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THE ENGLISH INHERITANCE-- What the First American Colonists Knew of Mediation and Arbitration

Derek Roebuck*

How extensive the practice of arbitration was among private citizens with no involvement of lawyers or the courts we will probably never know, as the only records of such practices will be happenstance.

James Oldham and Su Jin Kim¹

I. INTRODUCTION

It seems fair to assume that the first American colonists took with them attitudes and practices from home, including the ways in which they routinely resolved disputes. For example, on November 11, 1647 the General Court of the Massachusetts Bay Colony authorized the purchase of Edward Coke's *Reports, First and Second Institutes and Book of Entries*, "to the end we may have the better light for making and proceedings about laws."² But does that mean it was natural then for parties with differences to look to litigation for an answer? This Article provides ample evidence of a preference for other ways of resolving their disputes. Its main purpose is to show what dispute resolution attitudes and practices prevailed in England that could have been transported to the American colonies. It ends by providing, from English sources, names of one or two individuals, namely Nathaniel Bacon and Francis Bacon, who could have been particular conduits, leaving it for others to find and assess the American evidence.³

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1. James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 *LAW & HIST. REV.* 241, 245 (2013) [hereinafter Oldham & Kim].

2. RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 212 (Nathaniel Bradstreet Shurtleff, ed., 1853) at 212, available at <https://archive.org/details/record-sofgoverno01mass>.

3. Oldham & Kim, *supra* note 1, though concentrating on the adoption of the Arbitration Act 1698 Act, contains much more of relevance to the 17th century, particularly on Maryland and Pennsylvania, and is as authoritative for that century as Henry Horwitz and James Oldham *John Locke, Lord Mansfield and Arbitration During the Eighteenth Century*, 36 *THE HISTORICAL J.* 137 (1993) are for the 18th century. See also Bruce Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 *N.Y.U. L. REV.* 443, 446 (1984). Mann features Connecticut. Its reliability can be judged by such generalizations, impliedly of England: "For all practical purposes, arbitration awards were unenforceable." For Massachusetts, see DAVID THOMAS KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY 1629-1692*.

Throughout the 17th century England expanded its interests in the Americas. The colonists brought to North America the dispute resolution practices they had known in England.⁴ These practices included mediation and arbitration.⁵ There is something to be learned from the English cases reported in the 17th century, but contemporaries thought little of their law reports. As their most disparaging critic concluded, describing in detail the processes by which those reports came to be published:⁶

As if to avenge the seclusion in which this knowledge had been held, the nation dragged to light every thing [sic] which bore so much as semblance to the aspect of law. 'Then came forth', says a historian of the time (5 Mod viii), 'a flying squadron of thin reports', and past doubt there must be meaning in the sudden and unexampled increase of this sort of publication at the epoch of which we speak.... Most of these reports are *posthumous*, were printed from MSS not original; and that even the originals were not designed for the press. Ignorance and interest and accident all combined to produce error.

The first writers on arbitration law tried to make the best of what they had, but lawyers turning to them for guidance would find them thin sustenance.⁷

There are, however, ample primary sources in the form of records preserved in national and local archives of the work of practicing mediator-arbitrators. Any account of the period must try to take advantage of all of them. This Article relies on the voluminous collection of just one, Nathaniel Bacon (1546-1622), the son of Sir Nicholas Bacon, Elizabeth I's Lord Keeper and the older half-brother of the more famous Francis.⁸ Nathaniel was a busy Justice of the Peace (JP) in Norfolk⁹ and, as will be shown below, was often commissioned as arbitrator by the government,

4. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, 145-48 (Harvard University Press, 1977); Mann, *supra* note 3, at 443; Eben Moglen, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L.J. 135 (1983); Carli N. Conklin, *Lost Options for Mutual Gain: The Lawyer, the Layperson, and Dispute Resolution in Early America*, 28 OHIO ST. J. ON DISP. RESOL. 581, 583-84 (2013); Carli N. Conklin, *A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America*, 2016 J. DISP. RESOL. 55, 60-66; Oldham & Kim, *supra* note 1, at 241, 244-251, 266; James Oldham, *The Historically Shifting Sands of Reasons to Arbitrate*, 2016 J. DISP. RESOL. 41, 41-42.

5. For an overview of mediation and arbitration in early America, see generally JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (Oxford University Press 1983). See also references *supra* note 5 for works on English-style arbitration in specific British colonies in North America.

6. JOHN WILLIAM WALLACE, *THE REPORTERS, CHRONOLOGICALLY ARRANGED: WITH OCCASIONAL REMARKS UPON THEIR RESPECTIVE MERITS* (T. & J.W. Johnson, 2nd rev. ed. 1845) (emphasis in the original) available at <https://archive.org/details/cu31924024518346>.

7. Perhaps the best example by the author is *REGULA PLACITANDI, ARBITRIUM REDIVIVUM: OR THE LAW OF ARBITRATION; COLLECTED FROM THE LAW-BOOKS BOTH ANCIENT AND MODERN, AND DEDUCED TO THESE TIMES*, (Rich. & Edw. Atkins, 1694). Unfortunately, the identity of the author of *REGULA PLACITANDI* is unknown. See also JOHN MARCH, *ACTIONS FOR SLANDER AND ARBITREMENTS* (1648); JOHN MARCH, *THE SECOND PART OF ACTIONS FOR SLANDERS, WITH A SECOND PART OF ARBITREMENTS* (William Brown ed., 3rd ed. 1674).

8. Nathaniel Bacon lived from 1546-1622 and served as a member of parliament. *Nathaniel Bacon, THE HISTORY OF PARLIAMENT*, <http://www.historyofparliamentonline.org/volume/1604-1629/member/bacon-nathaniel-1546-1622> (last visited Dec. 10, 2016). His younger half-brother, Francis Bacon, lived from 1561-1626. *Francis Bacon, THE HISTORY OF PARLIAMENT*, <http://www.historyofparliamentonline.org/volume/1604-1629/member/bacon-sir-francis-1561-1626> (Last visited Dec. 10, 2016).

9. *Francis Bacon, supra* note 8.

but often too by private parties who were happy to rely on his reputation for integrity and expertise in private mediation and arbitration. Each side could appoint a single arbitrator or several arbitrators.¹⁰ It was not uncommon for the sides to appoint a single arbitrator when, like Bacon, both sides trusted him.¹¹

After Trinity College Cambridge, Nathaniel Bacon entered Gray's Inn, one of England's Inns of Court, but he was never called to practice as a barrister before the courts.¹² Instead, as soon as he could, he settled into the life of a country squire on the family estate at Stiffkey, Norfolk.¹³ In addition to serving as JP, Bacon was a Member of Parliament (MP) for King's Lynn, High Sheriff of Norfolk and Steward of the Duchy of Lancaster's lands in the county.¹⁴ He fulfilled his duties as MP but gave priority to the obligations, religious and civil, he considered essential to create an orderly and godly community within his jurisdiction.¹⁵ He devoted much of his time to settling disputes, and he submitted his own disputes to private arbitration.¹⁶

Bacon's enormous collection of manuscripts, preserved and edited under the title, *The Papers of Nathaniel Bacon of Stiffkey*¹⁷ provides the primary sources for an understanding of routine practices and attitudes to dispute resolution in his country at that time. Indeed, they themselves show that some extrapolation may be justified to the rest of England then. As the following account will demonstrate, most of the documents in the *Papers* refer to his work as a JP, many of them commissions to mediate from a great range of authorities, from the King, Parliament and Privy Council, and the various Courts, to individual authorities.¹⁸ But there is also plenty of evidence of his popularity as a private arbitrator, where with no official interference both parties were content for him to sit alone.¹⁹

This Article draws on edited volumes of the *Papers*, beginning towards the end of Elizabeth I's reign and ending with the latest volume in 1607.²⁰ The volumes contain two hundred or more documents relating to Bacon's activities as resolver

10. For English law on the number of arbitrators required for arbitration, see Carli N. Conklin, *A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America*, 2016 J. DISP. RESOL. 55, 60-62.

11. Such an appointment would be a sign of esteem. BACON PAPERS IV, *infra* note 17, at xliii.

12. *Nathaniel Bacon*, *supra* note 8.

13. *Id.*

14. *Id.*

15. *Id.*

16. BACON PAPERS IV, *infra* note 17, at xlii-xliii.

17. THE PAPERS OF NATHANIEL BACON OF STIFFKEY, of which five volumes have so far appeared: Volume I 1556-1577 (A. Hassell Smith, G.M. Baker and RW Kenny eds., (XLVI 1978/1979)) [hereinafter BACON PAPERS I]; Volume II 1578-1585 (A. Hassell Smith & G.M. Baker eds., (XLIX 1983)) [hereinafter BACON PAPERS II]; Volume III 1586-1595 (A. Hassell Smith & G.M. Baker eds., (LIII 1990)) [hereinafter BACON PAPERS III]; Volume IV 1596-1602 (Victor Morgan, Jane Key, & Barry Taylor eds., (LXIV 2000)) [hereinafter BACON PAPERS IV]; and Volume V 1603-1607 (Victor Morgan, Elizabeth Rutledge & Barry Taylor eds., (LXXIV 2010)) [hereinafter BACON PAPERS V]. Two earlier selections will remain useful until the greatly superior Norfolk Record Society edition is complete: NATHANIEL BACON, THE OFFICIAL PAPERS OF SIR BACON OF STIFFKEY, NORFOLK, AS JUSTICE OF THE PEACE 1580-1620 (H.W. Saunders ed., 1915) and SUPPLEMENTARY STIFFKEY PAPERS (F.W. Brooks ed., 1936).

