure made it susceptible to the type of faction and internal dysfunction that characterized so many domestic charter reviews in this period. That internal discord only reached the king's ears when dissatisfied members of the company sought the Privy Council's aid by petition. Thus, the Privy Council's role, and later the King's Bench, in this episode, like in dozens of others, was to serve as mediator in a local dispute that directly interested the king.

In the course of its investigations, however, the Privy Council clearly recognized that the scale of the Virginia Company, combined with its responsibilities for providing justice and security for the king's subjects abroad, made its dysfunction and its internal squabbles different in kind from the factionalism that regularly ailed the king's domestic corporations. Whereas the structure of borough corporations kept their governmental and administrative apparatus relatively small and manageable, the joint-stock nature of the Virginia Company allowed for an essentially unlimited membership.<sup>8</sup> The fact that each of the company's members were allowed a direct say in company policy prompted the king and his advisors to develop strong doubts about the ability of such a diverse group, each with different interests, to govern effectively.<sup>9</sup> Thus, while the *quo warranto* proceedings against the Virginia Company stemmed from the same impulse that drove

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<sup>8</sup> For instance, the borough of Leicester's 1609 charter limited membership to the corporation's court to the Mayor, Aldermen, and twenty-four burgesses. By contrast, when the *quo warranto* proceedings against the Virginia Company began in 1623, its membership had grown to over one thousand, all of whom had the right to cast a vote in the company's court meetings. For Leicester's charter, see "Charter of James I, April 17, 1609" in Helen Stocks, ed., *Records of the Borough of Leicester: Being a Series of Extracts from the Archives of the Corporation of Leicester*, vol. 4, 1603-1688 (Cambridge: University Press, 1923), 80. For information on the size of the Virginia Company, see Theodore K. Rabb, *Enterprise and Empire: Merchant and Gentry Investment in the Expansion of England, 1575-1630* (Cambridge, MA: Harvard University Press), 104.

<sup>9</sup> The right for every member of the company to have a vote in the corporation's affairs at any of the company's regular court meetings was established by the Third Charter, granted in 1611. See, "Third Charter for Virginia," 7:3805-06.

the entire project of early Stuart franchisal review, they ultimately became an indictment on the viability of corporate colonial government.

### **Interpretations of the Virginia Company *Quo Warranto***

Though the Virginia Company's experience with *quo warranto* placed it firmly in league with numerous domestic corporations who faced similar scrutiny in the early Stuart period, historians have generally ignored this domestic context when examining the dissolution of the company. For the Whig scholars of the late nineteenth century, the crown's effort to reform the company's charter resulted from what they believed to be royal antagonism against the planters' perceived efforts to establish liberal, representative government in the New World. In this interpretation, the *quo warranto* proceedings represented nothing less than a struggle for "the maintenance of liberal institutions in America [and] the defence of the rights of English citizens."<sup>10</sup>

When scholars following this traditional Whig narrative did situate the Virginia episode within the domestic context, they found it to be illustrative of a larger design by the king against liberal trends within his kingdom. For instance, J.A. Doyle, writing in 1889, described the Virginia case as "one of the earliest of those efforts [by the Stuarts] ... to wrest the process of law to the arbitrary purposes of the king."<sup>11</sup> This Whiggish interpretation proved so compelling that as late as 1974 Percival Griffiths continued to speak of the "antagonism" between the king and the company, whose efforts at erecting a representative assembly in Virginia could not have been "pleasing to a King who was engaged in an attempt to crush his own Parliament."<sup>12</sup> Thus,

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<sup>10</sup> Thomas Wertenbaker, *Virginia Under the Stuarts, 1607-1688* (Princeton: Princeton University Press, 1914), 58.

<sup>11</sup> J. A. Doyle, *English Colonies in America* (New York: Henry Holt and Company, 1889), 1:182.

<sup>12</sup> Griffiths, *Licence to Trade*, 155.



while the Whig historians of the last century, along with those who followed their interpretation, did occasionally attempt to situate the Virginia experience within a broader British context, their outmoded understanding of Stuart policy renders these accounts of little interest.

In 1934 Wesley Craven offered a significant critique to the traditional Whig interpretation of these events with his book length study on the *Dissolution of the Virginia Company*. Here, Craven flipped the traditional interpretation on its head, placing the majority of the blame for the company's failure on the shoulder of the Whigs' liberal hero, one-time company treasurer Edwin Sandys. According to Craven, it was Sandy's inexperience running a complex overseas mercantile enterprise, and his stubbornness in pushing through unsupportable projects, that placed the company in financial straits and promoted disunity among its leaders. For Craven, the entire episode was best understood not in charged political terms, but as a rather mundane example of corporate management: the company, "bankrupted in purse and in morale," required royal assistance to protect its members' assets (as well as the royal coffers).<sup>13</sup> To accomplish this, the king first had to reclaim the company's franchise, which the King's Bench accomplished. With the company's franchise in hand, the king was then able to assign the management of the company's finances to his Privy Council. In this interpretation, the legal proceedings against the company were not an attack on its liberties, but a necessary means to establish a "virtual receivership."<sup>14</sup> Ultimately, while Craven provided a more balanced critique of the crown's role in the company's dissolution, he showed little interest in the legal implications of the events, and treated the Virginia *quo warranto* case largely in isolation.

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<sup>13</sup> Wesley Frank Craven, *The Dissolution of the Virginia Company: The Failure of a Colonial Experiment* (New York: Oxford University Press, 1932), 333-34.

<sup>14</sup> Craven, *Dissolution*, 322.

In more recent scholarship, Ken MacMillan has argued that the company's dissolution signaled a more involved royal imperial policy, but his reading of the situation suffers from an incomplete engagement with the domestic context. MacMillan frames the court's decision against Sandys and Ferrar in imperial terms, viewing it as a "clear expression of [the king's] continued authority and sovereign rights and obligations throughout the entirety of the English New World." MacMillan suggests that by applying those rights and meeting those obligations consistently, the crown ensured "all of the New World colonies, regardless of how differently they were created, tenured, and governed, were structured according to the normal practices of state formation and governance in England and its dominions."<sup>15</sup> In this, MacMillan is certainly correct. As Michael Braddick and Phil Withington have shown, the patterns and processes of political and legal engagement that shaped state formation and the consolidation of central, royal authority in this period operated throughout the king's dominions, not solely within the realm of England.<sup>16</sup>

Yet like Craven, MacMillan fails to consider the Virginia case's domestic parallels. MacMillan's main purpose in examining the case is to show the growing role Privy Council commissions played in the administration of the king's overseas dominions. The king's exclusive authority to govern beyond the realm empowered the Privy Council to take on administrative tasks that might otherwise have fallen to common law jurisdictions.<sup>17</sup> Yet, as Patterson has

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<sup>15</sup> MacMillan, *Sovereignty and Possession*, 104-105.

<sup>16</sup> For Braddick's discussion of the expansion of the processes of state formation into the colonial sphere, see Michael J. Braddick, *State Formation in Early Modern England c. 1550-1700* (Cambridge: University Press, 2000), chapters 8 and 9. Phil Withington believes that focusing on the companies which largely did the business of colonizing in the early years of English overseas enterprise adds a further source of authority separate from the 'state' to the usual narrative of state-formation offered by Braddick and others. Phil Withington, *Society in Early Modern England: The Vernacular Origin of Some Powerful Ideas* (Cambridge: Polity Press, 2010), 205-207.

<sup>17</sup> MacMillan, *Atlantic Imperial Constitution*, chapter 6.

shown, the Privy Council was heavily involved in many domestic *quo warranto* proceedings as well. MacMillan is not incorrect to suggest that the Virginia Company proceedings prompted a shift in royal attitude towards the king's overseas dominions. His brief and isolated examination of the Company's dissolution, however, does not fully explain how and why the crown began to change its Atlantic administrative policies.

In order to appreciate fully how the Council's investigation of the Virginia Company impacted royal colonial administration, it is necessary to examine how the Council and the courts approached franchisal review in the domestic setting. By recounting the origins of criminal *quo warranto* proceedings in the King's Bench and by charting their application against domestic corporations in the early Stuart period, we can see that the crown had an established policy of using the courts to manage and arbitrate inferior jurisdictions. Given this insight into the crown's use of King's Bench to review inferior jurisdictions, we can then examine in detail the council's investigation into the Virginia Company. In doing so, we will find that neither the king nor any of his council originally had any interest in destroying the company, as previous historians have suggested. Nor did the crown enter negotiations with the company's leaders intending to assume control of the Virginia enterprise.

Instead, over the course of several months, the council, in consultation with the king's legal officers, determined that the size of the company and the scope of its enterprise rendered it incapable of effectively governing. It was to correct this ineffectiveness, which amounted to a misuse of the king's franchise, that the king, through his attorney general, ultimately engaged King's Bench. In doing so, the king sought to clarify his rights and responsibilities relative to the administration of Virginia, as well as the persisting rights of his subjects who had invested in its settlement.

## A Brief History of *Quo Warranto*

*Quo warranto* served to clarify the rights and liberties enjoyed by both king and subject by posing a simple question: by what warrant did the defendant claim to hold a particular set of franchises that by right belonged to the king. As Justice Spelman reminded those who attended his 1517 reading of *Quo Warranto*, the king's ability to ask this question came from the fact that "in the beginning all liberties and franchises were in the king ... and in no other person."<sup>18</sup> Though he had later "given to various people in various forms" the authority to administer justice, if those persons were then to misuse or abuse that privilege, it was "right that king should be certainly informed by what warrant they use such authorities." This was fundamental to the well-being of the realm as "the body politic of this realm of England ... [was] preserved solely by justice."<sup>19</sup> By this reasoning, *quo warranto* allowed the king's justices to examine a wide range of warrants and titles. These included not only corporate franchises claimed by towns, boroughs, and trading companies like the Virginia Company, but also individual franchises such as those that conveyed a right to appoint coroners and justices of the peace and to hold courts leet and other manorial jurisdictions.<sup>20</sup> *Quo warranto*, therefore, enabled the king and his courts to examine governance at all levels of English society.

The greatest use of *quo warranto* came under Edward I, whose legal officers initiated a sweeping campaign to discover and reclaim for the crown a wide variety of private jurisdictions

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<sup>18</sup> J.H. Baker ed., *John Spelman's Reading on Quo Warranto delivered in Gray's Inn (Lent 1519)* (London: Selden Society, 1997), 120.

<sup>19</sup> Baker, *Quo Warranto*, 76.

<sup>20</sup> In his study of *quo warranto* use during the reign of Henry VII, Harold Garret-Goodyear identified several dozen franchises examined by the courts. Harold Garret-Goodyear, "The Tudor Revival of Quo Warranto and Local Contributions to State Building" in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, ed. Morris S. Arnold, et al., (Chapel Hill: University of North Carolina Press, 1981).

exercised by Edward's nobility. In its traditional form, as employed by Edward in the thirteenth century, *quo warranto* proceedings began with the issuance of a writ out of chancery that required franchise holders to prove their claim before the king's justices. Such writs allowed only for a general review of a subject's charter, without reference to particular rights or franchises. Moreover, because the writs were only returnable before the king's central courts, the writ proved cumbersome and expensive, particularly in support of large-scale administrative efforts such as Edward's ambitious review of inferior jurisdictions. Thus, while Edward's endeavor generated hundreds of individual cases, the campaign ultimately proved less successful than desired, leading to the passage of a statute in 1290 that made the writ returnable before the king's itinerant justices.<sup>21</sup>

Despite the allowances of the statute, the use of *quo warranto* fell into abeyance after the culmination of Edward's campaign, and only reappeared on a large scale during the reign of Henry VIII, nearly two hundred years later. According to Harold Garret-Goodyear, interest in the writ came from jurists like Spelman who were closely associated with efforts to strengthen the king's prerogative rights. This interest led to two general summons in the early years of Henry's reign between 1519 and 1524, one covering the county of Middlesex and a smaller summons focused on Bishop's Lynn. Though these summons ultimately produced little in terms of favorable decisions for the king, Garret-Goodyear notes they provided the king's justices with important experience working with *quo warranto*.<sup>22</sup>

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<sup>21</sup> For a detailed study of Edward's use of Quo Warranto, see Donald W. Sutherland, *Quo Warranto Proceedings in the Reign of Edward I, 1278-1294* (Oxford: Clarendon Press, 1963).

<sup>22</sup> Garret-Goodyear, "Quo Warranto," 236-241.

This growing familiarity with *quo warranto* led to several important procedural innovations that remade it into an attractive legal tool for both the king and his subjects. The major innovation in *quo warranto* came when royal officers abandoned the traditional writ in favor of individual actions brought before King's Bench in the form of an information against the franchisee. Eschewing the writ, as well as the general summons that it allowed, curtailed the scope of *quo warranto* proceedings but offered the crown a more focused examination of individual franchises. This made it easier for crown officials to examine particular abuses following a complaint made against the defendant. While these actions occasionally arose at the behest of the king or his advisors,<sup>23</sup> informations could also proceed on the strength of a complaint made to the king by a rival franchise holder or other interested party. In this way, as Garret-Goodyear discovered, *quo warranto* became a powerful political tool, utilized by competing parties to invite royal mediation in local disputes or even by ambitious office holders seeking to enhance their authority at the expense of others.<sup>24</sup> And while these disputes often ended in dismissal or non-prosecution, and rarely in a "victory" for the king leading to a cancelled franchise, the continued use of *quo warranto* in this fashion "preserved for King's Bench a prominent place in the affairs of local governors."<sup>25</sup>

This interaction between the central courts and local authorities is perhaps best illustrated by the number of *quo warranto* actions brought against urban borough corporations in the first half of the seventeenth century. As noted above, the majority of England's urban corporations

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<sup>23</sup> For instance, Garret-Goodyear discovered six informations brought in 1517 against individuals claiming the right to appoint coroners that undoubtedly derived from earlier cases involving those coroners' inquests. Garret-Goodyear, "Quo Warranto," 256.

<sup>24</sup> Garret-Goodyear, "Quo Warranto," 234-236.

<sup>25</sup> Garret-Goodyear, "Quo Warranto," 267.

faced some form of *quo warranto* proceeding between 1603 and 1640. Catherine Patterson's survey of these cases show that on the whole, the trends identified by Garret-Goodyear in Henry VIII's reign continued into the early Stuart years. According to Patterson, the regular use of *quo warranto* against borough corporations did not stem from any concerted effort by the crown to "undermine borough franchises."<sup>26</sup> More often than not, actions stemmed from local initiative, as members of the corporation sought royal support to settle disputes within the corporation. Such was the case when the burgesses of Totnes appealed to the crown following the issuance of a new charter in 1596 that severely restricted participation in the governance of the corporation to the town's wealthiest residents. As Patterson notes, this case ultimately ended in a judgment for the corporation (in other words, for the more restrictive patent about which the burgesses had complained), largely because the crown favored such arrangements in this period. This happy coincidence of local needs and crown policy colored many of the *quo warranto* proceedings that Patterson examined, and reinforces the notion that *quo warranto* served as a mutually beneficial tool for both parties.<sup>27</sup>

Even when the justices ruled in favor of the king, the matter often sat unresolved following the judgment for years, and the crown took no decisive steps towards punishing the corporation involved by restricting or revoking its charter. When Canterbury found itself on the losing end of *quo warranto* in 1624, for instance, the court made no effort to enforce the decision. It seems likely that Canterbury suffered from poor legal counsel as it mounted its defense against the *quo warranto*, a fact the crown recognized when it offered the corporation a chance to retry the case two years later.<sup>28</sup> The goal here clearly was not the destruction of

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<sup>26</sup> Patterson, "Quo Warranto," 887.

<sup>27</sup> Patterson, "Quo Warranto," 888-89.

Canterbury's charter, but rather the reformation of the corporation's internal affairs. Nullification of a charter was a weighty issue, as it involved the legal death of the corporation, and with it the cancellation of all contracts involving the corporation and the forfeiture of all lands it held. Perhaps the most attractive feature of the *quo warranto* information compared with the traditional writ, was the flexibility it offered the crown in reviewing the activities of franchise holders without requiring the destruction of the franchise. Whereas the writ was binding on the king, meaning that a judgment against the defendant required the revocation of the charter, individual actions brought by information were not.<sup>29</sup> This allowed the justices to be much more lenient in their handling of wayward corporations, a fact which contributed to *quo warranto*'s sustained use in this period.

The consistent patterns in the crown's use of *quo warranto* identified by Garret-Goodyear and Patterson reflect broader patterns of state formation that shaped English government during the late sixteenth and early seventeenth centuries. As Steve Hindle has recently shown, the late sixteenth and early seventeenth centuries saw a marked rise in litigation at all levels of the English legal system. In part, this increased legal activity stemmed from efforts, supported by central and local authorities alike, to control perceived misbehavior, such as drunkenness and vagrancy. Private litigation also increased in this period, especially among the nation's steadily growing 'middling sort' who turned to the crown to settle disputed contracts and other economic complaints. Both trends were prompted by the increasing social and economic pressures England faced in this period, as its population grew and more and more rural poor migrating to the

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<sup>28</sup> Patterson, "Quo Warranto," 885-86.

<sup>29</sup> Garret-Goodyear, "Quo Warranto," 241n41.



nation's urban centers.<sup>30</sup> Ultimately, as a growing number of the king's subjects engaged his courts, whether voluntarily in order to resolve a dispute, or as the focus of a criminal proceeding, the reach and effectiveness of the central government grew. The law, as a result, "proved to be an incorporative force ... creating and intensifying links not only between individuals, but between the communities of parish, county and realm."<sup>31</sup>

*Quo warranto* actions, though only a minor fraction of the business of the central courts, certainly served to link more closely the affairs of the locality with the interests of the crown. The willingness of local franchise holders to subject their authority to royal review in order to clarify their position, confirmed the king's ultimate authority. The king and his justices were happy to oblige these petitioners, as the process enabled both parties to review and clarify the limits of the franchise conveyed by the warrant in question. *Quo warranto* therefore served as a useful tool by which local franchise holders engaged the central authorities and in doing so strengthened the mechanisms of distributed authority that sustained early modern English government. Its use in the Virginia Company case demonstrates the flexibility and reach of these mechanisms, which the crown found easily adaptable when addressing situations that arose outside the Realm. It is to that case that we now turn.

### **Genesis of the Virginia Company Cases**

As was the case in Canterbury and Totnes, the impetus for the *quo warranto* proceedings that attorney-general Coventry initiated against the Virginia Company in November 1623 came from within the corporation. Five months prior to the first appearance of the case, Robert Johnson, a

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<sup>30</sup> Steve Hindle, *The State and Social Change in Early Modern England, c. 1550-1640* (London: MacMillan Press, 2000), chapter 3.

<sup>31</sup> Hindle, *State and Social Change*, 89.

long-standing member of the company, submitted a petition to the Privy Council concerning the government of the corporation. Johnson's petition contrasted the early fortunes of the Virginia enterprise, which once flourished under a "discreet and mild government," with the company's current troubles, whereby "unity and peace at home is turned to civil discord and dissension among ourselves." Echoing the sentiments of many of his contemporaries concerning the dangers of incivility and discord, Johnson warned that "utter ruin and destruction of [the company's] great works is like to follow without the help of a supreme hand." To that end, Johnson humbly desired that the council might appoint a commission that could inquire into the affairs of the company during the years since the departure of Sir Thomas Smith as treasurer in 1619. This commission would, Johnson hoped, not only discover "all wrongs and injuries done to any of the adventurers and planters and the grounds and causes thereof," but also offer suggestions as to "how the businesses of the ... plantations may be better managed." Only then, when "all Contentions and difficulties b[e] reconciled ... unity and peace resettled, and the form of Governing and Directing these Affaires b[e] better established" could the company once more flourish.<sup>32</sup>

Johnson's petition evoked a view of incivility, disorder, and poor government to demonstrate to the crown the gravity of the Virginia Company's situation and the clear necessity for royal intervention. In doing so, Johnson channeled widespread contemporary concerns over the corrosive effects of social instability that permeated much of early modern English society. As Patterson and others have shown, the deeply layered hierarchies that comprised English society depended on stable relations among and between the different classes to function. Most believed this hierarchical social order to be ordained by God, and thus inviolable, and numerous

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<sup>32</sup> Kingsbury, *Records*, 2:373-74.

institutional and social conventions existed to reinforce ranks of status and place, ranging from the carefully ordered seating arrangements of the parish church to the highly elaborate theater of the annual assizes.<sup>33</sup> Local and central authorities alike feared that disorder at the higher levels of society (i.e. within corporate government) “might open up opportunities for instability further down the social hierarchy.”<sup>34</sup>

The dramatic demographic and economic shifts that swept England in the late Tudor and early Stuart periods heightened these fears, prompting a consistent campaign at all levels of society to combat misbehavior and social disorder.<sup>35</sup> Johnson, who served as both an alderman and sheriff for the London ward of Langbourn, would certainly have recognized the potential ill-effects of the disorder and dissension that he witnessed at the meetings of the Virginia Company court.<sup>36</sup> We should not read Johnson’s petition, therefore, simply as a cynical attempt to damage the company’s current leadership, but as an expression of the very real anxieties that colored much of the political and social interactions of the day.

The antidote to disorder and social instability, as Johnson also recognized, was good government. ‘Good’ in this context meant just, lawful, and ordered, and the desire for such government is apparent by the wide use of the phrase in contemporary political tracts, sermons, and charters. As discussed in the previous chapter, a critical function of any corporation was to

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<sup>33</sup> Catherine Patterson, *Urban Patronage in Early Modern England: Corporate Boroughs, the Landed Elite, and the Crown, 1580-1650* (Stanford: Stanford University Press, 1999), chapter 3; Paul Griffiths, Adam Fox, and Steve Hindle eds., *The Experience of Authority in Early Modern England* (New York: St. Martin’s Press, 1996), 1-3.

<sup>34</sup> Patterson, *Urban Patronage*, 87.

<sup>35</sup> For an overview of the early Stuart campaigns against disorder in society, see Hindle, *State and Social Change*, esp. chapters 6 and 7.

<sup>36</sup> Johnson served as Alderman for Langbourn from 1617 until his death in 1625. It is not clear when he served as sheriff. Alfred P. Beaven, *Aldermen of the City of London – Temp. Henry III – 1912* (1908).

provide stable government for the community or enterprise with which it was concerned. It was for this reason that the king granted corporate bodies such extensive franchises including the right to establish laws, appoint judicial and administrative officers, and hold courts. Misuse of these franchises could only lead to evil ends, as Justice Spelman had observed a century before.<sup>37</sup> As such, it was in the king's interest to ensure that all those who claimed to exercise elements of his authority did so properly. By alleging discord and dissension within the company, and alluding to the various "abuses and injuries" done to its members, presumably by the company's leaders, Johnson was clearly signaling the absence of good government. The failure to maintain order and stability would amount to an essential failure of the corporation's primary function, thus granting the crown ample cause to examine the company's charter.

Unsurprisingly, Johnson's fellow members did not agree that their actions amounted to an abuse of their royal franchise. When Lord Cavendish, one of the company's noble patrons and an opponent to Johnson and his party, introduced Johnson's petition at a company court on April 12, 1623 the majority denied Johnson's petition, claiming it "was against the Company it selfe," even though they had no copy of Johnson's petition to examine.<sup>38</sup> In response to Johnson's allegations, a majority of the members present pledged their determination to "justify themselves, and to defend their proceedings against these unjust and untrue informations." To that end, the members ordered that a second petition should be drawn up, with which to "beseech his Majesty that the Lords of the Council might have the examination of these things, and that

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<sup>37</sup> See above, p. 61.

