

Chapter VI

TRIALS — AND TRIBULATIONS

— 1 —

FROM HIS FIRST entry into politics until the publication of *The Right of the Inhabitants*, Dulany's efforts to introduce the English statutes and to establish an independent judiciary were his most conspicuous activities. Far more frequent, however, than his appearances on the political skirmish line were his courtroom battles in the causes of the clients that flocked to him. His successes had given him the edge over every other attorney in the Province, Thomas Bordley alone excepted, and had brought many profitable cases his way.

Perhaps the most lucrative business for attorneys with outstanding reputations was that of representing the London mercantile firms engaged in the tobacco trade. When he first entered practice, Dulany had been happy to take the cases of London firms singly, as often as their local factors or captains of their trading vessels sought his assistance in collecting a debt or suing on a bond. As he began to cut a larger figure in the profession and the calls increased, he accepted permanent retainers from two of the larger houses, Samuel Hyde & Company and Jonathan Forward & Company, whose interests in the Province he carefully guarded.

His relations with the merchant houses did not long remain on a narrow legal basis. Both Hyde and Forward carried on other business than shipping manufactured goods to the Province and loading the return cargoes of tobacco. Hyde invested in tobacco land, and, a few years after the beginning of their association, Dulany joined in partnership with him to purchase several rich tracts in southern Maryland. The arrangement

with Forward, who already had a number of provincial factors, never grew into anything like a formal partnership, but Dulany had real responsibility for the success of Forward's enterprises. Forward had obtained a government contract for transporting reprieved convicts from British gaoles to the Chesapeake where he sold them as bound laborers.¹ Although Marylanders resented the importation of these dangerous persons, they bought the indentures nonetheless for the long terms convicts served. Dulany had to keep a sharp eye on the traffic, for the community was hostile both to the "felons" and the contractor who transported them.

It was his association with Forward and the convict traffic that involved Dulany in the greatest case of his career and one of the most remarkable of his century. The litigation ran for ten years in the Maryland superior courts and five times resulted in appeals to the King in Council. Long before the final settlement the original issue had dropped from sight and the cases had grown into a struggle to establish a principle that was to affect the appellate system of the whole empire. Even the beginning was out of the ordinary.

In the summer of 1718 Gilbert Powlson, master of the *Dolphin*, arrived in the Bay with a cargo of 131 felons consigned to Jonathan Forward's Maryland factors. Public opinion was deeply stirred, especially in Annapolis where the citizens had officially expressed opposition to receiving these "persons of ill fame." Fresh rumors of transported convicts running amuck cropped up often enough to keep alive the painful memory of the cannon fire on the Pretender's birthday three years before. In behalf of the community the Annapolis city fathers not only protested but attempted, without the least success, to deny entry to the convicts. Powlson delivered the unwelcome cargo—"his Majesty's seven-year passengers," they were derisively named—and took on a return lading from Forward's agents with explicit orders to sail at once.²

As the *Dolphin* was about to clear the port alert creditors took her captain into custody for debt and had him committed to jail to prevent his escape from the Province until his obli-

gations were met.³ Powlson's arrest placed him in a serious predicament. He was entirely without funds and without immediate hope of relief, for his charter party with Forward provided for payment for the entire voyage at the rate of £ 50 sterling per month ten days after delivery of the return cargo in the Thames.⁴ His creditors would not permit him to sail until they were paid, and he could not pay them until he had completed the voyage. It appeared that Powlson would languish in jail indefinitely.

As a last resort, Powlson turned to Thomas Bordley in the hope of freeing himself from his hungry creditors. Bordley was quite equal to the emergency, and he acted with speed and originality. Ignoring the contractual provision that specified payment after completion of the voyage, Bordley filed claim for his client in the Court of Vice-Admiralty and obtained judgment for Powlson. Armed with a court order, he began to seize Forward's goods wherever he could find them to satisfy the judgment. Altogether Bordley attached nearly £ 2,000 of Forward's assets.