18. See generally BACON PAPERS, Volumes I-V, *supra* note 17 (detailing Nathaniel Bacon's work as a JP and the commissions he received to serve as a mediator or arbitrator from the King, Parliament, Privy Council, various Courts, and individuals).

19. *Id.*

20. *Id.* BACON PAPERS I-V, *supra* note 17.

of disputes.²¹ As the following discussion will demonstrate, mediation was an essential component of keeping law and order. There was no effective police force; as the editors of volume IV of the *Papers* write, Bacon's brother-in-law was injured in a duel and his son-in-law and later his step-son were to be killed in duels.²² Mediation and arbitration existed as alternative modes of dispute resolution. Bacon's status in the community was reflected in his selection by community members for assistance in peacefully resolving their disputes:

Resolution of minor local disputes may have been tiresome and time-consuming but the seeking out of a local gentleman such as Bacon as an arbiter by individuals in the locality or the referral to him of disputes that had reached the centre did two things. First, it reflected his existing standing in both local society and in the estimation of those at the centre.... Second, every act of mediation or arbitration helped to spin out yet further filaments of obligation.²³

Social class expected privilege. Obligations were more readily accepted on the understanding they would generate reciprocity. Bacon's selection as an arbitrator or mediator to resolve disputes was integral to this system.

This Article explores Bacon's role as a mediator and arbitrator, and the implications of that role for the practice of mediation and arbitration in the American colonies, in three parts. Part II explores Bacon's official commissions to arbitrate, which he received from the King, Parliament, Privy Council, Chancery and the Chancellor, the Court of Requests, in his role as High Steward, and from the preeminent English jurist, Sir Edward Coke. Bacon's communications with Coke, in particular, are worth looking at in depth as they demonstrate the high value placed on mediation and arbitration in this period.

Bacon also received private commissions to mediate or arbitrate disputes; these commissions will be discussed in Part III. Bacon's selection to serve as mediator or arbitrator for private dispute resolution most likely stemmed from his reputation in the community and his authority as Justice of the Peace. This Article explores several such commissions, including a dispute over land and debts between the widow Elizabeth Earle and her late husband's son, Robert, and disputes between neighbours over conflicts as varied as the use of well water, the payment of rents and tithes, and the killing of a boar. The variety of private commissions received by Bacon provides evidence not only of the broad use of mediation and arbitration to resolve disputes, but also of the great value community members placed on mediation and arbitration for settling controversies and restoring the peace. Indeed, in a surviving letter describing a dispute that Bacon was selected to help arbitrate, arbitration is described as a "pathway to peace" and the arbitrator is lauded as "blessed peacemaker".

Part IV concludes this article with a discussion of exportation of mediation and arbitration to the British colonies in North America. That exportation included not only the practice of mediation and arbitration to resolve disputes, but also the high value placed on those dispute resolution processes by individuals and entities as

21. *Id.*

22. BACON PAPERS IV, *supra* note 17, at xlii.

23. BACON PAPERS IV, *supra* note 17, at xliii.

varied as individual colonists and the Privy Council. Part IV ends with a call for future research in this area, in hopes that the uncovering and exploration of archival materials, like the papers of Nathaniel Bacon, might provide a more complete and nuanced understanding of how the English forms of dispute resolution played out in the early American colonies.

II. OFFICIAL COMMISSIONS TO MEDIATION AND ARBITRATION IN 17TH CENTURY ENGLAND

A. *Commissions From The King*

It was not uncommon for Bacon to receive an official commission to arbitrate a dispute. The endorsement at the foot of a commission might reveal the King's own hand.²⁴ For example, Martin Hambleton had mortgaged his land for one year to John Mingay and his son Henry, for £60 at 10 percent interest.²⁵ The land was leased to Edward Murton.²⁶ Murton and the Mingays took possession of the house and evicted the Hambleton family, even though Hambleton had offered them all he owed.²⁷ Hambleton specifically asked for Bacon and four others, or any two or three to examine his petition for redress.²⁸ The petition dated 16 May 1604 is endorsed with an order from King James I that, if the case was not being dealt with judicially, the arbitrators, or some of them, with two or more chosen by the other parties, should settle it equitably.²⁹

Julius Caesar, one of the two Masters of Requests, was the conduit through which the King's instructions were usually sent.³⁰ On June 24, 1603 he wrote to Bacon and Sir Christopher Heydon, referring to them the petition of Nicholas Ringold to the new King, who had asked that Ringold's cause be sent to "some indifferent gentlemen" of Norfolk.³¹

His Highness' good pleasure is that you should call both him and his adverse parties before you and examine the differences between them, and thereupon mediate such good end and order between them as you shall find to be agreeable to good conscience and dignity, that His Highness be no further troubled.³²

The request was expressly to mediate an outcome, not according to law, but according to conscience and dignity.

24. BACON PAPERS IV, *supra* note 17, at 108-109.

25. BACON PAPERS V, *supra* note 17, at 108-109.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. BACON PAPERS V, *supra* note 17, at li-iii, 38, 135, 153.

31. BACON PAPERS V, *supra* note 17, at 37-43.

32. *Id.*

Not all Bacon's efforts to mediate were successful. A matter referred to him and others on a petition to the King "concerning a message and 103 acres in Briston" was returned on May 1, 1604 when they were unable to persuade the parties to a settlement.³³

B. Commissions From Parliament

Parliament, too, might send a matter to arbitration, even when it was the subject of a bill before it. For example, Arthur Penning of Kettleburgh, Suffolk died in 1594.³⁴ His heir and executor was his elder son Anthony.³⁵ The will provided for his younger brother Edmund to receive £4,000 from the estate.³⁶ The intention was that Edmund should have a substantial share of the family lands.³⁷ As it would be impossible to convey land of exactly £4,000 in value, there would be a balance to be paid in cash.³⁸ A difference as to valuation might have been expected to be a simple matter. It was not.

A committee of the Commons appointed arbitrators: Bacon and Sir Charles Cornwallis for Edmund and Sir John Higham and Robert Kempe for Anthony.³⁹ Sir Robert Jermyn was appointed umpire but later replaced Kempe as arbitrator.⁴⁰ Their many attempts produced considerable heat, partly because Edmund's wife Anne was a determined woman who took over the conduct of their claim from her husband and stood up to Anthony's appointed arbitrators, who tried to bully her.⁴¹ Bacon was magisterial when they tried to insist on their preferred award.⁴²

Whatever the law might say about title not being arbitrable, arbitration or mediation was through the centuries the preferred method of dealing with disputed ownership of land.⁴³ Once the arbitrators had decided the question of title, they would get the necessary conveyances drawn and, when executed, they were as good as any title any court could give.⁴⁴

Anthony Penning wrote to Bacon on 8 September 1606 that he had received a draft conveyance from Edmund and that he had taken exception to it.⁴⁵ He had had his own draft prepared by counsel and submitted both to Bacon and whatever was acceptable to him, Higham and Jermyn he would willingly perform.⁴⁶

Higham got in first. He wrote to Bacon on 9 September 1606 to say he had perused both drafts and preferred Anthony's: "I hold it not reasonable that the woman, if she survive her husband, should hold the land without impeachment of waste."⁴⁷ Nor should Edmund have a life estate that he could dispose of, "for then

33. BACON PAPERS V, *supra* note 17, at 107.

34. BACON PAPERS V, *supra* note 17, at 17, at 222, n.612.

35. BACON PAPERS V, *supra* note 17, at 221-22.

36. BACON PAPERS V, *supra* note 17, at 222.

37. *Id.*

38. *Id.* The balance to be paid was 560 pounds. *Id.*

39. BACON PAPERS V, *supra* note 17, at 221-22.

40. BACON PAPERS V, *supra* note 17, at 222.

41. BACON PAPERS V, *supra* note 17, at 240-43, 250-51, 261-63.

42. BACON PAPERS V, *supra* note 17, at 261-63.

43. DEREK ROEBUCK, THE GOLDEN AGE OF ARBITRATION: DISPUTE RESOLUTION UNDER ELIZABETH I, at 244-58 (2015).

44. *Id.*

45. BACON PAPERS V, *supra* note 17, at 255.

46. *Id.*

47. *Id.*

he may, through his want of experience, be brought to pass away that interest and live full meanelly all his life after."⁴⁸ Better he should have only the profits from the land.⁴⁹ Was Higham worried that the woman would manipulate her husband?