<sup>38</sup> Kingsbury, *Records*, 2:347. The company had to rely on the report of several members who had been present at meeting when Johnson presented his petition to the Council. The court had "sent some of the company" to Johnson asking to review his petition, but Johnson replied that he did not have a copy and knew of no person who did. Johnson did, however, assure the delegation from the company that the petition "was not against the company." The company clearly disagreed.

[the company's] innocency or guiltiness might be cleared or punished."<sup>39</sup> To end the session, the court ordered that a committee be established to draw up this petition, which would be offered to the council as soon as possible, along with several documents relating the current state of affairs in Virginia.

Clearly the members of the company who voted for this second petition viewed the crown as a useful resource that could be drawn upon to settle a dispute that had been rankling for quite some time. And as much as Johnson's opponents believed in their innocence, they were willing to accept the consequences if the council's examination were to determine them guilty of the abuses Johnson alleged. This willingness to invite royal scrutiny into the company's affairs supports Garret-Goodyear's and Patterson's findings that royal franchise holders were often eager to engage the crown in order to settle local disputes and, in the process, strengthen and clarify their own position relative to their fellow subjects and to the king.

For his part, the king was happy to oblige the company's desire for his intervention into their affairs, and quickly instructed the Privy Council to appoint commissioners to inquire into the state of the Virginia enterprise. From the outset, this commission made clear that pressures internal to the company had prompted the investigation, not royal animus. The commission, written in James's voice, notes that the king had lately been "given to understand ... that divers factions, and disordered people of the said company, are onely bent against the greatest Adventurers and Auncient upholders of the Plantacion." These factious individuals, the king continued, hoped "onely to reape a benefit to themselves, and to wronge the rest of the Adventueres." The purpose of this commission was, therefore, to ensure that "the said

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<sup>39</sup> Kingsbury, *Records*, 2:347-48.

Plantation maye the better flourish and be preserved, and the said factions and disordered people [be] discovered and suppressed.”<sup>40</sup> Here we see a clear connection between disorder and dysfunction within the company and the corporation’s ability to provide for the welfare and good government of Virginia. Moreover, all of this information, as well as the request to establish the Privy Council commission, came to the king “at the humble suit and instance” of Johnson.<sup>41</sup> This was no orchestrated attempt by the crown to destroy a bothersome, liberal enterprise. Instead, this was a fairly mundane instance of a subordinate authority engaging the king, through the apparatus of his courts, to mediate an internal dispute.

To ensure that their investigation did not prompt further discord within the company, the council further ordered that all letters sent to Virginia must be restricted to “private business.” This, they hoped, would avoid any “discouragement” among the planters that might arise by way of “particular advertisement that may proceed from factious humors and private ends.”<sup>42</sup> When the council discovered several weeks later that members of the company had largely ignored this order, they sent a letter of their own to the Governor and Council of Virginia explaining the situation. Here again the council stressed the need for unity and order, noting that the king had undertaken a course “for the establishing of fit directions and Orders for the future, whereby all indirect courses, misunderstandings, and dissensions may bee prevented.”<sup>43</sup> This language underscores the fact that these examinations were not a concerted attack on the company’s charter, nor were they in any way meant to damage or undermine the corporation. The Privy

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<sup>40</sup> Kingsbury, *Records*, 4:85-86.

<sup>41</sup> Kingsbury, *Records*, 4:86.

<sup>42</sup> *APC*, 1:67-68.

<sup>43</sup> *APC*, 1:68.

Council, operating at the behest of one of the company's own members, was merely working to ensure that an enterprise that affected so many of the king's subjects proceeded smoothly and without strife. Such oversight was an essential function of the crown, no matter where the affected subjects might reside.

Though the king and his council did not set out to dissolve the Virginia Company or to reclaim its charter, the speed with which the Privy Council responded to Johnson's petition suggests that the crown was already aware of the deteriorating Virginia situation and recognized the need for intervention. Indeed, in the months prior to the establishment of the commission, Sandys and other members of the company's leadership had engaged in deep negotiations with the Lord Treasurer concerning the collection of tobacco duties within the realm. Sandys and his supporters sought from the king a contract conveying the sole right to collect duties on all forms of tobacco landed in the realm, whether brought from Virginia or elsewhere. In many ways this was a desperation measure by the company whose main source of income, public lotteries, Parliament had cancelled in 1622. While these negotiations ultimately came to nothing, it is clear that the king followed them closely and showed much interest in the financial troubles of the company.<sup>44</sup> There can be little doubt as well that the news of the massacre of over three hundred of the king's subjects in March 1622 must have colored the crown's attitude towards the company. Furthermore, the king was no great fan of Edwin Sandys, who regularly opposed crown policy in Parliament.<sup>45</sup> Yet while the king and his advisors clearly recognized a bad

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<sup>44</sup> For a thorough discussion of these negotiations, see Craven, *Dissolution*, 221-251. The negotiations ended only days after Johnson's petition reached the Privy Council, suggesting that the concerns Johnson raised about the management of the Company may have affected the Council's willingness to cooperate with it in this matter.

<sup>45</sup> As early as 1620, when Sandys sought reelection to the post of Company Treasurer, James is alleged to have informed some within the Company to "choose the Devil if you will, but not Sir Edwin Sandys." Theodore K. Rabb, *Jacobean Gentleman, Sir Edwin Sandys, 1561-1629* (Princeton: Princeton University Press, 1998), 349.

situation in Virginia, the language of the commission quoted above, as well as the actions of the Council in the months following its issuance, suggests that they had no interest in dissolving the company at this time in order to resume the franchises conveyed by its charter.

The crown's attitude towards the company began to change, however, owing both to the findings of the commission as well as to what the king viewed as uncooperative behavior by company leadership. On June 25th, for instance, James addressed a letter to the company informing them of his desire that they refrain from electing new officers for at least two weeks, until the commissioners had submitted their final report.<sup>46</sup> Though the members seem to have agreed to comply with the king's request, voting to maintain their current leadership until their next quarter court, the king found something upsetting in their reply. On July 4th, James ordered the attorney general to inspect the company's "commission and behavior, and inquire whether, in such extreme conduct as they use to the king, their commission is void."<sup>47</sup> Specifically, the king desired to know if the company had made "a pretext of their constitutions to refuse compliance with his command."<sup>48</sup>

While it is not entirely clear in what way the company had refused to comply with James' commands, this marks the first time that the king appears to have given serious consideration to nullifying the company's charter and issuing a new one. Yet the crown made no movement in that direction until the commissioner's final report reached the council several weeks later in late July. At that point the king ordered Coventry to "examine [the company's] former patents and the returns of the Commissioners that the king may terminate the present and pass another

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<sup>46</sup> *CSPD*, 1623-25, 4.

<sup>47</sup> *CSPD*, 1623-25, 4.

<sup>48</sup> *CSPD*, 1623-25, 7.



patent.”<sup>49</sup> Even then it was not clear that the king wished to be rid of the company entirely as the governing body of the Virginia plantation, but it is certain that he was displeased with the form of government currently in place.

The major issue that the king, and even some members of the company, had with the current structure of the company’s government concerned its expansive membership. Owing to its joint-stock nature, any investor who purchased at least one share of the company (initially valued at £12 10s)<sup>50</sup> became a member of the company with full voting rights at its various courts. This differed significantly from many urban corporations where members often became free of the company only after a long apprenticeship or other service within the town.<sup>51</sup> Apprenticeship as an avenue to membership not only limited the number of free members in any given borough, but also ensured that those who did become freemen would have a meaningful connection with their community. Tying membership to investment, on the other hand, led many to fear that the affairs of the company would be driven solely by a desire for profit and could be easily hijacked by small groups and factions. These fears only grew as the company’s membership swelled from the two hundred or so investors mentioned in the first patent to the over 1600 shareholders listed on the company’s books at the time of the *quo warranto* proceedings.<sup>52</sup>

Along with the expansive size of the company, the varied social and economic makeup of its membership also led to tension and discord. According to Theodore Rabb, landed gentry

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<sup>49</sup> CSPD, 1623-25, 35.

<sup>50</sup> Griffiths, *Licence to Trade*, 146.

<sup>51</sup> Withington, *Politics of Commonwealth*, 29-30.

<sup>52</sup> Rabb, *Enterprise and Empire*, 30, 104.

accounted for over half of the Virginia Company's members, with wealthy merchants comprising the remainder. While this was not the largest proportion of gentry investment in a joint-stock trading company at the time, the Virginia Company easily boasted more gentry investors than any other simply due to its size.<sup>53</sup> The high level of gentry involvement was problematic for several reasons. As a purely practical matter many of the company's landed elite spent large portions of the year away from London, particularly in the summer season when they retired to their country seats. This made it difficult to conduct the regular business of the company, as its court records attest.<sup>54</sup> Perhaps more significant, however, was the fact that the company's gentry members often held very different views concerning the direction of the company than their merchant counterparts. In fact, the factions that were of such concern to the Privy Council broke down essentially along status lines, with the company's prominent gentry supporting the projects and policies of Edwin Sandys, while its merchants generally followed Sir Thomas Smith. Tensions between gentry and merchant investors affected other companies at this time as well, though as Rabb found, in all other cases merchants so far outweighed gentry investors that the two never came into serious conflict.<sup>55</sup>

Ultimately, it was the company's size and the instability it seemed to engender that prompted James to move toward reforming its charter. As the Privy Council expressed to the company in October, the king had decided that "the miscarriage of the government in that Company ... cannot welbe remedied but by reducing the government into the hands of a fewer

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<sup>53</sup> Rabb, *Enterprise & Empire*, 35.

<sup>54</sup> The company's court books record the following resolution, adopted in June 1623: "since the nobility and gentry are most of them absent in the vacation when yet diverse weighty and urgent business happen, The Council therefore in supply thereof have thought fit that four should be chosen of the Council such as their continual living in town doth promise they will be very careful of the business." Kingsbury, *Records*, 2:447-48.

<sup>55</sup> Rabb, *Enterprise & Empire*, 54-55.

number of governors.”<sup>56</sup> To this end, James ordered that a proposal for a new charter be drawn up that would place the government of “the company and the colony” into the hands of two councils comprised of a governor and twelve assistants. One council would reside in London while the other met in Virginia. In its particulars, this arrangement harkened back to the original Virginia patent of 1606, a connection that James made explicit in his proposal to the company.<sup>57</sup> While the changes that the king proposed would require the company to surrender its charter, James wished to make it clear that he intended to protect the private interests of all the company’s investors and to honor all commissions and grants issued by the former government. The language of the proposal, with its mention of “company and colony,” suggests it is possible that the crown meant for the corporation to persist under the new charter. Yet even with these assurances, the king and his advisers seemed to anticipate resistance from the company as the Council warned that refusal to submit would force the crown to “proceede for the recalling of the said former charters in such sorte as shalbe just.”<sup>58</sup>

The council’s fears proved correct the day after their proposal reached the company, when the members voted to put off any decision regarding the king’s offer until their next quarter court.<sup>59</sup> Though the company argued that the king’s own patents required the delay, the Council’s patience with Sandys and his supporters had run out, and they ordered that the company make its response within the week. Failure to do so, the Council reiterated, would

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<sup>56</sup> *APC*, 1:68.

<sup>57</sup> The Privy Council’s letter to the Company notes that the king’s intent was to “reduc[e] the gouuernment into the hands of a fewer number of gouuernors neare to those that were in the first Patentes of that Plantation.” *APC*, 1:68.

<sup>58</sup> *APC*, 1:69.

<sup>59</sup> After much debate, the members decided that their charter required them to wait until a meeting of the entire company at one of their regular Quarter Courts to decide on such a weighty matter. Kingsbury, *Records*, 2:470.

result in legal action.<sup>60</sup> This second warning prompted company leaders to assemble a special court whereupon the majority of those who attended voted not to surrender their patent.<sup>61</sup> It was at this point that the king finally ordered attorney-general Coventry to initiate legal proceedings against the company.

### **The Case**

The suit began in November 1623 and involved several rounds of pleadings before the court passed a final judgment in May 1624.<sup>62</sup> To begin the proceedings, Coventry offered the court a lengthy recital of over a dozen “liberties, privileges, and franchises” that the thirty named defendants had allegedly “used and still use ... without any warrant or regular grant.”<sup>63</sup> The liberties and franchises that Coventry argued the defendants had usurped included nearly all those listed in the company’s various charters. The only specific franchise not mentioned by Coventry involved the mining rights conveyed by the 1609 grant. The net effect of the allegations levied by this information was to challenge the essential functions of the corporation, especially as regarded its ability to manage its own affairs and the affairs of the planters in Virginia.

The fact that the information against the company lists only thirty of its over sixteen hundred members suggests that the king’s actions were more in line with a purge of the

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<sup>60</sup> *APC*, 1:70.

<sup>61</sup> The Company’s court records note that nine members voted to surrender their charter and accept the King’s offer, while the remaining members, described as the “whole Court” though no indication of the total number in agreement is given, voted against the King’s proposal. Kingsbury, *Records*, 2:474.

<sup>62</sup> A record of the pleadings in Latin can be found in the Coram Rege Rolls at the National Archives, KB 27/1528. The full record is printed in Kingsbury with an English translation. Kingsbury, 4:295-398.

<sup>63</sup> Kingsbury, *Records*, 4:359.

company's membership, intended to restore order within the company, than a naked power grab. The purpose of this purge, clearly, was to induce the company's leaders to surrender their charter and to allow the Council to reorganize the Virginia enterprise on a new footing. In fact, many within the company were perfectly happy to work with the king to rectify the company's troubles. Several weeks after Coventry brought his information before the court, a petition signed by "sundrie Adventurers and Planters of the Virginia Company" reached the Privy Council, affirming the desire of the petitioners to surrender the company charter and accept the king's adjustments.<sup>64</sup> These same petitioners alleged that the defendants had attempted to frame the *quo warranto* as a proceeding against the entire company, and thus hoped to draw from its public stock in order to fund their defense.

The Council ultimately decided that the suit was not directed at the company as a whole, but only those of its members listed in the information, and as such only they should be responsible for the legal charges associated with the suit. The language with which the Council rendered this decision is telling, as it suggests again that the purpose of the *quo warranto* was to bring about a surrender of the company charter. Thus, the Council ordered, "those who are questioned in the said *Quo warranto* shall make their defence at their owne particular Charge," while all who were "willing to surrender shalbe discharged from all constribution towards the expence of the said suite, both in their persons and their goodes."<sup>65</sup> The goal here clearly was not to punish the company as a whole, or to further saddle its investors with more expense, but rather to push Sandys and his supporters to give up the charter. Given the experience of many other

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<sup>64</sup> Along with affirming their desire to submit to the king, the petitioners also claimed that Sandys and the other defendants had pushed through an order during one of the company courts to place the cost of their defense on the Company's public fund. In answer to the petition, the board ordered that each of the defendants should bear the costs of their own defense. *APC*, 1:76.

<sup>65</sup> *APC*, 1:76.

corporations who faced *quo warranto* proceedings during this period, it is likely that the case would not have proceeded beyond this initial stage had the Sandys party taken the view of the majority of the company who wished to cooperate.<sup>66</sup>

Because the company refused to surrender their charter, however, the court ordered that the defendants should make their answer to the claims alleged in Coventry's information, and set a date several weeks hence for that purpose. In making their answer, the defendants, through their lawyer Edward Offley, offered the record of the three patents granted to the Virginia Company since 1606. Stepping through the complaints one by one, Offley demonstrated to the court the particulars of each patent as it applied to the franchise in question. Offley also denied that the company had ever used several of the privileges mentioned in the information. For instance, regarding the claim that the defendants regularly imprisoned the king's subjects for failure to pay customs to the company, Offley protested that the defendants "do not claim nor have they used nor are they using these liberties, privileges, and franchises." Following the defendants' answer, Coventry asked the court to set a date to continue the pleading, and the court agreed, ordering that the case resume at the start of the next term.<sup>67</sup>

When the case resumed, Coventry opted not to challenge the facts presented by the defendants in their answer, but to proceed by demurrer, that is to seek judgment on a question of law, rather than on the merits of the facts in the case. Coventry's response to the defendants' answer followed the standard form of a demurral. The attorney general stated before the justices that the king should not be "precluded from having his information" against the defendants, as

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<sup>66</sup> In similar cases, Patterson found that *quo warrantos* often disappeared from the record before even entering the pleading stage, likely as a result of an agreement made outside the courts. Patterson, "Quo Warranto," 888.

<sup>67</sup> Kingsbury, *Records*, 4:389.

the plea they had offered in their answer was “insufficient in law” to achieve that purpose. Owing to this “default of sufficient response,” Coventry sought judgment from the justices and argued that the defendants should be convicted. Offley offered a joinder to the demurral by responding that the defendants’ plea was sufficient response, and stating that because Coventry “does not answer for the king to that plea nor deny it in any wise,” he sought judgment on the question of sufficiency.<sup>68</sup> This process played out for each of the disputed franchises, and ensured that the case would be determined by the justices of the court, rather than by a jury as would occur if the case were to be tried on the basis of the facts. This decision to proceed by demurral likely left the defendants confident of a positive outcome. After all, if producing three letters patent signed by the “king who now is” granting and confirming numerous franchises and liberties was not sufficient to answer by what warrant they held those franchises, what could be?

Unfortunately, the existing record of the case is silent concerning the arguments employed by each party to answer that question. The record only relates that when the court reconvened at the start of the Trinity term in 1624, the justices determined that the defendants’ response to the complaint was indeed insufficient in law, and as such, convicted them of usurping over the king the various franchises in question. The court further ordered that, as a result of the conviction, the king should seize into his hands the liberties, franchises, and privileges listed in the information, and enjoined Farrer, Sandys, and the other defendants from “interfer[ing] of and in the aforesaid liberties, privileges, and franchises.”<sup>69</sup> This was a disastrous result for Sandys and his supporters, who could no longer ignore the writing on the wall: despite

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<sup>68</sup> Kingsbury, *Records*, 4:394.

<sup>69</sup> Kingsbury, *Records*, 4:397-98.

all of their best efforts, the Treasurer and Company of Adventurers and Planters for the First Colony in Virginia would no longer control the colony's fate.

Reaction to the dissolution of the company was generally muted. It is true that Sandys and his supporters attempted to engage allies in Parliament in support of the company, and that Sir Edward Coke had scheduled a hearing into the matter in April 1624. But before the commons could hear Sandys' petition, the king intervened, writing to the Speaker on April 28, 1624 with the request that the House not "trouble themselves" with the matter of the Virginia Company, as doing so might "renew the factions of that Company, which are in settlement by his Majesty and the Council."<sup>70</sup> While some members were wary of the precedent that might be set should they comply with the king's order,<sup>71</sup> the majority felt relieved to let the matter rest. As one member put it, "the business appearing very foul, many, at first unwilling, were now content to have it ripped up."<sup>72</sup> John Chamberlain, capturing the public's attitude towards the affair, offered his opinion in a letter to Dudley Carleton that the king's dealings with the company were "the best course that could have been taken, and no doubt most pleasing to the major part."<sup>73</sup>

Parliament's acquiescence in the dissolution of the company suggests that both king and commons viewed the episode as an unremarkable exercise of royal administration. The *quo warranto* was clearly no naked power grab on the part of the king. Instead, it represented a measured response by the crown to an undoubted breakdown in governance that affected many

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<sup>70</sup> *CSPD*, 1623-25, 227.

<sup>71</sup> Sir Francis Nethersole noted that the House met James' order with a "general silence, but not without whispers that by such means any business might be taken out of the hands of Parliament." *CSPD*, 1623-25, 237.

<sup>72</sup> *CSPC*, 1:62.

<sup>73</sup> *CSPC*, 1:61.



of the king's subjects both within England and without. In this, it differed little from the hundreds of other such interventions the crown undertook in this period.

### **Conclusion**

Ultimately, when placed in the context of broader Stuart policy regarding corporations and the use of *quo warranto* in managing local government, the king's actions against Virginia appear to have been based on the exact opposite motivations than those proposed by such historians as Doyle and Wertenbaker. Far from "wrest[ing] the processes of the law for the arbitrary purposes of the king," James and his attorneys employed the king's prerogative to ensure order, stability, and good government in situations where it was impossible for the king to provide them directly. Given the horrible conditions faced by many of his subjects in Virginia, where thousands died for want of proper support and defense, and faced with the intransigence of the company entrusted with the government of those subjects, the king had little choice but to intervene legally. That he did so was not to the detriment of his subjects' liberties (whether those in Virginia or the company's shareholders in London), but rather to their benefit.

Yet, the dissolution of the Virginia Company did in many ways signify a shift in the way both the crown and those planning to launch overseas enterprises approached colonial endeavors. Even before the justices offered their final judgment in the case, James had issued George Calvert's Avalon charter which, as discussed in the previous chapter, took a far different form from the corporate charters that supported Virginia. With Calvert's grant, and similar charters like it issued to influential nobleman like the Earl of Carlisle and the Earl of Montgomery, the crown chose to repose its trust in a living individual who now wielded almost vice-regal authority, rather than a corporate body comprised of many individuals who held potentially competing interests. Whether or not James felt as adamantly as his son that corporate bodies, "to

whom it may be proper to trust matters of Trade and Commerce,” should not have any part in “ordering of State-affaires,”<sup>74</sup> it is clear that he and his advisors believed the expansive joint-stock model proved too cumbersome for the effective management of a colonial enterprise.

Thus, more than anything, the dissolution of the Virginia Company was a commentary on the inability of a bloated corporate enterprise to govern effectively. The crown never sought total authority over the king’s Atlantic dominions. Though the king did reclaim the franchises that had allowed the Virginia Company to govern in Virginia, the colony continued largely without royal oversight. Moreover, neither James nor his son Charles ever directly established a royal colony.<sup>75</sup> Instead, in the years following the dissolution of the Virginia Company, the crown sought a more manageable delegated jurisdiction, namely, the proprietary charters. It is to them that we now turn.

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<sup>74</sup> Charles I, *A Proclamation for Settling the Plantation of Virginia* (London: Bonham Norton and John Bill, 1625), 2.

<sup>75</sup> Craven, *Dissolution*, 330-333.

### Chapter Three

#### The Proprietary Grants: Property, Power, and Privilege

Seven months before Thomas Coventry opened his case against the Virginia Company in King's Bench, James I granted his principal secretary, Sir George Calvert, a small tract of land in Newfoundland's Avalon Peninsula and established Calvert as "absolute Lord and Proprietor" of the region.<sup>1</sup> Calvert's grant marked the first of a new form of colonial charter—the proprietary grant—that quickly became the standard by which the crown authorized new settlements in North America and the Caribbean. Over the next fifteen years, Charles I issued similar proprietary grants to the earl of Carlisle (the Caribbee Islands, 1627), the earl of Montgomery (Barbados and other islands, 1628), Sir Robert Heath (Carolina, 1629), Calvert's son, baron Baltimore (Maryland, 1632), and the earls of Pembroke and Holland, the marquess of Hamilton, and Sir David Kirke (Newfoundland, 1636). Through their grants, each of these men came to hold a personal, proprietary interest in some portion of the king's American holdings as well as expansive authority to govern that land and the people residing there.

These proprietary charters signaled a shift in English attitudes towards the Atlantic world, which became less a distant arena for trade and commerce and more an attractive space in which to establish a permanent, landed society. In previous colonial endeavors, land was viewed as a means to an end, either as the source of tradable commodities or the location of mineral wealth. Around 1620, however, with the success of tobacco cultivation in Virginia and a growing interest in Atlantic settlement among England's nobility, possessing and occupying land became its own

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<sup>1</sup> James issued two charters to Calvert in relation to Newfoundland. The first, dated December 22, 1622 and a second dated April 7, 1623 that reduced the size of the first. An English copy can be found in the Newfoundland Entry Books, TNA, CO 195/1.

end.<sup>2</sup> This focus on possession, along with the heavy involvement of the nobility in these proprietary projects, signaled a reconceptualization of the king's American holdings, which were now viewed as a territory worthy to be possessed, occupied, and incorporated into the political, legal, and social order of the king's dominions rather than simply an arena for trade and the extraction of mineral wealth. The royal proprietary charters of the 1620s and 1630s accomplished this feat by combining property in land with an extensive franchise to govern, all of which the king offered to a single individual.