Dulany stepped into the case as soon as he heard of Bordley's indiscriminate seizures. As Forward's attorney he had made no defense in Vice-Admiralty other than to deny the competence of the court to hear the case. But once Bordley started after Forward's goods, Dulany cut off the seizures with a temporary injunction from the Chancery Court.⁵

Dulany promptly dispatched an account of the high-handed admiralty proceedings to Forward, who presented a lengthy memorial to the Privy Council begging relief. Council machinery notoriously worked slowly. It was not until August of 1720 that an order was produced directing the Governor of Maryland to have Forward's effects returned and to allow the suit to be tried in the Provincial Court, with liberty of appeal to either party.⁶

Meanwhile in Maryland the Powlson-Forward case had got into the common law courts. Long before the order-in-council arrived Dulany was contending against a renewed assault on Forward's goods. Bordley was shrewd enough to guess the Privy

Council's decision and had anticipated it. With Forward's property secured by admiralty order, he brought suit for Powlson against Forward at the April term of the Provincial Court. Bordley sued for £ 360-7-6 alleged due and damages, which were certain to be considerable. Dulany postponed trial until fall, waiting for the results of Forward's petition to the Privy Council.

The September court convened but the order-in-council had not arrived.⁷ Dulany could not delay proceedings any longer. He replied simply *nil dicit* to Bordley's plea and judgment was entered for Powlson. On the same day a jury was ordered empanelled to assess damages. Dulany expressed no surprise at the decision against Forward or at the large damages, £ 600 sterling, awarded Powlson by the jury.⁸ He did object to the court's unusual haste, which played into Bordley's hands, and requested review of the proceeding by the Governor and Council sitting as the Court of Appeals.

Dulany's appeal from the decision of the Provincial Court was a continuation of his delaying action until relief arrived from England. He assumed that, pending decision on the appeal, the Provincial Court judgment could not be executed and that Forward's property was secure at least until the Court of Appeals reviewed the case.

Bordley acted on the contrary assumption that appeal was no bar to execution of judgment. As soon as the jury assessed damages at £ 600, Bordley directed the sheriff to attach Forward's Maryland assets in the hands of Thomas Cockey and three other Forward agents. All four were cited to appear at the bar of the Provincial Court in April of 1721 to show cause why the attached goods should not be condemned to satisfy the judgment.⁹

During the winter the Powlson-Forward case made a lively subject for speculation.¹⁰ The money stake was large enough to arrest attention. Now the two foremost attorneys in the Province were disputing whether appeal was a bar to execution of judgment. And the decision on this moot question was of interest to every property holder in Maryland.

In April Dulany faced a hostile panel of justices in the Provincial Court when he rose to contest Bordley's motion to condemn the goods and chattels in Cockey's hands. He argued that, until the Court of Appeals ruled on *Powlson v. Forward*, the judgment of the Provincial Court could not be executed. How illogical it would be, he said, to pay the £ 600 damages before the higher court decided whether Powlson was actually entitled to it.

The argument did not convince the judges, who consulted together a moment and laid down the rule that appeal does not stay execution.¹¹ Practically, the decision meant that Cockey had to turn over Forward's goods in the amount of £ 600 sterling or go to prison. In the momentary rustle that ran through the courtroom Dulany stood up to ask for review of the ruling by the Court of Appeals. At exactly the same moment Bordley leaned over to the clerk and told him in a hoarse whisper to fill out an execution. With the sheriff at his elbow, Bordley confronted Cockey with the writ of execution and gave him the option of drawing a £ 600 bill of exchange on Forward or going to jail. Cockey drew the bill payable to Gilbert Powlson and handed it to the sheriff.

Again Dulany had to resort to maneuver to prevent delivery of the £ 600 to Powlson until decision on the appeal. He frankly said that Forward could never recover it or the equivalent should the judgment on appeal be reversed. Powlson was a debtor, still in prison, and entirely without means of making restitution once his creditors got the bill of exchange, as they fully intended to do. Dulany stopped delivery of the bill in the Chancery Court where he obtained an order holding it in escrow until decision on *Powlson v. Forward* in the Court of Appeals. For the time being he had outmaneuvered Bordley.¹²

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After Dulany filed appeal from the Provincial Court ruling on the Cockey attachment in April of 1721, active litigation ceased for nearly two years. The Court of Appeals postponed

decision through successive terms, while the £ 600 bill of exchange lay in the Chancery Court.