A letter from Higham and Jermyn to Bacon dated 30 October 1606 appears in *The Papers of Nathaniel Bacon* preserved in the Folger Library.⁵⁰ Anne had been to see them at Bury St Edmunds.⁵¹ They had not enjoyed her visit.⁵² She had shown "great mislike" of their preference for the land to remain in trust, with discretion in the trustees as to where the profits should go in Edmund's lifetime:

Her importunity was so great as we sent for Mr Anthony Penning to come to us at Bury, where we laboured him to yield so to assure the lands as his brother might have the very land itself during his life . . . a counsellor-at-law (whom the gentlewoman entertained) did affirm that it might be safely done . . . Mr Anthony Penning desired to be advised by his own counsel, who fully resolved us that, if the land were assured for life as to the husband as it should be to the wife, with remainder to the issue etc, that then the husband and wife might then by recovery cut off the entail, and so in a short time the husband's estate would quickly be overthrown. The gentlewoman misliked of this and urged us to a certificate, and we perceiving her disposition and that nothing will content her but the sale of the land, we have in a letter set down the whole truth and ascertained my Lord Chancellor thereof, whereof if you like we pray you to subscribe, to prevent the malicious purpose of the woman.⁵³

Nothing in all the five volumes of *Papers* shows Bacon's qualities as an arbitrator so well as his reply of 1 November 1606:

Sirs, I have perused the certificate sent unto me under your hands . . . and have considered also of your letter . . . yet I must entreat you to excuse me though I forbear now to join in the certificate. You have had your judgments satisfied by hearing the parties on both sides to speak before you, and it may be I shall be of your judgment when I hear the like. But I am doubtful at this present how to judge this point, *viz* how far forth Edmund Penning shall be barred during his life. I allow well that he be barred to do no act to overthrow the inheritance, and this seemed on our first meeting to be agreed upon between us, and the other point was left doubtful. Therefore, I think it best that a cause of this importance be at London determined upon, where the best counsel in law may be had, and where you, Sir John Heigham, and I are like shortly to meet, and then upon more advice we may certify Sir Robert Jermyn what there falleth out best to be allowed upon and in the meantime the causes may rest as they be.⁵⁴

48. *Id.*

49. *Id.*

50. *Id.* at 261-62.

51. BACON PAPERS V, *supra* note 17, at 261-62.

52. *Id.*

53. *Id.*

54. BACON PAPERS V, *supra* note 17, at 262-63.

A model, even for today.

C. Commissions from Privy Council

James I's Privy Council used arbitration to deal with petitions just as Elizabeth I's had done, and Bacon's *Papers* reveal commissions from Privy Council. In giving instructions to those it commissioned, Privy Council rarely made a distinction between mediation and arbitration, or even between an order to resolve a dispute themselves or just to report back, such as in the commission dated 12 November 1604 to Bacon with Sir Miles Corbett, Thomas Cromwell and Owen Sheppard (or to any three or two).⁵⁵ They took extensive evidence of the rights of warren over Castle Rising, which were disputed by the Earl of Northampton's tenant and, among others, Sir Henry Spelman, the antiquary's father.⁵⁶ The arbitrators were instructed: "upon examination and perusal of such proofs and matters of evidence as they shall have severally . . . to end the controversy if you can, or otherwise certify us of your whole proceedings."⁵⁷

Sir John Popham often referred to Bacon matters that came before him when he was Chief Justice of the King's Bench (CJKB).⁵⁸ For example, in 1601 he directed Bacon, Henry Spelman, and Thomas Layer, or any two, to arrange a settlement between Katherine Barr, widow, and the executors of a foreign merchant, Adam Kindt, whom she accused of cheating her of her trading goods.⁵⁹ Kindt had died and his executors would not pay his debt.⁶⁰

The *Papers* do not always make it clear whether Popham was acting as CJKB or on behalf of the Privy Council. It made no practical difference to Bacon. Popham appointed Bacon sole arbitrator to determine all the disputes between the Reverend Edward Slynne and Robert Younger, gent, except for a matter between them in the Star Chamber.⁶¹ The parties entered into bonds to abide by his award, which survives.⁶² On 3 October 1601 he awarded that Slynne should allow Younger to enter the disputed land, of which some was copyhold in the manor of South Burlingham, and to release all actions other than that in the Star Chamber, to hand over the deeds and pay compensation.⁶³ Younger must allow Slynne to enter land in South Burlingham and release actions and deliver assurances on request, i.e. to execute the necessary conveyances.⁶⁴

Popham's commissions included one about trespasses to land and a stolen boar "to end if he may"⁶⁵ and a petition from the poor inhabitants of Wiveton against John King, a man of great wealth, who had got his hands on funds intended for the poor "now ready to starve," which Popham had himself endorsed to Bacon and Henry Spelman, to "examine this cause and, if you may, take some course that the

55. BACON PAPERS V, *supra* note 17, at 137-38.

56. BACON PAPERS V, *supra* note 17, at 137-41.

57. BACON PAPERS V, *supra* note 17, at 137-38.

58. BACON PAPERS IV, *supra* note 17, at 206.

59. *Id.*

60. *Id.*

61. BACON PAPERS IV, *supra* note 17, at 209.

62. *Id.*

63. *Id.*

64. *Id.*

65. BACON PAPERS IV, *supra* note 17, at 324.

poor may have their due, otherwise to certify me the true state of the matter at the next assizes.”⁶⁶

From the Privy Council Popham sent a dispute between two aldermen of Lynn, Baker and Gurlyn, to Bacon and Sir Miles Corbett, “to mediate matters between them and if you may finally to accord them.”⁶⁷ In June 1602 John Atkins of King’s Lynn wrote to Lord Keeper Egerton, on behalf of himself and his neighbours, complaining of the “unjust malefactions” of Alderman Thomas Baker, and asking him for permission to petition the Privy Council for “letters to be directed to 3 or 4 knights or gents in the county to call all the parties grieved before them... whereby some good order may be had for reformation according to their godly wisdoms agreeing with equity.” By letter from Popham the Council appointed “the right worshipful my very loving friends Sir Miles Corbett and Nathaniel Bacon Esq”:

With my very hearty commendations. Where there are certain controversies and suits depending between Mr Baker and Mr Gurlyn, two of the aldermen of the town of Lynn, which occasioneth some division in the town to the hindrance of the good governance of the same, I have thought good thereby to pray you to take the pains at this my entreaty to mediate matters between them and if you may finally to accord them wherein in mine opinion you shall do a very good office not only in making peace between these two in particular but in furthering thereby the continuance of the good government of that town.⁶⁸

D. Commissions from the Chancery and the Chancellor

In addition to receiving commissions from the King, Parliament, and Privy Council, Bacon regularly received appointments resulting from petitions to the Chancery, like the one from Thomas Pearce to Lord Keeper Egerton, which Egerton passed to Bacon to deal with alone in June 1600:

I pray you take the pains, calling both him and his mother before you to examine the matter and by some quiet order agreeable to equity and justice, to prevent and stop these farther suits which were unfit to be between parties so nearly bound to one another in love and duty, and which the petitioner seems to desire to have by this course prevented.⁶⁹

When he became Lord Chancellor Ellesmere, Egerton continued his habit of commissioning Bacon to mediate an end to matters before the Court of Chancery. Thomas Fairfax was plaintiff in a Chancery suit against John Rust. On 15 February 1605 Rust petitioned the Chancellor expressly to appoint Bacon and by a letter of 18 February he was asked “to make some quiet and friendly end between them according to equity and good conscience.”⁷⁰ But meanwhile Edward Coke had jumped in and sent Rust to Bacon with a letter dated 17 February, asking him:

66. BACON PAPERS IV, *supra* note 17, at 269-70.

67. BACON PAPERS IV, *supra* note 17, at 273.

68. *Id.*

69. *Id.*

70. BACON PAPERS V, *supra* note 17, at 152.

to hear and understand the controversy, and thereupon to do your friendly endeavour to end and determine the same between them . . . if by your good persuasion and means you cannot bring them to accept of such order and agreement as you in your wisdom and conscience shall think fit for them, then I pray you to certify to me the true state of the controversy and in whom you find the default to rest, that such order may be taken as is according to justice and equity.⁷¹

A memorandum of 5 March explains that the dispute was about mutual bonds and that the parties were brought to a settlement, except that Fairfax would not agree to Bacon's finding that he should bear the costs of the Chancery suit.⁷² So Bacon had to certify and return the commission, which he did by a letter of 8 April not to Coke but to Ellesmere LC.⁷³ He explained that the bonds had arisen out of liability for customs duties on barley exported to the Low Countries.⁷⁴ Fairfax had had no cause to start proceedings in Chancery, so he should bear the costs of them, £3 or £4.⁷⁵ Fairfax could not be persuaded.⁷⁶ And so Bacon was certifying and returning the commission, as instructed, "submitting my judgment to your Lordship's wisdom and grave consideration."⁷⁷

On 22 April 1605 Bacon wrote to Coke enclosing a copy of the certificate he had sent to Ellesmere LC on 8 April 1605, and "referring the poor man [Rust] to your further favour for his relief."⁷⁸

