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Settling the Law
Legal Development in Provincial New York

Eben Moglen

Acknowledgments

Much of the information about lawsuits discussed in these chapters is derived from the surviving practice papers of members of the New York legal fraternity, ranging over the period from the second to the tenth decade of the eighteenth century. I have attempted to use these and other often undisturbed sources to sharpen our picture of the details of law practice in eighteenth-century New York. But this remains in substantial measure a synthetic enterprise, and I am deeply indebted to the earlier work of scholars—including Julius Goebel, Douglas Greenberg, Stanley Katz, Sung Bok Kim, Leo Hershkowitz, Herbert Johnson, Milton Klein, and Joseph Smith—without whom the obscurity of the subject would be unrelieved. The apparatus of citation provides a formal recognition of their importance in shaping my own account, but a further acknowledgment is necessary here.

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Introduction

This is a book of legal history, by which I mean that it tells a story about how a legal system came to be. The particular story is about the legal system of the British colony of New York, from the time of its conquest in 1664 through the beginning of the Revolutionary War. In telling my story I have found it impossible to keep rigidly within those chronological limits; it was sometimes necessary to back up before the beginning or run on past the end, but outside these limits I do not claim to have added to the existing body of scholarship.

Much work has been done in recent decades to illuminate the processes of social development and change in colonial America by the use of legal materials. These studies have either treated the legal system as a set of sources documenting underlying social structures, or concentrated on the role of the law in ordering the processes of social confrontation and competition. My purpose in this book is different. While others have chosen to read the sources of the legal system to understand its effects on the larger enclosing society, I am pursuing the obverse course of attempting to understand how internal and external forces shaped the legal system. By the legal system I mean both the institutions—courts, law practices, bar associations, and (to a limited extent) legislatures—and the doctrinal structures that together determine at any given moment how disputes are adjudicated and who wins. The social and intellectual institutions of the legal system are affected by forces

arising within the system itself, but they are also affected by external impulsions from the contingencies of geography, politics, economics, and war. My goal in this book is to give an account of the legal history of colonial New York in which institutional and intellectual developments are related both to internal and external causes. I make no claim to a theory which will allow scholars to determine systematically what the balance of external and internal forces will be acting on another system at another time and place. As I hope my narrative will show, that balance in New York was a contingent product of the minute and multiple effects of people, time, and place. Its change over time could not have been predicted by reference to any rule of development that abstracted from the full substantive context. It may seem unnecessary to point this out, but the purpose of the historical enterprise, whether in the discipline of paleontology or legal history, is to explain processes which are intrinsically contingent. Mechanisms of development can be identified, though legal historians have not the advantage of a conception as elegant and powerful as the principle of natural selection. But no matter how helpful are our general conceptions, there can be no alternative to narrative description. Ultimately the history of law in colonial New York, or the history of life on earth, is the story of what happened to happen.

I have chosen to tell the story of what happened to the legal system of colonial New York by reference to a concept I have called "legal settlement" or "settling the law." Having loosed another conception on the world, I think it incumbent upon me to show that I have not multiplied entities unnecessarily. The idea of legal settlement was not one upon which I had determined before the years I spent learning the sources, nor was it even clear to me when I began to write the history I had learned. As I have written elsewhere,¹ I originally approached the sources with quite different generalizations in mind. The new conception was required in part because my story described events on a different scale from previous writing. Nowhere else in the historical

1. See Eben Moglen, *Settling the Law* ii-iii (PhD. dissertation, Yale University, 1993).

literature had someone tried to explain the development of the whole legal system of a North American colony of the first British Empire, from foundation through independence. Studies of particular features of colonial legal systems had appeared, including some about colonial New York without which my own study could not have proceeded. The general growth of the legal system of Massachusetts had been discussed in George Lee Haskins' masterpiece, *Law and Authority in Early Massachusetts*. But Haskins' description of the legal system of Massachusetts Bay concerned only the developments of the seventeenth century, mostly those occurring before 1650. On the other hand, the conceptions that brought structure to Lawrence Friedman's *History of American Law*, long the only work attempted on that magisterial scale, were plainly not adapted to the explanation of colonial developments.

Even more important than the scale of description was the unique combination of elements defining the society of colonial New York. Ideas about "colonial" legal systems required modification, because the colonies of the first British Empire were not like colonies of the European Empires of the nineteenth and twentieth centuries. Ideas generated by the description of colonial Massachusetts required modification because New York was unlike Massachusetts. Consideration of these differences explains the utility of the concept of legal settlement.

From 1664 to 1776 New York was a provincial society and a colony of the British Empire. We take these facts for granted, but for the legal historian to grasp their implications requires precise distinctions that contemporary usage tends to hide. Since 1945 the adjective "colonial" has most often denoted those African and Asian societies in which a comparatively small minority of Europeans, endowed with a monopoly on the modern technology of military force, established and controlled the economic, political, and legal institutions under which the indigenous majority lived, worked, and died. The connotations of the word include ideas of domination, repression, forced religious conversion, and cultural desecration. Contemporary literary

critics have elaborated theories of “colonial discourse,” describing the layers of acceptance and resistance precipitated by the conjunction of conqueror’s language and the mind of the dispossessed. In discussing the experience of “colonial” or “imperial” societies we are led by the words we use to expect the ambiguities of deracination, the arrogances of overweening power, and the coercive reshaping of traditional societies. For the historian of the law, the essential problems in the study of such colonies are to be found in questions like “How did imperial administration succeed in imposing the law of the metropolis on the indigenous economy?” and “How did the traditional law ways of the vanquished appear in or inflect the legal culture established by the foreign rulers?”

These are good questions, if we ask them in the hope of explaining the constitutional law of British India, or the administration of property law in Palestine under the Mandate. But they do not much illuminate the legal development of British North America before 1776. When we speak of “colonial” America the word evidently means something rather different, and the legal historian must adjust the questions accordingly.

In 1625 Manhattan Island witnessed the transplantation of a foreign society onto what its members visualized as empty land. To be sure, the Atlantic littoral of North America was really less empty at the opening of the seventeenth century than was Sicily before Corinthians arrived, or was the Tunisian coast before the advent of the first Phoenicians. But to the European migrants who viewed for the first time “the great green breast of the New World,” Syracuse and Carthage were colonies—offshoots of the root stock, transplanted cities in the wilderness. So these new North Americans thereafter described themselves.

“Colonization,” as a word describing the felt experience of these people, was a process of creation rather than domination. The indigenes contributed more to the process of social construction than the newcomers ever seemed able to admit, but in every area of life emphasis fell on the task of creation. To the

newcomers, the physical landscape they found required reworking in order to be fitted to human use. The long adjustment between the land and its human occupants was invisible to them, just as settlers in Australia two centuries later failed to grasp that the landscape lying before them had been shaped by 40,000 years of engineered combustion. As with the physical environment, so it was with respect to all the institutions of human social and cultural life. Religion, productive labor, sexual morality, decorative art, economic exchange—all must be reinvented to populate an environment conceived as empty, waiting for the revivifying touch of civilization, but nonetheless exerting profound influence over human behavior. Some of the activity populating this “empty” world consisted of the direct transplantation of scenery from one stage to another, carried in the memories of men or in the holds of ships. Currant bushes and the Thirty-Nine Articles could be carried, but the sugar mill, the cane it ground, and the labor that worked it had to be invented or borrowed.

Thus “colonization,” applied to these societies, describes a process of transplantation and invention directed at the creation of a familiar—yet perhaps somehow improved—community in a geographic space where, at least in the mind of the colonist, none had existed before. This process of populating the void, hidden inside the rather different connotations of “colonization” in our own time, deserves a word of its own—let us call it “settlement.”

Just as the land itself must be settled, so must the law. The legal historian of societies conforming to this meaning of “colonial” must ask questions about legal settlement—“How is the empty legal space of the new environment filled?” “Where do principles and institutions come from to meet the unique conditions of the new physical environment?” “What determines the rate at which settlement occurs?” “When is settlement complete, and how do we know?”

Having said that New York was in this sense a colonial society, we must also consider the implications of its place in the

British Empire. Though George Haskins addressed in his study of early Massachusetts many of the questions about legal settlement outlined above, stories about Massachusetts law before 1650 have little to do with the activities of Imperial government, precisely because until the latter seventeenth century British Imperial policy had little direct effect in Massachusetts. From its beginnings, New York—conquered from the Dutch as part of the explicit imperializing policy of the Restoration government and held as a proprietary by the brother of the King—was for better and worse more intimately involved with the Empire than Massachusetts Bay. This was true not only in 1664; reflection on the events of the 1770s reveals the same situation. But the British Imperial government of the seventeenth and eighteenth centuries was limited in its capacity to control trans-Atlantic colonies by the nature of its infrastructure for receiving information at the center and projecting power at the periphery. New York was a locale in which, for primarily strategic reasons, the Empire had much interest in control, as exemplified by the atypical permanent presence of the Army throughout the eighteenth century. But for several reasons, of which by far the most important was the astounding ethnic, religious, and cultural diversity of New York's population, interest in control outran the possibilities of its successful exercise. Time and again, as I have tried to show, Imperial alterations of legal technology in New York achieved results very different from those intended, as the local conditions transformed imposed or transported rules. Legal development in New York reflected the constant negotiation between settlers and overseas authorities—a complex dynamic of balance and exchange—in which imposition and conciliation led to innovation. For this aspect of the process, too, the word “settling” is appropriate.

Legal settlement in New York occurred in yet a third sense, because the legal development of the British colony began with problems of negotiation and merger. The diversity of New York society was not a consequence of British conquest—the space occupied by the Duke of York through his agents in the fall of 1664 could never be mistaken, even by an Englishman, for empty.