As a consequence of tying authority to property, many of the legal challenges faced by proprietors, and by the crown when reviewing proprietary activity, in these years involved disputes over title to land. These disputes required new legal solutions, as the common law could not examine matters relating to property outside of England. One such dispute arose in 1628 when Charles I granted title to Barbados to his treasurer, the earl of Montgomery, despite the fact that he had already granted the island to the earl of Carlisle, a favorite of his father and a member of the Privy Council. To rectify the situation, Charles worked outside the common law courts, engaging Thomas Coventry, now Lord Keeper, to examine the two claims and inform the king as to who held the proper title to the island. Coventry ultimately found in favor of Carlisle, despite protests from Montgomery that his investigation had been done "without law."<sup>3</sup> When Montgomery's agents continued to press his claim in Barbados, even arresting Carlisle's

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<sup>2</sup> For a general discussion of this shift, see Christopher Tomlins, "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century," *Law and Social Inquiry* 26 (2001): 315-372.

<sup>3</sup> James A. Williamson, *The Caribbee Islands under the Proprietary Patents* (Oxford: Oxford University Press, 1926), 33.

governor and seizing his tobacco, Carlisle turned to the court of Chancery, hoping that the looser rules of equity would allow him to resolve the matter once and for all.

Though rules of procedure prevented them from utilizing the common law courts, these legal efforts by Carlisle and the king's legal officers nonetheless demonstrate a clear attempt to grant English courts jurisdiction over Atlantic lands. This reliance on the courts of equity, the king's legal officers, and the Privy Council marked a shift in royal attitude towards colonial administration. For the first time, the crown found the procedures of the common law insufficient for reviewing overseas jurisdiction, and the king relied on a series of ad-hoc courts and commissions to fill in the jurisdictional gaps. The flexibility of this approach, combined with the relative simplicity of dealing with a single proprietor instead of a large, diverse corporate body, meant that the proprietary charters actually provided the crown more oversight of Atlantic enterprise than had been the case under the corporate charters.

While the proprietary grants prompted a range of legal innovation in England, the terms they established also had a significant impact on the exercise of authority in the regions they covered. As we will see, each of the proprietary charters involved two distinct grants. The first gave the proprietor a heritable and assignable interest in some region, which the king erected into a named province. This grant conveyed various incidental rights and franchises, the most significant of which established the proprietor as a palatine lord with the same authority as the Bishop of Durham. Yet the king qualified this authority with further, unassignable franchises relating to the execution of justice. This authority complemented the proprietor's interest in his newly granted estate, but did not depend on it. Thus it would be possible for a proprietor to alienate some or all of the lands under his control, but still retain the authority to govern those lands.

Such was the case, as we will see, in Barbados when the Earl of Carlisle placed his proprietary interest in the Caribbee Islands in trust shortly before his death in May 1636. Confusion over the earl's ability to devise his proprietary franchise led to a bitter dispute between the earl's son and his trustees over who possessed authority in Barbados. Ultimately the two parties appealed to the Privy Council seeking royal intercession, and the king turned the matter over to his chief legal officers for a final determination. This pattern of royal administration quickly became the norm with regards to proprietary holdings.

This struggle between the second earl of Carlisle and his father's trustees concerning the government of Barbados highlights several of the key implications of proprietary government. By granting title both to a parcel of land and to the authority necessary to govern that land, all proprietary charters achieved an effective union of *dominion* and *imperium*—property and authority. This union underscores the essential elision of public and private interest upon which colonial endeavor depended. As has often been noted, the English monarchy did not have the financial resources to fund an expansive colonial project, and instead relied on private investors, whether combined into a corporation or operating individually, to carry the burden of overseas settlement. This model served both the king (whose exchequer benefitted from the customs associated with colonial trade) as well as the investors who oversaw that trade.<sup>4</sup> The crown's reliance on private investment in this regard gave rise to a long-standing belief among later commentators that the king had abdicated responsibility for governing his overseas dominions, and had placed the public work of governance into private hands.<sup>5</sup>

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<sup>4</sup> Rabb, *Enterprise and Empire*, chapter 1.

<sup>5</sup> For a discussion of the historiography of this abdication, see Ken MacMillan, *The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World* (New York: Palgrave MacMillan, 2011), introduction.

Such assessments, however, depend on a modern distinction between public and private that did not exist in the early modern period. As Michael Braddick has shown, in order to function effectively, the early modern state depended on the efforts of a network of private individuals imbued with the ability to exercise royal authority in matters of justice, taxation, and social welfare.<sup>6</sup> Though royal justices of the peace, constables, and coroners were public figures in the sense that they were recognizably officers of the state doing the king's work, their authority rested on franchises that they held as private property. Moreover their livelihood often depended on the fees and fines they collected in the course of doing their duty. This was true at the court as well, where, according to Kevin Sharpe, the "private household of the monarch and the public business of the realm were not clearly distinguished."<sup>7</sup> Thus all facets of early modern government depended on the intersection of private and public interest, a fact which ultimately erodes the meaning of the terms "public" and "private." The same held true in the context of early English Atlantic settlement, as we will see in more detail below.

Recognizing that public and private interests were not mutually exclusive in the context of early colonial administration helps us understand the range of legal resources that proprietors could engage to secure their interest and in doing so provide for the government of their holdings. The trust that the earl of Carlisle established just prior to his death is one such example. The purpose of the trust, as we will see, was to provide for the payment of the earl's debts, a relatively common procedure. The fact that Carlisle employed such a mundane legal maneuver to accomplish such a unique end, placing in trust both overseas territories and the authority necessary to govern them, suggests once again an attempt to grant English courts jurisdiction

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<sup>6</sup> For Braddick's definition of the state, see Michael J. Braddick, *State Formation in Early Modern England c. 1550-1700* (Cambridge: Cambridge University Press, 2000), chapter 1.

<sup>7</sup> Kevin Sharpe, *The Personal Rule of Charles I* (New Haven: Yale University Press, 1992), 161.

over Atlantic lands. Such a legal maneuver, when combined with those outlined above, suggest that the move to proprietary government of the king's overseas dominions required new forms of law and established new types of jurisdiction that distinguished these enterprises from previous endeavors. Before examining the legal implications of the proprietary charters, however, it will be helpful to establish how and for what reasons they developed.

### **Context – The Development of the Proprietary Charters**

The proprietary grants arose out of two complementary impulses: a growing interest among court nobles in the benefits of colonial endeavors, and a shift in focus from extractive and mercantile enterprise to large-scale territorial occupation as the goal of new plantation projects. Gentry and noble interest in colonial projects had a long history by the time George Calvert received his grant in 1623. During this period, twenty five percent of the individuals who invested in one of England's many overseas trading companies came from the gentry and nobility.<sup>8</sup> Yet with the exception of a few active individuals like Edwin Sandys, gentry and noble investors had little interest in purchasing American lands or settling themselves in the New World. Even when promoters lauded the excellent hunting and salubrious climate of places like Newfoundland and Virginia in the hopes of drawing noble interest for their projects, "few in the landed classes invested money ... with the real intention of setting up house overseas."<sup>9</sup>

By the early 1620s, however, attitudes began to shift, as wealthy and influential courtiers took notice of the potential financial and political benefits offered by America's large, unclaimed

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<sup>8</sup> Theodore Rabb's exhaustive study of early English colonial finance offers a detailed discussion of gentry and noble investment in English overseas trading companies. Theodore K. Rabb, *Enterprise & Empire: Merchant and Gentry Investment in the Expansion of England* (Cambridge, MA: Harvard University Press, 1967), chapters 1 and 2.

<sup>9</sup> Rabb, *Enterprise and Empire*, 36.



spaces. In 1620, for instance, a group of investors that included many members of the king's household (such as the Duke of Lennox and the king's favorite, Buckingham) revived plans laid out in the first Virginia Patent of 1606 for a plantation in New England. To this end, they received a charter which incorporated the group as the Council for New England, and granted them authority along the same lines established by the Virginia Company's 1609 patent. The charter restricted the Council to forty members, of which thirteen were peers and a further nineteen were knights.<sup>10</sup> It is clear that from the outset the various members of the Council had little interest in managing a traditional trading venture and viewed the enterprise as a means for personal aggrandizement. Less than a year after receiving their grant, the Council established plans to divide New England into a collection of large estates, which the members were to hold on beneficial terms from the king. The council intended to divide these estates further into baronies and hundreds, and sought the authority to create new tenures, titles, and honors.<sup>11</sup> New England, under this system, would not be simply an outpost for trade, inhabited by factors and agents, but a fully-fledged society, based on the English model, and operating largely to the benefit of its noble proprietors. The plans of the Council for New England ultimately came to nothing, but their ideas persisted in later schemes that did eventually establish proprietary authority in North America and the Caribbean.<sup>12</sup>

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<sup>10</sup> "The Charter of New England – 1620," in Francis Newton Thorpe, *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, vol. 3, *Kentucky – Massachusetts* (Washington: GPO, 1909), 1827-1840.

<sup>11</sup> Viola Barnes, "Land Tenure in English Colonial Charters of the Seventeenth Century" in *Essays in Colonial History Presented to Charles McLean Andrews* (New Haven: Yale University Press, 1931), 19-20.

<sup>12</sup> Sir Percival Griffiths, *A Licence to Trade: The History of English Chartered Companies* (London: Ernest Benn Limited, 1974), 177-78.

*Calvert's Avalon Charter*

The first such grant came in April 1623 with Calvert's Avalon grant. Calvert, like many of his fellow proprietors, was deeply involved both in court affairs as well as the oversight and management of the king's Atlantic dominions. Calvert was an early investor in both the Virginia Company, where he appeared as one of the original members of the corporation in its 1609 charter, and the East India Company.<sup>13</sup> He had extensive experience in Irish affairs as well, spending four months investigating complaints by the king's catholic subjects in 1613, and later serving as clerk of the crown and of the assize in County Clare, important judicial postings that gave him experience with the legal and juridical challenges of colonial administration.<sup>14</sup> By 1620, Calvert served as both the king's principal secretary of state and one of his Privy Councilors, a position held by many of the men who later sought proprietary charters.<sup>15</sup> Thus deeply entrenched at court and in the business of the kingdom, Calvert was well-positioned not only to recognize the benefits and challenges of American settlement, but also to gain favor from the king. As a favored and influential courtier, Calvert set the tone for later proprietors and noble adventurers, most of whom held lofty positions at court. Indeed, positions of favor and influence within the king's household became essentially prerequisite for anyone hoping to establish a new Atlantic enterprise by the end of the 1620s.<sup>16</sup>

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<sup>13</sup> John D. Krugler, *English and Catholic: The Lords Baltimore in the Seventeenth Century* (Baltimore: The Johns Hopkins University Press, 2004), 33-34.

<sup>14</sup> Wm. Hand Brown, *George Calvert and Cecilius Calvert: Barons Baltimore of Baltimore* (New York: Dodd, Mead & co., 1890), 1- 4.

<sup>15</sup> Brown, *George Calvert*, 7-8.

<sup>16</sup> James Williamson makes this point in his discussion of the controversy concerning the title to the island of Barbados. Williamson, *Caribbee Islands*, 38.

While Calvert's influence at court aided in gaining the king's approval of his colonial plans, his interest in North American settlement stemmed from a purchase he had made in 1620 of a parcel of land in Newfoundland. The king had originally granted this land to the London and Bristol Company, a joint-stock corporation formed in 1610 to capitalize on the Newfoundland fishery by establishing a permanent settlement on the island. The company quickly ran into trouble, and devised a plan to bolster its finances by selling off large portions of its holdings to interested investors, including Calvert's friend and Oxford classmate, William Vaughan.<sup>17</sup> Though Vaughan had plans to turn this land into a refuge for the Welsh poor, he eventually sold his interest to Calvert and Henry Cary, Viscount Falkland.<sup>18</sup> Calvert proved an active administrator of his new lands, and by summer 1621 had sent an expedition of planters under the command of Captain Edward Wynne bound for Avalon. These early settlers, supplemented by a further expedition sent in 1622, met with more success than had any previously, and by 1623 Calvert's enterprise was prospering.<sup>19</sup> It is at this point that he sought to expand his interest in Newfoundland with a new, more beneficial grant from the king.

The grant James presented Calvert in April 1623 confirmed his possessions in Avalon, erected the region into a province, and made Calvert its "absolute lord and proprietor."<sup>20</sup> In terms

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<sup>17</sup> Gillian T. Cell, *English Enterprise in Newfoundland, 1577-1660* (Toronto: University of Toronto Press, 1969), 72-75.

<sup>18</sup> The particulars of this sale are no entirely evident. Vaughan, an accomplished self-promoter, wrote in 1626 that he had "assigned the Northerly part of [his] Grant" to Calvert and Falkland, though he did not relate the terms by which he did so. Historians tend to agree that Calvert bought Vaughan's interest in Avalon. William Vaughan, *The Golden Fleece....* (London: Printed for Francis Williams, 1626), 2-3. For a modern interpretation of this transaction, see Cell, *English Enterprise*, 73.

<sup>19</sup> Cell, *English Enterprise*, 92-95.

<sup>20</sup> Unfortunately, likely due to his close access to the king and to his position on the Privy Council, Calvert's efforts to obtain this grant left little documentary residue. It is unclear, for instance, if he formally petitioned the king in writing or if he engaged in more informal verbal negotiations with his fellow councilors concerning the dimensions of his grant. In either case, no record of any petition to the Privy Council exists.

of territorial extent, Calvert's grant was not the most impressive. Though originally the king granted all of Newfoundland to Calvert, complaints from the London and Bristol Company, who still had an interest in the region despite their struggles, prompted James to issue a second patent in August of that year that reduced the size of Calvert's proprietorship to several hundred square miles centered in the Avalon Peninsula.<sup>21</sup> Yet it was not the size of Calvert's proprietorship that set it apart from earlier grants and marked such a significant shift in English colonial enterprise, but the terms by which Calvert held his land and the rights and responsibilities that accompanied it. As such, the language of the charter is worth examining in some detail.

At the outset, Calvert's charter makes it clear that property in land was the motivating impulse of the charter. After the traditional salutation, the charter recognized that Calvert had "to his great Cost purchased a certain region or territory ... in Newfound Land" and noted his intention to establish a colony there.<sup>22</sup> This mention of Calvert's purchase immediately sets his charter apart from all previous colonial charters in which the patentee's relationship with the land covered by their charter was never proprietary and usually only aspirational. Moreover, unlike previous charters which highlighted transitory activities like trade and fishing, Calvert showed his intentions for the land to be more permanent. Calvert's ultimate goal, as the charter made clear, was to "enlarge the extents ... of [the king's] empire and dominion," by "transport[ing] thither a very great and ample colonie of the English Nation."<sup>23</sup> The charter, therefore, and all the rights, privileges, and immunities that Calvert enjoyed by it, supported that one essential goal: the establishment of a large, permanent society of Englishmen in the New World.

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<sup>21</sup> Cell, *English Enterprise*, 92-93.

<sup>22</sup> TNA, CO 195/1/1.

<sup>23</sup> TNA, CO 195/1/1.

The terms by which Calvert held his lands from the king also supported his intentions to establish a colony in which possession and occupancy of land was the primary goal. To this point, tenants holding lands from the king in North America (including Calvert), held those lands “as of [the] manor of east Greenwich, in free and common soccage.”<sup>24</sup> This was a fairly easy form of tenure that freed the tenant from the normal obligations expected of the king’s tenants-in-chief.<sup>25</sup> Calvert’s grant, however, reconfirmed his holdings in Newfoundland by a new tenurial arrangement that had Calvert holding his lands “in capite, by knight’s service.”<sup>26</sup> In England, the king’s tenants-in-chief sat at the top of the social order and it was from them that most tenants in England held their land. Knight’s service, however, was in many ways an onerous arrangement for the king’s tenants. Though the military levies that once served as the traditional foundation (and animating purpose) of knight’s service tenure no longer had any force, the king still exacted significant fines, fees, and other incidents from his tenants in chief, with wardship and relief being the most contentious.<sup>27</sup> For this reason, at the time Calvert received his grant the king faced significant pressure to do away with knight’s service tenure entirely, a fact that makes the inclusion of such tenure in Calvert’s grant somewhat surprising.<sup>28</sup>

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<sup>24</sup> This was the tenure by which the king had granted Newfoundland to the London and Bristol Company. Presumably, this tenure transferred to Calvert when he purchased his lands from Vaughan. For the Bristol Company charter see, D. W. Prowse, *A History of Newfoundland from the English, Colonial and Foreign Records* (Belleville, Ontario: Mika Studio, 1972), 122-25.

<sup>25</sup> Barnes, “Land Tenure,” 5-10.

<sup>26</sup> TNA, CO 195/1/3.

<sup>27</sup> For a discussion of the various forms of feudal tenure and their history see J.H. Baker, *An Introduction to English Legal History* (London: Buttersworth, 2002), chapter 13. Viola Barnes examined the extension of these forms to North America and the Caribbean in the 1930s, and provided a clear explanation of the benefits and obligations of knight’s service tenure. Barnes, “Land Tenure,” 16-21.

<sup>28</sup> Barnes, “Land Tenure,” 25.

Given these obligations, and the discontent they engendered, Viola Barnes has argued that the inclusion of Knight's service tenure in Calvert's charter (and those that followed it) represented a cash grab of sorts on the part of James and later Charles.<sup>29</sup> Such a move would not have been out of character for the early Stuarts, who famously exploited outmoded sources of royal revenue in order to raise funds.<sup>30</sup> It is not clear, however, that Calvert and his fellow proprietors were ever subject to the standard incidents attached to this form of tenure. Indeed, the only services required from Calvert by his grant were relatively minor: a fifth of all the gold and silver he might extract from his lands, as well as "one white horse" to be provided to the king whenever he should happen to be in Newfoundland.<sup>31</sup> Moreover, the king granted Calvert several further rights and immunities that offset his tenorial obligations, such as the right to establish his own manors and offer new tenures.<sup>32</sup> In this way, Calvert's land grant seems to represent a compromise of sorts that granted the proprietor status and authority within his province and the king a claim to certain financial benefits arising out of it.

#### *Palatine Authority in the Proprietary Patents*

Calvert was not content, in any case, with the privileges that came with his status as tenant-in-chief, and he sought to bolster his rights with the addition of a grant that has become famous in English colonial history: the Bishop of Durham clause. Along with all the lands and other

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<sup>29</sup> Barnes, "Land Tenure," 25.

<sup>30</sup> Sharpe, *Personal Rule*, chapter 3.

<sup>31</sup> TNA, CO 195/1/1. One fifth, or twenty-percent, was not necessarily a minor payment. By this point, however, it was clear to most that the northern shores of North America had little to offer in terms of mineral wealth.

<sup>32</sup> TNA, CO 195/1/1.

appurtenances<sup>33</sup> that Calvert now held from the king *in capite*, James also granted him “all and singular ... Rights, Jurisdictions, priviledges, prerogatives, royalties, Liberties, Immunities and Franchises whatsoever, as well by Sea as by Land, within the Region ... aforesaid, to have exercise use and enjoy the same as any Bishop of Durham ... hath at any time heretofore had, held, used or enjoyed.”<sup>34</sup> This grant in essence established Avalon as a palatinate, such as had previously existed in Durham, Chester, and Kent. While the English monarchy had absorbed the palatinates of Chester and Kent before this time, the Bishopric of Durham still enjoyed considerable autonomy in the early seventeenth century.<sup>35</sup> For instance, the king’s ordinary writs did not run to Durham (though his prerogative writs did, as they did everywhere) and the Bishop could accomplish many things normally reserved for the king, such as establishing corporations and granting other liberties and franchises. Moreover, the Bishop was universal landlord in Durham, and no tenants there held their lands directly from the king. Taken together, these immunities and liberties enabled the Bishop of Durham to exercise *imperio in imperium*, such that the Bishop acted in Durham much as did the king in the rest of his dominions.<sup>36</sup>

It is not entirely clear what motivated Calvert to seek the authority of the Bishop of Durham in connection with his Newfoundland possessions or why the king accepted such a significant delegation of authority. Traditionally, historians like Barnes argued that with the

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<sup>33</sup> These included all ports, harbors, creeks, soil, lands, woods, lakes, rivers, fishings, and mines within the region covered by his grant, as well as “the patronages and advowsons of all churches which ... shall happen hereafter to be erected.” TNA, CO 195/1/1.

<sup>34</sup> TNA, CO 195/1/1.

<sup>35</sup> Tim Thorton, “The Palatinate of Durham and the Maryland Charter,” *The American Journal of Legal History* 45, no. 3 (July 2001): 242-244.

<sup>36</sup> For a detailed examination of the rights and immunities of the Bishop of Durham, see Gaillard Lapsley, *The County Palatine of Durham: A Study in Constitutional History* (Cambridge, MA: Harvard University Press, 1924), chapter 2.

proprietary patents, the crown meant to establish a series of buffers within the king's distant, and potentially dangerous, American dominions. This interpretation assumes that the domestic palatinates served a similar function in Britain. And indeed, Durham and Chester occupied important strategic positions on the borders of Scotland and Wales respectively, while Kent's location on England's south-east coast placed it in closest proximity to England's longtime enemy France. To safeguard those borders, Barnes argued, the king granted several of his trusted magnates extraordinary authority that would enable them to deal quickly and efficiently with any emergency, something which the king could not himself accomplish at such a great distance.<sup>37</sup>

This required not only extensive authority but also considerable autonomy, something which the Durham model certainly provided. As Tim Thorton has recently noted, though reforms in the Tudor period had reduced Durham's autonomy to some degree, at the time Calvert sought his grant, the Bishopric was "no spent force."<sup>38</sup> Durham was exempt from most taxes, its representatives did not sit at the Westminster parliament, and its officials were chosen by the Bishop.<sup>39</sup> In this way, Thorton argues, the application of the Durham model to the king's Atlantic dominions represented the "adoption of a currently existing example of constitutional autonomy for another, broadly comparable peripheral territory."<sup>40</sup> Moreover, the similarities between Durham and places like Newfoundland and Maryland (the two areas with which the Calverts were most interested) would have been immediately apparent to Calvert. Not only did Calvert spend his youth in York, close to the border with Durham, his family had long ties to the region.

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<sup>37</sup> Barnes, "Land Tenure," 22-23.

<sup>38</sup> Thorton, "Palatine of Durham," 242.

<sup>39</sup> Thorton, "Palatine of Durham," 242.

<sup>40</sup> Thorton, "Palatine of Durham," 244.



This meant, as Thorton argues, that Calvert had lived “heavily under the influence of Durham and other franchises,” and his decision to seek similar authority to the Bishop stemmed from that early exposure.<sup>41</sup>

It is important to note, however, that Calvert’s authority, though modeled on that of the Bishop of Durham, did not equal the Bishop’s in scope or quality. Perhaps the greatest difference between Calvert’s authority and that of the Bishop of Durham was that James qualified Calvert’s authority with a series of further grants that defined exactly how he could govern within his palatinate. The resulting authority placed a premium on property and possession and blurred the lines between public and private interest. In the first place, the king granted Calvert authority to “make, ordain, enact and . . . publish any laws whatsoever appertaining either unto the public estate of the said province or the private utility of particular persons.” The king further willed that Calvert should seek the “advise, assent, and approbation of his freeholders” when establishing new laws, except when the urgency of a troublesome situation made it impossible to gather them together.<sup>42</sup>

Whether Calvert established law in consultation with his freeholders or on his own in an emergency, the king required that all such laws “must stand with reason and be not repugnant to the laws, statutes, and customs of [the] kingdom of England.” Calvert’s grant also established that no law or ordinance should “extend to the right or interest of any person or persons of or in their freehold, or to distrain, bind, charge, or take away, his or their goods or chattels.”<sup>43</sup> The importance of property is clear: while Calvert could promote “private utility” with the

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<sup>41</sup> Thorton, “Palatine of Durham,” 246.