E. Commissions from the Court of Requests

Some commissions to mediate went to Bacon through the Court of Requests. For example, after a detailed memorandum of disputes between Robert Barnard and Thomas Clarke relating to corn, oats, straw, malt, peas and a horse, the settlement is recorded:

It is agreed 6 August 1604 between Robert Barnard gent and Thomas Clarke as followeth *viz* Robert Barnard doth accept in full discharge of a debt of £250 due to him from Thomas Clarke the £239 14s 6d demanded by Thomas Clarke, and in discharge thereof, as also of all other demands, agreeth to seal him a special acquittance. And Thomas Clarke agreeth to seal the like acquittance unto Robert Barnard.⁷⁹

71. BACON PAPERS V, *supra* note 17, at 153.

72. BACON PAPERS V, *supra* note 17, at 156.

73. BACON PAPERS V, *supra* note 17, at 169-170.

74. BACON PAPERS V, *supra* note 17, at 170.

75. *Id.*

76. *Id.*

77. *Id.*

78. BACON PAPERS V, *supra* note 17, at 173-74.

79. BACON PAPERS V, *supra* note 17, at 121-24.

F. Commissions Received by Bacon as High Steward

Among his many other public offices, Bacon was High Steward of the Crown and Duchy of Lancaster in Norfolk.⁸⁰ He received commissions to serve as arbitrator in that capacity, as well. For example, in November 1604, Thomas Edwards of Wisbech complained to him as High Steward of the King's manor of Walpole that the brothers Griggs had by a suit in the manor court wrongly taken his copyhold land.⁸¹ On 14 November 1604, Ellesmere LC made an order referring the case to Bacon as High Steward "to decide in law and conscience," "as the fittest person to decide this controversy" but "to make a quiet and friendly end between them according to law and conscience."⁸² This made for a nice little conundrum of categorization for the conceptual purist.

Bacon heard the matter as High Steward and wrote forthwith to both counsel that he had considered the legal title and what could be alleged in equity for Edwards and had asked each of the parties whether either would be prepared to renounce the land to the other and for what price.⁸³ Edwards was willing but the Griggs were not, insisting on their title.⁸⁴ Bacon told counsel that he would therefore certify to the Lord Chancellor that a trial be held at the next assizes.⁸⁵ Edwards assented but the Griggs said they needed further advice.⁸⁶ So Bacon asked counsel to give him their opinions as soon as possible.⁸⁷ But even at this stage he made his preference clear: "I incline rather to have the cause mediated than referred to the law if the Griggs would be ruled by me."⁸⁸

Bacon settled another dispute, referred to him by the Duchy Chamber with the consent of both parties. Musket surrendered his rights in a tenement and orchard to Bretland, who agreed to pay him two instalments of £3 6s 8d "in full satisfaction of money due under any cause now depending in the Chamber."⁸⁹

As Chief Steward of the Duchy Lands, Bacon had jurisdiction to decide disputes in his own court. He also performed other judicial functions. For example, if copyhold land was held by a husband in the right of his wife, the wife's agreement was necessary for any transfer.⁹⁰ A memorandum of surrender recites that Alice was examined in the absence of her husband by Sir Nathaniel Bacon, Chief Steward, and then John and Alice surrendered the land to Bacon.⁹¹

80. *Nathaniel Bacon*, *supra* note 8.

81. BACON PAPERS V, *supra* note 17, at 136.

82. BACON PAPERS V, *supra* note 17, at 136, 141-42.

83. BACON PAPERS V, *supra* note 17, at 175.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. BACON PAPERS V, *supra* note 17, at 268.

90. BACON PAPERS V, *supra* note 17, at 292-93.

91. *Id.*

G. *Commissions from Sir Edward Coke*

Edward Coke dominates the legal world of this period. The *Papers* preserve three documents, trimmed and redacted here, which illustrate his involvement with Bacon in the settlement of disputes.⁹²

On 8 September 1602 William Cobbe, whose land adjoined Edward Paston's, wrote to Bacon seeking a private arbitration:

Sir, I must confess my presumption to be far greater than my deserts, so as I cannot challenge that interest in your love I so greatly desire. Yet, knowing that it hath been agreeable with your good disposition not to think that time lost which is spent in so good a work as ending of controversies and dissensions, and making of peace and amity between gentlemen and your neighbours, pardon me if I seem troublesome, that am so wrongfully troubled (as I suppose) being not led thereto with self will, yet willing to defend my poor patrimony to my power, being resolved of my right by them of judgment and learning, as also by divers trials lately passed at the common law to my great trouble, charge and hindrance; which by your good means I hope shall now receive a friendly and quiet end (and the rather for that it hath pleased Mr Attorney General [Coke] so earnestly to move the same).

Sir, the sincerity of my cause is to be censured out of your wisdom to which I do appeal, desiring our cause may be weighed in equal balance. I covet not that which I never had, but what my ancestors time out of mind have quietly enjoyed without interruption of them that had the right Mr Paston now hath. Neither build I upon bare presumptions (as shall plainly appear unto you) but upon divers depositions which will be verified by ancient evidence.

I wish the state of my body were such as I might safely adventure to attend you myself, but my cousin Athow [the barrister Thomas Athow] and my wife will be ready at all times to attend your leisure for the same, and what you and they shall agree I will most willingly perform, and acknowledge myself bound to you in bonds of perpetual friendship. William Cobbe.⁹³

His wife Mary took over. She wrote to Bacon on 21 September 1602, referring to a visit she had made to him with a Mr. Mingey, a relative of Coke's, with Coke's "request that you should take pains to hear and end (if it may be) certain causes betwixt Mr. Paston and Mr. Cobbe, my husband."⁹⁴ If they could not mediate a settlement, the matter would go back to Coke, "that he by his wisdom and better persuasions may effect that which you cannot."⁹⁵ She suggested possible dates.⁹⁶ She had spoken to Paston and got his agreement to submit to Bacon and Henry Wyndham, "to perform without delay what shall be then ordered by you and Mr.

92. BACON PAPERS IV, *supra* note 17, at 284-88.

93. BACON PAPERS IV, *supra* note 17, at 284-85.

94. BACON PAPERS IV, *supra* note 17, at 285-86.

95. *Id.*

96. *Id.*

Wyndham, and consented to by him, my cousin Athow and myself.”⁹⁷ So William Cobbe had authorised his wife, with the lawyer Athow, to consent to a binding settlement.

Mary wrote to Bacon four days later.⁹⁸ She had received his answering letter (which has not survived) and letters from Coke which she had not read but presumed were attempts to fix a date.⁹⁹ She pressed for a date before the start of the legal term.¹⁰⁰ Shortly thereafter Bacon and Wyndham wrote to Coke, responding to his request for them to work for a peace between Cobbe and Paston touching certain land.¹⁰¹ They reported that they had “had a meeting at Appleton, Mr Paston’s house, with the allowance of Mrs Cobbe in the absence of her husband, and there we saw the ground in question and did after see their evidence and hear the depositions read.”¹⁰²

Both sides had deeds, which conflicted as to whether rights of common were attached to Babingley manor or Newton manor, “and this we left undetermined, with a consent that the same should be used for the graving of flags and such like as hath of late years been most accustomed.”¹⁰³ Differences as to who should have rights to feed sheep and rabbits were not a major point of contention.¹⁰⁴ But the arbitrators had to listen to all the complaints of both sides’ tenants, and that may have been the scarcely concealed collusive object: to get rid of the bickering between their tenants over rights of common and pasture, then a general source of more contention even than the pews in their churches.¹⁰⁵

They wrote a similar letter to William Cobbe, to tell him of their judgment, adding though that Athow, “your counsellor in the cause” was at the hearing.¹⁰⁶ Would you call that a private mediation, or arbitration, or did Coke’s intervention make it Government-ordered? However it may be classified, it seems to have worked. The Cobbes were recusants, as were the Pastons. Religious differences did not inhibit wealthy neighbours from seeking Protestant Bacon’s intervention, or affect his willingness to provide them skilled and experienced services.

Coke wrote fairly often and informally to Bacon.¹⁰⁷ He sat with Bacon as a Commissioner for Sewers in 1605.¹⁰⁸ Because of the leading part he played in the creation of the modern law, the *Papers*’ evidence of his involvement as a party in mediation and arbitration deserves particular attention.

A letter dated 2 March 1603 from Henry Warner, a friend of both sides, asked Sir Miles Corbett to arbitrate in a land dispute between Edward Coke, then Attorney General, and the same Edward Paston.¹⁰⁹ The disputed land in Flitcham may have adjoined both their properties.¹¹⁰ Bacon agreed to be the other arbitrator.¹¹¹ Coke’s

97. BACON PAPERS IV, *supra* note 17, at 286.

98. BACON PAPERS IV, *supra* note 17, at 286-87.

99. *Id.*

100. BACON PAPERS IV, *supra* note 17, at 287-88.

101. *Id.*

102. BACON PAPERS IV, *supra* note 17, at 287.

103. *Id.* at 288.