Bordley was busy preparing for the outcome of the meditations in the Court of Appeals. In February, 1722, he brought Gilbert Powlson's pitiable condition to the attention of the provincial Assembly. Powlson, he told the legislators, had contracted the "Dry Gripes" and was in danger of dying unless removed from prison. Bordley personally steered through an act releasing Powlson on condition that he assign all his property to his creditors.¹³ At the moment Powlson's property was a fiction, but at least he had prospects.

When the Court of Appeals convened in May, 1723, Powlson's prospects became a reality, and the case took a new turn. The court rendered its decision sustaining the judgment of the Provincial Court. The highest tribunal in Maryland had decided that Powlson was entitled to damages against Forward.

Dulany now prepared for the last resort, a further appeal to the King in Council. His motion for appeal was granted, but the troublesome problem of keeping the bill of exchange from Powlson cropped up again. Dulany petitioned the court to impound the bill until final decision on the case in England, in effect, to suspend execution of judgment pending the appeal.¹⁴ His supporting argument failed to convince their honors, who dismissed the petition and left him without further means of withholding the bill from Powlson.

As soon as the Court of Appeals dismissed Dulany's petition, the bill became Powlson's property and went directly into the hands of his waiting creditors. Over five years of litigation Bordley had become one of the principal creditors. He received the bill, buying out the interests of other claimants, and sent it to London for collection.¹⁵

Dulany's appeal and Bordley's bill of exchange went to England at the same time. Their arrival created a sensation in the mercantile community and in the household of Lord Baltimore. The proprietary family was already much worried because of the attention focussed on the Province by the squabble over the English statutes. Baltimore had recently overheard the

Lord Chief Justice airing opinions decidedly hostile to proprietary pretensions. Secretary Lowe had been exultant when the Powlson-Forward case had dropped into the background for a time, even indulging in one of the more obvious forms of humor, "Mr F - - - is not so forward as he was." His crowing was drowned in a furious revival of activity when Forward received Bordley's demand for payment of the £ 600 bill drawn by Cockey.

Forward refused to honor the bill, even though his own agent had drawn it, until the King in Council heard the case and decided whether he actually owed the damages. The bill returned to Bordley protested.¹⁶

Since the day Dulany had lost in the Court of Appeals, every new development in the Powlson-Forward affair appeared to make his plight worse. When the protested bill turned up in Maryland, Bordley hailed Cockey into court to make good the face value. Dulany had no defense whatever. On the surface this was a routine collection, exactly like dozens of other smaller ones that crowded the court dockets. Bordley had judgment without trouble and forced Cockey to draw a second bill on Forward, this time for £ 720 sterling to cover the face of the old bill and twenty percent damages due on the protest. Bordley also demanded bond from Robert Gordon and William Rogers, two other Forward agents, to secure payment of the new bill of exchange, which he dispatched to London for collection in the autumn of 1724.¹⁷

In early 1725 the succession of reverses halted. Dulany at last had the results of his appeal to England—an order of the King in Council reversing the decisions of the Maryland courts and commanding Powlson to restore all he had taken on judgment from Forward. He immediately secured a writ of restitution for repossessing Forward's assets.

Then the hitch occurred. When the writ was served, Bordley walked into the Court of Appeals and coolly denied that the reversal by the King in Council concerned him in any way.¹⁸ Furthermore, he told the court, he had acquired the bill of exchange legally and hinted that he was prepared to defend his right if challenged.¹⁹

Dulany had no chance whatever of recovering from Powlson, who had long since dropped out of the case entirely, stripped of his goods and "not worth a Groat." His only hope of repossessing the bill was to attack Bordley's right to it in the first place. On 18 May Dulany began proceedings in Chancery against Bordley's equitable claim to the bill of exchange.²⁰

A few days later he had three more suits on his hands. The second bill of exchange for £ 720 returned to Maryland protested, and Bordley brought separate suits against Cockey and the two sureties, Gordon and Rogers, for £ 828 sterling, the face of the bill and costs of protest.²¹ The cycle of protest and recovery was apparently endless.

Apparently endless, too, was the succession of decisions in the Maryland courts unfavorable to Dulany. He lost his case in Chancery and took it to the Court of Appeals where he lost again.²² Defending Cockey, Gordon, and Rogers in separate suits at the bar of the Provincial Court, he also lost all three and, when he took them to the Court of Appeals, he lost there.