<sup>42</sup> TNA, CO 195/1/1.

<sup>43</sup> TNA, CO 195/1/1.

establishment of law, he could not degrade or imperil the personal interest of any of his tenants. Ultimately, Calvert's authority to establish laws and provide for justice in his province, though broader than any that came before, was carefully tailored to support the establishment of a permanent, landed society in Newfoundland.

Along with the authority to establish laws and provide for the government of his proprietorship, Calvert's charter contained several further innovations that enhanced his authority and distinguished Avalon from the king's other overseas dominions. For one, James granted Calvert the right to confer honors and convey titles to deserving individuals for their services either to him or to the king. This, the king argued in the charter, would entice "men well borne" to employ their services in furtherance of the colony, something that had been lacking in previous enterprises, as discussed above. Moreover, Calvert's charter gave him the power to "erect and incorporate towns into boroughs, and boroughs into cities."<sup>44</sup> Both of these powers, to confer titles and to incorporate towns and boroughs, belonged exclusively to the king and their inclusion in Calvert's charter signified once again a desire to incorporate Avalon within an extended English social and political framework.

Despite his carefully constructed charter and the rights and authority it conveyed, Calvert eventually abandoned his efforts in Avalon after spending several dreary winters in Newfoundland.<sup>45</sup> Yet the new attitudes towards English colonial enterprise that informed his charter and the legal structures that shaped his authority survived Avalon and became a new standard. Over the next decade, several more of the king's influential courtiers sought similar grants from the crown for lands in both North America and the Caribbean. In all of these grants,

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<sup>44</sup> TNA, CO 195/1/1.

<sup>45</sup> Krugler, *English and Catholic*, 95-101.

the general formula remained the same: a capacious grant of land that the king established as a palatine province along with a franchise to govern that province. And while the corporate model of colonial enterprise did not disappear completely, it is clear that by the mid-1620s, the focus of most new colonial projects was permanent settlement rather than occasional trade, and that property in land became both an attractive feature of colonial enterprise as well as the foundation of authority in these new, unformed societies.

### **Implications of the Proprietary Patents on Colonial Government**

This new focus on land as both the purpose of Atlantic enterprise as well as the basis of authority in that region created several challenges for the king and his advisors. One such challenge involved defining what lands and territories a particular proprietor was entitled to hold. Without a geographically accurate description of the lands that were to comprise the proprietary grant, situations might arise wherein two proprietors could claim title to the same parcel of land. Such competing claims would be problematic for the proprietors as well as for the crown. For instance, the proprietor's authority, as well as any profits he might hope to gain from his holdings, could be placed in jeopardy in the face of a competing title. If another individual claimed to be seized of those lands, then they too could claim the authority and profits incident to them. For this reason, competing claims could have serious ramifications for the execution of government in the disputed territory, as each claimant would be compelled to provide for the good government of his proprietorship by the terms of his grant.

To complicate matters further, while the crown had a clear interest in preventing competing claims of this sort, the work of defining the limits of a given proprietary holding often fell to the aspiring proprietor, and informal, personal arrangements went a long way towards

shaping the dimensions of final grant.<sup>46</sup> And whereas the king and his legal officers could rely on well-established legal procedures to regulate and review abuse and misgovernment of corporate colonial endeavors, as we saw in the previous chapter, conflicts over proprietary claims had no clear remedy in the common law courts. Thus when mistakes did occur, it was necessary to identify new forms and new procedures to rectify the situation and thereby ensure the well-being of the king's subjects. Unfortunately for Charles I, such a mistake occurred in 1628 when both the Earl of Carlisle and the Earl of Montgomery held charters that made each the absolute lord and proprietor of Barbados.

#### *The Carlisle and Montgomery Controversy*

Unlike George Calvert, who possessed a clear interest in his Newfoundland estate when he approached James for a favorable grant, Carlisle and Montgomery had much murkier claims to the lands they sought from the king. Carlisle's claim depended indirectly on the enterprising activity of Thomas Warner, an adventurer who had established a small plantation on the island of St. Christopher in 1624. Warner began his plantation without support from the king, but in 1625, with help from his merchant backer Sir Ralph Merrifield, he petitioned the Privy Council for custody of St. Christopher and three other islands: Nevis, Monserrat, and Barbados.<sup>47</sup> The king approved, and commissioned Warner to be King's Lieutenant of the island, with authority to "order and direct" all the king's subjects who resided in that region. Warner's commission did not give him any proprietary interest in the lands, however, but only placed the islands in his

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<sup>46</sup> For instance, when the earl of Carlisle sought a grant of the Caribbee Islands in 1627, his agents brought a "carde or mapp[e] of the islands" to the Attorney General. This map showed the location and names of the islands Carlisle hoped to claim, and was intended to aide in "pass[ing] the Earles Patent." TNA, CO 1/5/11.

<sup>47</sup> For a discussion of Warner's activity in St. Christopher, see Sir Alan Burns, *History of the British West Indies* (London: George Allen & Unwin Ltd, 1954), 187-92. Warner's Commission is printed in full in Burns, Appendix E.

custody.<sup>48</sup> Warner's activity in the Caribbean eventually came to the notice of the king's treasurer, the earl of Marlborough who, it appears, developed plans of his own to establish a plantation in the region.

It is difficult to recover Marlborough's exact interest in the lands over which Warner had custody. The records are silent as to who approached whom or to whether Marlborough ever purchased Warner's interest in the custody of the islands. All that is clear is that at some point between the death of James I and the issuance of a charter to the Earl of Carlisle in 1627, Marlborough developed plans to begin "the planting and protecting of certen Islands called the Charibee Islands" and hoped to be a "suitor to his Majesty for a grant thereof."<sup>49</sup> As treasurer, it is possible that Marlborough had previous contact with Warner's merchant partners, and may have become aware of Warner's plantation after Warner landed his first crop of tobacco at the London customs house.<sup>50</sup> Despite his plans, Marlborough never did petition the king for a grant covering the Caribbees. Instead, he appears to have agreed with Carlisle to abandon the enterprise in exchange for a £300 annuity to be paid out of the rents of St. Christopher and Nevis.<sup>51</sup> This freed Carlisle to make his own suit to the king for possession of the islands, which he did in August 1627.

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<sup>48</sup> Warner did have authority to "order and dispose" the lands within his custody in the King's name, but he did not himself have a real claim to them. He did, however, have "an interesse in their custody." Burns, *West Indies*, 741; TNA, CO 1/5/11.

<sup>49</sup> These quotes concerning Marlborough's plans for the Caribbees come from a deposition given by his son in 1635 in a chancery suit against Carlisle. The purpose of the suit was to recover several years of arrears on the annuity which Marlborough's son claimed Carlisle owed his father in consideration for his interest in the Caribbees. TNA, CO 1/9/32.

<sup>50</sup> Marlborough served as treasurer from October 1624 to July 1628, and thus would have been in the office just as Warner was returning his first tobacco shipments to England. Wilfred Prest, "Ley, James, first Earl of Marlborough (1550-1629), *Oxford Dictionary of National Biography* (Oxford: University Press, 2004).

<sup>51</sup> Again, from the deposition of Marlborough's son. No copy of the arrangement (if a formal, written arrangement ever existed) survives. TNA, CO 1/9/32.

The connections, blurry as they are, that drew Warner, Marlborough, and Carlisle together and that formed the basis of Carlisle's claims in the Caribbean illustrate the degree to which patronage and personal arrangements influenced the direction of the "public" business of colonial administration. As much as we wish to separate "private" from "public," these distinctions had far less meaning in the early modern period than they do today. Patronage permeated all levels of English society at this time and, in many ways, oiled the gears of government by providing lower status individuals a voice at court.<sup>52</sup> And at the higher levels of society, those closest to the king held such influence that the "private household of the monarch and the public business of the realm were not clearly distinguished."<sup>53</sup> We have already seen the degree to which the king and his advisors crafted proprietary authority in such a way as to serve both public and private interest. The fact that these charters often resulted from unofficial, informal arrangements further blurred these lines.

The bonds of patronage seem to have formed the basis of Montgomery's claim to Barbados as well as Carlisle's. At the same time that Warner was scratching out his plantation in St. Christopher, two brothers, John and Henry Powell, sought to establish one in Barbados. John Powell had originally scouted Barbados as a site for plantation in 1624 and returned in 1626 with about thirty men and the financial support of the wealthy London merchants Peter and William Courteen.<sup>54</sup> Unlike Warner, however, the Powells and Courteens never sought authorization for their activities directly from the king. Instead, they engaged the assistance of the earl of

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<sup>52</sup> For a discussion of patronage and the impact of patron client relations on local government see Catherine Patterson, *Urban Patronage in Early Modern England: Corporate Boroughs, the Landed Elite, and the Crown, 1580-1640* (Stanford: Stanford University Press, 1999), chapter 3.

<sup>53</sup> Sharpe, *Personal Rule*, 161.

<sup>54</sup> Gary Puckrein, "Did Sir William Courteen Really Own Barbados?" *The Huntington Library Quarterly* 44, no. 2 (Spring 1981): 136-137.

Montgomery, the king's chamberlain. The connection between Montgomery and the Courteens is even less evident than that between Marlborough or Carlisle and Warner. It does appear that Montgomery was involved in the enterprise early on, and that he approached the king for a grant of the island at around the same time Carlisle sought his.<sup>55</sup>

Whatever his connection to the Powells and Courteens, Montgomery managed to secure from the king a proprietary charter in 1628 that established him as lord of Trinidad, Tobago, Barbados, and Fonseca.<sup>56</sup> Though the geographical scope of Montgomery's charter was less than that of Carlisle's, the terms of the two were nearly identical. Like Carlisle, Montgomery was also to become Lord Proprietor of a newly erected province, named Provincia Montgomeria. And like Carlisle, and Calvert before him, Montgomery would enjoy the same authority in Montgomeria as the Bishop of Durham did in his palatinate.<sup>57</sup> Thus, from February 1628, two members of the king's household could both claim exclusive authority to govern one of the king's dominions.

When Carlisle learned of Montgomery's grant, he quickly approached the king and asked for a confirmation of his grant. Charles appears to have agreed, as he issued a second patent to Carlisle on April 7, 1628 once again naming him proprietor of the Caribbees.<sup>58</sup> Charles did not, however, cancel Montgomery's patent, and the dispute between the two earls continued until finally, in early 1629, Montgomery together approached Charles and asked the king to confirm his title to the island. This is evident from a letter that the king addressed to Charles

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<sup>55</sup> In answers against a Chancery complaint levied by Carlisle, Henry Powell mentions certain aids and assistance proffered by Montgomery in support of his and early plantation. TNA, C1/Chas 1/C58 no. 4. For more on this complaint, see below pp. 109-100.

<sup>56</sup> The original Latin copy of Montgomery's charter can be found on the patent rolls, TNA, C66/30/1.

<sup>57</sup> TNA, C66/30/1.

<sup>58</sup> Williamson, *Caribbee Islands*, 46.

Wolverstone, Carlisle's governor in Barbados, explaining the situation and ordering him to reside peacefully with Powell and his men until the matter could be resolved.<sup>59</sup> The letter, sent in February 1629<sup>60</sup>, states that a dispute had arisen between the two earls on the basis of Montgomery's grant to Barbados which, "in truth," as the king admitted, "was formerly granted to [Carlisle]." To confirm this truth, Charles, with the "mutual consent" of the two earls, next ordered Thomas Coventry, now his Lord Keeper, to review the matter and make a recommendation as to which earl had the strongest claim to the land.<sup>61</sup> Coventry appears to have taken several months to investigate the issue, in the process interviewing many witnesses with knowledge both of the claims as well as the situation and nature of the island. By April, Coventry was satisfied with the information he had received, and made his report to the king.<sup>62</sup>

According to Coventry's report, the issue turned on two questions. First, should Barbados be reckoned one of the Caribbee Islands? If so, as all agreed, "the earl of Carlisle ought to enjoy it." Second, was Barbados "intended to be passed in the earl of Carlisle's patent, though it be not one of the Caribbees?"<sup>63</sup> As to the first question, Coventry quickly determined, after consulting with several mariners who had experience navigating the Caribbean Sea, that Barbados was not one of the Caribbee Islands. Difficult currents in the region would have made it impossible, the

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<sup>59</sup> TNA, CO 1/4/9.

<sup>60</sup> The letter is dated January 6, 1629 but its actual date is most likely February 3, 1629, as a note in pencil on the document suggests. In a letter to Wolverstone sent several months later in April 1629, Charles mentioned his first letter, referring to it as "ours of February last." TNA, CO 1/4/40.

<sup>61</sup> TNA, CO 1/4/9.

<sup>62</sup> Coventry's report can be found at the National Archives in the Colonial Office records, TNA, CO 1/5/11. A printed copy also appears in Williamson, *Caribbee Islands*, 56-58.

<sup>63</sup> Williamson, *Caribbee Islands*, 57.



sailors suggested, for the native Caribs who inhabited the Lesser Antilles, and after whom the islands were named, to visit Barbados.<sup>64</sup>

Determining whether the island should have passed by Carlisle's patent was more complicated. Both parties agreed that "in the earl of Carlisle's patent should passe whatsoever was formerlie passed by way of custody to Capt. Warner."<sup>65</sup> Thus the question became whether Warner's commission gave him custody over Barbados, or over the similarly named Barbuda, a small rocky island to the north east of St. Christopher. Warner and Merrifield both testified that in their original petition they had sought Barbados, not Barbuda, and several other witnesses supported their story. Montgomery objected that this testimony had little worth as it was not taken in a "judicial manner" and because Warner and Merrifield were "not indifferent having been interesse [sic] in the custody" of the island.<sup>66</sup> Coventry rejected these concerns, stating that he could not have taken the testimonies "otherwise, [than] upon the reference made to me," and that the various "speeches" Montgomery offered in support of his own claim faced the same criticism.<sup>67</sup> Ultimately, though he believed that the evidence Montgomery offered in defense of his claim "might give him a probable ground to make claim" to Barbados, he found in favor of Carlisle on the basis that "proof on the earl of Carlisles part . . . is verie stronge."<sup>68</sup>

Coventry's report is interesting for what it signified concerning the king's shifting approach to colonial administration. Montgomery's objection that the testimonies Coventry

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<sup>64</sup> This was because, as the sailors informed Coventry, the Caribs' sailing was "but from shore to shore in Canoes, without use of the Compasse." Williamson, *Caribbee Islands*, 56-57.

<sup>65</sup> Williamson, *Caribbee Islands*, 57.

<sup>66</sup> Williamson, *Caribbee Islands*, 57-58.

<sup>67</sup> Williamson, *Caribbee Islands*, 58.

<sup>68</sup> Williamson, *Caribbee Islands*, 58.

procured were not taken “in a judicial way” demonstrates that the determination of this question of right was done outside the courts. This was at base a dispute over property, and as such would usually have been addressed in one of the king’s common law courts. The fact that the property in question stood beyond the shores of England, however, disqualified Common Pleas and King’s Bench as proper venues for redress. This was essentially a matter of procedure: even if Carlisle could find a writ suitable to circumstances of the case (and he couldn’t) no sheriff existed in Barbados to execute it.<sup>69</sup> Thus for reasons of procedure, and problems of jurisdiction, Carlisle was forced to find a legal remedy outside the common law courts to defend his claim.

It was this inability of the common law courts to entertain the matter that the king referred the controversy to his lord keeper. As steward of all that passed under the great seal (including the letters patent that established Carlisle’s and Montgomery’s claims) Coventry had both the means to investigate the matter and the responsibility to rectify the mistake. Moreover, Coventry’s experience as attorney general, and particularly his experience several years early in the Virginia Company case, uniquely qualified him to make this determination. In referring this matter to Coventry, the king signaled his intent to fill the jurisdictional hole left by the common law courts’ inability to determine property matters outside of England, by referring such questions to his legal officers. Yet Montgomery’s complaints, and Coventry’s answer that he could only proceed as the king instructed him, suggests that this was still uncharted ground and that the novelty of the proprietary plantations required legal solutions that were still in flux. As we will see below, Charles and his legal advisors continued to work out the kinks throughout his reign.

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<sup>69</sup> For a discussion of writ procedure and the limitations of the common law of property, see Baker, *Legal History*, chapters 2 and 4.

In many ways this dispute between Carlisle and Montgomery was a wakeup call to the king and his advisors. When Charles issued his second grant to Carlisle in April 1628, he took great care to describe in detail exactly what lands were to comprise Carlisle's proprietary. This level of detail was necessary, the charter explained, as "there [was] not such true and certayne expression and mencon of the saide islands and the longitude and latitude thereof as is prerequisite" in the original. The king framed this lack of clarity as an honest mistake, claiming that such "certayne expression" was "then not soe well foreseene as such it appeareth to be necessary."<sup>70</sup> Charles thus seems to have recognized the potential problem inherent in his proprietary charters. Without a clear definition of the territory conveyed, how could a proprietor be sure of his rights and immunities? And how effective would the proprietor's authority to govern his lands be if he was not secure in that title? In this way, the careful definition of the territories and lands conveyed by all subsequent proprietary charters became a means not only to ensure the proprietor's rights, but also to confirm and establish with clarity the foundation of his authority.

#### *Equity and the Limitations of the Common Law*

Despite the clarity of the second grant, the dispute between Carlisle and Montgomery did not end, but instead spilled over to Barbados itself. Conflict on the island arose when Carlisle's governor Wolverstone landed in June 1628 to find it already occupied by the Powells and several dozen of their fellow planters. The Powell men resisted Wolverstone's authority and ultimately, under the direction of Montgomery and Courteen, placed Wolverstone under arrest, seized his commission, and declared John Powell governor of the island under Montgomery's authority.<sup>71</sup>

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<sup>70</sup> TNA, C66/6/1.

<sup>71</sup> For a detailed account of this episode, see Williamson, *Caribbee Islands*, chapter 3.

The dispute did not end there, but continued until August 1629 and featured several more arrests and assertions of authority from both sides, as will appear in more detail in the next chapter.

Finding no resolution to the conflict between Carlisle's agents and the Powells, Carlisle sought to protect his holdings with an action against the Powells in Chancery. This court, over which the Lord Chancellor presided, was England's primary court of equity. As a court of equity, the Chancellor was not constrained by the strict rules of the common law courts, but could decide the merits of a case with reference to conscience.<sup>72</sup> Carlisle's complaint, dated September 9, 1629, recounted in abundant detail the Powells' "invasion" of Barbados.<sup>73</sup> Specifically, Carlisle complained that the Powells, "confederating, pra[c]tiseing and combineing themselves with Sir William Courteen," had sailed to Barbados "armed and p[re]pared with powder shott and munc[i]on" to take the island from Wolverstone.<sup>74</sup> Carlisle further complained that after the Powells landed, they arrested Wolverstone and called the island's inhabitants together, at which time John Powell declared himself governor. Powell then decreed that all tobacco on the island "should be taken into his howse," and that "all the lands of the [earl's plantations] should be seized and taken."<sup>75</sup> As a result of this activity, Carlisle claimed that he had lost over one hundred thousand weight of tobacco that was owed to him in rents and customs dues. To recover his loses, Carlisle requested a writ of subpoena that would both sequester the tobacco and require

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<sup>72</sup> Baker, *Legal History*, 99-111.

<sup>73</sup> The full text of Carlisle's complaint, as well as several answers offered by the Powells, can be found in Williamson, *Caribbee Islands*, Appendix I.

<sup>74</sup> Williamson, *Caribbee Islands*, 222.

<sup>75</sup> For a discussion of this case see Williamson, *Caribbee Islands*, 38-42.

the Powells and Courteen to answer his complaint, so that Carlisle could be “relieved in equite.”<sup>76</sup>

It is possible from the language of Carlisle’s complaint that he intended to frame the episode as a criminal trespass, a matter normally determined in one of the king’s common law courts.<sup>77</sup> As Carlisle informed the Chancellor, however, the fact that the alleged wrongs occurred outside of England meant that he could have “noe remedie by the strict rules of the common laws of this realm.”<sup>78</sup> The reason, Carlisle informed the Chancellor, was “for that noe certain accon can be brought or laied here in England where the said Henry Powell [and others] now be resident.” This statement about Powells’ location gets to the root of the jurisdictional issues Carlisle faced as he sought to recover his property. If Powell was currently in an English jurisdiction, the wrongs he was alleged to have committed should be tried in an English court. But since those wrongs occurred outside the realm, those courts could not entertain the matter. The issue again was one of procedure, as Carlisle “ha[d] not witnesses now in England to make proffer of the wrongs iniuries and losses done to [him].”<sup>79</sup> These statements, though a regular feature of any Chancery complaint, clearly show the limits of the common law relative to matters of property. In the absence of a writ able to address the specific, and peculiar, circumstances of the case, and with no witnesses present to attest the truth of the matter, the law could not take cognizance of the wrongs done.

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<sup>76</sup> Williamson, *Caribbee Islands*, 226.

<sup>77</sup> In particular, Carlisle’s regular allusion to the force and arms employed by the Powells followed the language of *vi et armis* that distinguished writs of trespass. Baker, *Legal History*, 60-64.

<sup>78</sup> Williamson, *Caribbee Islands*, 225.

<sup>79</sup> Williamson, *Caribbee Islands*, 225.

Carlisle, however, was not completely without remedy, as he carefully informed the Chancellor. That was because the island from which the Powells had taken the tobacco in question was “within his Ma[jes]t[y]’s obedience and parcel of his dominions of the crowne of England.”<sup>80</sup> This simple statement of fact accomplished two important jurisdictional feats. First, it established that Barbados was possessed by Charles, in his capacity as king of England. As such, all events that occurred there fell under the king’s jurisdiction and, by delegation, to that of his Chancellor—the keeper of the king’s conscience. Second, Carlisle’s formulation of the legal status of Barbados also confirmed the foundation of the relationship between the island and the “crown of England:” namely, the fact that Barbados stood in obedience to the king. Here again we see the importance of the ties of allegiance and obedience that the justices in *Calvin’s Case* determined were the foundation of subjecthood. Taken together these statements by Carlisle demonstrate that while the wrongs related in his complaint had occurred outside the realm of England, they had not occurred outside the reach of the king’s justice

Though it appears that Carlisle’s case in equity against the Powells ultimately came to nothing, the legal maneuvering it demonstrated provides a compelling example of the legal and jurisdictional complexities that arose out of English Atlantic settlement.<sup>81</sup> The fact that Carlisle sought redress from equity in the first place, combined with his admission of the limitations of the common law, suggests an attempt to grant to a court in England jurisdiction over territories outside the realm. It is even possible that Carlisle hoped to use the court to establish once and for all a clear title to Barbados. As noted above, the king had never cancelled Montgomery’s patent,

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<sup>80</sup> Williamson, *Caribbee Islands*, 225.