104. *Id.*

105. BACON PAPERS IV, *supra* note 17, at 287-88.

106. BACON PAPERS IV, *supra* note 17, at 288.

107. BACON PAPERS V, *supra* note 17, at 143-44.

108. BACON PAPERS V, *supra* note 17, at 187.

109. BACON PAPERS V, *supra* note 17, at 11-12.

110. *Id.*

111. *Id.*

confidence in Bacon as a mediator is shown time and again in the commissions he sent him, but this, of course, was a purely private arbitration.¹¹²

The relevant records begin again with a letter of 1 September 1604 from Coke to Bacon and Sir Miles Corbett, which included:

I being desirous not only of quietness between ourselves (whereof I made no doubt) but also between our posterities afterwards, and that suits (that commonly are mothers of unkindness) might stay, desired you (as likewise my cousin Paston did) to inform yourselves of the true state of the matter in variance; and by your good mediation to end the same. Whereupon (as I am informed) you have taken the pains to view the ground, and to hear the allegations and proof of either party. These are to desire you to proceed in so good a work, and to the end your labours already taken may not be lost, and that either party may receive the better satisfaction, that you would be pleased to meet again at Fritcham some time this next week, and to set down the proof and matters tending to the maintenance of the claims by either party, and to the manifestation of the right touching these matters in variance, wherein as you shall do a charitable and friendly work, so shall you make us much both beholden to you for your pains and indifferency herein. And so I commit you to the blessed protection of the Almighty.¹¹³

That letter was enclosed with the following, dated the next day:

Sir, you shall perceive by these enclosed what a desire I have of quietness, and how bold I am to require your further travails. Sir Miles sent me word by the messenger that any day after tomorrow he would give meeting about the finishing of your former travails. Whereof I am the more desirous, because I would have it driven to an issue before I depart. What day it please you to appoint, this bearer shall give notice thereof to Sir Miles. It was my cousin Paston's resolute request that the reasons and proofs of either side should be set down or else he would no further proceed. And so with my very hearty commendations to you and your good lady I commit you to the blessed protection of the Almighty and ever rest, your assured friend.

Godwike 2 September 1604 Edw Coke¹¹⁴

Sadly, the *Papers* tell us nothing more of how this matter was resolved, so research must continue elsewhere.

Coke took pains to encourage Bacon's mediation of a dispute between Jerome Alexander, a King's Bench attorney and Alexander's brother-in-law Robert Plandon over copyhold land.¹¹⁵ On 16 February 1604 he wrote to Bacon:

112. BACON PAPERS V, *supra* note 17, at 11-12, 128-129.

113. BACON PAPERS V, *supra* note 17, at 128-29.

114. *Id.*

115. BACON PAPERS V, *supra* note 17, at 74.

After my very hearty commendations. I have received knowledge that there are very many suits betwixt this bearer my servant and one Plandon, his wife's brother. And that there are commissions awarded to you and others directed to examine witnesses and to end and determine the same suits. And forsomuch as I heartily wish a peace between them, lest the one should consume the estate of the other, and in the end feel the sharpness of their own faults to their great hindrances. Therefore I heartily pray you in the behalf of both their goods to take the more pains at my request to reconcile all questions betwixt them, so shall you do a work of much piety betwixt them, and give me occasion to be heartily thankful to you for your travail therein to be taken

Your very loving friend [signed] Edward Coke.¹¹⁶

Unfortunately, the later correspondence shows no signs of a successful settlement.¹¹⁷

In the summer of 1606 Coke referred to Bacon to end or certify a petition he had received as Chief Justice of the Common Pleas about a dispute over money deposited with Thomas Thetford in trust for the two brothers and five sisters of John Moretoft.¹¹⁸ It asked for “some course to come by their money, being very poor and unable to sue for their rights.”¹¹⁹ Four sisters were married and one was a widow.¹²⁰ Bacon's own notes show that he addressed the problem, comparatively trivial in financial terms, with as much care as he had the Pennings' £4,000, with the result that: “Mr Thetford agreed to disburse presently 20s apiece” to the three husbands and the widow, and the rest “their portions out of the said remainder” on Thursday at the house of Bacon.¹²¹ A memorandum dated 21 August 1606 sets out the final settlement in detail.¹²² Thetford was also a party to a dispute, this time with no less than Sir Christopher Heydon, Bacon's partner in so many arbitrations. Coke as Chief Justice of Common Pleas (CJCP) similarly referred petitions for wrongful possession of a house and – a grandiloquent effort with many Biblical references, some apposite – from “your poor orator . . . whose cry ascends to God.”¹²³

On 13 August 1606 Bacon's reply to a Coke commission relates that he had tried to mediate a settlement of a claim against the heir of the debtor, who was answering that he had administered the estate and the claim was too late.¹²⁴ Bacon wrote:

In conscience (in my judgment) he ought to pay, both in respect of the poverty of the man, who lent the money to old Lambart, and also of the portion of land which was left to the young man by his father being of the

116. *Id.*

117. BACON PAPERS V, *supra* note 17, at 74-75, 77.

118. BACON PAPERS V, *supra* note 17, at 243-44, 249-50.

119. BACON PAPERS V, *supra* note 17, at 244.

120. BACON PAPERS V, *supra* note 17, at 243.

121. BACON PAPERS V, *supra* note 17, at 250.

122. BACON PAPERS V, *supra* note 17, at 253-54.

123. BACON PAPERS V, *supra* note 17, at 244-45.

124. BACON PAPERS V, *supra* note 17, at 251.

value of £40 by year being copyhold. I would have had him repair unto your Lordship with the bearer but he refused to do it without warrant. I have thought fit to certify thus much unto your Lordship referring the poor man to your considerations.¹²⁵

On 5 November 1606 Bacon reported failure to Coke on a matter Coke had referred to him from the Norfolk Assizes: “Bullen, notwithstanding his consent given to abide my arbitrement, refuseth to enter into a bond to perform my arbitrement as touching the matter passed by verdict for him before you Thus leaving the cause to your Lordship’s further consideration, I take my leave.”¹²⁶

A year later, on 2 November 1607, Bacon’s letter to Coke reveals the work he was prepared to undertake to resolve a dispute, and the limitations he laboured under, even with Coke’s authority as Chief Justice behind him.¹²⁷ He had tried again but:

Bullen refused and withdrew himself in a froward and obstinate sort I moved Bullen to a most reasonable course (as I thought) for end. But his wilfulness was such as he would not be conformable in any sort, which will breed him great trouble from others of his neighbours as well as Laseby.

Thus, being sorry that my labour hath brought forth so little fruit, I yet hope that the wisdom and consideration of your Lordship and the rest will bridle this Bullen, who spareth not to hazard his own undoing for the trial to have his will.

And so I take my leave.¹²⁸

The closeness of their relationship is shown by a letter from Coke to Bacon asking him to play the detective.¹²⁹ Joan Cooke had been remanded in custody, charged with poisoning her husband Thomas, parish officer and overseer.¹³⁰ Bacon had examined her.¹³¹ Coke commended his actions, particularly in not allowing bail, for poisoning one’s husband was the most damnable crime and therefore petty treason.¹³² He made specific suggestions:

It were in mine opinion necessary to get that black stone that was supposed to be brought out of Iceland and to sift out that matter of the ratsbane . . . and to re-examine the widow, where and when she bought it The matter of unkindness between her and her husband would be thoroughly examined. Your true and loving friend. Edw Coke

125. *Id.*

126. BACON PAPERS V, *supra* note 17, at 263.

127. BACON PAPERS V, *supra* note 17, at 300.

128. *Id.*

129. BACON PAPERS V, *supra* note 17, at 257-58, reply at 269-70.

130. BACON PAPERS V, *supra* note 17, at 257-58.

131. BACON PAPERS V, *supra* note 17, at 257.

132. *Id.*

Item Whether he chewed any tobacco that morning and whether he had any in the house.