The Stuart proprietary imposed a top layer on strands of settlement already woven in New Amsterdam, Fort Orange, and the Long Island towns. Precisely because the geographic and military problems presented by New York exceeded the proprietor's resources for occupation government, the managers of the newly-constituted administration were compelled to make the provincial future as continuous as possible with the various pre-provincial pasts. The legal space of early New York was filled from several directions independently; the task of the legal historian is to map those appearances and give an account of the processes through which the legal system settled the discrepancies.

"Legal settlement" as thus defined is a rather specialized concept, relating to the unique conditions of provincial New York. It is not predictive in character. It has those properties which J.H. Hexter so warmly commended in a framework for social history: it is contextualizing, flexible, and not a particularly good platform for the making of inflated general claims.² But it may also be valuable, I believe, in assessing the path of legal development elsewhere in colonial North America, and perhaps in other societies as well. It is helpful, for example, in avoiding a long-standing but not terribly productive controversy in the historiography of American law, concerning "transplantation" and "reception." The task of locating the moment of reception of the common law, and the allied task of differentiating between "indigenous" and "transplanted" rules have consumed a good deal of energy. Even those engaged in this process have tended to recognize that the apparently mutually exclusive categories were deceptive. The most patently transplanted rules (such as those of criminal law in New York, delineated in detail by Julius Goebel and discussed below in chapter four) nonetheless developed along unique pathways in the particular local context, and to be useful any historian's narrative had to capture both metropolitan and local contributions. As to the New York

2. See J.H. Hexter, *A New Framework for Social History*, in **Reappraisals in History: New Views on History and Society in Early Modern History** (1961)

criminal law, to take an example that readers may see as both self-evident and of utility outside the context of colonial New York, we can as Goebel suggested plot the course of proceedings with the *Clerk of Assize* in one hand and Duncombe's *Trials per Pais* in the other, but the rules will have a somewhat different meaning in a city with a large slave population, whose infractions of law are dealt with in a separate system. Some of the resulting legal material can be called indigenous, and some transplanted, borrowed or received. But the real point for narrative examination is the ecological relationship between the indigenous and introduced forms; the concept of settlement is useful precisely because it focuses on that complex dynamic of interrelation.

Another respect in which the concept of settlement may be put to wider use, and subjected to further critical examination, concerns the story I have told in this book about the relationship between New York's legal system and the Imperial government during the fifteen years preceding independence. More than most writers about colonial legal history in recent years—for reasons already specified—I have concentrated attention on the effect of Imperial policy and activity. One of my central claims, reflected in different aspects in the following chapters, is that the process of legal settlement was decisively affected by disruptive Imperial developments after 1763. Changes in strategic policy after the successful end of the long confrontation with France undid much of the complex negotiative settlement in the commercial law of New York, altered the underlying arrangements that made the criminal justice system workable, and revealed weaknesses in the relation between physical settlement policy and the technicalities of the land law. In some but not all respects one could speak of this as a period of unsettlement in the New York legal system. Two questions which my book has tried to answer about New York in this context might usefully be asked about other parts of British North America as well. Did Imperial policy after 1763 strain the social and political arrangements contributing to legal stability? If so, what role did these destabilizations of the legal systems play in the rapid social and

political changes in English-speaking North America in the last quarter of the century?

In the chapters that follow I answer the first question unequivocally, and suggest the outlines of the answer to the second. The first two chapters concern institutional and professional development; the next three discuss the development of substantive areas of law. The first chapter describes the initial meeting of English and Dutch legal cultures in the colony, ending with the constitutive legislation of 1691. My primary purpose has been to show the unfolding of the institutional settlement. The various legal regimes existing before the English conquest had to be brought into some roughly stable coexistence, while at the same time the first themes of Imperial policy in the formation of law were sounded. The process was by no means entirely peaceful. Both the New York and metropolitan Imperial political systems went through convulsive change in the period; part of my task has been to show the formation of connections between English and New York political structures and styles so far as they affected legal development. But this formative period also involved significant conflict between ethnic groups in New York's society, and this conflict too had profound resonances in the legal system. The institutional arrangements reached before the turn of the eighteenth century largely settled the questions of court structure and interrelationship. A few important open issues remained, and other chapters describe some of the consequences of those gaps.

In the second chapter I consider the history of the legal profession through the provincial period. Here the theme of settlement is reflected in the process of professionalization—the growth of intellectual and social institutions that gave coherence and self-consciousness to the Bar. I have tried to show the roots of the professional settlement in their generational context, as the provincial Bar moved towards self-regulation and control of the educational process in the course of the eighteenth century. I argue that the professional settlement had been more or less fully achieved by the end of the war in 1763. The professional

resilience of the Bar, as many have noted concerning other places and times, is not necessarily impaired by legal uncertainty. Radicalized early by features of Imperial policy destructive to the legal order, the profession largely made its peace with the Imperial system as it affected New York by 1770. New York's Bar therefore attained a state inclining toward conservatism in the events that followed. The post-revolutionary legal history of New York, which lies outside the scope of this volume, significantly begins with the almost wholesale replacement of an emigrant Tory Bar by Whig upstarts. Chapter 2 ends by considering the relation between the institutions so far described and the doctrinal developments considered in subsequent chapters.

Starting in the third chapter I have attempted to give accounts of the settlement processes at work in the formation of the land law, the system of criminal justice, and the legal organization of commerce. The law of real property is intimately and reciprocally related to the processes of geographic settlement. At one level, the negotiation process over land law controls settlement by determining, as in other legal regimes, the permissible land uses and their spatial distribution. On the other hand, the pace of physical settlement also determines the content and meaning of the land law. Competition for tenants and border disputes with neighboring colonies played important roles in the legal settlement. What settlement compromised, in the development of the land law, was the manorial doctrinal structure against the much more market-oriented reality on the ground. This process of settlement can be seen to develop through mid-century, only to be significantly undone by the pressures at the borders caused by expansionism on the part of New Yorkers and others. The Hudson River Valley thus became a locus of social disorder—a disorder also caused by Imperial policies after 1763.

Social disorder—associated in the countryside with the partial collapse of the land law and in New York City with commercial disruptions discussed in chapter five—placed

enormous strains on the criminal justice system. In chapter four I show how the law of crimes and criminal process developed in New York. Early and complete convergence on English models was the rule—a shared inherited property of most of the British North American systems. But the social context of the rules was very different from any prevailing in Britain, and formal convergence—sometimes described as reception—began rather than ended the process of settlement. Without substantial formal change, the system was nonetheless adjusted to accommodate problems of personnel and resources not part of the British context. The evolution of the prosecutorial system—constrained by issues of cost and political resistance to consolidation of executive authority—and its changing allocation of resources trace the path of governmental response to the increasingly difficult problems of public order in the course of the eighteenth century.

In the fifth chapter I present an interpretation of the history of the commercial aspects of the provincial legal system, centered on the activities of the merchants and lawyers of New York City. I argue, for the first time so far as I am aware, that the primary force shaping the commercial law of the province was the cycle of peace and war between Britain and its continental competitors, primarily France. New York, I contend, experienced its primary commercial success in peacetime through wide-scale involvement in trade forbidden by the metropolitan commercial regulation of the Empire, while its infinitely more lucrative wartime activities largely involved privateering. The effect of this disjunction between Imperial policy and the economic realities in New York was to place strain on the domestic commercial dispute resolution mechanisms. The cycle of war and peace created recurrent crises in the collection of debt, while Imperial political control prevented New Yorkers from taking measures either to legitimate their acknowledged trading practices or to reduce the shock of cyclical disruption in the credit system. In the period after 1763—when the end of naval war in the Atlantic brought to a permanent stop the lucrative privateering component of New York's maritime economy—New Yorkers tried, and failed, to stave off

the adverse consequences of Imperial trade law. Though the crisis of the late 1760s seemed to have eased by 1770, the consequences of the legal system's destabilization contributed to the collapse of Imperial authority in the course of the decade.

Perhaps a few further words about method are in order. Much harm has been done in the writing of history about legal systems by a contention between advocates of the belief that legal systems are bodies of rules, and defenders of the contrary conviction that they are quantifiable collections of disputes and outcomes. The former conception seeks to use extant documentary materials to infer the state of the body of rules at two or more moments, separated by an appropriate interval, and to characterize as "legal change" every difference between the inferred sets of rules. Under the latter conception, the comparison of statistics based on the work of institutions at two or more periods serves the same purpose of delineating "legal change." Both approaches share the property of presenting inferred results, rather than mechanisms of change. In this sense they seem to me at once valuable and intrinsically incomplete. The historian's job, as I understand it, is to explain as fully as possible how something happened. And how it happened is not likely to be explained by the display of vastly differing before-and-after snapshots; what is true for obesity remedies is true for historical writing as well. At the risk of undue repetition let me say again that I have tried in this account to eschew static portraiture in favor of narrative, at least in the sense that it presents the processes by which incremental change occurred, as I can best understand them, rather than merely a collection of juxtaposed results.

Such a narrative of legal development can descend into a tedium so profound as to stultify all but the most obtuse and intently committed reader. The elucidation of every incipient stage of every altered rule; the meticulous correlation of each alteration in practice with the most prudent conjecture as to its basis in the logic, economics, or politics of lawyering; the careful delineation of the diffusion of legal knowledge—for a book

containing all of these we wish devoutly, provided that we do not actually have to write or read it. After a decade of work, I remain much too ignorant to present anything like the comprehensive account of detailed legal development found for one doctrinal area in the encyclopedic work on *Crime and Law Enforcement in Colonial New York* of Julius Goebel and T. Raymond Naughton. It would be invaluable in the long run, after the results of ongoing research have contributed to clearer understanding, to pay such concentrated attention to the other elements of the provincial legal system. But at this stage it is only the larger outlines that I can persuade myself I understand, and to those I have limited myself.