<sup>81</sup> Williamson notes that in October 1629, Courteen asked the court for a respite, as he had been out of the country when Carlisle made his complaint. He also asked that he might be allowed time to meet with Carlisle and make a private arrangement concerning the matter. No record of this arrangement survives, but the Chancery case seems to have stopped here. Williamson, *Caribbee Islands*, 62-63.

though he had granted Carlisle a second charter confirming his right to the island. Carlisle may therefore have sought assistance from the court to accomplish what the king had not. This would explain the care with which he demonstrated his claim to the island, as well as the mention he makes both of the Powells seizing Wolverstone warrant and of their own proclamations of authority.<sup>82</sup>

Whether Carlisle was interested only in reclaiming his stolen tobacco, or something larger, his case demonstrates an essential feature of law in England's composite monarchy: different jurisdictions required different remedies, whether those jurisdictions existed in England or abroad. This fact did not discount one form of law or elevate another. As Lord Chancellor Ellesmere noted in *Calvin's Case*, all the king's dominions were equivalent, and all were "to be obedient alike; and to be ruled alike."<sup>83</sup> As we saw in the previous chapter, in some instances the established rules and procedures of the common law were sufficient to provide for the administration of colonial matters. The proprietary charters, however, with their focus on property, brought new challenges and required proprietors and the crown alike to seek and test new legal forms and procedures. Under Charles, more often than not this meant a heavy reliance on the king's legal officers as well as his Privy Council, as the next and final episode examined in this chapter will attest.

#### *Estate Management and its Effect on Proprietary Authority*

The proprietary nature of provinces like Avalon and the Caribbees meant that the operation of government in those places depended a great deal on the ways in which the proprietor saw fit to

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<sup>82</sup> Carlisle's complaint began with a long recitation of his two grants. Williamson, *Caribbee Islands*, 218.

<sup>83</sup> Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge: Cambridge University Press, 1977), 237.

use his property. In the case of the Caribbee Islands, the earl of Carlisle's profligate spending and resulting massive debt prompted the earl to leverage his proprietary holdings to ease his financial burdens. During the seven years he possessed the islands before his death, Carlisle sought to satisfy his creditors through favorable leases and to protect his proprietary holdings for his son through careful estate management.<sup>84</sup> All of this activity, though generally unremarkable had the estate been a parcel of land in England, had significant implications for the development of local government in places like Barbados owing to the complex connections between property and authority Carlisle's charter established.

Even before Carlisle had received a full confirmation and clarification of his right to the Caribbees from Charles I in 1628, the earl sought to use the islands to his financial advantage. His first action involved leasing a large plantation to be established within the bounds of his proprietary holdings to a syndicate of London merchants led by Marmaduke Rawdon, to whom Carlisle was deeply indebted.<sup>85</sup> The exact date of this initial lease is unclear, though it must have occurred between the issuance of Carlisle's first patent in June 1627 and his own grant of a commission to the merchants' agent and appointed governor Charles Wolverstone in March, 1628. By this commission, Carlisle established Wolverstone as "Governor, Commander, and Captain over all such persons as the said merchants shall at their charge cause to be transported to the said planation." Wolverstone's authority included power for the "doing of justice; deciding of controversies; keeping his Majesty's peace; and punishing offenders ... according to the laws

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<sup>84</sup> Roy E. Schreiber, *The First Carlisle: Sir James Hay, First Earl of Carlisle as Courtier, Diplomat and Entrepreneur, 1580-1636* (Philadelphia: American Philosophical Society, 1984), 138-39.1

<sup>85</sup> Puckrein, "Sir William Courteen," 136.



of the Kingdom of England.” Wolverstone was to hold his position and his authority for three years, unless the merchants decided otherwise.<sup>86</sup>

The initial grant to the merchants, and Carlisle’s commission to Wolverstone, established a kind of unformed jurisdiction within the earl’s proprietary that Wolverstone, along with the planters he brought to Barbados, would have to work to define. Though no copy of Carlisle’s first lease to the merchants survives, Wolverstone’s commission notes that Carlisle had granted Rawdon and his associates “privileges and authority to settle a plantation in the Barbados Island or in some one other of [Carlisle’s] islands.”<sup>87</sup> Thus, because the exact limits of the merchants’ plantation had not yet been determined when Carlisle appointed Wolverstone governor, his authority was not directly bounded by territorial limits. Instead, Carlisle defined Wolverstone’s authority with reference to the people he was to govern, namely those planters to whom the merchants would provide passage to Barbados. With its reference only to people, and not to land, Wolverstone’s commission defined a situational and relational authority that made him more like captain of a party, than governor of a territory.

By February 1630, however, Wolverstone had succeeded in roughing out a tenuous plantation that prompted a second, more refined lease to the merchants from Carlisle. Here Carlisle granted to Rawdon and four named associates 10,000 acres of land in Barbados, “being that plantation which hath been already partly measured and marked out by Captain Wolverstone.” Carlisle then defined the limits of those 10,000 acres with reference to several natural landmarks including the “river of the Mangrove bridge” and the “black rock.”<sup>88</sup> In this

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<sup>86</sup> Puckrein, “The Carlisle Papers,” 304.

<sup>87</sup> Puckrein, “The Carlisle Papers,” 304.

<sup>88</sup> Puckrein, “The Carlisle Papers,” 309-311.

way, the merchant's plantation, which previously had been defined in reference only to the people who would settle it, now became a thing rooted in land and bounded within certain territorial limits. So too did the authority of James Holdip, the man whom the merchants appointed to replace Wolverstone as governor of their plantation. Holdip's commission from Carlisle, dated January 1630, defined his authority differently than Wolverstone's. Whereas Wolverstone was to be governor over "all such people as the merchants shall cause to be transported," Holdip became "sole agent, commander, and Governor over the said plantation and every part thereof, and all such persons as the said merchants shall cause to be transported."<sup>89</sup> Holdip's commission, unlike Wolverstone's, rooted his authority in a definite territory and established well-delineated jurisdictional boundaries that set the merchants plantation apart from the rest of Carlisle's holdings.

The legal and jurisdictional distinction between the merchants' plantation and the remainder of the island became even more fixed when Carlisle appointed William Tufton to serve as governor over Carlisle's own plantations in the island. Tufton's commission, which the earl sent to him on February 12, 1630, empowered him to do all things necessary "for the ... good rule, order, and government defense and maintenance of the said island and the furtherance of the plantation there." Yet while Tufton would enjoy authority over the entire island, Carlisle specifically ordered that he should not "enter into the land granted or agreed by me to be granted and confirmed to Captain Marmaduke Rawdon ... nor to intermeddle with the rule, order, dispose, or government of their officers, servants, agents or plantation." Only if the security of the island were threatened, whether by foreign invasion or by internal tumult (including any rebellious activity arising within the merchants' lands) would Tufton have authority to enter the

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<sup>89</sup> Puckrein, "The Carlisle Papers," 306-07.

merchants' planation and only then to defend it.<sup>90</sup> In similar fashion, in Holdip's commission, Carlisle ordered that the merchants' governor should "conform himself unto the command and direction of Sir William Tufton ... in all things that shall or may concern the general good security and defense of the said island."<sup>91</sup> These two commissions, therefore, established a situation-dependent layering of place and jurisdiction. In all matters relating to the management and operation of the merchants' planation, those lands (and the people who inhabited them) were reckoned distinct from the rest of the island. But in all things touching the direct interest of the proprietor (such as the security of his possessions) the island was reckoned as one.

Carlisle's various leases to his merchant creditors, as well as the commissions he offered to Wolverstone, Holdip, and Tufton, demonstrate that authority under the proprietary patents was often flexible and conditional. In Wolverstone's case, we see that jurisdiction was not merely a textual imposition defined by the proprietor's charters or commissions. Instead, jurisdiction had to be physically established within the generally uncharted and unworked territories that Carlisle possessed but had not yet defined. And once those jurisdictional limits had been established, the terms of Carlisle's grant allowed him to modify and amend those limits and even introduce new, and in some cases, competing authorities.

In all these arrangements, however, Carlisle took care to maintain his interest in his proprietorship and with it his ultimate authority as lord of the province. It is not clear by what manner the merchants held their lands from Carlisle, but the terms of the lease did establish that they remained his tenants and did not become proprietors in their own right. According to the lease, Carlisle expected the merchants to pay "the twentieth part or 5 per cent of all the fruits,

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<sup>90</sup> Puckrein, "The Carlisle Papers," 307-09.

<sup>91</sup> Puckrein, "The Carlisle Papers," 307.

profits, and issues yearly rising out of the 10,000 acres.”<sup>92</sup> Furthermore, Carlisle commanded that the merchants and their agents must “conform themselves in all things that may tend to the honor, welfare, and preservation of ... the maintenance of the Lordship’s right and power over the [island].”<sup>93</sup> And as already shown, both Wolverstone and Holdip held their commissions from Carlisle, even though they were nominated for that position by the merchants. Thus while Carlisle almost certainly offered these 10,000 acres in consideration of the debts he owed Rawdon and his associates,<sup>94</sup> and was willing to allow them considerable leeway in the management of their estate, he was not willing to relinquish entirely his right as lord and proprietor. This again demonstrates the powerful ways in which private interest comingled with the public work of governance. Jurisdiction, as these commissions and leases show, arose through the interplay of Carlisle’s private dealings and the public activities of men like Wolverstone and Holdip.

While the arrangements Carlisle made with Rawdon and his other creditors had an immediate impact on jurisdictional realities within Carlisle’s Caribbean holdings, the earl’s careful estate planning established the potential for even greater impacts in the event of his death. Even though Barbados soon proved an important financial asset for Carlisle, generating £4000 in customs and rents by 1630 and perhaps over £10,000 at the time of his death in March 1636, Carlisle remained heavily indebted.<sup>95</sup> Long before that, in 1628, Carlisle managed to secure several amendments to his original grant that would enable the administrators of his estate to

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<sup>92</sup> Puckrein, “The Carlisle Papers,” 310.

<sup>93</sup> Puckrein, “The Carlisle Papers,” 304.

<sup>94</sup> Puckrein, “Sir William Courteen,” 137-38.

<sup>95</sup> Schreiber, *The First Carlisle*, 181.

benefit from the profits of his proprietorship. By the terms of the original charter, Charles granted Carlisle and his heirs and assigns the right to collect all customs and duties arising out of any goods shipped into or out of his islands without interference from, or requirement to pay customs to, the king's customs officers. Carlisle's second grant retained these immunities, but granted them to Carlisle, "his heirs, assigns, executors, and administrators."<sup>96</sup> The implication of this modification is that those responsible for executing Carlisle's will would be authorized to collect the profits arising out of his Caribbean holdings and, presumably, put them towards satisfying the earl's numerous creditors. In one sense, this was a means by which the earl could protect his executors and administrators who, by recent innovations in legal proceedings relating to debt recovery, could be held liable for the earl's outstanding obligations.<sup>97</sup> Beyond this, though, the modifications Carlisle (or, more likely, his agents and advisors) introduced into the earl's second charter demonstrate the degree to which Carlisle viewed his proprietorship as a bulwark against his financial difficulties and the steps he would take to protect it.

While these innovations in Carlisle's second charter had no direct bearing on the establishment or execution of government in the Caribbees, the final arrangement Carlisle made to protect his estate and provide for the satisfaction of his debts destabilized the island's government for years. Soon before his death, Carlisle transferred all his interest in the Caribbees and all the rights and franchises arising in relation to that interest to his cousins Archibald Hay and James Hay. This was not a simple transfer, however, as the earl established that James and Archibald would hold the lands "upon trust for the said Earl for his life and afterwards upon trust that they their heirs and assigns shall make leases grants sales and conveyances ... and disburse

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<sup>96</sup> TNA, C66/6/1.

<sup>97</sup> Baker notes that after 1611, changes in the use of *assumpsit* to recover debt meant that executors could be held reliable for their testators' debts. Baker, *Legal History*, 344-45.

the moneyes and other profits for payment of the earl's debts."<sup>98</sup> This was a complicated arrangement that split the possession and use of the property during the term of Carlisle's life but then reunited it in the trustees following his death. At no point, however, did the use or benefit of the property go to the earl's son James, at least not until the trustees had satisfied their duty, at which point the trust would terminate and James would enter by virtue of his inheritance.<sup>99</sup>

While trusts like the one Carlisle established in the months before his death were not uncommon at this time,<sup>100</sup> Carlisle's was significant because it conveyed possession not only of certain lands but also the authority to govern both that land and the people who resided there. Indeed, the terms of the indenture made it quite clear that the trustees were to become, in essence, proprietors in their own right. They were to have "all and singular the said islands, lands tenements powers prerogatives jurisdictions authorities franchises privileges immunities profits easements commodiites advantages emoluments & hereditaments ... to the same belonging," as well as the "right title interest estate trust benefit & demand of the said Earl in or to the same."<sup>101</sup> This meant that from April 1635 James Hay and Archibald Hay, two men whom the king had not intended to fill this role, potentially had power to make law and to appoint officers to enforce that law, even including the imprisonment and corporal punishment of the king's subjects.

This arrangement, however, did not please the earl's son James, who, at age twenty four and thus fully of age, became the second Earl of Carlisle when his father died in 1636. The new

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<sup>98</sup> National Records of Scotland (NRS), Hay of Haystoun papers, GD34/955/1.

<sup>99</sup> For an explanation of trusts and the various divisions between possession and use that they could enact, see Neil Jones, "Trusts in England after the Statute of Uses: A View from the 16<sup>th</sup> Century" in *Intinera Fiducia: Trust and Treuhand in Historical Perspective*, ed. Richard Helmholz and Reinhard Zimmermann, (Berlin: Duncker & Humblot, 1998).

<sup>100</sup> Baker, *Legal History*, chapters 14 and 16.

<sup>101</sup> NRS, Hay Papers, GD34/955/1.

earl bristled at what he felt was a usurpation of his inheritance and right title to his father's estate and became actively involved in the management of what he saw as his proprietorship, operating independently of the trustees and without their authorization.<sup>102</sup> The trustees jealously guarded their rights in connection with the estate, however, and sought to nullify Carlisle's dealings. For instance, in 1639 the trustees sent a strongly worded letter to Henry Ashton, the governor of Antigua, reprimanding him for seeking and accepting a grant of lands within that island from the young Carlisle. The trustees expressed their surprise that Ashton had "desired any such thing of our Lord without our privity and consent" considering that Ashton knew well that "title and interest in those islands were conveyed unto us in good right in law by the late earl" and further that "the new earl hath never medled with any of the rents nor disposed of any thing coming from thence."<sup>103</sup> Interestingly, Ashton was the trustees' own choice for governor, and James and Archibald seem to have allowed him to retain the lands he had obtained from the earl, but commanded that he remit all rents and other profits arising from them to the trustees.

Tensions between the new earl and his father's trustees mounted until finally, in February 1640, the two parties jointly petitioned the king to determine to whom the right and title to the late earl's proprietorship properly belonged. The trustees argued that Carlisle, "being seized in fee of your majesty's royall grants" both of the Caribbee Islands and "the power and government thereof," had "assigned upon trust" those islands "for payments of his debts." James and Archibald further informed the king that they were faithfully executing that trust and that in all matters relating to the law had "taken advice of Counsell learned in the law" and had appointed commissioners "nominated and well approved by [the king]" to give them "advise and assistance

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<sup>102</sup> Williamson, *Caribbee Islands*, chapter 6.

<sup>103</sup> NRS, Hay Papers, GD34/933/2.

from time to time for the better government of the said islands.”<sup>104</sup> The trustees’ position seemed a strong one: they could show that Carlisle had assigned his entire interest in the Caribbees to his cousins, and that they had done all required to fulfill their trust, including gaining the king’s approval of the officers they appointed to govern the islands.

For his part, the new earl challenged his cousins’ right to govern the islands. He asserted that “the right of government of the said islands is descended unto him and did not passe by the grant of the said late Earl.”<sup>105</sup> Carlisle thus believed that his father’s charters, while they allowed him to devise and assign his interest in the lands conveyed by the charter, did not allow him to transfer his authority to govern them. This franchise, Carlisle asserted, could only descend to his father’s heir and thus was properly his. The trustees disagreed, prompting their appeal to the king’s judgment, admitting that “they themselves cannot reconcile” the difference.<sup>106</sup> Charles, in response to the petition, decided to refer the question to the chief justice of the Common Pleas, whom the king recommended should seek the advice of the attorney general and “such other of his majesty’s council at law he should think fit.” After considering the question, the chief justice and his associates were to “certify his majesty their opinions to whom the right of the government of the said islands doth appertaine,” after which time, presumably, Charles would make his final decision regarding the matter.<sup>107</sup> Thus, while this question would again not be a matter for the courts to decide, Charles found it weighty enough to enlist the council of his highest legal officers.

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<sup>104</sup> NRS, Hay Papers, GD34/928/1.

<sup>105</sup> NRS, Hay Papers, GD34/928/1.

<sup>106</sup> NRS, Hay Papers, GD34/928/1.

<sup>107</sup> NRS, Hay Papers, GD34/928/1.



Unfortunately, no record survives of the opinion offered by Chief Justice Finch, if in fact he ever did offer it. We do have, however, in the papers of the Hay family a document which seems to summarize an inquiry into the situation and offers some insight into the main points of contention. This document, which bears the title “Brieff of the leters patents and conveyance of the Caribbee Islands” is undated and unattributed, but must have been drafted in response to the trustees and Carlisle’s petition.<sup>108</sup> The brief first summarizes the terms of both of Carlisle’s patents, touching point by point all the rights, privileges, and immunities that Charles granted the first earl. Next, it recounts the terms of the indenture, discussed above, by which the earl established his trust. Finally, the brief lists five questions dealing with the intent and legality of Carlisle’s indentures. These questions remain unanswered within the brief, but do provide some insight into the points of fact and matters of law under contention.<sup>109</sup>

The first of these questions set the tone for the remaining four, and inquired into the powers Carlisle had to convey elements of his proprietorship. Specifically, the brief asked “whether or no in some part of the King’s grant the words going only to the Earl and his heires, the Earle have not power to assigne and the assignee to enjoy.”<sup>110</sup> This, in essence, was the new earls’ contention, that the authority to govern the proprietorship passed only to the earl and his heirs and could not be transferred. This is a crucial question, and one that could not be answered easily, thanks to certain ambiguities present in the earl’s two patents. Carlisle’s first patent comprised a grant of all the lands comprising his proprietorship, along with numerous appurtenances, including all the rights, liberties, and franchises enjoyed by the Bishop of

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<sup>108</sup> NRS, Hay Papers, GD34/955/1.

<sup>109</sup> NRS, Hay Papers, GD34/955/1.

<sup>110</sup> NRS, Hay Papers, GD34/955/1.

Durham. As was the case in Calvert's Avalon charter, this grant went to Carlisle, "his heirs and assigns."<sup>111</sup>

It would seem by these words that the earl's first charter established an assignable franchise for the government of the proprietorship. However, the charter qualified this authority with further grants that defined Carlisle's right to make laws, appoint officers to enforce those laws, and do all other things necessary for justice and the maintenance of peace and order within his islands. This grant, significantly, went only to "the said earl and his heirs," and not to any of his assigns.<sup>112</sup> Thus we see that by his original charter, the earl possessed two distinct franchises that each defined elements of Carlisle's authority over his proprietary holdings. The first of these was incidental to the earl's lands while the second depended on the trust and confidence that the king had in Carlisle and was not directly tied to any property in land.<sup>113</sup>

To complicate matters further, the earl's second charter departed from the first and seems to have made all judicial and governmental authority relating to the proprietorship assignable. This charter did not actually establish any new franchises or privileges, but instead simply summarized and confirmed the grants conveyed by the first charter. But in doing so, the second charter featured the phrase "to the said earl, his heirs, and assigns" in relation to all the rights and franchises conveyed by the first, including the right to make and enforce law and to appoint justices and magistrates.<sup>114</sup> Whether this was a purposeful amendment to the original charter, or simply a scribal error is impossible to determine. It is interesting, however, that the person who

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<sup>111</sup> TNA, CO 29/1.

<sup>112</sup> TNA, CO 29/1.

<sup>113</sup> Charles began the clause of Carlisle's first grant in which he gave the earl authority to establish law by noting the confidence he had in Carlisle's "fidelity, prudence, justice, and wisdom." TNA, CO 1/29/1.

<sup>114</sup> TNA, C66/6/1.

prepared the brief summarizing the patents and the conveyance, likewise used the phrase “to the earl, his heirs, and assigns” in all instances for both grants.<sup>115</sup>

If the king did intend to amend Carlisle’s charter so as to enable him to transfer his franchise to govern the Caribbees, such an amendment would run counter to all but one of the proprietary charters issued between 1623 and 1640. Each of these, including Calvert’s original Avalon grant, Montgomery’s disputed grant for Barbados, Cecilius Calvert’s grant for Maryland, and Robert Heath’s grant for the Carolinas, specifically restricted all franchises (saving those included in the Bishop of Durham clause) relating to the government of their respective proprietaries to the proprietor and his heirs. Only one grant, issued to David Kirk and several of his noble associates in 1639 in relation to Newfoundland, provided for the possibility of assigning those rights.<sup>116</sup> Clearly the king and his advisors wished to take special care to restrict governmental and judicial authority in these various dominions of the king only to those individuals whom the king trusted to exercise that authority.

The distinct terms by which the king conveyed property in land, as well as authority as property, to his North American and Caribbean proprietors provides significant insight into the attitude the king and his councilors had towards the governance and administration of his Atlantic dominions. As land able to be possessed, occupied, and worked, the king viewed his overseas holdings no differently than he viewed his realm of England. The king was ready to accept any tenant whom his proprietors might substitute in their place, and would grant to them all the rights and incidents attached to that land. The king was not as ready to extend to these

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<sup>115</sup> NRS, Hay Papers, GD34/955/1.

<sup>116</sup> Like Carlisle’s second charter, Kirk’s Newfoundland charter utilizes the more expansive “heirs, and assigns” phrasing throughout. A copy of Kirk’s charter can be found in the Newfoundland Entry Books, TNA, CO 195/1.

new tenants the trust he had originally reposed in his proprietors concerning the governance of those lands and his subjects who resided in them. Indeed, the right and authority which the king delegated to his proprietors in this regard, depended on the “fidelity, prudence, justice, and wisdom” of the individual proprietor (to use the words employed in Carlisle’s grant).<sup>117</sup> These were noble qualities generally believed to be tied to a person’s blood and circumstances.<sup>118</sup> Thus, while the king expected the same fidelity and prudence from the heirs of his proprietors, he could not necessarily expect it from a potentially unknown person or people to whom a proprietor might transfer his property.

As it turns out, neither James Hay nor Archibald Hay were strangers to the king, as each held significant positions within his household. James served as esquire of the body to Charles while Archibald served an usher to the queen.<sup>119</sup> The close proximity of the trustees to the king and queen may explain why Charles seems to have favored the trustees in their dispute with the second earl. While no decision concerning their joint petition exists, it is clear from the trustees’ correspondence that James and Archibald continued to be heavily involved in the management of Barbados and the other Caribbee Islands long after their complaint to the king. As late as 1646, Peter Hay, the trustees’ principal agent in Barbados, still sent reports to Archibald concerning the collection of rents in the island, and requests for instruction and advice in that regard.<sup>120</sup> Yet some form of compromise likely emerged concerning the government and management of the

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<sup>117</sup> TNA, CO 29/1.

<sup>118</sup> Richard Cust, *Charles I and the Aristocracy, 1625-1642* (Cambridge: University Press, 2013), 3.

<sup>119</sup> NRS, Hay Papers, GD34/927/1.

<sup>120</sup> NRS, Hay Papers, GD34/924/36

islands, as the correspondence between the trustees and their agents include frequent references to the will, pleasure, and directions of the earl.<sup>121</sup>

## **Conclusion**

While the dispute between the first earl of Carlisle's trustees and his son concerning the government of the Caribbees may have found a peaceable solution, the effects of the earl's indenture lasted for years. For years after the first earl's death, ambitious agents of the both parties took advantage of the legal uncertainties established by Carlisle's trust in order to advance their position within Barbados. Their actions, as I will show in more detail in the next chapter, had a lasting effect on the course and nature of governmental institutions in Barbados.