Item Who were those that saw the body to know it after he was dead.¹³³

H. Between Half-Brothers: Nathaniel Bacon and Francis Bacon

The *Papers* provide little evidence of brotherly relations between Nathaniel and Francis, but arbitration crops up even here. In fact, the only substantial record is of Nathaniel intervening to remind Francis of his obligation to arbitrate impartially in a dispute in which he had acted as counsel for one of the parties.¹³⁴

The inhabitants of Southwold had petitioned the Council against Richard Gooch.¹³⁵ The matter came by bill before the Star Chamber, which referred it to Francis for report.¹³⁶ It was alleged that Gooch had maintained the unfounded complaints of Margaret Raphe, widow, against named persons and other inhabitants of Southwold, twenty persons in all, by bringing frivolous suits in Star Chamber and Chancery.¹³⁷ The petitioners introduced what would today be objected to as irrelevant matter: a third of the town had been destroyed by fire, what was left had been ravaged by plague and pirates (Dunkirkers) and “hostile enemies of Spain” and “hard voyages in fisher fare and bad markets whereon the state of the town wholly dependeth” had taken their livelihoods away.¹³⁸ They pointed out that Francis had been Gooch’s counsel when bringing the bill in Chancery, and Gooch had worked for Francis and Nathaniel’s brother Nicholas.¹³⁹ He was hardly likely to be impartial.¹⁴⁰ So they asked Nathaniel to write to Francis, asking him either to recuse himself or, if not, to act judicially rather than as an advocate.¹⁴¹

On 21 October 1606, two of the petitioners wrote a note to Nathaniel, asking for an answer to their request and setting out the details of their petition.¹⁴² For two years Gooch had wrongfully occupied town lands worth £50 a year in rent and cut and sold timber, with other wrongs, some of them “continued by reason of an injunction grounded upon a report made by a doctor being one of the Masters of the Chancery.”¹⁴³

So, on 25 October Nathaniel wrote to Francis:

Good brother, I understand that there is a reference made unto you out of the Court of Star Chamber, of a bill there exhibited by the township of Southwold in Suffolk against R Gooch, my brother [Nicholas] Bacon’s servant and your client. And they of the town being not very rich, by reason

133. BACON PAPERS V, *supra* note 17, at 257-58.

134. BACON PAPERS V, *supra* note 17, at 256-60.

135. BACON PAPERS V, *supra* note 17, at 256-57.

136. *Id.*

137. *Id.*

138. *Id.*

139. BACON PAPERS V, *supra* note 17, at 257.

140. *Id.*

141. *Id.*

142. BACON PAPERS V, *supra* note 17, at 259-60. Letter is to Nathaniel Bacon’s clerk, Martin Man. For Man’s designation as Bacon’s clerk, see BACON PAPERS V, *supra* note 17, at 350.

143. BACON PAPERS V, *supra* note 17, at 260.

of the great pestilence which hath been lately amongst them, and by other occasions of piracy and fire, are loth to hold on a chargeable contention, and therefore have entreated me to be a means unto you in their behalf, that some good course might be taken whereby there might be no continuance of the suits between them.

The consideration hereof causeth me hereby to be a suitor unto you, that you will take knowledge of the grievances of both sides and, as a judge, advise and move such a proceeding as a peace may be concluded between them. And in so doing, as well Gooch as the townsmen of Southwold shall have great cause to hold themselves beholden unto you, and will be ready to do you any kindness or service for your travail so bestowed, and I also take it kindly at your hands.

When I was at the last parliament I did hear some of them, and R Gooch also speak touching the differences between them, and I then thought Gooch in fault and did tell him that I would complain to his master for the unquiet carriage of himself.

So I commend you to the grace and favour of God.¹⁴⁴

While hardly affectionate, it was quite straightforward.

III. PRIVATE COMMISSIONS FOR MEDIATION AND ARBITRATION

Bacon's authority as a JP, and no doubt his reputation for integrity and impartiality, led not only to official commissions but also to many private requests to resolve disputes. Perhaps, too, his special skills as a mediator were recognised at all levels within his community, as well as by the several government authorities.

On 13 November 1601 Bacon mediated an end to a dispute over land and debts.¹⁴⁵ Elizabeth, widow of Robert Earle, agreed to pay £100 in two instalments to John Earle, Robert's son, presumably by a previous marriage, who agreed to release her from all claims and convey to her all his father's lands.¹⁴⁶ She also agreed to pay to Robert's married daughter, Margaret Slye, "besides her legacy 20s after three years."¹⁴⁷

Richard Foster, rector of Burgh Parva, wrote to Bacon to ask him to resolve a dispute between his former servant, poor but honest, and a John Bacon – no relation – who was accusing him of trespass.¹⁴⁸

In September 1604, Bacon took detailed and rambling evidence in successfully mediating the settlement of a dispute between John Girdlestone and Ellen Howes, a widow.¹⁴⁹ On 25 September the neat and straightforward agreement is recorded: The parties were to exchange bonds, John and his brother were to make payments

144. BACON PAPERS V, *supra* note 17, at 260-61.

145. BACON PAPERS IV, *supra* note 17, at 219-20.

146. BACON PAPERS IV, *supra* note 17, at 219.

147. BACON PAPERS IV, *supra* note 17, at 220.

148. BACON PAPERS V, *supra* note 17, at 129-30.

149. BACON PAPERS V, *supra* note 17, at 126, 130.

to her, and she was to allow John to farm her copyhold land until her son was 14 – “and all reckoning clear.”¹⁵⁰

Two settlements were recorded on one day, 25 August 1606.¹⁵¹ One was a simple exchange of a money payment for the release of a bond.¹⁵² The other was of a dispute over Mundy’s liberty to draw water from his neighbour King’s well:

King shall pay 10s unto Mundy towards the making of a well in his own ground. And Mundy to forbear to draw water at King’s well hereafter. And the 10s is agreed to be left in Robert Walker’s hand, and 5s thereof to be paid to Mundy so soon as he doth begin the well and the rest after it is finished. And each party releaseth the peace taken against one another and against the rest contained in the warrants made and granted by Sir Nathaniel Bacon and Mr Gwynne.¹⁵³

Bacon and Gwynne had referred to themselves and mediated a settlement of a matter, which had come before them as JPs, arising from mutual allegations of breaches of the peace.¹⁵⁴ Has there ever been a legal system, which could have produced a more refined resolution?

But sometimes it was arbitration that was expressly required. As Christmas approached and 1602 came to an end, Bacon was as busy as ever. As sole arbitrator on 9 December 1602 he declared his award in a private arbitration between neighbours, Roger Bulwer (and his sons Edward and George) and John Athill.¹⁵⁵ Athill must pay Roger 30s before 1 February 1603, for a boar he had killed.¹⁵⁶ Disputes between Roger and Athill over rents and tithes were to be decided by John Fountaine and if Mr. Fountaine could not reach a decision that both parties agreed to, the matter would be referred to Bacon.¹⁵⁷ “The demand of tithe hay from Mr George Bulwer by Mr Athill in the right of the vicar is referred to a trial at the Assizes in summer next,” and Bacon added: “Memorandum: I have promised that no advantage shall be taken of bonds which have been formerly passed for abiding by this my order.”¹⁵⁸

In December 1594, the *Papers* had recorded a violent tithe dispute - with a vicious mastiff and heavies imported from Kent with long pikestaffs - which the parties had submitted to local mediation.¹⁵⁹ Bacon’s role was limited to fixing and allocating costs and acting as umpire if called on.¹⁶⁰ The matter arose again eight years later. On 27 December 1602 Bacon had signed a memorandum of evidence in disputes between Armiger and Franklin, which spilled over into the new year.¹⁶¹ The land dispute was deferred until the following Whitsuntide, “when a sight shall

150. *Id.*

151. BACON PAPERS V, *supra* note 17, at 254.

152. *Id.*

153. *Id.*

154. *Id.*

155. BACON PAPERS IV, *supra* note 17, at 301.

156. *Id.*

157. *Id.*

158. *Id.*

159. BACON PAPERS III, *supra* note 17, at 285-87. *See also* BACON PAPERS IV, *supra* note 17, at 302-303, nn.638-639.

160. BACON PAPERS III, *supra* note 17, at 285-87. *See also* BACON PAPERS IV, *supra* note 17, at 302-303, nn.638-639.

161. BACON PAPERS IV, *supra* note 17, at 302-303.

be had of the survey made in the meantime.”¹⁶² Certain trespasses were referred to the judgment of the arbitrators, Mr. Holland and Mr. Warde, “on Monday next . . . and if they do not order it then it shall be decided by Nathaniel Bacon esquire.”¹⁶³ Franklin’s demands for tithes and wool and sheep were also “referred to their examination and ordering.”¹⁶⁴ “Costs of suit and for battery with costs of suit, referred to Nathaniel Bacon when the other matters be brought to order.”¹⁶⁵ On the same day Bacon signed an order for the hearing the following Monday.¹⁶⁶ On time, an agreement between Armiger and Franklin was mediated and signed by Holland and Warde on 3 January 1603¹⁶⁷:

First Mr Armiger is to pay unto Mr Franklin for the tithe hay 15s.

Item Mr Armiger is to pay him for the tithe rakings five combes barley.

Item Mr Armiger is to pay him for the tithe of tenscore couples of ewes and lambs sold to Mr Buggin 52s.

Item for grasses occupied by Mr Armiger of the parsonage glebe for every acre 16d.

The day of payment of the said sums of money and barley to be set down by Mr Bacon his worship.¹⁶⁸

One undated letter must suffice to show in detail how a submission worked and how arbitration was valued then:

Good Sir Nathaniel Bacon, mortal men should not have immortal suits, and suits commenced by fathers and continued by their children in an unchristian and uncharitable succession do often times ravel up and undermine the fathers’ estates before they die, and in the end do utterly undo their heirs by descent, when they be dead, a cross and a curse, that contention by God’s wrathful ordinance brings with it, which you in your wisdom and experience hath seen to fall upon divers families. Not far off – *sic obdurit cor Pharaonis* [‘so he hardened Pharaoh’s heart’ *Exodus* 7.13 and 14] - through the which, by excessive fees disbursed upon exceeding lawyers, both Mr Bulwer’s family and mine, shall hereafter fare the worse, for prevention whereof at the first, before any suit was set on foot between him and me, I for my part made an overture of peace unto him, above 10 years since, to submit all intended controversies to any men of worth and wisdom in all Norfolk to decide and censure the same.