Again there was the last resort. The curtain rang down on the Maryland phase of the litigation on 4 June 1726 when all four cases were appealed to the King in Council.²³

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Dulany was not personally involved in the final settlement of the tangle that had grown out of the Powlson-Forward case, but he was vitally interested in the outcome as a test of the principle for which he had contended, the suspension of execution of judgment on appeal. The Maryland courts had unanimously decided against him, and their decisions had worked hardships that only the Privy Council could undo.

There was at the moment before the public eye an obvious example of the trouble created by the absence of a rule staying executions on appeals. Bordley sailed for England in the spring of 1726 to conduct the defense of the four cases on appeal before the King in Council. Before he quit the Province he had executed his judgment for £ 828 against Robert Gordon. Gordon

had refused payment until the outcome of the appeals to the King in Council was known and Bordley had promptly jailed him for non-payment.²⁴

Shortly thereafter Dulany had news of the first definitive results from the complicated litigation, and they vindicated his stand. The Privy Council had ordered instructions sent to all colonial governors directing them to suspend execution of judgment in cases on appeal, unless the appellee could give security for restitution on reversal.²⁵ As soon as the instructions reached the Governor, the rule became binding on the Maryland courts and had the immediate effect of freeing Gordon from imprisonment.

In broader terms the instructions corrected appeals procedure throughout the empire and made uniform for all colonies the rule that Dulany had contended to establish in Maryland.

The suits themselves were not settled for another three years, and, as it turned out, Bordley did not appear in the final scenes. He arrived in England desperately in need of medical attention and put himself under the care of the eminent surgeon, Dr. William Cheselden. Before the Privy Council was ready to proceed with the hearings in the autumn of 1726 Bordley died.²⁶ In 1729 all the judgments of the Maryland courts were reversed and perpetual injunction issued against further proceedings on any of the bills. By mutual agreement between the contending parties Bordley's executors paid Forward £ 850 sterling to end the litigation after ten years of court battles.²⁷

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In the five years preceding his rival's death Dulany's career had been curiously entwined with Thomas Bordley's. Although they had been keen competitors since their first brushes in Prince George's County court before Dulany's marriage to Rebecca, they had also worked together in a common cause during the statutes controversy. In 1725 they were drawn into even closer cooperation by an action of the Assembly that threatened catastrophe to their professional incomes.

At the autumn session of Assembly in 1725 the delegates proposed to pass an effective act to put a stop to what was described as the "ill practices of attorneys practicing the law within this province." Ever since Dulany had first qualified as a lawyer his fees had been subject to the periodic regulating acts, but the provisions had never worked any particular hardship. Once his reputation was established his retainers had made up for the comparatively low fees that he was restricted to by law. Now times were hard and the Assembly was in a mood to end once for all these extra charges. The proposed act set up a table of fees, as had previous legislation, but it also provided that both client and attorney make oath that no greater fees than those specified had been paid or accepted.²⁸

Dulany and Bordley appeared jointly at the bar of the Lower House to argue against the proposal, which bore more heavily on them than on any other lawyers in the Province. They failed utterly to convince the delegates and turned to the Upper House to defeat the measure. Their memorial, which was also subscribed by Dulany's protégé, Joshua George, and Michael Howard, his successor as Attorney General, protested against the "private whispers, slanders and false Insinuations" taken as evidence of malpractice by the Assembly to justify the move against the bar. The petition effected nothing more than verbal changes in the act before it was finally passed.²⁹

Nor did the lawyers get any sympathy from the Governor, who not only approved the legislation but, in the following March, called a special session of Assembly to plug some loopholes. "I am Determined," Calvert announced, to "support the Law which is the best that ever was enacted for the relief of the Inhabitants of this Province."