Moreover, the trust Carlisle established in relation to his Caribbean holdings illustrates quite clearly the degree to which English interest in North America and the Caribbean had now become fully focused on the possession and use of land. Barbados and the other Caribbees had become valuable possessions that, by the terms of the proprietary charters, could be leveraged to meet private needs and also transferred and sold. But in applying legal structures derived to meet problems arising out of English common law practices (the trust) to manage his overseas holdings, Carlisle introduced new problems that had not been foreseen when Calvert sought his Avalon charter, or Charles issued Carlisle's Caribbee patent. Thus while traditional legal practices like *quo warranto* proved sufficient to manage overseas colonial activity during the corporate phase, the introduction of the proprietary charter required new law and new solutions.

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<sup>121</sup> For instance, in a letter dated August 3, 1641, Archibald Hay wrote to Peter Hay informing him that the earl had become displeased with Peter, for which reason the trustees had been "forced to discharge you from your place." The trustees and the earl also submitted a joint petition to the king in 1641 asking that he appoint a commission to investigate the behavior of Henry Hawley, the former governor of Barbados who had swindled the planters there to accept him as their leader even after he had been deposed by the trustees (an episode I will discuss at length in the following chapter). NRS, Hay Papers, GD34/923/35.

## **Chapter 4:**

### **Authority in Action**

While the legal and governmental structures established, defended, and refined in England by the various means discussed in the previous chapters provided a rough framework for government, this framework was necessarily incomplete. The novelty of the Atlantic experiment, combined with the impossibility of obtaining full and accurate information concerning the geography, climate, and situation of the lands under settlement, ensured that no one in England could adequately provide for the entire government of any of these places. And in fact, as the previous chapters have shown, none tried. Instead, the king offered his trusted delegates expansive authority to establish law, and with it the parameters that both bound that law and gave it force. This chapter examines the process of jurisdictional definition by which English planters and settlers (both governors and governed) established the practical dimensions of government and authority in the early decades of Atlantic settlement.

#### **Definitions and Context**

On the one hand, the various charters, judicial findings, and personal legal arrangements that structured and legitimized English Atlantic settlement defined an overarching jurisdiction that empowered the patent-holder to govern. Yet on the other hand, the practical operation of this prototypical jurisdiction often had little impact on the experience of authority on the ground in the regions with which it was concerned. That is because the mechanisms of government, and the various jurisdictional boundaries that would define who could apply what laws where and when, did not yet exist. What the charters and other instruments and legal maneuverings provided was a broad, but still carefully limited, power to create and define jurisdiction. The actual work of

establishing jurisdiction on the ground, as we will see, rarely involved those whom the king directly authorized to do so, but more generally the governors and counsellors the charter holder (or holders) appointed for that purpose.

This process of jurisdictional definition involved an often problematic, though ultimately productive, interplay between jurisdiction and authority. As we saw in the introduction, jurisdiction can be viewed as a space within which a delimited subset of law and authority can operate. As Shaunnaugh Dorsett put it, jurisdiction "is the tool used to mark ... the sphere within which one institution has authority to determine an issue from the sphere of another."<sup>1</sup> Bradin Cormack takes this definition one step further in his discussion of jurisdiction in early modern literature, arguing that the delimitation of a given jurisdictional sphere is "the precondition for the juridical as such, for the very capacity of the law to come into effect."<sup>2</sup> In these ways, jurisdiction serves both to limit (whether spatially, temporally, or situationally) authority and also to sustain and even animate it.

And yet, authority is almost always exercised with some manner of discretion; that is, authority figures often choose to amplify or minimize the effect of their authority in response to mitigating circumstance. Scholars of early modern criminal procedure have shown that such discretion pervaded, and in a sense made possible, England's criminal justice system. Discretion developed naturally in a system that depended on untrained lay participants at all levels, and allowed those involved to shape that otherwise rigid criminal process, with its simple, but

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<sup>1</sup> Shaunnaugh Dorsett, "'Since Time Immemorial': A Story Of Common Law Jurisdiction, Native Title And The Case Of Tanistry," *Melbourne University Law Review* 3 (2002): 35.

<sup>2</sup> Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of the Common Law, 1509-1625* (Chicago: University of Chicago Press, 2007), 3.

restrictive rules and harsh sanctions, to the moral precepts of the age.<sup>3</sup> Certain equitable jurisdictions, such as the court of Chancery, also enabled justices to consider conscience and equity in instances where the strict procedures of the common law might prove unable to provide a remedy. Discretion, though it was always to be bound and limited lest order give way to the whim of the magistrate, thus provided a space for innovation and relief in an otherwise closely defined legal system.<sup>4</sup>

Discretion was also a characterizing feature of the legal foundations that underpinned colonial settlement. Indeed, the unsettled and unformulated nature of colonial government required innovation and experimentation in order to address the unknown (and largely unknowable) challenges of colonial life. If forced to follow only the establishing order of their charters or instructions, the undermanned, underfunded, and undersupplied settlements that represented England's first foray into overseas colonization would certainly have floundered. Without discretion to act in response to crises, hamstrung governors and officials could not have adapted to the often harsh realities of geography and climate they encountered. The actions of these governors, always executed with reference to their justly ordained authority, as well as the (often critical) response offered by the planters they governed, in time established the parameters of local government in these regions. In this sense, authority, in its selective application and occasional amplification, served in itself to shape and expand the jurisdictional boundaries that ultimately defined it.

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<sup>3</sup> Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge: Cambridge University Press, 1987), 5-7.

<sup>4</sup> Christopher Brooks, *Law, Politics and Society in Early Modern England* (Cambridge: Cambridge University Press, 2008), 413.



The process of creating and elaborating the jurisdictional boundaries that defined the English Atlantic world that I am describing is similar to what Mary Bilder has termed the "trans-Atlantic Constitution." This constitution comprised an on-going conversation between center and periphery "over how and when the laws of England should apply in the colonies."<sup>5</sup> The notion that colonial law might differ but could not stand repugnant to English law animated this conversation, and enabled colonial lawyers and lawmakers to selectively apply the laws most suited to their local circumstances. Moreover, these notions of non-repugnance and divergence allowed for the relatively painless incorporation of an expanding series of locally-oriented legal cultures into the larger, established British constitutional system.<sup>6</sup>

As important as this process was for defining a consistent and cohesive legal apparatus through which the crown and the colonies could govern their relations, before it could occur the terms of the conversation that Bilder describes first had to be established. For instance, in this conversation, who would be allowed to speak for the king's colonial subjects, and in what (legal) language? In other words, the settlers and planters who resided in these colonial spaces, and particularly those appointed to govern them, had to determine who held jurisdiction, what were the limits of that jurisdiction, and over whom did it extend. This process occurred largely on the ground, and depended less on negotiation between center and periphery (that is between colonial representatives and the king in council) than on the give and take between governor and governed in the locales. Only when a governor's discretion clearly failed or when planters

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<sup>5</sup> Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA: Harvard University Press, 2004), 1.

<sup>6</sup> Bilder, *Transatlantic Constitution*, chapter 1.

resisted what the crown viewed as legitimately constituted authority did the king intercede to clarify the limits and order of his government on the ground.

This chapter examines four episodes critical to jurisdictional development in the earl of Carlisle's Caribbee Islands in order to demonstrate the way in which jurisdiction, authority, and discretion worked in concert to establish the legal foundations for government in that region. The Caribbees offer a particularly interesting example of this process, as the province was the first significant and lasting settlement framed by a proprietary charter.<sup>7</sup> And, though Carlisle's charter reckoned the Caribbees as a single province (given the unwieldy name "Carliola") over which the earl possessed ultimate jurisdiction, the Caribbees were in fact a collection of individual islands, each with its own governor, counsel, and (potential) body of laws. The archipelagic nature of Carlisle's proprietary holdings increased the opportunity for jurisdictional experimentation and fragmentation within the province and also led to challenging questions about the legal relationships among and within the constituent islands.

At first glance it would seem that defining jurisdictional boundaries on an island would prove straightforward. Unlike continental spaces, an island's geography offers natural spatial dimensions by which jurisdiction could easily be defined and maintained. Yet in the early modern experience, jurisdictional boundaries did not necessarily equate to geographic boundaries. Jurisdiction, being simply (but powerfully) the ability to speak law and thereby do justice, could extend over a collection of people or a genre of law or activity as easily as it could over a given parcel of land.<sup>8</sup> Moreover, territorial boundaries, though they seem fixed and

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<sup>7</sup> Calvert's Avalon charter came several years before Carlisle's, as discussed previously, but his Newfoundland plantation quickly floundered after only two years.

<sup>8</sup> Dorsett, "Since Time Immemorial," 35.

definite on a map, are fragile, mutable, and contested things. This is because territory, unlike geography, is a political construct that requires constant maintenance. Thus while an island's geographical bounds are (more or less) fixed, the territorial boundaries that define an island politically, need not be.

Even an island as small as St. Christopher (the location of the first episode I will examine) which measures a mere twenty miles long and six miles wide on average, provided ample room for competing territorial claims. Such competing claims underscored the most significant jurisdictional development in the island's early history. In May 1627, the island's first English governor Thomas Warner signed a "treaty of partage" with Pierre Belain, sieur d'Esnambuc, commander of a small settlement of French planters also residing on the island. This treaty, which effectively split possession of the island between the English and French settlements, defined each "nation's" jurisdictional boundaries in both territorial and situational terms. The treaty confirmed for the English governor and courts a general competency to try matters arising on their side of the island, and likewise the French. In cases involving both English and French planters, the rules differed depending on circumstance. Ultimately, by this treaty, Thomas Warner established a lasting, and complex, jurisdictional arrangement that transcended national boundaries and directed the exercise of government on the island for over a century. Yet Warner's limited commission, which made him King's Lieutenant of the island, did not authorize him to treat with subjects of a foreign king in this fashion. A close examination of the treaty along with Warner's commission, however, will show that Warner sought to uphold his responsibilities as custodian of one of the king's dominions, even as he imperiled the king's claims to it.

While Warner found a (reasonably) peaceful solution to his thorny jurisdictional issue, in many cases governors and other authority figures employed violence and force to assert, defend, and maintain their authority. The use of force under these circumstances is not especially surprising, given not only the isolated nature of these settlements (far from the support of London), their overwhelmingly young, male population, and, perhaps most significantly, the lack of any established and accepted structures of order and social hierarchy. In England, established institutions, like the Church and the King at the national level and the vestry, parish, corporation, and manor at the local level, served to reinforce the structures of order and hierarchy upon which English society depended. Authority figures working within these institutions had at their disposal a carefully crafted and consistently employed set of ceremonial and textual tools by which they could demonstrate and disseminate law and order.<sup>9</sup> Newly formed plantations like St. Christopher and Barbados lacked the pompous displays of power and authority that were so familiar to any in England who had witnessed, for instance, the ceremony of an assize proceedings.<sup>10</sup> Instead, these governors used force, which stood in for these displays and proved the most effective means by which an embattled (or unscrupulous) authority figure could assert his power.

As separate incidents involving the first governors of Barbados will demonstrate, force (or the threat of force) could be used both to defend a legitimate claim to authority against resisters and also as a coercive tool to expand, and even break, the limits of authority. In the first

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<sup>9</sup> "Introduction," in Paul Griffiths, Adam Fox and Steve Hindle eds. *The Experience of Authority in Early Modern England* (New York: St. Martin's Press, 1996), 3.

<sup>10</sup> For a discussion on the effect of such legal ceremonies, see Herrup, *Common Peace*, 51-53. Douglas Hay's classic essay in *Albion's Fatal Tree* also provides a thorough examination of "the theater of the law" in the context of eighteenth century class relations. Douglas Hay, "Property, Authority, and the Criminal Law," in Hay, et al., *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (London: Allen Lane, 1975).

instance, Charles Wolverstone, appointed by Carlisle to serve as governor of the Merchants' plantation, sought to subdue with force a group of planters who refused to recognize the proprietor's authority.<sup>11</sup> This use of force, which culminated in a nighttime raid on the interlopers' plantation, came only after an impassioned attempt to win these recalcitrant men over peaceably. The result of Wolverstone's actions helped settle in the minds of the planters the question of the island's ownership, as well as to unify its residents into a cohesive colony. Though these acts proved ultimately beneficial to the island and its government, Wolverstone's commission defined his authority not in relation to the island as a whole, but only to a specific subset of planters. Through his centralizing activities, bolstered by the use of force, Wolverstone refashioned his authority, and thus the jurisdictional boundaries that defined it, from one focused on people to one focused on territory.

Several years after Wolverstone's efforts to unite the planters of Barbados into one colony, Henry Hawley, the island's third governor, used force to extend gubernatorial authority, and with it his own personal interest in Barbados even further. Though established as the commissioned governor by warrant from Carlisle, Hawley faced criticism from planters over both his attempts to raise rents and also the restrictive rules he put in place concerning the island's shipping. Hawley's most vocal opponent was the man whom he had replaced as governor, William Tufton. After several months of strained relations between Hawley and the planters, Hawley had Tufton arrested, tried by martial law, and executed for mutiny. Hawley's actions, motivated in part by a concern to protect the dignity of his office, but perhaps more so by a desire to line his pockets with the profits of the island's produce, demonstrates the interplay between private and public interest that so often impacted the development of government in the

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<sup>11</sup> For more on this arrangement, see above pp. 113-117.

Atlantic. Moreover, Hawley's use of a martial court to proceed against Tufton, though determined to be "without law" by some observers in England, had a legal foundation in Carlisle's patent, which allowed the earl or his appointees to utilize martial law in cases of tumult and rebellion.<sup>12</sup> In this way, Hawley's actions reflected a common theme in which both those in power and those resisting power consistently acted with reference to some legitimizing authority, whether it be a foundational charter or simply their rights as Englishmen, even when their actions seemed to have exceeded the bounds of that legitimizing authority.

While force, or the threat of force, proved effective in establishing, expanding, and defending the limits of authority, in some instances the jurisdictional voids and irregularities inherent in the chartering process were so great that ambitious men like Hawley could enact serious change simply through guile and misrepresentation. Thus was the case in the fourth episode I will examine, in which Hawley duped the planters of Barbados into installing him as their governor, even though he had been recalled from the position and replaced. Hawley was so persuasive that even when his appointed successor arrived with a commission from the second earl of Carlisle and a letter from the king, the planters rebuffed him. Though commissioners sent from London by authority of the king ultimately displaced Hawley and installed Henry Huncks to succeed him, Hawley used his time as illegitimate governor to establish new institutions that persisted and eventually became central features of Barbadian government.

All of these episodes demonstrate that defining jurisdiction did more than shape the structures of government. In St. Christopher, Warner's and d'Esnambuc's partition of the island, which carried mutual agreements of support regardless of the status of their two parent nations,

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<sup>12</sup> TNA, CO 1/14/31.

required an assertion of authority that bordered on a claim to sovereignty. In Barbados, Wolverstone's campaign against the Powells was at root a struggle to define legitimacy: did first possession and continued occupation grant the right to govern, as the Powells contended, or would it be the authority of the king, represented in Wolverstone's commission that determined that right? Struggles over jurisdiction could also involve a struggle to define a society's values and interests. Such was the case when the planters of Barbados worked to remove Tufton from office after his attempts to reform their labor force. Finally, as the career of Henry Hawley demonstrates, jurisdiction could be used as a tool for profit and gain. Taken together, these episodes highlight the critical role jurisdiction, and the struggles to define it, played in forming the normative rules of English society in these islands.

***“For ye maintaining their commissions”: Thomas Warner and the division of St. Christopher***

The treaty of partage signed by Thomas Warner and his French counterpart d'Esnambuc is a fascinating example of the resourceful and innovative ways local authority figures shaped jurisdiction to address local challenges. As mentioned briefly in the previous chapter, St. Christopher was the site of the first permanent English settlement in the Caribbean. Warner, who had initially scouted the island for plantation in 1622, arrived with fifteen planters, including his wife and teenage son, in January 1624. Though this small expedition had the financial backing of prominent London merchants Ralph Merrifield and John Jeaffreson, Warner did not have authorization from the king to undertake his enterprise.<sup>13</sup> Warner's plan seems to have been first to establish the viability of the plantation and only once it had produced, return to London seeking authorization from the king. This he did in March 1625, sailing with the plantation's first

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<sup>13</sup> Sir Alan Burns, *History of the British West Indies* (London: George Allen & Unwin LTD, 1954), 187-88.

tobacco crop in a ship that had two weeks previously brought much needed supplies and further adventurers. As discussed in the previous chapter, Warner's activities in London in the summer of 1625 as he sought royal support for his project are largely unknown, but it is clear that by September 1625 he was prepared to petition the Privy Council with the aid of Merrifield.<sup>14</sup> The council quickly approved Warner's petition, and on September 13, 1625 the king issued Warner a commission that named him King's Lieutenant of St. Christopher and three other islands.<sup>15</sup>

As King's Lieutenant, Warner enjoyed custody (but not possession) of the islands named in his commission and was responsible for governing and defending them as well as the people who resided within them. Warner's authority was significant, but not as expansive as that which the king would grant to Carlisle two years later. Warner's main responsibility was to "governe rule and order all and singular persons which now are or hereafter shalbe abiding in the said Islands." This authority to govern extended to any who might inhabit the islands, including subjects of the king, the island's native inhabitants, "and all others that shall happen to be or abide there." Furthermore, Warner had the power to erect all "such good and reasonable orders Articles and Ordinaces ... as shalbe most requisite and needful at the discretion of him." Any inhabitant of the islands who disobeyed these orders and ordinances Warner could punish as he saw fit, though the commission made no mention of any authority to imprison or corporally punish wrongdoers. Finally, the king authorized Warner "with force and strong hand to repress and anoy all such as shall in hostile manner attempt ... to possess or invade the said Islands ... or to impeach our possession thereof."<sup>16</sup> With this commission, the king granted Warner both the

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<sup>14</sup> Warner's and Merrifield's petition is dated August 30, 1625 and requests that Warner be granted custody of the islands and given certain powers to govern there. The language of the final commission corresponds quite closely with the language of the petition. *APC*, 150.

<sup>15</sup> Burns, *West Indies*, 190.



authority to govern his new plantation as well as the discretion to adapt that government to the contingent circumstances of Caribbean settlement.

Warner faced his first major challenge when he returned to St. Christopher in August 1626 and discovered that in his absence a French vessel under the command of d'Esnambuc had landed on St. Christopher to undertake repairs. D'Esnambuc, a seasoned Caribbean navigator, and his men recognized the commercial potential of the island and began planting a tobacco crop of their own in the months it took to repair their ship.<sup>17</sup> During this time, contact between the French and English seems to have been limited, though both settlements did come together to repel a Carib hunting party that sought to drive the Europeans from the island.<sup>18</sup> By late spring 1626 the French had finished repairs, and d'Esnambuc set sail for France, hoping to receive for himself a commission from the French king authorizing him to establish a settlement on the island.<sup>19</sup> This he received on October 31, 1626 at which time he quickly set about fitting out a ship and gathering volunteers for a return to the island.<sup>20</sup> After a rough journey during which more than half his recruited planters died, d'Esnambuc returned to St. Christopher in May 1627. Five days later, he and Warner met at Old Bridge on the north side of the island and, after a long conference, drew up and signed their treaty of partage.<sup>21</sup>

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<sup>16</sup> A copy of Warner's commission can be found in Burns, *West Indies*, Appendix E.

<sup>17</sup> Nellis M. Crouse, *French Pioneers in the West Indies, 1624-1664* (New York: Octagon Books, 1977), 16-17.

<sup>18</sup> Burns, *West Indies*, 190.

<sup>19</sup> Crouse, *French Pioneers*, 17.

<sup>20</sup> d'Esnambuc's and his deputy Du Rossey's commission is quoted in Eric Williams, *Documents of West Indian History: From the Spanish Discovery to the British Conquest of Jamaica* (New York: A & B Book Publishers, 1994), 254-55. For the complete French text, see Jean-Baptiste Du Tertre, *Histoire Generale des Antilles Habitées par les François* (Paris: T. Lolly, 1667-71) 1:11-14

<sup>21</sup> Burns, *West Indies*, 193.

The short treaty, which covers a scant two pages, both determined the territorial boundaries of the French and English settlements on the island and also provided several articles that would serve to govern relations between the two "nations." The treaty began with a simple, but significant, statement that identified it as: "Articles made betweene the gentlemen Gov'no'rs Captaine Warner & Captaine Denumbuke, & Cap. Du Roissey, for ye maintaining of their Commissions received from ye King of England & ye King of France."<sup>22</sup> This both established the authority by which the two parties acted—their royal commissions—while also signifying the purpose of the treaty, namely the maintenance of those commissions. The treaty's next clause recounted the peculiar historical and political circumstances that led to this moment, noting that "the French and English had together conquered the Island of St. Christopher," and that subsequently both Warner and D'Ensambuc had received commissions "for the same place" from their respective kings. In light of these facts, both parties agreed that "they shall remaine Govern'rs of this Island, each in their severall plantations."<sup>23</sup>

In this explicit recognition of the other's authority, we can see how both Warner and d'Esnambuc sought to "maintain" their commissions by this treaty. Without such clarity, the legitimate ability of either governor to act would always be in question. The very existence of the treaty offered further weight to Warner's commission through recognition by an outside observer. Yet at the same time, by recognizing the validity and strength of d'Esnambuc's commission, Warner also implicitly recognized the validity of the French king's claims to the island upon which that commission rested. The treaty, therefore, illustrates the basic pragmatism

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<sup>22</sup> The full text of the treaty can be found in Vere Langford Oliver, *The History of the Island of Antigua: One of the Leeward Caribbees in the West Indies, from the First Settlement in 1635 to the Present Time* (London: Mitchell and Hughes, 1894), 1:ix-x.

<sup>23</sup> Oliver, *Antigua*, ix.

inherent in early modern understandings of the relationship between territory and authority. Both Warner and d'Esnambuc could, without contradiction, assert authority over the same island based on their respective monarch's possessional claims over that territory. And in fact, the situation on St. Christopher demanded they did so: without such an agreement, peaceful coexistence on such a small island would have been difficult to maintain. To ensure the maintenance of peace, the two governors defined their authority with reference not to the island itself but to the people residing there.

Indeed, these opening lines of the treaty also established a fascinating and complex jurisdictional arrangement. On the one hand, both Warner and d'Esnambuc were to remain governors "of this Island," yet, on the other hand, they were to do so "each in their severall plantations."<sup>24</sup> In effect, this clause of the treaty established a nebulous authority that was both territorially expansive and territorially compressed at the same time. While the agreement did not restrict each governor's authority to rule the island, it did establish a particular locus for that authority. The treaty's third article further qualified each governor's authority and in doing so complicated the jurisdictional picture even more. Here, both parties agreed that "all Englishmen that are upon the Island shall live under the authoritie and com'and of the King of England & his Lieutenant Governor; and likewise the french-men, under their King, & the Governours made by him."<sup>25</sup> This clause of the treaty defined authority in personal, not territorial terms: Warner was to have jurisdiction over all Englishmen (wherever they might reside on the island) while d'Esnambuc's jurisdiction would extend over all French subjects on the island. In this way, both men could satisfy the trust given them by their respective kings (Warner, after all, remained

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<sup>24</sup> Oliver, *Antigua*, x.

<sup>25</sup> Oliver, *Antigua*, x.

custodian of the island's English population) while also acknowledging and accounting for the unforeseen circumstance of the other's presence. Moreover, each could assert and defend his respective monarch's claims to the island by defining them not in territorial but in personal terms.