162. BACON PAPERS IV, *supra* note 17, at 302.

163. BACON PAPERS IV, *supra* note 17, at 303.

164. BACON PAPERS IV, *supra* note 17, at 302-303.

165. BACON PAPERS IV, *supra* note 17, at 303.

166. *Id.*

167. BACON PAPERS V, *supra* note 17, at 1.

168. *Id.*

But Mr Bulwer then, before the walking spirit of the lands in question was any wise conjured, utterly refused that my peace offering, saying that he would not put his coat to dyeing, to never a man in England. But now of late (and somewhat too late for us both) he hath changed his mind and out of his own voluntary, (the pleasingest motive that may be), it hath pleased him to come walking unto me in the pathway of peace, protesting to embrace that peace now which long since was offered unto him, before any money was spent, or rather spoiled, at law. Requesting at my hands a submission and a compromise of all matters in difference betwixt us, to some men of worship in the country (lawyers excepted, the minters of other men's coin, out of their true owners' purses into their own). Gladly I condescended to this his motion, as proceeding from God, and did put upon him first to choose one for himself and I would second it, suit and sort another of like quality and condition. He, for him, chose Sir Nathaniel Bacon, a knight in his opinion without exception. And I, purposing to choose one that was *omni exceptione major* [above all objection] and in all respects suitable and sortable that never would dissent in judgment, nor jar in the proceeding, chose for me your worship to be the judge, the justicer and *honorarius arbiter* of all our controversies. At which my seconding choice Mr Bulwer was so well pleased that presently off went our hats, on went our hands and hearts to a pacification, which was the first time that ever we two shook either hands or hearts together, making you by mutual and reciprocal consent our judge, if you please to assume that office upon you, *beati pacifici, exuenda est persona amici, et induenda iudicis* [the blessed peacemaker must doff the character of friend and don that of judge] to end as in a moment ten years tedious and costly suits, thereby to give better satisfaction to Mr Bulwer, concerning his supposed right and title to the lands in question by delivering your opinion therein, than either the Lord Chancellor or the high court of the Chancery by decree, injunction and commission could do, or than I can do by paying 200 marks out of the said lands to his sister for her marriage portion, and by spending in suit or otherwise 400 marks more *in toto* paid and spent out of my poor purse, twice as much money as the recovered lands be worth. Thus stand I, *de damno vitando* [for avoidance of loss], a loser at the close, although I got somewhat at the crush. Thus contendeth he, *de irreparabili damno* [in relation to loss which cannot be recovered], for lawyers have irrevocably got his money. *Omnia vestigia antrorsum, nulla retrorsum, opera et impensa periit* [if every track leads forward, none back, then the toils and the costs have vanished]. Fearing tediousness I submit myself to your censure, and you and yours I do recommend to the protection of the Almighty, together with my duty remembered to the good Lady Bacon.¹⁶⁹

Both parties signed, though it was penned by Dr John Hunt, himself a civil lawyer and Master in Chancery (c1596-1615), a JP in Suffolk and an expert devotee of arbitration.¹⁷⁰ If no other record had survived, that fortuitous product of Nathaniel Bacon's determination to hoard every scrap of evidence of his daily work

169. BACON PAPERS V, *supra* note 17, at 113-14.

170. BACON PAPERS V, *supra* note 17, at 114.

would stand as colourful proof of how mediation was regarded then. It repays the most careful reading.

Nathaniel Bacon was a busy man. He had to arrange for troops to be mustered, taxes collected, and for the support of unmarried mothers and their children.¹⁷¹ In a footnote to the Papers of Nathaniel Bacon, the editors reveal that Bacon must have acted as mediator in many more disputes than the *Papers* document: “Entries in Bacon’s recognizance books suggest that this procedure was widely used but rarely figures in the formal records.”¹⁷² He may well have dealt on average with two or three matters every month, which might require him to ride for a day, stay at least two nights away from home, spend a day to inspect many acres of land and perhaps another to hear dozens of witnesses’ inexpert testimony.

Many awards make orders, which apply to non-parties. A good example is that of 28 June 1603, in a title dispute between Richard Boulter on the one hand and Gyles Mychell and Thomas Grene on the other, referred to arbitrators from the Consistory Court.¹⁷³ The calendar reads: “Concerning covenants in a pair of indentures for land lately bargained and sold to Boulter by Mychell, Boulter may reasonably require Mychell’s son Mardocheus, at his coming of age, to release to him all title and interest.”¹⁷⁴ No quibbles about whether the son was a party could be allowed, even if they were noticed.

There was no bar against women being parties to arbitration, whether they were single or married. The *Papers* are weighty testimony of the routine involvement of women in all kinds of dispute, including the ownership of land. For example, Margaret Bosom had no need to involve her husband Adam in a complex claim on a bond involving her son by a previous marriage.¹⁷⁵ She gave evidence and signed her deposition herself.¹⁷⁶ Anne Penning’s determination exasperated Higham and Jermyn, who rudely referred to her as “the woman.”¹⁷⁷ The evidence from America is the same. I still search, though, for women who resolved disputes in this period.

IV. EXPORTATION TO THE AMERICAN COLONIES

Just a cursory reading of some of the secondary sources has been enough to show not only that a systematic study is wanted, but that there must be primary sources surviving in the United States which have not yet been discovered or fully exploited. The tasks for new generations of scholars will be pleasurable and satisfying. They will know that their work is worthwhile if only to ensure that future practising mediators and arbitrators will not grow up believing, as many of their forebears have done, that: “Arbitration did not become an integral part of the early social and economic development of the country nor a recognised institution of any consequence.”¹⁷⁸ Though they may accept as a challenge: “Arbitration literature of

171. Nathaniel Bacon, *supra* note 8.

172. BACON PAPERS V, *supra* note 17, at 52, n.137.

173. BACON PAPERS V, *supra* note 17, at 39.

174. *Id.*

175. BACON PAPERS V, *supra* note 17, at 121-23.

176. BACON PAPERS V, *supra* note 17, at 121.

177. BACON PAPERS V, *supra* note 17, at 255.

178. FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 6 (1948).

this period is exceedingly sparse and enquirers are therefore handicapped in examining the somewhat vague course taken by arbitration and the causes of its inaction.”¹⁷⁹

There is only one way of combatting such apparently complacent ignorance! The American story must be left to American authors. But Connecticut Colonial Records declare that in 1645 that state’s General Assembly suggested that trials could be prevented if arbitrations were held privately.¹⁸⁰ There are examples such as George and Christopher Sanders, two brothers who were partners in a commercial venture to Jamaica and England.¹⁸¹ “When they could not settle their accounts themselves, they submitted their dispute in 1677 to the arbitration of four men.”¹⁸² Oldham and Kim’s section on “The Maryland Experience” gives the full text of an award of 1668 and comes to the conclusion: “The Maryland archival records demonstrate an early American endorsement and continuation of English arbitration practices.”¹⁸³

So there is evidence (and there are tantalising clues to more) of arbitration’s early start in North America. No doubt there is more work to be done on Dutch influence in New York and perhaps Swedish in Delaware, following the example of John Locke, the architect of the Arbitration Act 1698, whose role Horwitz and Oldham have described so well. Two letters from Benjamin Furly, the English merchant of Rotterdam who promoted the first German emigration to America,¹⁸⁴ show his comparative scholarship and merit further attention.

Some evidence from England can contribute. There are a few references in this period to the Americas in the *Acts of the Privy Council (APC)*.¹⁸⁵ The Privy Council might appoint a committee of its own members to resolve a dispute; although that might not be comprehended in anyone’s definition of arbitration, it shows an attitude. The best evidence comes from *APC* entries relating to Virginia.¹⁸⁶ In 1627 Sir George Yeardley, the Governor of Virginia, died leaving by his will to his widow and sole executrix, Dame Temperance, always known through three marriages as Temperance Flowerdew, her maiden name, all the household goods in his house in St. James City, later Jamestown, and all his other estates in Virginia to be sold.¹⁸⁷ The proceeds were to be divided, one-third to Temperance, two-thirds to his three children. She then married Francis West, the next Governor, who left to her Yeardley’s estate. Temperance could be trusted. She had left England in 1609

179. Frank D. Emerson, *History of Arbitration Practice and Law* 19 CLEV. ST. L. REV. 155, 158 (1970).

180. Mann, *supra* note 3, at 452.

181. Mann, *supra* note 3, at 453, n.41, 454 n.43.

182. Mann, *supra* note 3, at 453.

183. Oldham & Kim, *supra* note 1, at 262-65, 262 n.109 for references.

184. JULIUS FRIEDRICH SACHSE, BENJAMIN FURLY, AN ENGLISH MERCHANT AT ROTTERDAM, WHO PROMOTED THE FIRST GERMAN EMIGRATION TO AMERICA, PRINTED FROM THE PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY (1895), available at <https://archive.org/details/benjaminfurllyane00insach>.