Neither Dulany nor Bordley could agree that the act was the best ever enacted, but there was no doubt that it was the most drastic. Rather than conform to the requirements both lawyers withdrew from active practice.³⁰

Had Dulany not been a wealthy man already the interruption of his law practice would have been ruinous. As it was, the loss of income was only partly offset by the profits he made in land deals and other enterprises that he engaged in while he was out of active practice. Unfortunately for him the act had gone into force at a critical stage of the Powlson-Forward case, just as he was about to take the last four cases on appeal to the King in Council. His ward, Michael Macnemara, fresh from the Inns of Court where Dulany had sent him after Thomas's death, took care of the actual courtroom work, filing the appeals and posting the required security that the cases would be prosecuted.³¹

But Michael could not fill Dulany's shoes, much less contribute to the increase of Dulany's fortune. Lawyers of first ability were very few in the Province. On several occasions the courts excused Dulany from the oath in order that he might appear for a client unable to prosecute a case without his expert legal counsel. He was also, of course, able to appear "in his proper person" when his personal suits were tried. These were numerous enough to call him to court with reasonable frequency and kept him in touch with the profession.

The restraining act was scheduled to come up for renewal in 1729, and against that day Dulany laid careful plans to defeat it. He was by no means the only lawyer in the Province opposed to a renewal, but the combined forces of the whole profession appeared unlikely to overcome the Assembly's resolve to keep the law on the books. Dulany hoped, however, that he could bring sufficient pressure to bear on the Lord Proprietor to secure his dissent. His cue was to find someone with sufficient influence to present the lawyers' case to Baltimore and to persuade his Lordship to disallow the act of renewal.

That person was the eminent barrister of Lincoln's Inn, John Sharpe, who had recently been retained by Lord Baltimore as legal adviser. In the name of his professional colleagues, Dulany retained Sharpe to lobby against the act at the proprie-

tary court.³² As soon as the Assembly passed the act of renewal Dulany sent Sharpe the relevant papers to prepare his case. Nor did he allow Sharpe to rest until the hearings were held. In December, 1729, Dulany reminded him of the "great hardship and oppression" imposed on the profession by the law.

I wrote to you last . . . August and sent you sev^l papers relating to the Attorneys Act, which I hope you have received, and that you'll be as Expeditious as possible in getting some end to the Affair. I am sure you'll Excuse me for being thus pressing when you consider how great a Sufferer I have already been by that Unrighteous law (as you justly term it) & that by Y^e Continuance of it, I lose daily. . . . I beg you'll favour me with a line or two by the first Opportunity how you proceed.³³

In early 1730 Sharpe brought about the result desired by the Maryland lawyers. He presented a formal petition to the Lord Proprietor setting forth the unfairness of the act. Baltimore agreed. He disallowed the legislation on the grounds that it was not agreeable to any known law of England and was "repugnant to Reason & Equity."³⁴

Dulany returned to his practice, debtor to the proprietary veto then under attack by the Assembly. A second time higher authority had rectified what he deemed injustice in the Province. The lesson was not forgotten.

¹³ Dulany's personal library contained well thumbed volumes of the classics in European political thought. See below, pp. 209-210.

¹⁴ *Maryland Gazette*, 17 December 1728. A unique copy of this pamphlet is preserved in the Maryland Historical Society which acquired it with the Calvert Papers. It is conveniently reprinted as Appendix II of Sioussat, *The English Statutes in Maryland*, with the original pagination.

¹⁵ Daniel Dulany, *The Right of the Inhabitants of Maryland to the Benefit of the English Laws* (Annapolis, 1728), 1-2.

¹⁶ *Ibid.*, 3, 12-13.

¹⁷ *Ibid.*, 4-5.

¹⁸ *Ibid.*, 13.

¹⁹ There had never been an explicit and unambiguous adoption of the common law. Dulany may have wanted the record to show chapter and verse. Paul S. Reinsch, *English Common Law in the Early American Colonies* (Bulletin of the University of Wisconsin, No. 31) (Madison, 1899), p. 42.

²⁰ Sioussat, *The English Statutes in Maryland*, 61-69.

NOTES TO CHAPTER VI: TRIALS—AND TRIBULATIONS

¹ Forward continued in this highly profitable trade for many years. *Calendar of Treasury Books and Papers, 1729-30*, pp. 258, 284, 352, 472, 478, 556, 602; *ibid.*, 1731-34, pp. 166, 188, 310, 324, 350, 402, 482, 634, 657.

² Bond ed., *Proceedings of the Maryland Court of Appeals*, xlii.

³ Provincial Court Judgments, Liber PL # 4, folios 20-21.