Chapter 1

Beginnings, 1664-1691

'Tis not with us as in our Fatherland, or as in Kingdoms and Republics which are established and settled by long and well experienced laws and fundamentals, best agreeing with the condition of the people. But in our little body, made up of divers members, namely, folks of different nations, many things occur in the laying of a foundation for which there are no rules nor examples.¹

The legal history of the British colony of New York may be said to have begun on August 26 1664, when Colonel Richard Nicolls anchored his little flotilla in Gravesend Bay and demanded from Peter Stuyvesant the surrender of New Amsterdam. Nicolls' bloodless conquest confirmed the grant made by Charles II; James Stuart, Duke of York, could now attempt to dictate the terms of occupation and government in the rich domain to be called New York.

In a larger sense, however, the legal history of New York began fifty years before. Many of the external determinants of the legal order, including the geographic, strategic, and economic

1. Magistrates of Gravesend to the Amsterdam Chamber of the Dutch West Indies Company, 1651, 2 NY Col Docs 155-56.

constraints on occupation of the territory, were already expressed in the organization of the Dutch colony of New Netherland. In conquering a province with an existing administrative system, moreover, the agents of the new proprietor had not the luxury of unrestrained creation; the ways, means, and expectations of the population needed to be taken into account, if only to prevent the kind of social unrest that would require prohibitively expensive measures to garrison the Duke's new possession. New York's unique status in British North America as the only colony attained by conquest imposed from the beginning limitations less visible in other colonies, where managers could proceed according to the fiction that in establishing a legal system they were writing on a clean slate.²

What Richard Nicolls began in August 1664 was nevertheless a process of settlement, in all senses of the word. Settlement implies transplantation, as people, ideas, and institutions arrived in the reorganized colony from Britain and elsewhere in British North America. There was also a process of settlement in the sense of compromise, as disparate ideas and practices of government were uneasily reconciled, fused into synthetic new arrangements. Settlement implies a realization of constraints. As the land was settled, geography's constraints had to be comprehended and faced—the physical features of the land channeled demographic and economic growth, and established the boundaries around which the ideas of jurisdiction coalesced. Imperial strategies were also settled in the decades that followed 1664, and events in Montreal and Versailles, Whitehall and Lake Winnipeg, imposed constraints, for example, on the treatment of land disputes in the upper Hudson River valley. Under the constraints of geography and strategy trade routes were settled, and began to influence both business practices and systems for the resolution of disputes.

2. Cf. the fiction at work in Massachusetts, where the "Builders of the Bay Colony" were busy. See **Samuel Eliot Morison, Builders of the Bay Colony** (1930). For the classic and most perceptive account of the early legal development of Massachusetts, see **George Lee Haskins, Law and Authority in Early Massachusetts** (1960), which is significantly subtitled "A Study in Tradition and Design."

Law was not invented or imposed. It was negotiated—settled, as the country was. The process of settlement Nicolls began in 1664 was not complete when the Stamp Act crisis arose a century later, nor was it complete ten years after that when shots were exchanged at Lexington Green in April 1775. Processes of settlement evolve from one unstable compromise to another. So it was that the law was settled in New York, beginning with the unstable compromises administered by the Dutch government whose surrender Nicolls accepted on August 29 1664.

The Dutch presence on the Hudson River began in 1609. Henry Hudson explored the river and claimed its drainage for his employers, the Dutch East India Company and the government of the United Provinces. The importance of the site at which the Mohawk and Hudson river valleys meet was grasped early, and by 1614 a trading post, called Fort Nassau, had been established on Castle Island, just below the later site of Albany. With the end of the Twelve Years' Truce with Spain, and the coincident organization of the Dutch West India Company in 1621, that Dutch activity in the western hemisphere began in earnest.³

The initial intention of the Dutch West India Company was to confront Spain's monopoly of trade to the Spanish possessions, largely through the same combination of piracy and unlicensed trade that the English had pursued from Drake onward. For these purposes the control of the Hudson River was not particularly important, lying as it did too far to the north of the important Spanish positions and trade routes. But the fur trade could traverse the Mohawk Valley's water-level gate through the Appalachians, and this alone rendered Fort Nassau and the harbor at the mouth of the Hudson a significant if secondary

3. For the early history of the Dutch presence on the Hudson, see **S. Hart, *The Prehistory of the New Netherland Company: Amsterdam Notarial Records of the First Dutch Voyages to the Hudson*** (1959). For the policies of the Dutch West India company in the organization of the colony see **V. Bachman, *Peltries or Plantations: The Economic Policies of the Dutch West India Company in New Netherland, 1623-1639*** (1969); **T.J. Condon, *New York Beginnings: The Commercial Origins of New Netherland*** (1968), from which my own account is primarily drawn. See also Hart, *The Dutch and North America in the First Half of the Seventeenth Century*, 46 **De Halve Maen** 5 (Apr. 1971).

possession. The Castle Island post was relocated to its permanent site at Fort Orange in 1624, and in 1626 a permanent settlement on Manhattan Island was established,⁴ populated largely by Company employees transferred from Fort Orange and the Dutch settlement on the Delaware.

The design implied by these preparations was that of a purely commercial establishment, a colony in which all the inhabitants would be Company employees, permanently resident to facilitate the transportation of furs out and the transport of essential commodities in. The Company (or, more precisely, the committee of the Company's Amsterdam Chamber which had effective control over the rather peripheral enterprise at New Netherland) foresaw sufficient agricultural output in the colony to make shipment of food supplies unnecessary after the first winter. While these expectations were to prove unwarranted, and although the Company charter empowered it to act to "advance the peopling of those fruitful and unsettled parts," in New Netherland as elsewhere the Company took no steps directed at large-scale colonization. Governance of the colony was thus seen as a matter of Company governance, and the judicial and administrative functions the Company was authorized to perform under its charter were, in New Netherland, entrusted to a resident director and after 1626 a council, vested with full legislative, administrative, and judicial powers, subject to review by the Amsterdam Chamber of the Company.

This central government was supplemented after 1629 by the second of Dutch mechanisms for settling and governing New Netherland: the patroonship system. Initial disappointment with the colony as a wholly-owned commercial venture, combined with the urgings of influential investors more interested than the Company's managers in the possibilities of large-scale

4. The purchase of Manhattan Island, it should be noted, was made not by Peter Minuit, as tradition has it, but rather by his predecessor Willem Verhulst, who fell from grace and was removed almost immediately thereafter, in October 1626, for embezzlement of Company property. See Weslager, *Did Minuit Buy Manhattan Island from the Indians?*, 43 *De Halve Maen* 5 (Oct. 1968).

colonization, led to an attempt to settle New Netherland through private initiative. In order to encourage support for emigration to the colony, the West India Company granted large tracts of land to “patroons,” or proprietors—most of them the Amsterdam investors, led by Kiliaen van Rensselaer, who had been agitating for increased settlement—on condition that the patroons arrange for the settling of fifty families within their new dominions.⁵ The patroons were granted the power to establish and administer courts of justice. These Patroon’s Courts, which were to have complete civil and criminal jurisdiction, were in practice courts of first and last resort;⁶ provision was made for appeal to the governor and council in civil cases where the amount exceeded fifty guilders, but the patroons may have required renunciation of the right to appeal as a condition of tenancy within the patroonship.⁷ The patroonship experiment was also essentially unsuccessful; by the time of the English conquest in 1664 only Kiliaen van Rensselaer’s dominion of Rensselaerswyck, the oldest and largest of the patroonships, was still a going concern. The notion of creating large quasi-feudal manors within the colony was not moribund, however, and was to flower under English cultivation at the end of the century.

Neither the director’s government at New Amsterdam nor the patroonship system was particularly successful in stimulating immigration. The population of New Netherland in 1626 was approximately 270; by 1640 the population had not reached beyond 500. Kiliaen van Rensselaer actively promoted his patroonship as an emigration destination, and sent 82 settlers there before 1639, but many of them chose to settle elsewhere in

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5. See **Van Rensselaer-Bowier Manuscripts** 157 (A. van Laer, trans. and ed. 1908).
 6. The only surviving records for a Patroon’s Court in the period before 1664 are printed in **Minutes of the Court of Rensselaerswyck, 1648-1652** (A. van Laer ed., 1922).
 7. Such, at any rate, was the charge made by both Governors Kieft and Stuyvesant. Some leases, primarily those contracted in Holland, contained language suggesting a restriction of the right to appeal, but leases made on the ground in Rensselaerswyck, at any rate, do not support the claim. See **S. Nissenson, The Patroon’s Domain** 144 n.175 (1937).

the Hudson Valley rather than remain in his domain. Attempts to secure labor for the Company's purposes led to the early importation of African slaves, beginning in 1626. By 1664, slaves and free blacks probably made up almost ten percent of the population.⁸

The demographic pattern in New Netherland underwent crucial change in 1640, when inhabitants of the Massachusetts Bay settlement at Lynn removed to Long Island, settling just west of Montauk at the site they called Southampton. By 1645 other New Englanders had settled nearby at East Hampton, and on Long Island's north shore at Southold. These Long Island towns proceeded to govern themselves on the New England model, holding yearly elections of magistrates and enforcing rules similar in content to those in force in the towns of Massachusetts Bay.⁹ These movements brought within the compass of New Netherland communities with values and practices very different from those of the Dutch, or for that matter from the English rulers who would follow. Self-contained, fractious, and given to organized resistance when subjected to interference by centralizing authority, the Puritan towns of Long Island would long remain important parties in the multilateral negotiation of law in New York.