Yet while the treaty offered some clarity in terms of each governor's relative authority, on an island as small as St. Christopher, interactions and possible conflict between the island's French and English planters was inevitable. Such cases raised an obvious jurisdictional quandary: if Warner was to have jurisdiction over the island's English planters, and d'Esnambuc over the island's French planters, who would have jurisdiction in matters involving both French and English parties? To answer this question, Warner and d'Esnambuc agreed that "if there be any quarrelling or fighting between any of the English and the french, they shall be judged by the governors; & after judgment passed . . . they shall be sent each of them to their own plantations to be punished." By separating the authority to judge from the authority to punish, the treaty added one final jurisdictional wrinkle that respected each governor's competency to order the lives of their respective countrymen while also avoiding possible bias and the friction such bias might engender. In this way, through these carefully constructed articles we can see Warner adapting his authority to meet the pressing challenge of the French presence, while maintaining and respecting the essential foundation of that authority: namely the connection (mediated by Warner) between king and subject.

***"The freedome of Englishmen": Force and Authority in Early Barbados***

While Thomas Warner and Pierre Belain found a peaceful resolution to the jurisdictional quandary presented by the dual settlement of St. Christopher, the first governors of Barbados required force and violence to defend their authority and secure their interest, and that of their

patrons, on the island. I have already examined the legal turbulence created by the contest over possession of Barbados between the earls of Carlisle and Montgomery. That turbulence carried over to the island where, over the course of about sixteen months, a heated and drawn out struggle raged between agents and officers of Carlisle and a group of planters loyal to Montgomery. In the process, through raids, arrests, and sham trials, men like Charles Wolverstone and his rivals John and Henry Powell established the practical limits of gubernatorial authority on the island largely without instruction or support from the competing proprietors or the king.

Though both Carlisle and Montgomery supported their claims to Barbados with reference to the great “cost and charge” they incurred in arranging the island’s settlement, neither earl truly had a hand in first establishing an English presence there.<sup>26</sup> Instead, in the summer months of 1627, a small group of planters under the leadership of Henry Powell arrived on the island and began carving a tobacco plantation out of its dense foliage.<sup>27</sup> Like Thomas Warner had done before them in St. Christopher, Powell and his fellow planters began their enterprise without authorization or support from the king. According to Thomas Parris, a Londoner who joined Powell in July 1628, this nascent plantation was the work of the planters alone, each of whom “took up land att their pleasure, for themselves . . . without acknowledging any Lord Proprietor or other owner.”<sup>28</sup> The plantation was not without order, however, as upon their arrival the first planters had voted among themselves to appoint Powell their governor. It is unclear in what manner Powell governed, or by what authority (if any) he claimed to do so, but it is unlikely he

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<sup>26</sup> This phrase appears in both men’s charters. TNA, C66/30/1 (Montgomery); TNA, CO 29/1 (Carlisle).

<sup>27</sup> Larry Gragg, *Englishmen Transplanted, The English Colonization of Barbados, 1627-1660* (Oxford: Oxford University Press, 2003), 31.

<sup>28</sup> “Deposition of Thomas Parris, Merchant. Aug. 1, 1660” TNA, CO 1/14/31.

employed a heavy hand, as Parris described these early months of the island's settlement as a time of "peace and freedom."<sup>29</sup>

That peaceful atmosphere changed in the early autumn when Charles Wolverstone, Carlisle's first appointed governor, arrived bearing his commission and a letter from the earl. This letter was not in itself an assertion of authority nor was it meant to establish any jurisdiction over the planters who already resided on the island. Instead, Carlisle simply urged Powell and his men to receive Wolverstone and his planters as "your friends and Countreymen" adding that "the addition of [their] strength cannot but further your securitie without anie way impeaching your proffitt."<sup>30</sup> The restrictions on Wolverstone's authority, which, as we saw in the previous chapter, covered only the small group of about eighty planters sent with him to Barbados by Carlisle's merchant creditors, complemented Carlisle's assurances.<sup>31</sup>

Wolverstone, however, appears to have had ideas of his own about both the Powell men and the limits of his commissioned authority. Several months after his initial arrival in June 1628, Wolverstone called all the planters then residing on the island together and, "pretend[ing] a power by virtue of some patent of the Earl of Carlisle," (as Parris recounts) announced his intention to "make a collony of the people of the said island." Powell and his fellow planters refused this offer, answering that they wished to "continue in freedome as they had settled in their owne right, and enjoy the freedome of Englishmen." At this response, Wolverstone made "some disturbance, which drew the people to arms."<sup>32</sup> Only the intervention of the island's sole

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<sup>29</sup> TNA, CO 1/14/31.

<sup>30</sup> A copy of Carlisle's letter can be found in James A. Williamson, *The Caribbee Islands under the Proprietary Patents* (London: Humphrey Milford, 1926), 50.

<sup>31</sup> See above, p. 113.

<sup>32</sup> TNA, CO 1/14/31.

clergyman prevented the conference from breaking down into violence, and each party left with assurances that Wolverstone would maintain the status quo.<sup>33</sup>

This initial interaction between Wolverstone and the island's original planters suggests the difficulty authority figures like Wolverstone faced as they attempted to establish and defend their power in such distant and unsettled places as Barbados. While Wolverstone possessed a lawfully issued commission, backed by a royal patent, the planters who heard his proposals favored their rights (as they understood them) based on first possession, over Wolverstone's claims to authority, based on a presumed title of which they were unaware. According to Parris, at the time Wolverstone called this conference, "there was noe maner of discourse," among the planters at Powell's plantation "of any power of the Earle of Carlisle by patent from the King or otherwise."<sup>34</sup> Significantly, Parris made no mention in his deposition of Montgomery either. At this early stage, the planters under Powell believed themselves to be in sole possession of the island, thanks to their own efforts in establishing a plantation there.<sup>35</sup>

John Powell, Henry's brother and co-captain, himself averred this general ignorance of the legal arrangements made in London that would determine the island's government. In his response to the chancery bill brought against him by Carlisle in 1629, Powell acknowledged that while he would come to learn about (and accept) Carlisle's rights to the island, at the time "he kn[e]weth not that the said honorable Earle ... did make any entry into the said Islande ... by virtue of the [king's] said Letters Patents." In the same way, Powell declared his ignorance of the various powers and authority that Carlisle had granted to his merchant creditors and protested

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<sup>33</sup> Williamson, *Caribbee Islands*, 52.

<sup>34</sup> TNA, CO 1/14/31.

<sup>35</sup> See above, p. 142.

that he knew nothing of “what authoritie they or any of them gave to the said Charles Wolferstone.”<sup>36</sup> Considering the time necessary for communication between Barbados and England, the lack of any established shipping to the island, and the recent and still contested nature of Carlisle’s proprietary claim, it is not surprising Powell and his fellow planters had no knowledge of the island’s current status.

Yet there is no doubt that Wolverstone brought with him and displayed a legitimate, properly sealed commission attesting his authority. This suggests the Powells’ refusal to submit stemmed from more than simple ignorance of the political situation in England. Indeed, this refusal to accept Wolverstone’s authority demonstrates the positive certainty that each planter felt in his own right to work his land unhindered. For his part, John Powell asserted that he and his brother had “att [their] owne costes & charges” furnished the ships and recruited the men that had settled the first plantation on the island. It was their own action settling and improving the land that legitimized the Powell plantation and underpinned their claims to authority. Thomas Parris highlighted a further basis of legitimacy and authority when he noted both the planters’ desire to abide in “their owne right” and their declaration that they “enjoy[ed] their freedom as Englishmen.”<sup>37</sup> This tantalizing statement suggests that Parris and the other planters under Powell’s leadership possessed a clearly defined sense of the rights they enjoyed by virtue of their status as subjects of the English king (even as they disobeyed the king’s authority, represented in Wolverstone’s commission). Parris did not elaborate on the mechanism by which such rights travelled beyond England, nor did he give any indication of his understanding of the way in which place impacted his relationship with the king. Yet it is clear that even an ordinary planter

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<sup>36</sup> Williamson, *Caribbee Islands*, 227.

<sup>37</sup> TNA, CO 1/14/31.



such as Parris held a firm conviction of the inherent connection between him and his monarch, and that this connection should serve as a kind of fundamental authority that could be utilized to challenge Wolverstone's claims.

In the face of this opposition, and with no means to demonstrate or effectively communicate the legitimacy of Carlisle's patent or his own authority that derived from it, it is not surprising that Wolverstone turned to the threat of force to compel submission from Powell and his men. Though Wolverstone initially relented and promised to allow the Powell plantation to continue as it had, Parris recounts that soon after this first meeting, Wolverstone reneged on his agreement and "putt many of the principal free planters in prison ... and kept them there some time." Wolverstone did not stop at detaining the leaders of this plantation, however, as he eventually established a court, before which he "tryed them for their lives by a jewry picked by ... Wolverstone and his accomplices." Even when this jury acquitted all the accused, Wolverstone had the men arrested once more and kept them in jail for over six weeks.<sup>38</sup>

Wolverstone's juridical activities suggest an attempt to leverage legal process in order to add legitimacy to his jurisdictional claims. Though we do not know what charges Wolverstone levied against Parris and his fellow prisoners, it seems likely he presented their actions as mutinous or otherwise contemptuous of his authority. If this were the case, then a pronouncement of guilt offered by a jury of planters drawn from the island would carry with it an implicit recognition of Wolverstone's authority. In fact, simply by erecting the court and arraigning the accused, Wolverstone established his power to render justice on the island. The jury's acquittal of these men, however, shows the limitations of law when it does not reflect

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<sup>38</sup> TNA, CO 1/14/31.

community mores and expectations. By refusing to condone Wolverstone's action against his enemies, the jury signaled that their norms did not coincide with Wolverstone's, and that in effect, his actions did not carry the weight of law. Authority, as Griffiths, Fox, and Hindle have argued, "was always, to a certain extent, bound by the limits of the possible and mitigated by the need for consent."<sup>39</sup> The jury's decision in this instance shows that law could face the same limitations.

Wolverstone's position came under a further, and final, threat in February 1629 when Henry Powell returned with a force of one hundred new planters. Powell carried a commission from Montgomery that named his nephew, also named John, governor of the island by virtue of Montgomery's patent.<sup>40</sup> Thus emboldened, the Powells quickly freed all the men whom Wolverstone had seized and put Wolverstone himself under arrest. According to Wolverstone's account of the episode, some of the planters loyal to the Powells ransacked Wolverstone's house and "tooke awaie all the warr[an]tts commissions and other authorities whereby ... Wollferston had power and authoritie to governe and command the said Island."<sup>41</sup> This seizure of Wolverstone's commission by the Powells demonstrates recognition on their part of the importance these documents had as symbols of authority. Without his commission, Wolverstone had no claim to power and could not challenge the Powells' position on the island except through force.<sup>42</sup> To avoid that eventuality, John Powell placed Wolverstone in chains and sent him on a

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<sup>39</sup> Fox, Griffiths, and Hindle, *Authority*, 5.

<sup>40</sup> Williamson, *Caribbee Islands*, 54.

<sup>41</sup> Williamson, *Caribbee Islands*, 225.

<sup>42</sup> Carlisle made this point clear in his Chancery complaint against the Powells when noted that without his commission, Wolverstone could not provide evidence of his right to the office of Governor. Williamson, *Caribbee Islands*, 225.

ship bound for England. One month later, Captain Henry Hawley arrived with a commission from Carlisle and news of the king's confirmation of Carlisle's right to the island. In a final display of forceful authority, Hawley placed John Powell under arrest and compelled an admission of loyalty to Carlisle from all the island's planters.<sup>43</sup>

***“Severe Measure”: Martial Law and the Execution of Governor William Tufton***

Only a year removed from the clash between Wolverstone and the Powells, force and violence once again proved decisive in projecting and maintaining gubernatorial authority on the island. By May 1629 Carlisle had decided to replace Wolverstone (who was then still under arrest, on a ship bound for London) with Sir William Tufton.<sup>44</sup> Tufton arrived in September 1629 and soon began a series of reforms designed to protect the island's growing servant population, which angered many of the island's chief planters.<sup>45</sup> Unfortunately, no records from Tufton's time as governor survive, so the exact nature of these reforms is unknown. Secretary Dorchester, who reviewed Hawley's actions against Tufton, noted that Tufton sought a “reformation of abuses of cruelite of masters against servants.” Tufton's “cheife offence” in the eyes of the planters was that he “remov[ed] these servants from their masters and plac[ed] them with other men.” These measures, in the eyes of some planters, demonstrated that Tufton had “disregarded all their ‘rules and government.’”<sup>46</sup>

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<sup>43</sup> Williamson, *Caribbee Islands*, 60-61. Williamson argues that the planters' readiness to accept Hawley and affirm Carlisle's right demonstrates a recognition after several months of turmoil that “a change in the proprietorship would make little difference to their prospects.” This claim paints the planters as politically disinterested, concerned only with the profits of their lands. Clearly the two were intertwined, and in protecting their financial interests the planters also demonstrated their political sensibilities, which stemmed from an ingrained sense of right and order.

<sup>44</sup> A copy of Tufton's commission as governor can be found in Gary Puckrein, “The Carlisle Papers,” *The Journal of the Barbados Museum and Historical Society* 35 (1978): 307. For a further discussion of Tufton's commission and its jurisdictional implications, see above, p. 114.

<sup>45</sup> Gragg, *Englishmen Transplanted*, 35.

In response to these reforms, a group of displeased planters (labelled “rebellious persons”<sup>47</sup> by one observer on the island) launched a campaign to discredit and annoy Tufton by intercepting his letters and sending complaints of their own to Carlisle.<sup>48</sup> Several of the planters even plotted to “seize Tufton and send him from the island,” for which offense Tufton initially sentenced the men to death but then commuted the sentence and instead “sent [them] into Eng[land].”<sup>49</sup> These negative reports from the island managed to sway Carlisle, who decided to remove Tufton from office and appoint Henry Hawley in his stead.<sup>50</sup>

Hawley, after a brief stay on St. Christopher following his censure of the Powells on Barbados, returned to the island in June 1630 with a commission naming him governor and instructions from Carlisle to remove Tufton from office, with force if necessary. Hawley, seeking to establish his authority beyond doubt, first chose to “make a free election” among the planters and asked them to pick their next governor. The planters, no doubt to Hawley’s surprise, choose Tufton, at which point Hawley produced his commission from Carlisle and announced himself governor.<sup>51</sup> Tufton yielded, and Hawley began his tenure as governor with several peaceful (if strained) months of uneventful rule. Tensions between Hawley and the planters mounted, however, with the arrival of an English ship bearing much-needed supplies in spring 1630.

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<sup>46</sup> Gragg, *Englishmen Transplanted*, 36. Gragg is quoting a letter from several of the island’s planters to Carlisle, found in the Davis Papers at Cambridge.

<sup>47</sup> “Notes in the handwriting of Sec. Lord Dorchester, upon the cause of Sir Will. Tufton, Governor of Barbadoes,” TNA, CO 1/5/101.

<sup>48</sup> “John Fincham to an unknown correspondent, October 12, 1629.” TNA, CO 1/5/11.

<sup>49</sup> TNA, CO 1/5/101.

<sup>50</sup> Williamson, *Caribbee Islands*, 36-37.

<sup>51</sup> TNA, CO 1/5/101. This suggests the ill-will towards Tufton among the planters that had prompted Carlisle’s decision to replace him, was limited to a select group, and that on the whole the island’s inhabitants supported him.

Though the island was in the midst of what one early chronicler termed a time of “great scarcity” Hawley refused to release the ship’s supplies, and would only allow planters who had obtained his special license to trade with the ship.<sup>52</sup> To rectify what they saw as a glaring abuse, Tufton and a group of about thirty planters marched to Hawley’s house, intending to present a petition for redress. Hawley fled the angry planters (who, later accounts suggest, were “armed with muskets,”) and returned with a force of his own to arrest Tufton and several of his followers. Two days later, Hawley convened a “councill-of-warre,” which tried Tufton and found him guilty of mutiny. The next day, Hawley executed the sentence, and ordered Tufton be “shot to death” for his offence.<sup>53</sup>

This violent struggle between a commissioned governor and his displaced predecessor is interesting both for what it tells us about the measures Hawley employed to assert and defend his authority and also for the reaction it prompted in London when news of Tufton’s execution reached the king. In the first place, Carlisle’s decision to remove Tufton as governor speaks powerfully to the influence the island’s planters (and the chief source of Carlisle’s profit) already held. Though Tufton had confirmed grants of land made by his predecessors, he seems to have governed without regard for the planters’ interest.<sup>54</sup> His attempts to reform and regulate the treatment of servants had the potential to impact negatively the planters’ main source of labor. In going so far as to remove servants from abusive households, Tufton’s reforms may even have been viewed by the planters as an assault on their property.

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<sup>52</sup> William Duke, *Memoirs of the first settlement of the island of Barbados and other the Carribbee Islands : with the succession of the governors and commanders in chief of Barbados to the year 1742* (London: 1743), 15.

<sup>53</sup> TNA, CO 1/5/101.

<sup>54</sup> Duke, *Memoirs*, 14.

Not only had Tufton meddled with the planters' potential well-being, the planters also complained that he "refuse[d] to have a councell" and "opposed all [the] rules of law and government" then in place on the island.<sup>55</sup> The anger the planters expressed at these oversights suggests that even in a society this young, where the first plantations had begun only three years prior, the planters already held firm expectations of the proper limits and procedures of government. When Tufton, as the island's primary authority figure, chose to ignore those procedures or to overstep those limits, the planters reacted with outrage and attempted to correct the imbalance by applying to a higher authority, namely the earl of Carlisle. Ultimately, this appeal to "tradition," as we might term it, in such a newly formed colony suggests a delicate balance between the exercise of authority and its reception. A governor's ability to rule effectively could only stretch as far as the governed were willing to accept.

Hawley, in denying the planters access to the supplies they desperately needed, faced the same manner of resistance from the planters that had led to Tufton's removal. But where Tufton responded with magnanimity and forbearance, Hawley utilized force. That he did so under the guise of martial law illustrates the degree to which he was willing to stretch (and even overstep) gubernatorial jurisdiction on the island to protect his position. The composition of the tribunal Hawley called to try, and ultimately convict, Tufton is not known, though contemporary accounts suggest that Hawley chose several members of his council to join him in judgment.<sup>56</sup> Nor is it clear what procedure (if any) Hawley employed in reaching his judgment. Yet contemporaries described the court as a "counsell-of-warre," and labelled the proceedings

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<sup>55</sup> TNA, CO 1/5/101.

<sup>56</sup> Duke, *Memoirs*, 17. Though he published his *Memoirs* as late as 1743, Duke contended his account was drawn from several earlier statements of the island's settlement rendered in the 1680s by some of the last surviving witness to these events.

“martiall,” in nature. Despite the lack of clarity on the composition and the proceedings of the court, the charge, mutiny, and the sentence suggest that in Hawley’s view this was a legitimate proceeding governed by the “law of armes.”<sup>57</sup>

If Tufton’s trial were indeed a martial proceeding, as the evidence suggests, it would have been an exceptional use of that jurisdiction in the context of overseas settlement. Though the first governors and captains of Jamestown used martial law extensively twenty years earlier, by the late 1620s, the king faced considerable pressure to restrict martial jurisdictions and limit closely the ability of overseas governors to employ it. As a result of this pressure, commissions granted to those engaged in colonial settlement confined the use of martial law to matters directly relating to war; that is martial law could only be employed during a “state of war,” and then, generally, only against soldiers.<sup>58</sup>

Without a clear record of the proceedings it is difficult to recover Hawley’s understanding of the situation. It is possible that he believed Barbados to be in a state of war, whether as a result of the protests against his rule, or perhaps due simply to the general atmosphere of the Caribbean at the time, where Spanish or native attack was a constant fear.<sup>59</sup> Furthermore, Hawley did have some claim to martial jurisdiction, by way of Carlisle’s charter, which empowered the Earl’s “Captaine, deputy, or other officers,” to “use the law of armes against any delinquent” in case of “suddaine rebellion, tumult, or sedition.”<sup>60</sup> It is not clear that

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<sup>57</sup> TNA, CO 1/5/101.

<sup>58</sup> John Collins, “One of Many: Martial Law and English Laws, c. 1500 – c. 1700” (Doctoral Thesis, University of Virginia, 2013), chapter 8.

<sup>59</sup> Hawley himself had been present at Nevis in 1629 when a fleet of Spanish warships attacked the island. Williamson, *Caribbee Islands*, 77-78.

<sup>60</sup> TNA, CO 1/29/8.

Tufton's attempt to petition the governor, though his followers may have been armed, qualified as such an occurrence. Nonetheless, Hawley's use of a martial court, even if for his own ends, suggests a familiarity with, and willingness to employ, a range of judicial tools to meet the challenges he faced as governor.

Ultimately, the king's own legal officers could not agree whether Hawley's actions went beyond his established authority and if, as a result, the proceedings against Tufton were legitimate. Word of Tufton's death must have reached London quickly, for by August 1630 the king had ordered an inquiry into the affair. Though no warrant for such inquiry exists, and it is not clear exactly whom the king appointed for the task, notes on the findings of the inquest, prepared by Secretary of State Dorchester, do provide a hint into the crown's response.<sup>61</sup> The marginal notes of these papers prove them to be a record of the arguments presented by several of the members of the inquiry. The chief participants in this debate appear to have been one "sergt Thin," (presumably serjeant at law Egremont Thynne)<sup>62</sup> and "Mr atturnie for the k[ing]," who was, at the time, Robert Heath, himself a noted overseas projector. According to Thynne, Tufton's execution proved only the last in a long list of conspiracies against the former governor, including one by Hawley's brother-in-law and eight others who had "rayseed a mutinie" against Tufton. In assessing the final attack on Tufton, Thynne concluded that Hawley had "secretly and suddainly with his friends taken Tufton" after the latter had come to Hawley's house "demaunding victuals." The subsequent tribunal against Tufton Thynne determined to be "*coram*

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<sup>61</sup> These notes bear no date, nor do they give much indication as to their nature, beyond the content of the notes. The editor of the Calendar of State Papers, however, calendared the document as "Notes in the handwriting of Sec. Lord Dorchester, upon the cause of Sir Will. Tufton, Governor of Barbados," and gave the notes a date of August 1630.

<sup>62</sup> According to J.H. Baker, Thynne was called to the order in October 1623 along with fifteen other serjeants. Thynne never appears in any list as one of the king's serjeants, and thus was not at the time a member of the king's own counsel. See, J.H. Baker *The Order of Serjeants at Law, A chronicle of creations, with related texts and a historical introduction* (London: Selden Society, 1984), 181.



*non judice*” because there was “no competent judge” and was thus “without lawe.” Thynne based his determination on a seemingly mistaken understanding that Hawley had entered the office of governor on a “pretended commission,” and that as a result, at the time of the trial “Tufton was governor, not Halay.”<sup>63</sup>

For his part, Heath disagreed with Thynne’s assessment of Hawley’s actions, and without offering a final determination, presented the affair as if it were truly a mutinous rebellion. Heath argued that Carlisle had received multiple complaints from his planters about Tufton’s behavior, beginning “upon Tufton’s first arrival.” He also noted that Hawley did in fact have a commission from Carlisle as well as instructions to remove Tufton “and if he refuse, to sequester him by force if need be.” Heath also framed the final interaction between Hawley and Tufton in somewhat antagonistic and even violent terms. Tufton, according to Heath, “came to Hawley’s lodging with 24 or 26 armed with muskets,” and had before then “proclaimed libertie for servants upon reward in tobacco.”<sup>64</sup> Whether these servants comprised the force that Tufton brought to Hawley’s house, or whether some of the island’s planters joined him, Heath does not make clear.<sup>65</sup> Heath does offer witness testimony, however, that Tufton himself came armed and that he later confessed to the “assault.” Witnesses even testified that Tufton had issued some manner of “proclamation” which contained “words against Hawley’s commission.”<sup>66</sup> If Tufton had indeed disclaimed or disparaged Hawley’s commission, his words could have been

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<sup>63</sup> TNA, CO 1/5/101.