⁴ *Archives*, XXV, 426.

⁵ Expiration of the injunction a few weeks later unleashed Bordley. Chancery Record, No. 3, folios 820-826.

⁶ *Acts of the Privy Council: Colonial Series*, II, 781; Provincial Court Judgments, Liber WG # 2, folios 120-121.

⁷ The order was not handed down until 11 August 1720, *ibid.*

⁸ Bond, *op. cit.*, 348-349; Provincial Court Judgments, Liber WG # 1, folios 343-344.

⁹ Provincial Court Judgments, Liber WG # 1, folios 431-433.

¹⁰ A convict scare in early 1721 aroused further interest and quite possibly prejudiced Forward's case. On 3 March Mayor Tasker convened a special session of the city court to hear testimony on a reported plot of indentured convicts to seize the arms magazine and distribute arms to all those willing to fight for their freedom. Bordley, the city Recorder, entered the depositions *verbatim* in the Mayor's Court proceedings for the edification of the curious. The evidence amounted to nothing more than second-hand reports of incautious remarks and complaints by servants. But the townspeople forced Tasker to demand bond for the good behavior of convict servants in Annapolis. Mayor's Court Proceedings, Liber B, folios 27-29.

¹¹ Provincial Court Judgments, Liber WG # 1, folios 431-433.

¹² Bond, *op. cit.*, 502-503.

¹³ The "dry gripes" was ship's fever. *Archives*, XXXIV, 303, 330.

¹⁴ Bond, *op. cit.*, 355-357.

¹⁵ *Ibid.*, xliii.

¹⁶ *Ibid.*, 505.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 436-438, 445-446.

¹⁹ *Ibid.*, 447.

²⁰ *Ibid.*, 490.

²¹ *Ibid.*, 506.

²² By the time the appeal was taken to the Court of Appeals Dulany was no longer acting directly in the case. He was disqualified and the actual courtroom work was done under his eye by his protégé, Michael Macnema. *Ibid.*, 511.

²³ *Ibid.*, 515.

²⁴ *Archives*, XXXV, 524.

²⁵ The order of the King in Council was dated 5 July 1726; the Board of Trade submitted the instruction 28 July. CSP, Col: A&WI, 1726-27, p. 127.

²⁶ The nature of Bordley's illness is not clear, but it is fair to surmise from his symptoms that he suffered from gall stone. Cheselden's reputation is associated with his brilliant "lateral method" of cutting for the stone, perfected about the time of Bordley's death. *Dictionary of National Biography*, X, 192-194.

²⁷ Bond, *op. cit.*, xlv.

²⁸ *Archives*, XXXV, 435, 445-447, 474-475; *ibid.*, XXXVI, 226, 233, 255, 258, and the text of *An Act to restrain the ill Practices of Attorneys, and to prevent their taking Money-Fees*, 586-593.

²⁹ *Ibid.*, XXXV, 474.

³⁰ Bond, *op. cit.*, xlv.

³¹ See above, note 22.

³² Dulany to John Sharpe, 19 December 1729. Dulany Papers, MHS.

³³ *Ibid.*

³⁴ Calvert Papers, No. 295½, MHS.

NOTES TO CHAPTER VII: THE MAN OF AFFAIRS

¹ Prince George's County Land Records, Liber E, folios 663-665, 700-702.

² See above, Chapter II, note 3.

³ Patent Records, Liber IL # A: "Progress," 264 acres, folio 151, "Long Acre," 104 acres, folio 150, "Walnut Tree Island," 284 acres, folio 151, "Seneca Landing," 104 acres, folio 151, "Concord," 1106 acres, folio 150.

⁴ *Ibid.*, Liber AM # 1, folio 237; Liber PL # 8, folios 258-59; *Maryland Calendar of Wills* (Compiled and edited by Jane Baldwin and Roberta B. Henry), V, (Baltimore, 1917), 216-219.

⁵ William Eddis, *Letters from America, Historical and Descriptive* (London, 1792), p. 130-131.

THE DULANYS OF MARYLAND

A Biographical Study of

DANIEL DULANY, THE ELDER (1685-1753)

and

DANIEL DULANY, THE YOUNGER (1722-1797)

BY

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