As the English towns were being established on the outer end of Long Island, a few Dutch communities developed at the inner end, close to New Amsterdam. The first of these towns—Breuckelen, later Anglicized to Brooklyn—was chartered in 1646; others grew up in the following decade. But while these new towns and New Amsterdam remained Dutch in theory, they were extraordinarily diverse in practice. When the Jesuit Father Isaac Jogues passed through New Amsterdam late in 1643, the colony's

8. M. Kammen, *Colonial New York: A History* 37, 38, 58 (1975).

9. The first minister at Southampton, Abraham Pierson, apparently brought with him in the winter of 1640 a code of laws entitled *An Abstract of the Lawes of Judgment as given by Moses to the commonwealth of Israel...*, which collects provisions from the many codes of laws proposed in Massachusetts Bay after 1636. Liber A, 1-8, Southampton Town Clerk's Office.

Director-General, Wilhelm Kieft, told him that there were eighteen languages spoken on Manhattan.¹⁰

The geographical and linguistic dispersion of New Netherland's inhabitants was mirrored by their dispersion along the axis of religious belief, so important in the European world of the seventeenth century. As the Dominie of the Dutch Reformed Church wrote to the Classis in Amsterdam in 1655:

[W]e have here Papists, Mennonites and Lutherans among the Dutch; also many Puritans or Independents, and many Atheists and various other servants of Baal among the English under this Government, who conceal themselves under the name of Christians; it would create a still greater confusion if the obstinate and immovable Jews came to settle here.¹¹

They did.

Under these conditions, the pursuit of a reliable model of central government in New Amsterdam was also attended by considerable difficulty. Not until the arrival of Peter Stuyvesant in 1647 did New Amsterdam have a governor fully competent to administer the colony's affairs; his predecessor, Wilhelm Kieft, had, during his nine years in office, brought the inhabitants of New Amsterdam almost to the point of revolt. Stuyvesant responded to the popular discontent through the creation of a representative council of eighteen, from whom were drawn the "Body of Nine Men." The Nine Men, among other functions, provided panels of three judges, for the hearing of civil and criminal cases. Their decisions were reviewable by the governor and council, and thus, along with the Patroon's Courts and the

10. **I. Jogues, *Novum Belgium*** 11 (J.G. Shea trans. & ed. 1862). It is unclear whether Kieft was counting Indian languages in his total, but it is possible that he meant only languages spoken by Europeans.

11. **M. Kammen**, *supra* note 8, at 61-62 (1975). The Jews Dominie Megapolensis was objecting to were refugees from Brazil. See G. De Jong, *Dominie Johannes Megapolensis: Minister to New Netherland*, 52 **New-York Hist. Soc. Q.** 7-47 (Jan. 1968).

town courts in English Long Island, established a tier of courts of first instance throughout the colony.

Dissent in New Amsterdam was not laid to rest by Stuyvesant's early measures of grudging reform; the Body of Nine petitioned the States General for additional changes, intended to structure the government of New Amsterdam after the models of municipal administration used in Holland. As a result of this petition, the States General ordered various reforms, including the establishment of a Court of Justice and burgher government, similar to those of Amsterdam, in New Amsterdam. The West India Company resisted the order, as violative of its charter rights, but conceded after two years of political maneuvering. In February 1653, the new Court of Magistrates met for the first time. It was composed of a schout, combining the roles of sheriff and prosecutor; two burgomasters, or senior administrative officers; and five schepens, the equivalent of aldermen.¹² Similar courts were erected in the five Dutch settlements on Long Island, and in the English settlements at Beverwyck, near Fort Orange; Canorasset, later called Jamaica; and Middleburgh, or Newton.¹³

Procedure in the Court of Schout, Burgomasters, and Schepens was comparatively simple. Cases were tried to the court without jury, and extensive use was made of arbitration, with outside arbitrators or members of the court assigned the task of mediating a settlement between the parties. Many of the efficiencies in procedure established by the Dutch in this period

12. 1 A. Flick, *History of the State of New York* 308 (1933). In Holland the burgomasters and schepens served different functions; in New York they formed one governmental entity. The officials in Amsterdam were elected; in New York, however, they were appointed by Stuyvesant, who exploited for this purpose an ambiguity in the order commissioning the court.

13. The five Dutch towns were Breuckelen (Brooklyn), Midwout (Flatbush), Ameersfort (Flatlands), New Utrecht and Boswyck (Bushwyck). These courts were presided over by one schout, resident in Breuckelen, who took them in circuit. H.W. Scott, *The Courts of the State of New York* 50 (1909).

were, as we shall see, to become part of the English practice in New York.¹⁴

The administrative and judicial systems of New Amsterdam embodied details that the English would adopt after 1664, but in addition they revealed structural imperatives that bore upon any attempt to govern the area as a unit. Geographical dispersion and ethnic heterogeneity provided strong incentives for the creation of decentralized legal and administrative systems, while the initial resistance to the New Amsterdam Director-General's autocratic central administration provided an object lesson in the likely difficulties to be encountered in attempting to govern the heterogeneous inhabitants of the colony without representative institutions. Both of these obstacles to centralized government were aggravated rather than relieved under English power. The scope of the Duke's grant included not only New Netherland (itself including the land west of the Hudson and south to the mouth of the Delaware, soon to be split off as the Jerseys) but also Maine and the islands offshore from New England, including Martha's Vineyard and Nantucket. This more extensive domain did nothing, to palliate the problems of ethnic diversity. The English now occupied territory in which Dutch-speaking inhabitants, presumably loyal to the States General of the United Provinces, were very much in the majority. Tension between Dutch and English settlers was primarily alleviated—after the conquest as before—by geographic separation; only in the few mixed towns such as Gravesend and in New Amsterdam itself were the two populations thoroughly intermingled.

Nor were the new managers of the conquering government free to experiment with the possibilities of a representative assembly as the centerpiece of a new constitutional order. It is hardly surprising that James Stuart viewed popularly-elected legislatures with hostility and distrust; his actions as proprietor in New York and as King over the next fifteen years would demonstrate how deep that hostility ran. He had no intention of

14. The process of arbitration under the Dutch and its effect on the commercial law of colonial New York is more extensively discussed in Chapter 5.

permitting such a body as part of the government of his North American dominion. Indeed, Richard Nicolls' mission carried more than instructions for the conquest and government of New York. He and his coadjutors—Samuel Maverick, Sir Robert Carr, and Sir George Cartwright—were also secretly instructed to investigate excesses of political independence in Massachusetts Bay, and to convince the General Court of that colony to surrender its charter for amendment in a more royalist direction, including a provision for royal appointment of the governor. In the meantime, Nicolls was secretly instructed to engineer his own election as Governor of Massachusetts.¹⁵ The splendid impracticability of this order serves only to emphasize the axiomatic nature of the preference for autonomous executive power in the political and legal thinking of the Duke of York and his advisers.

That Nicolls fully understood the practical limitations on his new government is shown by the course of action he pursued from the moment he appeared off Manhattan Island. The terms under which Stuyvesant surrendered, in addition to providing for continued immigration from the Netherlands and a six months' period of direct trade with the former metropolis, protected the legal institutions of Dutch life in New Netherland, including guarantees of treatment under Dutch law for existing contracts and land titles and recognition of the Dutch practice of partible inheritance.¹⁶ Such guarantees were necessary if Nicolls was to control the roughly 8,000 inhabitants of the colony, or even the 1,500 inhabitants of New York City, with fewer than 200 soldiers.¹⁷ But however much the terms of capitulation savored

15. Nicolls' secret instructions can be found in 3 *NY Col Docs* 57-61. Records of the hearings which preceded the issuance of the instructions are in PRO CO 1/18/46. The story of this failed attempt to create the Dominion of New England in 1664 lies outside the scope of this narrative. See *D. Lovejoy, The Glorious Revolution in America* 126-29 (1972).

16. "Articles of Capitulation," 2 *NY Col Docs* 250-53.

17. The population of New Amsterdam at the time of the surrender was estimated by the magistrates to be 1,500. Of the 254 taxables (heads of households) listed in 1664, only 16 bore English surnames. See 2 *RNA* 110-15. This somewhat understates the English population, no doubt; some Englishmen chose to refer to themselves by Dutch equivalents of their actual English surnames.

of expediency, they were the beginning of a system of legal pluralism in the new colony—in which the rules and systems of administration varied from area to area in keeping with ethnic composition—which was to remain a feature of the colony’s legal order for some time to come.

After the confirmation of Dutch rules and systems of administration in New York City (and at Fort Orange, now renamed Albany, where the rights and privileges of the *handlaers* who managed the fur trade with the Iroquois were similarly guaranteed), Nicolls’ next step was the determination of the legal order among the English on Long Island. This process was begun in February 1665, when Nicolls called a convention at Hempstead of the representatives of the Long Island towns and the English settlements in Westchester. The invitation was not explicitly limited to English inhabitants, and the five Dutch towns sent representatives, but only 9 of the 34 delegates were Dutch,¹⁸ The patent granted by Charles II to the Duke of York provided for the making of laws within the colony, subject to the traditional reservations that the laws not be “contrary” to English law and that the Crown retain the right to hear appeals from judgments rendered,¹⁹ and Nicolls’ first employment of this legislative authority was to present to the Hempstead convention “the Duke’s Laws” for the government of English New York.²⁰

Although the delegates at Hempstead prevailed on Nicolls to make some minor changes, the content of the Duke’s Laws had been fixed before Nicolls left New York City. The text of the Laws²¹ had been prepared by Nicolls and his secretary, Mathias Nicolls—a barrister, unrelated to the Governor, who was to have a long and distinguished career in the New York administration.

18. For the names of the delegates, see 14 NY Col Docs 565.

19. First Patent to the Duke of York, March 12 1664, 1 N.Y. Col Laws 1, 2-3.

20. The definitive account of the Hempstead convention and the promulgation of the Duke’s Laws is Pennypacker, *The Duke’s Laws: Their Antecedents, Implications, and Importance*, in **New York University Anglo-American Legal History Series**, ser. 1, no. 9 (1944).