<sup>64</sup> TNA, CO 1/5/101.

<sup>65</sup> Gragg presumes these servants formed the bulk of the force Tufton brought to Hawley’s house, but Duke, in his *Memoirs*, suggests Tufton came “at the head of some of the planters.” Gragg, *Englishmen Transplanted*, 37; Duke, *Memoirs*, 17.

<sup>66</sup> TNA, CO 1/5/101.

construed as running in defiance of the king. Thus, Heath's account of events suggests that Tufton's intentions were not as peaceful as Thynne asserted, and that this march on Hawley's house may in fact have constituted a rebellious or mutinous gathering.

In the end, it seems that the crown may have taken Heath's view on the incident, as Hawley suffered no rebuke or ill consequences for his actions.<sup>67</sup> Yet, the disagreement between some of the nation's most learned legal minds concerning the nature of the events and the legitimacy of Hawley's actions shows the latitude colonial officials had to determine jurisdictional boundaries and employ their authority as they saw fit. Even at a time when the crown was under heavy scrutiny by Parliament concerning the use of martial jurisdictions by crown officers, the king's own attorney general could not find Hawley's actions to be in error or unlawful.

Of course, the king's unwillingness to censure Hawley may have more to do with court politics than anything else. But the very existence of this inquiry is further evidence of the king's reliance on his legal officers to adjudicate matters arising in his overseas dominions. As he had done to address the dispute between Carlisle and Montgomery and as he would later do again to settle the disagreement between the second earl of Carlisle and his father's trustees, the king deferred to his learned legal counsel when deciding these matters. In doing so, the king reaffirmed that he and his advisors were the final arbiters in questions of jurisdiction arising in the king's dominions. For all the bluster from the planters against Tufton, Tufton against Hawley (and perhaps even the king), and Hawley against Tufton, these issues had a final resolution in the king, as it was from the king that all jurisdictions emerged.

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<sup>67</sup> Indeed, Hawley remained governor in Barbados until 1639, until he was recalled to England and replaced by Henry Hucks.

***“A cloud betwixt their eyes:” Jurisdiction as Private Interest***

The king and his legal officers once again were compelled to intercede in Barbadian politics in the summer of 1639, when Hawley found himself once more at the center of a series of developments that altered the political and jurisdictional landscape of Barbados permanently. After six turbulent years as Governor, Hawley returned to England for an unknown purpose sometime in late 1638. It is possible Hawley had been recalled by either the new earl of Carlisle or the trustees, or that he went on his own accord in order to confer with the earl of Warwick over the latter’s plans to settle a plantation in Tobago.<sup>68</sup> Warwick, an active colonial projector, had recently purchased the earl of Pembroke’s right to that island, and, by October 1638, had arranged an agreement with the second earl of Carlisle to purchase Barbados as well.<sup>69</sup> For his part Carlisle likely saw this sale as a means to outmaneuver his father’s trustees (with whom he was locked in a long dispute, as discussed in the previous chapter) and thus finally gain some profit from the island. Warwick, on the other hand, saw the island not only as a source of profit, but also a base of recruitment for his other Caribbean plantations. Ultimately, however, the two sides never concluded the sale and Barbados remained part of the trust established by the late Carlisle.<sup>70</sup>

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<sup>68</sup> This is what Williamson believes, though he offers no evidence to support the notion. Some connection to Warwick can be inferred from Hawley’s comments to Huncks (see below), but no evidence beyond that proves any definite interaction between the two. Williamson, *Caribbee Islands*, 110.

<sup>69</sup> Pembroke (as Montgomery was now styled) seems to have sold Warwick the right to Trinidad and Tobago that he held by virtue of his 1628 patent, the same grant that had caused so much trouble between him and Carlisle. Williamson, *Caribbee Islands*, 109.

<sup>70</sup> As it must have, seeing that the terms of his father’s trust denied Carlisle the right to dispose any of the Caribbees. That power belonged only to the trustees. In any case, by March 1639, Carlisle and the trustees seemed to have resolved their differences and were acting together once more to administer the island, as a joint petition to the king makes clear.

Though the sale fell through quickly, the possibility that the island's ownership might be transferred established a degree of uncertainty in the minds of the planters as to whom their loyalty belonged (and, perhaps more importantly, to whom their rents were due). Warwick himself added to this uncertainty in a series of letters he sent to Barbados. In October 1638 Peter Hay, the chief agent of the trustees on Barbados, wrote trustee James Hay to inform him that Warwick had sent Hay a letter ordering that he collect the rents and customs normally due to the trustees and hold them for Warwick's use instead. Hay, for his part, assured the trustees that he refused the order and would acknowledge no new proprietor until he saw a "commission under the great sealle of England or a deed of sale" from Carlisle. Yet Hay was nearly alone in his commitment to Carlisle and the trustees, as he found that "the most part of the inhabitants" welcomed Warwick.<sup>71</sup> Indeed, the planters had become "so deluded ... by my lord of Warwick's letters" that many refused to bring in their rents to Hay until the situation resolved itself.<sup>72</sup> Complicating matters further, the governor and council, though they supported Carlisle, refused to acknowledge the authority of the trustees. When Hay showed them a copy of the earl of Carlisle's grant to the trustees, the council replied that "they did not thinke the ... grant was in force because [Carlisle] was deceased."<sup>73</sup>

Hay's account of the difficulties prompted by the proposed sale of Barbados shows once again the way in which private arrangements in London could impact the practical administration of the king's overseas dominions. The ambiguity created by these drawn out and contested arrangements induced a wait-and-see attitude among the island's population that made it

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<sup>71</sup> "Peter Hay to James and Archibald Hay, October 9, 1638," NRS, Hay Papers, GD34/924/16.

<sup>72</sup> "Peter Hay to James Hay, 24 May, 1649," NRS, Hay Papers, GD34/924/17.

<sup>73</sup> "Peter Hay to James and Archibald Hay, October 9, 1638," NRS, Hay Papers, GD34/924/16.

impossible for administrators like Hay to undertake their duties effectively. Hay, whose efforts in maintaining the trustees' estate had already left him "no friends" on the island, was forced into the difficult position of collecting rents for a proprietor whom many on the island believed now had no right to demand them.<sup>74</sup> The long and unreliable channels of communication upon which all parties relied further compounded the issue. Hay's letters, for instance, offer poignant evidence of the effect of the time lag inherent in Atlantic correspondence as he regularly lamented lost or delayed letters and often urged the trustees to send him speedy advice.<sup>75</sup> This delay allowed some like Hawley and his councilors to further their own agendas (as we will see below), while more circumspect men like Hay could only wait for instruction that might never come.

The uncertainty engendered by the proposed sale of Barbados to Warwick not only affected Hay's ability to administer the island on behalf of the trustees, but also gave Hawley an opening he could exploit in order to maintain his authority on the island. By March, 1639 Warwick's attempts to draw away planters from Barbados had prompted the trustees and Carlisle (with whom they had settled their disagreements) to seek assistance from the king. Charles obliged by issuing a letter to all the governors of the Caribbees in which he forbade them to allow any of their planters to leave without the consent of either the trustees or Carlisle. In the same letter, the king informed the council and planters of Barbados that Carlisle had appointed a new governor, Henry Huncks, to replace Hawley, and ordered that they accept him and his authority "or answer contrary to their perille."<sup>76</sup> Hawley would not give way easily, however,

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<sup>74</sup> NRS, Hay Papers, GD34/924/17.

<sup>75</sup> During one critical stretch, during which Hawley refused to admit the trustee's new governor (more on which below) Hay complained to the trustees that he had been over a year without receiving any letters from them, despite sending multiple packets of his own. NRS, Hay Papers, GD34/924/20.

and managed to obtain from the king a commission granting him authority to investigate the excessive planting of tobacco in the king's overseas dominions.<sup>77</sup>

Hawley's rather specious commission (several islands, including Barbados and St Christopher, had already imposed a two year hiatus on tobacco planting at the time Hawley received his orders) named Hawley as the "lieutenant general & governor of Barbados," a fact which he used to great effect when he reached Barbados in June 1639, four weeks before Huncks.<sup>78</sup> According to Huncks, Hawley immediately "call'd in all commissions, made all fines voyd, summoned ye country, made ye gaole delivery a day of Mercy, chose burgesses, [and] settle[d] a Parliament."<sup>79</sup> Hawley's intentions here are transparent: recognizing he had only a matter of days or weeks before Huncks arrived with his commission and his letter from the king, Hawley sought to do all in his power to sway the planters in his favor. The gambit worked, and by the time Huncks arrived in July, Hawley had gained the firm support of both his council and the leading planters on the island.

Both Hawley's support on the island and the planters' readiness to cast off Carlisle in favor of Warwick were so great that neither Huncks' commission nor the letter he carried from the king were enough to sway the council to receive him as their new governor. In a letter dated July 11, 1639 Huncks related to the trustees that after presenting Hawley and the council the

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<sup>76</sup> "The King to the Governor, Council, Planters, and Inhabitants of the Caribbee Islands or province of Carlisle, March 16, 1639," TNA, CO 1/10/12.

<sup>77</sup> According to a petition submitted by the Trustees and Carlisle, the decision to replace Hawley with Huncks had been "signified" and were "well knowne" to Hawley before he sought his commission from the king. TNA, CO 1/10/29.

<sup>78</sup> For Hawley's commission see, TNA, CO 1/10/17. The date of Hawley's arrival in Barbaods is given by Huncks, in a letter to Carlisle; TNA, CO 1/10/17.

<sup>79</sup> Huncks must here be relating the situation as he found it to be when he arrived in July 1639 as he was not present when Hawley first returned to Barbados in June. TNA, CO 1/10/27.

king's letter, they "bade him lay it on the table" and would not allow Huncks to read his commission. When Huncks demanded the government of the island, Hawley replied that he "knew not whether [the trustees] had power" to appoint him governor, maintaining instead that "the proprietary belong[ed] to the Lord of Warwick and not to [Carlisle], for ought he knew." At that point, Hawley ordered the sergeant at arms to seize Huncks' commission and lock it up for later review. After four days, the council summoned Huncks and informed him that after reviewing the king's letter, they determined that the king "was misinformed." And though they pledged that they would "answere the King," in the meantime they informed Huncks that "they would obey nor acknowlege nor receive any Governor but Capt. Hawley." If Huncks resisted, he would be "pistol'd." Thus threatened, Huncks fled Barbados for Antigua, where he awaited assistance from the trustees and Carlisle.<sup>80</sup>

Hawley's brazen theft of the government of Barbados eventually reached the ears of Carlisle and the trustees who again petitioned the king for his aid in reigning in Hawley. Specifically, they asked that the king should "vouchsafe a hearing of the particulars," so that orders may be sent to recall Hawley and thereby secure "the vindicacon of [the king's] royall dignity," and the "redresse of the injuries done" to the petitioners.<sup>81</sup> Charles referred the matter to the Privy Council who found that the planters in Barbados never should have "taken upon them to determine the right of the place contrary to his Majestys express declaracon upon any implied stile to Captain Hawley in a ... commission given him to another purpose."<sup>82</sup> Instead they should have accepted Huncks and appealed the matter to the king if they could show just cause.

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<sup>80</sup> "Serj. Major Henry Huncks to the Earl of Carlisle, July 11, 1639," TNA, CO 1/10/27.

<sup>81</sup> TNA, CO 1/10/17.

<sup>82</sup> "Order of the Privy Council, January 15, 1640," TNA, CO 1/10/48.

To resolve the situation, the king commissioned four men to recall Hawley and place Huncks in the governorship. The commissioners made quick work of their task and on June 23, 1640 wrote the king to inform him that they had received a formal resignation from Hawley and a promise of allegiance from the planters. With Hawley under arrest, the commissioners recalled Huncks from Antigua and “settled [him] upon the government of [the island].” As a final act, they sequestered Hawley’s estate and sent him home in the king’s custody.<sup>83</sup>

This turbulent episode in the early history of Barbadian government neatly encapsulates many of the themes concerning jurisdiction and authority that I have been discussing in this chapter and throughout the dissertation. The concessions Hawley made to the planters of Barbados in order to gain their favor and support permanently altered the island’s jurisdictional landscape. In particular, when Hawley allowed the planters to elect burgesses and call a “parliament,” as Huncks called it, he established a precedent for representative government that would persist on the island for centuries. From that point, the Assembly, as the body would come to be called, featured as one of the island’s central governmental institutions. Later governors and their councils, along with the members of the assembly itself, would further elaborate the powers of the assembly and regularize the jurisdictional interplay between governor and council and the assembly.<sup>84</sup> But it was Hawley who roughed out the initial legal sphere of influence in which the island’s planters would come to have some say in the political and legal administration of the island. The fact that he did so by virtue of an “implied stile [found] ... in a commission

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<sup>83</sup> “Henry Ashton, Peter Hay, William Poverly, Daniel Fletcher to the King, June 23, 1640,” TNA, CO 1/10/70.

<sup>84</sup> For a discussion of the later history of the Assembly, see Gragg, *Englishmen Transplanted*, chapter 4.



given him to another purpose,” underscores the degree to which authority at this time and in these distant lands was never a fixed and certain commodity.<sup>85</sup>

Moreover, it is clear that Hawley acted solely in order to bolster his own position on the island and thus further his interest there. When the commissioners whom the king appointed to investigate Hawley’s behavior sought to explain how it was that the king’s hitherto loyal subjects on Barbados had so openly rejected his will, they concluded that a “cloud [had] spread it selfe betwixt [the planters’] eyes and the Cleerness of [the king’s] intentions.” This cloud, they suggests, condensed out of the “liberal distribution yt Captain Hawley had made amongst [the planters] of [the king’s] power Together with ye rights and honor (as well as of ye lands and rents) of the Earl of Carlisle.”<sup>86</sup> This rather poetic rendering of events makes clear that Hawley had no regard for the good government of the island when he established his parliament and voided all fines and fees, but instead, hoped to win the favor of the planters. Amazingly, when the commissioners interviewed Hawley, he admitted that he never “would soe have opposed [the king’s will] but in his hope (by gayneing tyme) to secure an Estate hee had uppon the island.”<sup>87</sup> Thus, in Hawley’s dishonest hands royal authority, in the form of his misappropriated commission, became a tool by which he could protect his personal property, a rather extreme example of the intersection of personal and public interest.

## **Conclusion**

For all that Hawley scorned the king’s will and managed to sway the direction of Barbadian government, royal authority ultimately won out. As he (and his father) had done during previous

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<sup>85</sup> TNA, CO 1/10/70.

<sup>86</sup> TNA, CO 1/10/70.

<sup>87</sup> TNA, CO 1/10/70.

administrative crises, the king turned to his Privy Council to investigate the situation and pass judgment on the actions both of Hawley and of the planters who supported him. The crown's use of royal prerogative courts and the king's legal officers to regulate overseas government formed a kind of ad-hoc administrative apparatus in these early days of colonial activity. This apparatus was only one part of an interconnected network of authority that ultimately shaped government in these regions. At the forefront of this network, actors on the ground like Warner, Wolverstone, and Hawley probed the boundaries of their authority and in the process established the jurisdictional realities that came to govern society in places like St. Christopher and Barbados. The king, his councilors, and the proprietors and companies he authorized to pursue Atlantic colonization reviewed and, if necessary, corrected the actions of these men. Together, these two spheres of influence worked in tandem to extend English authority, in all its forms and dimensions, across the Atlantic into the king's foreign dominions.

## Conclusion

In March 1603, when James I gained the throne of England, he became head of a composite monarchy that included England, Scotland, Ireland, and various islands in the English Channel and the Irish Sea, including Mann, Guernsey, and Jersey. Though James ruled over an impressive array of dominions, his holdings covered only a small portion of north-western Europe, and had not changed significantly for several hundred years.<sup>1</sup> By the time James' grandson and namesake James II lost the throne of England in 1688, however, the English composite monarchy had grown dramatically, and now included almost two dozen American territories, several African colonies, and interests in Asia and the south pacific.<sup>2</sup> The growth of England's American holdings in the Stuart period was particularly impressive as tens of thousands of English (and Scottish and Irish) men, women, and children had established lasting roots in places as diverse as Newfoundland in the far north Atlantic to Barbados in the south eastern Caribbean.<sup>3</sup>

Critically, each of these new territories came to be held by the king in a variety of different ways, and the government of those places reflected that diversity. Newfoundland began, for instance, as a seasonal stopping place for west-country fisherman governed first by a small

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<sup>1</sup> The king's official style also named him "King of France," though at this point that was only wishful thinking. For a discussion of the traditional possessions of the King of England, and their history, see Sir Matthew Hale, *The History of the Common Law of England* ed. Charles M. Gray (Chicago: University of Chicago Press, 1971), chapters 9 and 10.

<sup>2</sup> In a 1699 treatise on the laws and government of England and its dominions by Henry Curson, the author lists two Asian plantations, Banten in Indonesia and Bombay (neither of which were actually in the king's possession), two African colonies, Guinea and Tangiers (though he notes that the English fortifications in that city had been destroyed), and twenty American plantations. H. Curson, *Compendium of the Laws and Government Ecclesiastical, Civil, and Military: of England, Scotland & Ireland, and Dominions, Plantations and Territories thereunto belonging*....(London: printed for John Walthoe, 1699).

<sup>3</sup> By 1700, for instance, the total population of England's North American colonies stood at over 250,000. Douglas L. Anderton, Richard E. Barrett, Donald J. Bogue, *The Population of the United States* (New York: Free Press, 1997), 6.

corporation based in London and Bristol, and then by a series of proprietary lords who ruled the territory with almost regal authority. Further south, New York came to the crown by way of a treaty signed with the Dutch in 1664 following a European war, and was granted as a proprietary colony to the king's brother, the Duke of York.<sup>4</sup> Virginia, the first and most populated of the king's North American holdings, also began as a corporate colony before losing its charter in 1624 and reverting to royal control.<sup>5</sup> As a result of these different histories, as we have seen, each of the king's Atlantic territories stood in a distinct relationship to the English crown; a relationship established by charter and refined by the legal actions of the king, his advisors, his courts, and the various corporate bodies, proprietors, and local authority figures to whom the king granted the government of these American spaces.

Critically, these relationships were defined in terms of jurisdiction. At the most basic level, the king held jurisdiction over all his subjects wherever they resided by virtue of his fundamental obligation to provide protection and justice to all who owed him allegiance. The size and complexity of the king's dominions meant that he could not govern each directly. Instead, he delegated his authority to govern to corporate groups and proprietary lords who themselves empowered others to rule in their stead. These were the building blocks of jurisdiction out of which locally empowered individuals like Charles Wolverstone and Henry Hawley carved the final legal and judicial forms that came to frame and define government in the king's Atlantic holdings.

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<sup>4</sup> Though it was the property of the future James II, Daniel Hulsebosch maintains that New York essentially functioned as a "self-governing corporation," owing in large part to the mixed Dutch and English population in the province. Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005), chapter 2.

<sup>5</sup> By 1701 Virginia's population stood at almost 60,000, several thousand more than the next largest colony, Massachusetts. Robert V. Wells, *The Population of the British Colonies in America before 1776: A Survey of Census Data* (Princeton: Princeton University Press, 1975), 161.

In this way, jurisdiction shaped English Atlantic enterprise in the early half of the seventeenth century. Jurisdiction defined who could speak law, and in speaking law, defined the forms and procedures of local law. The range of public and private interests that drove Atlantic enterprise ensured that the English legal regimes that settled in places like Virginia and Barbados spoke through a chorus of voices. In Virginia, as we saw, the joint-stock nature of the Virginia Company ensured that dozens, and potentially hundreds, had a direct say in the government of the company and the colony. In Barbados, the proprietary nature of the island's settlement restricted participation in its government. The proprietor's freedom to dispose of his lands as he sought fit, however, still allowed for a variety of competing interests and values to impact the course of government. When disputes over jurisdiction arose, as they inevitably did, it was the responsibility of the king and his courts to mute some of these voices, and in doing so, confirm what would stand as law in each territory.

Yet jurisdiction also dictated the remedies available to the king and his council in regards to colonial administration. In some instances, the established rules and procedures of the common law provided ready solutions to overseas jurisdictional problems. Such was the case in 1624 when the Privy Council determined the Virginia Company was simply too unwieldy to provide effective government in Virginia. As authority became tied more and more closely to property in land, however, the limits of common law jurisdiction forced the king and his proprietors to seek new legal remedies. It was for this reason that Charles I turned to his legal officers and not the courts to determine a question of right in the case of Barbados. By the same token, the earl of Carlisle, unable to seek remedy in the common pleas, turned to Chancery in an attempt to protect his overseas interests in an English court. Whether using established law or

creating new forms, these legal remedies further refined the legal relationships that existed between the English crown and its overseas dominions.

Finally, as authority figures on the ground sought to employ law to meet the contingent challenges of Atlantic settlement, they gave function and form to jurisdictions that had until then existed only on paper and parchment. In doing so, men like Thomas Warner, Charles Wolverstone, and Henry Hawley established a series of distinct legal regimes that reflected the values and interests of the enterprises they governed. This system served both local officials and planters as well as the crown, however, because it allowed the flexibility necessary for a cash-strapped and distant monarch to ensure his subjects saw justice even when he could not personally provide it. And though the actions of men like Warner and Hawley gave local flavor to the legal regimes that came to order the societies they helped create, the king never abdicated his responsibility to provide justice to his subjects and to ensure his authority was well employed.

It is important to note that this process of jurisdictional definition, refinement, and realization was not part of an imperial project, nor did it add up to a coherent Atlantic or Imperial constitution. No specific fundamental law existed to shape and limit government in the king's Atlantic holdings. While reasonably consistent policies did emerge by the end of the century, and the administration of the Atlantic colonies had largely been assigned to various permanent committees of the Privy Council, this did not entail a distinct constitutional arrangement.<sup>6</sup> The late-century constitutional "conversations" between British center and colonial periphery that

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<sup>6</sup> For an overview of these policies, and the continued role of the Privy Council in colonial administration, see Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University press, 1950), chapter 2.

Bilder describes were fundamentally conversations about jurisdiction.<sup>7</sup> When litigants in Rhode Island, to use Bilder's example, and Privy Council commissioners debated over the applicability of colonial law, they were asking who had the authority to speak law. And the procedures, policies, and modes of administrative thought that MacMillan identifies as unique to the Atlantic colonies were simply part of the crown's larger work to police royal jurisdictional in all the king's dominions.<sup>8</sup>

Ultimately, the territorial expansion that the Stuart kings oversaw was as much a legal effort as it was a commercial or agricultural enterprise. Law established Atlantic spaces as possessions of the English king, and legal formulations provided the framework to govern them. Of course this was not a singular law, but a broad range of legal procedures and ideas expressed within an equally broad array of new jurisdictions. In this way, the seventeenth century saw not only the expansion of England's possessions, but also a significant expansion of England's laws. This expansion did not end with the Stuarts, of course. But the important work done by the Privy Council, the king's legal officers, and the various corporate bodies, proprietors, and local officials discussed in this dissertation laid the legal foundations of later English, and eventually British, colonial enterprise.

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<sup>7</sup> Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA: Harvard University Press, 2004).

<sup>8</sup> Ken MacMillan, *The Atlantic Imperial Constitution: Center and Periphery in the English Atlantic World* (New York: Palgrave MacMillan, 2011).

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