185. ACTS OF PRIVY COUNCIL OF ENGLAND. For the Acts of Privy Council of England, see <http://www.british-history.ac.uk/search/series/acts-privy-council> [hereinafter ACTS OF PRIVY COUNCIL].

186. On Lady Wyatt’s petition against the Virginia Company: “take such effectual course for the petitioner’s relief as in justice and equity you shall find cause,” see 39 ACTS OF PRIVY COUNCIL 360 (J.V. Lyle ed., 1933). For the petition of Elizabeth Barwick, see 45 ACTS OF PRIVY COUNCIL 104-105 (R.F. Monger & P.A. Penfold eds., 1960).

187. For the following account of Sir George Yeardley, Francis West, and Temperance Flowerdew Yeardley West, see 46 ACTS OF PRIVY COUNCIL 38-39 (P.A. Penfold ed., 1964).

with her new first husband Richard Barrow in the *Falcon*, part of that ill-fated community of whom all but a few perished. She was one of those who survived the terrible “Starving Time.” Barrow apparently did not.

Yeardley had been in the same convoy but his ship, the *Sea Venture*, was wrecked on Bermuda. No lives were lost and two ships were built from the wreckage. They made it to Virginia in May 1610. Soon thereafter three ships arrived there from England. Temperance married Yeardley. They had three children, Elizabeth, Argoll and Francis. He became Deputy Governor in 1616. In 1618 he and Temperance were in London. He was knighted and appointed Governor and granted 300 acres of land. They returned to Virginia and created the Flowerdew plantation of 1,000 acres, producing tons of tobacco annually. He died in 1627. Forthwith Temperance married his successor as governor, Francis West, but she died the next year.

Temperance had sent the tobacco to Yeardley’s brother Raph, apothecary of London. When he knew Temperance was dead, under the pretence of affection for the children, he took possession not only of his brother’s but also of Temperance’s estates. He refused to account to West or come to any agreement with him. The Council, “considering the difference between them rests chiefly upon matter of account,” referred it to four merchants, “persons experienced in business of this nature . . . to mediate and settle such an end (if they can) as shall be indifferent and equitable, or certify in writing in whom the default is.”¹⁸⁸ That is good early evidence of a mediation relating to the North American colonies.

Ensign Edmond Rossingham was Temperance’s nephew. He had asked the Council for “relief and satisfaction out of the estate of Sir George Yeardley in the possession of Raph Yeardley as his administrator.”¹⁸⁹ He claimed he had left cattle and goods in Sir George’s hands and had performed services for him there.¹⁹⁰ The Privy Council had referred the matter to “certain persons of judgment and experience in the affairs of that Plantation,” who had certified that those services had been beneficial, and the cattle worth £360, and that Raph had confessed that the estate in his hands was worth £1,200.¹⁹¹ Therefore on 19 February 1630, “rather for that by dissolving the Company (the government thereof being assumed by his Majesty into his own hands) the Petitioner was left without remedy in the ordinary course,” the Privy Council ordered Raph to pay Rossingham £200.¹⁹² The order would be a sufficient discharge against any other claimants against the estate, “for that it did not appear there were any debts at all.”¹⁹³

Another Governor of Virginia was John Potts.¹⁹⁴ He and his wife Elizabeth sailed from London aboard the *George* in March 1619 and arrived in Jamestown in May. In 1623, he prepared the poison which killed 200 native Americans attending

188. *Id.* See also, *A Tale of Two Houses in Virginia and Kirkcudbright*, 74 TRANSACTIONS OF THE DUMFRIESSHIRE & GALLOWAY, NAT. HIST. & ANTIQUARIAN SOC’Y 120-22 (3rd series, 2000) available at <http://www.dgnhas.org.uk/transonline.php>

189. 45 ACTS OF PRIVY COUNCIL, *supra* note 186, at 285-86. For the following account of Edmund Rossingham, see *id.*

190. 45 ACTS OF PRIVY COUNCIL, *supra* note 186, at 285-86.

191. *Id.*

192. *Id.*

193. *Id.*

194. For the following discussion of John and Elizabeth Potts, see 46 ACTS OF PRIVY COUNCIL, *supra* note 187, at 85-86.

a “peace ceremony” at Jamestown. He became a member of the Governor’s Council in 1625 and Governor in 1629. On 9 July 1630 he was convicted of cattle theft and dismissed. He may have lived until 1645. On 30 September 1630 the Privy Council wrote to the Governor and Council of Virginia:

Complaint hath been made both to his Majesty and this Board against you in a petition presented by the brother of Dr Pott But we are not apt to give credit to any complants of this kind against a man that is entrusted by his Majesty in a place of government as you are. Therefore we have sent you the Petitions . . . take it into consideration and thereupon proceed according to justice and the orders established in that Government . . . with convenient expedition so that there may be no further just cause for complaint.¹⁹⁵

Eleven members of the Privy Council signed that letter. The *APC* show no further activity in relation to Dr Potts but later the same day it wrote again to the Governor and Council of Virginia.¹⁹⁶ It had received a complaint from Thomas Grendon that he had spent £1,400 in various parts of Virginia, and learned from him that planters only planted tobacco and this did not help the plantation and planters did not have permission to do so. Grendon had supplied “divers ingenious artificers for the making of artificial mills, useful for sundry commodities, and saws for sawing timber,” and “people skilful in making rape oils and soap ashes,” all “for the good of the Common Weal.”¹⁹⁷ The Council “earnestly recommend his good endeavours” and ask the Governor and Council to help Grendon in getting in his debts.¹⁹⁸

The last record of Privy Council’s interest in the colony is a letter of 30 June 1630.¹⁹⁹ John Woodhall was a speculator in the colony who never left England.²⁰⁰ He had bought land from the estate of Sir Samuel Argoll, famous among other things for kidnapping Pocahontas and bringing her to England. Lawsuits ensued. Woodhall complained that “the chief detainers of his land and cattle are both parties and judges” in his cause.²⁰¹ The Privy Council’s response was to tell the Virginian Council:

As we cannot but marvel at such your neglect of the commands and recommendations from this Board and have just cause not only to blame you for the same but for your partial and dilatory proceedings (if they be such as informed) in the administration of justice . . . we expressly require you to afford the Petitioner expedite justice.²⁰²

195. *Id.* at 85.

196. For the following account of Thomas Grendon, see *id.* at 88.

197. *Id.*

198. *Id.*

199. *Id.*

200. For the following discussion of John Woodhall, see 46 ACTS OF PRIVY COUNCIL, *supra* note 187, at 88.

201. *Id.*

202. *Id.*

Another example of early American arbitration occurs with Francis Poythress, who went to Virginia c1633 as agent for the London merchant Lawrence Evans.²⁰³ Evans later charged Poythress with breach of trust.²⁰⁴ In March 1639 the Governor and Council appointed four merchants in Virginia to arbitrate; they decided in Poythress's favour.²⁰⁵ The Privy Council's committee for the foreign plantations "directed a further enquiry when Evens was to go to Virginia himself."²⁰⁶

There is a Canadian reference to arbitration, as well. In 1628 Charles I himself referred to the Privy Council a complaint by two Frenchmen that another Frenchman had "taken them at sea in a voyage they were making for a Plantation in Canada."²⁰⁷ The Council formed a committee of three of its members (or any two) to report "that thereupon such final order may be taken . . . consonant to justice and equity."²⁰⁸

Another example of 17th century arbitration comes from Barbados. The National Archives preserve the record of an award made on 18 June 1652 in a private arbitration between Sir Anthony Ashley Cooper, and Gerard Hawkaine, (probably Hawkins), about a plantation in Barbados.²⁰⁹ Cooper became the first Earl of Shaftesbury, a member of Cromwell's Council of State and one of the founders of the Whig party.²¹⁰ He was John Locke's patron and collaborated with him on the Fundamental Constitutions of Carolina.²¹¹

V. CONCLUSION

I shall be happy if this Article, with all its inadequacies and perhaps false starts, does no more than attract the attention of scholars, perhaps especially younger Americans, to fill the blanks and correct the errors in what all must agree is at this stage a patchy and inadequate history of dispute resolution in the early American colonies.

203. TRANSACTIONS OF THE DUMFRIESSHIRE & GALLOWAY, *supra* note 188, at 120-22.

204. *Id.*

205. *Id.*

206. William B. Hall, *The Polythress Family: A Study of Francis, Francis, Francis, and Francis*, 14 WM. & MARY Q., 77, 77 (1934).

207. 44 ACTS OF PRIVY COUNCIL 359 (R.F. Monger ed., 1958).

208. *Id.*

209. PRO 30/24/49/1 Award of the arbitrators between Sir Anthony Ashley Cooper and Gerard Hawkaine, NAT'L ARCHIVES (June 18, 1652), <http://discovery.nationalarchives.gov.uk/details/r/C6757225>.

210. See *Anthony Ashley Cooper, 1st Earl of Shaftesbury and successors: Papers*, NAT'L ARCHIVES, <http://discovery.nationalarchives.gov.uk/details/r/C11970> (last visited Dec. 10, 2016).

211. *Id.*