21. Duke of York’s Laws, March 1 1664/5, 1 NY Col Laws 6-71.

The sources of the Laws are disclosed in a letter Nicolls sent to John Winthrop Jr., the Governor of Connecticut, after the close of the Hempstead convention:

Yrs of the 14th of ffeb: with a Copy of yr Lawes came to my hands by Mr Pell when I was upon the way to Hempstead and had finisht the body of Lawes for this Government except the Publike Rates whereof I gave the Deputies their choice amongst all the Lawes of the other Colonies who received verbatim those of Conecticott. All the other Lawes are collected out of those of Boston, Newhaven Mary-Land or Virginia, and by that you may conclude them not much different from those of yr Colony.²²

The inferior courts established by the Duke's Laws served to administer justice in the area Nicolls called Yorkshire: Long Island, Staten Island, and Westchester (counties were not erected elsewhere within the colony until 1683). Within the three ridings of this new Yorkshire, the Duke's Laws assimilated the town courts, and established appointed justices of the peace and under-sheriffs, who were to provide the Bench for a Sessions Court three times a year in each riding, with jurisdiction to hear appeals from the decisions of the town courts. Judgments of the Sessions over £20 were to be reviewable by the Court of Assizes, which was to meet once a year in New York City. Capital cases were to be heard either by the Court of Assizes, or by commission of oyer and terminer.²³

The effect of these arrangements was to establish a more centralized administration of justice in the English communities of the colony, under substantive rules familiar to the transplanted New Englanders. The response to the Duke's Laws among the Long Island communities was unfavorable, and for reasons that illuminate the difficulties under which Nicolls labored in settling law for New York. While the Duke's Laws continued to provide

22. Letter dated March 13 1664/5, Long Island Collection, East Hampton Library. It is reprinted in Pennacker, *supra* note 20, at 22.

23. Duke's Laws, 1 NY Col Laws 7-8, 16-17.

for elected town magistrates, Nicolls' new code made no provision for a general assembly of the town to make substantive decisions as well as to elect officers. This enraged the inhabitants of towns whose yearly meeting had been the center of their governmental life and the essence of New England local organization. Nicolls' first levy of £200 from the towns for the support of government met with heated opposition in the convention, and the complaint against the imposition of taxes without the concurrence of an elected legislature was now heard for the first time in this part of British North America.

Nicolls was certainly correct in telling Lord Clarendon that he had obeyed the spirit as well as the letter of his instructions, observing tellingly that "our new Lawes are not contrived soe Democratically as the rest."²⁴ This pithily expressed one of the essential principles that would govern legal development under the Duke's proprietorship, but there were others visible as well. Nicolls' use of the New England codes as the basis of the Laws, like his confirmation of Dutch contract and land law in the terms of capitulation, recognized that there were already several systems of law in existence in the colony. In view of the heterogeneity of the population and the proprietor's disinclination to representative assemblies, legislation was probably impossible. What management required instead was a strong centralized administration, operating in the fiscal and political interests of the proprietor; the substantive rules administered within that structure were of substantially less importance, and for the foreseeable future would vary from community to community within the colony. In time, the Duke's Laws formed the doctrinal basis for much of the civil law of the colony; at the time of their promulgation, they applied only within those communities that recognized their substantive provisions as familiar.

Having created the central institutions of colony-wide justice, Nicolls next tried to incorporate the subordinate Dutch substantive and procedural institutions into that system. He

24. Letter from Nicolls to Lord Clarendon, July 30 1665, *NYHS Coll* 1869, at 77.

confirmed the Court of Schout, Burgomasters and Schepens, which, rechristened as the Mayor's Court, would remain an important court of first instance in New York City, particularly in commercial cases, throughout the entire colonial period. Here, as in many other localities in the colony, Dutch remained the spoken language of the courts, records were kept in both Dutch and English, and, with the exception of provision for jury trial, Dutch procedure was followed.

Following the theme of conscripting old institutions to new purposes, the new supreme court of the colony, the Court of Assizes, was structured as a continuation of the Court of the Director-General and Council, which had served similar ends under the Dutch. In addition to the Governor and his Council, all Justices of the Peace were entitled to attend the Court of Assizes, as were the Mayor and Aldermen of New York City and the Commissioners of Albany. The minutes of the court, which have survived for the years 1680-1682, show that such attendance was not infrequent; judicial officers attended from as far away as Nantucket and Delaware.²⁵

The Court of Assizes acted not only as a court of appeal, but also as a court of first instance, both in capital cases and in cases concerning real property of value greater than £20, although this latter class of cases was also triable at Sessions, at the plaintiff's election. All cases, both at Assizes and in the Sessions, were tried to juries, originally composed of six or seven jurors, except in capital cases. Later, the law was amended to provide for full juries of twelve in all cases of first instance in the Court of Assizes.²⁶

In addition to its judicial responsibilities, the Court of Assizes also acted as a body of quasi-legislative character. The term of the Court of Assizes provided an opportunity for the dispatch of legal and administrative business of concern to the

25. Proceedings of the General Court of Assizes held in the City of New York Oct. 6, 1680 to Oct. 6, 1682, *NYHS Coll* 1912, at 3-4, 8-9, 17-18, 26.

26. See 1 *NY Col Laws* 42, 91.

colony as a whole without the calling of the representative assembly Nicolls had been instructed to avoid. The first such employment of the assizes came at the opening sitting in 1665, when Nicolls brought before this new institution the perplexing problem of determining township and other boundaries throughout the province. From establishing the bounds of individual small-holders' estates through settling the lines of intercolonial demarcation, boundaries and their adjudication were a permanent and fruitful source of discord in the management of New York.²⁷ The disgruntlement of the Hempstead delegates in February 1665 arose in part from Nicolls' announcement of the arrangement whereby John Winthrop Jr. had abandoned any territorial claim by Connecticut to the settlements on Long Island, in return for a rectification of the boundary with Westchester. This most pressing of colonial boundaries could be resolved by executive action, but the many vexing difficulties presented by disputes over township boundaries could not be so expeditiously negotiated. As litigation over these boundaries in the new courts threatened to expand out of hand, the Court of Assizes took an essentially legislative step—it ordered all patentees, regardless of the source of their patents, to come forward and receive new grants from the Duke.²⁸ When this proved insufficient to induce the townships to come forward, the Court announced at the 1666 term that any patent not confirmed by April 1 1667 would not be pleadable in real actions.²⁹ This had the desired effect, and allowed the central administration to repatent the townships so as to clarify boundary problems. The early success of the Court of Assizes as a quasi-legislative organ gave Nicolls and his successor, Francis Lovelace, a powerful tool in the management of the colony.³⁰ It

27. Michael Kammen, indeed, argues that the problems of boundary resolution in colonial America are emblematic of the larger social volatility produced by the "quest for legitimacy" in all social arrangements. See *M. Kammen, People of Paradox* 43-44 (1973).

28. 1 NY Col Laws 44, 80.

29. 1 NY Col Laws 93.

30. Amendments to the Duke's Laws, styled "By order of ye Governor & Court of Assizes" in the period from 1666 to 1675 can be found in 1 NY Col Laws 82-100.

also established the close connection between the colony's highest court and the political balance of power in the administration—a connection which was to prove a substantial and continuing problem throughout the eighteenth century.

The consolidation of Nicolls' control of the colony under his new legal system acquired an international dimension in the winter of 1665/6, when the French staged a campaign against the English-affiliated Iroquois. The French appeared before Albany, but retreated when they found Nicolls' garrison installed.³¹ They were at war again with the Iroquois north of Albany in the summer of 1666, and at this time staged a ceremony claiming the Hudson River valley for France.³² An early lesson in the critical strategic importance of the Champlain corridor, these events testified to the need for a permanent military garrison in New York (a burden no other settlement in British North America was to carry in the seventeenth century), and rendered the colony's managers acutely conscious of the importance of a reliable government in Albany. An English administration there was an impossibility, given the overwhelmingly Dutch population and the continued monopoly of the fur trade enjoyed by the *handlaers*, but the selection of Albany's *commissaries* by the governor now took on an additional urgency, and from this point began the long maneuvers to defeat the claims of Rensselaerswyck's proprietor to a stake in the government of Albany.

Consolidation of control was also dependent on another aspect of imperial policy—the state of relations with the Netherlands. The hiatus between the second and third Anglo-Dutch wars, lasting from 1668 to 1673, lessened the internal strains within the colony, and permitted the new governor, Francis Lovelace, to attend to the strengthening of the colony's economic order. Under the system established by the Duke's Laws, the dominant institutions in the colony's government were the governor and his appointed council (which also dominated

31. See "Relation of the March of the Governor of Canada," 3 NY Col Docs 118-19.

32. 3 NY Col Docs 135; see 1 Doc Hist NY 60-70.

the Court of Assizes) and the corporation of New York City operating through the Mayor's Court and the Common Council. These institutions reflected the concerns of the city's leading citizens—merchants whose intention it was to organize the colony's economic life in keeping with their own interests.

The trade system of the colony at this time comprised four separate regional economies. The Delaware settlement, not yet divorced from the rest of the colony, produced tobacco, and helped to swell production and depress prices in the colonial tobacco market of the 1660s and '70s.³³ The settlements on Long Island produced substantial quantities of grain; livestock raising also made possible an export trade in beef and pork. By 1670 the Southold and Hamptons communities had begun a whaling industry, and added whale oil to their trade. At Albany the southernmost outpost of the fur trade shipped beaver and otter pelts in exchange for Indian trade goods, while in the surrounding lands and at Esopus Dutch farmers were producing exportable quantities of grain. The interest of the city's merchants lay in engrossing each of these regional trades for themselves.

But the mercantile primacy of New York City was not lightly conceded. The Long Island English, still essentially linked to New England and by no means reconciled to the arrangements which had removed them from Connecticut's jurisdiction, preferred to trade to New Haven or to Rhode Island than to ship goods down the coast. Albany's fur traders were even less eager than in Dutch times to subject themselves to the tender attentions of city merchants—the river afforded them a channel of independent trade with Europe, and they saw no advantage to themselves from the battening downstream middlemen. Although the merchants of the city had briefly convinced the Board of Trade to grant an exception from the Navigation Acts,

33. No statistics for tobacco prices at New Castle are available for this period. A rough approximation may be derived from the Maryland figures constructed by Russell Menard. See Menard, *Farm Prices of Maryland Tobacco, 1659-1710*, 48 *Maryland Hist. Mag.* 80-85 (1973). For Virginia in the same period, see E.S. Morgan, *American Slavery, American Freedom* 187-205 (1975).

permitting direct trade with the Netherlands, this privilege was paradoxically terminated with the conclusion of peace in 1668.³⁴ Deprived of the opportunity for licit direct trade with the Netherlands, the city's merchants were all the more determined upon the control of the colonial trade with the metropolis. The arrival of Francis Lovelace, who intended to make his fortune through speculation in mercantile activity in the city, provided the merchants with a powerful and not over-scrupulous ally.³⁵ A series of steps between 1668 and 1672 brought the city merchants new control over the colony's trade. By the end of 1670 the governor and council had ordered all goods bound for Albany to be unloaded in the city; trade upriver could only be conducted in ships owned by a city freeman. Overland trade with Albany was barred altogether, a measure which not only strengthened the city merchants against their Albany cousins, but also tended to eliminate competition from New England fur traders.³⁶ Not only the fur trade was subjected to the control of the city. Between 1671 and 1673 the Court of Assizes repeatedly forbade the export of grain from the colony, while permitting the export of flour and bread. The intention was to require all grain to be milled, bolted, and baked in the city, and re-exported as a finished commodity. The beneficiaries were the millers, coopers, bakers, and merchants of the city; the losers were the farmers of the river valley and Long Island.³⁷

These and other similar and related actions by the Court of Assize, increasingly dominated by city members, enraged the ever-turbulent Long Island communities, which demanded the creation of a representative assembly; by 1672 Southold, East

34. For the Order in Council granting the privilege of direct trade to the extent of three ships a year, see 3 *NY Col Docs* 165-66. For the order bringing the trade to a close, see *id.* at 175-78.

35. The complicated commercial life of Francis Lovelace is summarized in **R. Ritchie, *The Duke's Province: A Study of New York Politics and Society, 1664-1691***, at 59-60 (1977).

36. See 1 *Minutes of the Executive Council: Administration of Francis Lovelace, 1668-1673*, at 56-58 (V. Paltsis, ed. 1910); 2 *id.* at 522-23.

37. The export restrictions were highly controversial and difficult to enforce. The sequence of events is described in **R. Ritchie**, *supra* note 35, at 61-63.

Hampton and Southampton were petitioning the Crown to be removed from the jurisdiction of the Duke's proprietary and returned to the control of Connecticut.³⁸ The peculiar hybrid of centralized administration and regionally varying law which characterized the colony's government seemed to be withering under the strain of unbalanced economic development. The process was inflected, however, by the outbreak of the third Anglo-Dutch war, and the embarrassing reoccupation of New York in 1673.

The war was brief and its conclusion, the Treaty of Westminster, which was signed on February 9 1673/4, saw the abandonment of any Dutch claims to New Netherlands. The issue of the war, indeed, was the expulsion of the Dutch from North America. With this result the British and French empires now locked themselves in the struggle for dominance on the continent which affected all spheres of life (including the law) in New York until 1763. By the Treaty of Westminster the Duke of York was spared the expense of an invasion for the reconquest of his proprietary; on November 18 his new governor, Edmund Andros, arrived to reclaim New York.

The initial measures of the Andros government were directed at restoring the balance achieved under the administration of Richard Nicolls. The fractious Long Island towns, having raised militia to stand off the occupying Dutch forces on Manhattan, had declared their independence and returned to the jurisdiction of Connecticut. Even the communities of the inner Island were restive; the citizens of Jamaica could not welcome Andros without reminding him of the assembly that Nicolls had (in their view) promised to call in 1664 and deploring their lack of representation on the Governor's Council.³⁹ Andros would have none of this. With the firmness

38. The Order in Council, dated July 3 1762, referring this petition to the Council on Foreign Plantations is preserved in 3 *NY Col Docs* 197-98. The petition itself is lost. The committee to which the petition was referred included the Duke of York. The lack of any further proceedings is hardly surprising.

39. Petition of Jamaica, December 1 1674, 24 *NY Col Mss* 25.

and absence of tact that would mark his every action through a long career in colonial administration, he called upon the town magistrates to answer for their loyalty or be treated as rebels, and threatened the towns with the same treatment. Having warned John Winthrop Jr. that Connecticut might not meddle in the matter without securing the King's extreme displeasure, Andros went in person to secure the surrender of the towns, returning them to the existing system by measures just short of a show of force.⁴⁰

The territorial reintegration of the colony was only one of the many measures necessary to undo the consequences of the Dutch occupation, and the legal system of the colony was largely conscripted to that end. The minutes of the New York City Mayor's Court through the end of 1675 show substantial litigation connected with the occupation, as owners sought to reclaim property seized by the Dutch, or to collect rents and debts held in abeyance during the occupation.⁴¹ The final extinction of Dutch claims to the colony produced a harder line on loyalty questions. For the first time the records reveal prosecutions for sedition against those who spread rumors of a Dutch return,⁴² while Andros again required all inhabitants of the province to swear loyalty to the Duke.

The loyalty oath question precipitated a crisis. Andros' order was proclaimed in the Mayor's Court on Saturday, March 13 1675, and on Monday eight leading members of the Dutch merchant community, all of them former office-holders, appeared in the Court to request "a Confirmation of their former priviledges granted to them by Governour Nicolls."⁴³ These privileges they declared to be religious liberty, freedom from impressment, the continuance of Dutch inheritance rules, and

40. For the official records of these events, see 14 NY Col Docs 681-85.

41. See, e.g., Manning v. van Cleyfe, 12/22/74, **Minutes of the Mayor's Court of New York, 1674-1675**, at 7 (K. Scott, ed. 1983); Darvall v. Aldrix, 11/17/74, *id.* at 1; Lawrence v. Bayard, 2/9/74-5, *id.* at 19.

42. See, e.g., Sheriff v. Cornelis the Fisher & Ogden, 2/19/74-5, *id.* at 22.

43. *Id.* at 29.

freedom from any requirement to take arms against the Dutch nation. These guarantees had been extended in the articles of capitulation in 1664, and again the Dutch inhabitants of the colony were insisting upon the constitutional status of that document. Faced with a similar claim in 1664, Nicolls had restricted himself to declaring that nothing in the required loyalty oath conflicted with the articles of capitulation.⁴⁴ Andros, as usual, eschewed compromise. The Mayor's Court referred the matter to the Governor and Council, which the same day returned the message that "without Condition, Articles or Provisoes they must take the Oath."⁴⁵ After the Dutch merchants again refused to swear the required oath, a committee of the council ordered them held for trial at the next sitting of the Court of Assizes. Before a court consisting of 21 English and 4 Dutch justices, and a jury of twelve English residents of Long Island, the merchants were convicted of fomenting rebellion. The jury further convicted them of trading illegally in the province, since they had not taken the oath. The penalty was forfeiture of all lands and goods in the province.⁴⁶ Although the States General protested the decision in London, the Duke backed Andros in his disposition. Sir John Werden wrote to Andros on York's behalf that the Duke "would have you endeavor upon all occasions to keepe ye people in due obedience and subjection, and all inclinations towards mutiny severely suppress."⁴⁷ Faced with the reality of the sentence, all of the petitioners backed down and took the oath; their punishment was remitted to one-third of their estates.⁴⁸

The loyalty oath trial and its outcome are emblematic of the forces acting on the legal system of New York after the Treaty of Westminster. The convictions and harsh punishment

44. See **R. Ritchie**, *supra* note 35, at 69-70.

45. **Mayor's Court Minutes**, *supra* note 41, at 29.

46. Papers connected with the trial and sentence are in 24 NY Col Mss 172, 176K, 186a-k.

47. Werden to Andros, September 15 1675, 3 NY Col Docs 232-34.

48. See 25 NY Col Mss 14-15.

demonstrated the extent to which the legal and administrative system centralized in the Court of Assizes harnessed the colony's regional and ethnic tensions in the service of the Governor and Council. The response from the Duke demonstrates once again the strength of the proprietor's commitment to crushing any "democratical" movements among New York's inhabitants.

That the Anglo-Dutch merchants of New York City, previously in high favor under the Lovelace administration, were the victims of the system on this occasion was fully understandable, but these events also presaged a general withdrawal of the Dutch from the legal system of the colony after 1675—a withdrawal which one seems to glimpse in the decreasing frequency of suits by Dutch parties against other Dutch parties in the New York City Mayor's Court. Nor, it appears, were the Dutch in New York as willing to serve on juries: in the 1674-75 period 26% of the jurors in the Mayor's Court were Dutch; by 1681-82, the proportion had fallen to 16%.⁴⁹

The relative discomfort of the Dutch inhabitants of the province after 1675 did not prevent those leaders of the Dutch mercantile community who had made their peace with Andros and the permanence of English administration from rising with the times. Frederick Philipse and Stephanus van Cortlandt, both of whom had served in Lovelace's Council, were mainstays of the Andros administration; both were to be richly rewarded under Governor Dongan.⁵⁰ The fiscal assistance of these and other

49. The figures for 1674-75 are my calculation from the minutes, involving the juries in 17 cases. The figures for 1681-82 were calculated by Robert Ritchie; unfortunately he does not give us the size of his juror population. See **R. Ritchie**, *supra* note 35, at 143. The proportion of English jurors is almost identical in my calculation and Ritchie's, at 71%, probably reflecting a strong selection bias. The room made by the withdrawal of Dutch jurors appears to have been taken by French ones; the French population of New York City expanded rapidly in the latter 1670s, and in Ritchie's sample they amounted to more than 12% of the jurors. Less than 2% of the jurors in 1674-75 were French. Because of selection bias, the figures do not conclusively demonstrate that Dutch inhabitants withdrew from jury service; they might have been excluded.

50. The creation of the van Cortlandt and Philipsburgh manors is discussed in Chapter 3.

members of the merchant community was still crucial for the funding of the garrison in New York; the Duke, intent upon making the colony pay, was both unable and unwilling to appreciate the depths of his Governor's fiscal difficulties.

For merchants like Philipse and van Cortlandt, peace with the Governor was not only a way to avoid the embarrassments that had overtaken their more stiff-necked compatriots—it was also a measure of protection against new and powerful commercial competition. After 1674 New York began to attract increased attention from London merchants,⁵¹ several of whom began directly trading into the colony through factors or resident family members. This trade threatened the carefully arranged web of explicit monopolies and trade restrictions the city merchants had garnered in the preceding decade. Increasing competition threatened the loss of the Long Island and Albany trades, and made the legal system's continued bias in their favor the greatest protection the merchants had. Andros responded to the situation in support of the interests of Philipse, van Cortlandt, and their circle. By 1678 Andros and his Council had closed the river trade to all but ships owned by New York residents with a license from the Governor, an order supplemented by a regulation requiring the river towns to bring their goods to the city for reshipment.⁵² When the Albany merchants protested, alleging their traditional right to direct foreign trade, Andros' Council rather pointedly inquired whether the Albany merchants wanted a foreign commerce or a monopoly of the fur trade, and the Albany commissaries backed down, promising "to do therein as his honor [the Governor] in his wisdom and sound judgment

51. In the decade following 1664, roughly half a dozen ships made a direct commercial voyage from English ports to New York. I count four in the customs entries, PRO E 190/50/5, 62/1, 62/5. Robert Ritchie counts five, a discrepancy for which I cannot account, and which underscores the roughness of the figure. See **R. Ritchie**, *supra* note 35, at 109. We are in agreement, in any event, that from 1675 to 1680 eighteen such voyages were made. PRO E 190/62/1, 5; 66/5; 80/1; 89/10; 91/1; 106/1. The change in shipping volume is clearly significant.

52. For the order directing traffic through the city, dated August 22 1678, 13 NY Col Docs 531-32; 27 NY Col Mss 175 (order August 8 1678 closing river trade to unlicensed vessels).

shall see fit, which no doubt will tend to the preservation and benefit of the place."⁵³

Additional legal defenses against the new commercial competition were necessary to the city's merchant oligarchs. Other trades in the city also profited by the export trade, prominently the carters and the coopers, and in the newly competitive environment they sought to protect their own share at the expense of the merchants. The Common Council of the city acted against a combination of the carters in 1677;⁵⁴ when in December 1679 the coopers agreed to set their own prices, the Governor and Council fined them all, and fired two who worked for the customs collector.⁵⁵ The final step in the legal response to heightened competition came in 1680, when after a lapse of seven years the Court of Assizes acted to renew the city grain monopoly. Orders were issued forbidding packing or bolting of flour outside the city, and restricting the ownership of bolting mills and the retailing of grain to city freemen.⁵⁶

While Andros' response to the economic threat against the merchant elite was largely a payoff in return for its economic and political support of his government, there was also a direct benefit to the proprietor, for the strict regulation of trade through the city made the proprietor's customs revenues more certain. The

53. The relevant Council minutes for May 6 1679 are in 28 **NY Col Mss** 86-87. See 2 **Minutes of the Court of Albany, Rensselaerswyck and Schenectady, 1668-1680**, at 413-14 (A. van Laer trans. & ed. 1926). For the submissive answer of the commissaries, dated May 22 1679, see 28 **NY Col Mss** 99.

54. The order of the "special court" (actually the Mayor and Aldermen sitting to discharge both administrative and judicial business at the same session, effectively the Mayor's Court), made October 17 1677, discharged twelve carmen from the free of the city "for not obeying Comand and Doing their Dutyes as becomes them in their Places." After they made submission and paid a fine they were restored to their privileges, which were to continue to move cargo at the price set by the Court. See 1 **Minutes of the Common Council of the City of New York** 64-65 (H.Osgood, ed. 1905).

55. The coopers interestingly proposed to fine those who defected from the combination's prices by requiring them to make donations to the city's poor. For the agreement itself, and the Council's response, see 29 **NY Col Mss** 2-3c.

56. See 29 **NY Col Mss** 29; 2 **Albany Minutes**, *supra* note 53, at 480-83.

London merchants were a powerful force for Andros to reckon with, however, and they had much to do with securing his recall in May 1680. Among the charges leveled against him was that of favoring New York merchants over metropolitan traders. Although he successfully defended himself before the Duke's managers, Andros did not return to New York.⁵⁷

The departure of Andros marked a transition in the constitutional development of the colony. The perennial fiscal difficulties worsened as the economy turned sharply down, in part as a result of bad weather and a poor harvest in 1679. The garrison remained a significant charge against falling public revenues, and Andros' interim replacement, Captain Anthony Brockholls, the commander of the Albany garrison, was unfitted by experience and connection for the delicate political task of governing New York. By the time Andros was officially relieved of office and his successor, Thomas Dongan, could reach New York to take up his duties, which he did in August 1683, Brockholls had largely lost control of events. Resistance to prerogative taxation, always a feature of tension between the eastern Long Island communities and the proprietor's government, now flared elsewhere in the province, and Brockholls had neither the political skill to outmaneuver his opposition nor the influence with the Anglo-Dutch merchant oligarchy to meet even the most pressing of the government's bills.

Nor was the proprietor himself in a position to control the colony without Andros' skilled, if high-handed, management on the ground. The Duke's domestic political situation was extremely unfavorable. He was in exile from 1679 to 1682, and even his comparatively stable residence in Edinburgh through much of that time left him little opportunity to divert attention from the pressing affairs at court to his colonial dominions. The patenting of the Pennsylvania colony to his friend William

57. For the events surrounding the recall of Andros, see **R. Ritchie**, *supra* note 35, at 117-26.

Penn,⁵⁸ which removed the Delaware settlements from the Duke's control notwithstanding his opposition and thus deprived New York of an important asset in a worsening economic situation, demonstrates the difficulty York experienced in protecting his colonial interests from exile.

York's return from exile in March 1682, and his appointment of Dongan to succeed Andros, marked the beginning of an attempt to resume proprietorial control of New York. Events had moved too far in the interim, however, to make feasible a resumption of government in the style of Andros. The Duke had repeatedly hinted to Brockholls, presumably for discreet leakage in the heated environment of colonial politics, that he was considering the calling of an elected assembly. By February 1682, as York prepared his return to England, a fundamental shift in his thinking had occurred. Sir John Werden wrote to Brockholls informing him that York would probably agree to call an assembly, provided that an agreement could be made in advance to adopt taxes sufficient to pay off the colony's public debt and provide sufficient revenue to carry the expenses of the garrison and government. Brockholls was instructed to discuss this proposal with influential New Yorkers, and to transmit their signed responses to the Duke for his scrutiny.⁵⁹ Dongan was appointed to the governorship in August, selected to carry out the

58. The remarkable and paradoxical friendship of William Penn and James Stuart provides yet another insight into Penn's extraordinary character. See **V. Buranelli, *The King and the Quaker*** (1962). Consider, as one of the effects of this friendship, the spectacle of Penn acting as mediator between the hapless Brockholls and his opposition during his visit to New York in December 1682. Penn, exhorting the opposition to consider the Duke's graciousness in agreeing to call an Assembly, "perswaded all Partys to lett fall their Animositys, which they promest." Penn to William Blathwayt, October 21 1682, 7 Blathwayt Papers (ms., Colonial Williamsburg). Perhaps Penn somewhat overestimated the effectiveness of his mediation; on the other hand, the event tempts one to speculate about the extraordinary effects on New York history that would have resulted from the appointment of the Quaker proprietor as New York's Governor.

59. Letter dated February 11 1682, 3 **NY Col Docs** 317. York himself repeated the substance of this proposal in advance of Brockholls' response, offering the disconcertingly disingenuous reason that he sought "ye common good ... and ye increase of their trade, before my advantages to myself." York to Brockholls, March 28 1682, *id.* at 318.

Duke's new policy. His instructions, sealed on January 27 1683, contained specific directions for the holding of elections;⁶⁰ in August Dongan arrived in New York, and on September 13 writs of election issued.⁶¹

Undoubtedly the deteriorating political and fiscal situation in New York was predominantly responsible for the abandonment of the Duke's long-standing resistance to the creation of a representative assembly. But the proprietor's legal position was also changing, and in a direction which made adherence to his prior policy, however strongly held, a distinct liability. In 1677 the Lords of Trade, coping with the fractious behavior of the representative assembly in Jamaica, decided to mount a direct assault on its powers. Taking the position that the constitutional status of the Jamaica assembly derived solely from the governor's instructions, the Board drafted new instructions which duplicated the constitutional arrangement reached in Ireland under Poyning's Law—the Jamaica assembly would be reduced to approving or disapproving laws drafted by the Crown, without any power of initiating legislation. The Board, meeting the predictable Jamaican resistance, asked the Law Officers for an opinion on the legality of the new instructions, and the Attorney General, Sir William Jones, responded with an opinion that the colony could constitutionally be governed only by laws made in Jamaica under the Crown's authority, and not by laws originating in England. The Jamaican plan was scrapped accordingly.⁶² The Attorney General's Jamaica opinion sig-

60. 3 NY Col Docs 311-35.

61. 14 NY Col Docs 770-71.

62. See A. Whitson, *The Constitutional Development of Jamaica, 1660-1729*, at 82-107 (1929). The technical situation is somewhat complex, and is not made more comprehensible by the absence of several important documents. The Law Officers apparently told the Board that the question was one which should be referred to the Judges for their opinion. The opinion of the Attorney General was expressed in this context, and no copy of the opinion itself seems to have survived. A question was drawn for submission to the judges, but there is no record of any opinion in the matter; it may well be that none was returned. Traces of the business rendering plausible the interpretation given in the text may be found in [1677-80] CSFC nos. 1322-23, 1346-47, 1405-06.

nificantly unsettled the proprietor's legal position for the collection of prerogative taxes in New York; this weakening of position must have been clear when news reached the Duke in the autumn of 1681 that collectors of excise in New York City and Albany had been indicted or otherwise proceeded against during the summer for the collection of allegedly illegal excise taxes.⁶³ The legal events of the summer of 1681 provided at least an independent reason for the rethinking of fundamental policy whose results appeared the following February.

The New York Assembly convened for its first session on October 17 1683, and remained in session for three weeks. No records of its proceedings have survived, and with a handful of exceptions, the eighteen delegates cannot be identified.⁶⁴ The result of this first brief session was a collection of fifteen significant statutes, including the famous "Charter of Liberties and Privileges" and the first judiciary act for the colony.

63. The proceedings against William Dyre, the Duke's Collector for the colony, can be seen in the record of a special session of the Court of Assizes called to consider a charge of treason against Dyre. See Minutes of June 29-July 2 1681, *NYHS Coll* 1912, at 8-15. The prosecution had begun in the Mayor's Court, which evaded the undesirable responsibility on the ground that treason had been charged and it had no jurisdiction to try capital cases. In Albany, Robert Livingston sued John Delaval, son of the former collector Thomas Delaval, for landing 510 gallons of rum at Albany without paying excise. Delaval responded by challenging the legal basis of the excise. The jury in the Albany Mayor's Court found in a special verdict that the only warrant for the defendant's responsibility for excise was the governor's order, and that the defendant was guilty if and only if the governor's order was sufficient in law. See 3 *Albany Minutes*, *supra* note 53, at 153-57 (session of August 29 1681).

64. Mathias Nicolls served as speaker, possibly holding one of the four seats from New York City. John Lawrence sat for the city, Cornelius Van Dyck and Dirk Wessels ten Broeck for Albany, Ryer Jacobse Schermerhorn for Schnectady, Hendrick Beekman and William Ashford for Esopus, and Giles Goddard for Pemaquid. One contemporary observer characterized the membership as predominantly Dutch, but on the basis of surviving data this seems implausible. More likely there were ten English and eight Dutch delegates. The composition of the Assembly is skillfully analyzed in John Murrin's remarkable unpublished paper "English Rights as Ethnic Aggression: The English Conquest, the Charter of Liberties of 1683 and Leisler's Rebellion in New York," read at the American Historical Association meeting, 1973.

The charter embodied the constitutional consensus in New York as it had developed from 1664 on. It defined the powers and relationship of the executive and legislative elements of colonial governance, and further guaranteed religious toleration and other fundamental civil and legal rights.⁶⁵ The charter's fundamental constitutional aim was the entrenchment of the newly-created assembly. The power to govern under the King and proprietor was lodged "forever" in the "Governour, Councell, and the people mett in Generall Assembly." The executive authority of the Governor was to be exercised with the "advice and Consent" of the Council, which also became the second house of a bicameral legislature through the requirement that it separately approve all legislation. Laws having the assent of Governor and Council were to remain in effect "untill they shall be repealed by the authority aforesaid that is to say the Governour Councell and Representatives in General Assembly by and with the Approbacon of his Royal Highnesse or Expire by their owne Limittacons."⁶⁶ The principle of local legislative supremacy in matters of taxation was explicitly decreed in the charter, and immediately exercised. The rates imposed on Long Island inhabitants by the Duke's Laws and so often resisted were repealed outright, to be replaced by an essentially equivalent system.⁶⁷ The Assembly, in keeping with the dignity of a sovereign legislature, claimed for itself in the charter all the constitutional privileges of Parliament, including triennial

65. See 1 NY Col Laws 111-16. For the most detailed account of the charter and the antecedent events, see Lovejoy, *Equality and Empire: The New York Charter of Liberties, 1683*, 21 WMQ 3d ser. 493-565 (1964).

66. 1 NY Col Laws 113. This provision placed the New Yorkers squarely in opposition to the constitutional position taken by the Board of Trade in the Jamaica crisis. A critical dispute over the constitution of the British Empire was sounded here; one which was to absorb much of the attention of colonial and metropolitan disputants in the great constitutional crisis of the 1760s. See J.P. Reid, *The Constitutional History of the American Revolution: The Authority to Legislate* (1990). In keeping with the position advanced, the charter itself was submitted to Dongan and his councilors for approval. See 2 J.R. Broadhead, *History of the State of New York, 1609-1691*, at 661 (1853).

67. "An act for Repealing the former Lawes ab't Country Rates and allowance to the Justices of the Peace," November 1 1683, 1 NY Col Laws 124.

sessions, judgment of the qualifications of members, and privilege from arrest.

The Assembly's basis of representation was also fixed, through the establishment of twelve counties as election districts.⁶⁸ These counties replaced the patchwork of incommensurable jurisdictional arrangements that had begun with the erection of Yorkshire in the English parts of the colony in 1664, and began the process, completed by other legislation in the session, of revising the structure of local government throughout the province. One immediate effect was to establish a substantial reserve of patronage for the Governor, who now had a high sheriff and his deputies to appoint in each of the counties, in addition to the other existing offices.

In addition to the structural aspects of constitutional law, the charter also addressed individual rights concerns. Using language taken from Magna Carta and the Petition of Right, the Assembly sought to guarantee due process, trial by jury of the vicinage, indictment by grand jury, the right to bail, and free exercise of Christian worship. The problems created by the presence of the garrison in New York induced the addition to the charter of provisions against quartering of troops in private homes in peacetime and the employment of martial law against civilians. Beyond those elements of civil and legal rights which subsequent events taught Americans to consider "constitutional" in character, the charter also protected more narrowly "legal" rights by measures including a prohibition on forced sale of freehold land in satisfaction of judgments, protection of the

68. The counties taken for granted by the apportionment clauses of the charter were formally created by another statute of the session. The counties erected were New York (Manhattan), Kings (the Dutch and mixed towns at the west end of Long Island), Queens (Newtowne, Jamaica, Flushing, Hempstead, and Oyster Bay), Suffolk (from Huntington to Montauk, along with the outlying islands), Richmond, Westchester, Ulster (the vicinity of Esopus, now called Kingston), Albany (including Rensselaerswyck and Schnectady), Dutchess's, Orange (from the south border of Ulster to the uncertain border with the Jersies), Duke's (Nantucket and Martha's Vineyard), and Cornwall (Pemaquid and the Maine settlements). "An Act to divide this province & dependencies into shires and Countyes," November 1 1683, 1 *NY Col Laws* 121-23.

dower rights of widows, and prohibition of “all Herriotts Ward Shipps Liveryes primer Seizins yeare day and Wast Escheats and forfeitures upon the death of parents and ancestors naturall unaturall casuall or Judiciall, and that forever.”⁶⁹

The charter of liberties was the first of the Assembly’s contributions to the settlement of the colony’s legal system. The second, the judiciary act,⁷⁰ marked the first attempts by New York’s inhabitants, convened in a legislature, to structure a system of law enforcement for the entire colony.⁷¹ The basic structure of local justice was formalized, and the institution of the town courts was revived. Town courts, consisting of three commissioners acting without a jury, were to sit one day a month to determine all causes of debt and trespass under 40s. Jury trial was permitted in the town courts, “but at the propper Costs and Charges of the person desireing the Same.”

Above the town courts in this structure were the Courts of Sessions, or county courts. These courts, composed of the Justices of the Peace for the county, sat at stated intervals through the year—semi-annually in most counties, four times a year in New York City. They were empowered to try to a jury all civil and criminal cases, except capital crimes.⁷² In addition to the county

69. 1 *NY Col Laws* 115. The property provisions of the charter, including this vigorous prohibition of feudal incidents, are discussed in connection with the development of the land law in Chapter 3.

70. “An Act to settle Courts of Justice,” November 1 1683, 1 *NY Col Laws* 125-128.

71. Dongan’s instructions ordered him to consult with his council to determine what if any changes to the court system were necessary to ensure the administration of justice. *See* 3 *NY Col Docs* 333. The Assembly’s preemption of that function is unexplained in the records; presumably Dongan let it proceed on the ground that he had adequate remedies if the resulting legislation was unacceptable. The very fact that the Assembly undertook the task without substantial executive opposition reflects nonetheless the profound alteration in the balance of political power in the colony.

72. The operation of the Court of Sessions for Westchester County throughout the period from the beginning of English rule through the establishment of the judicial system of 1691 can be glimpsed in the minutes of proceedings 1657-1696, 2 *Publications of the Westchester County Historical Society*

courts, the statute provided for annual commissions of oyer and terminer and general jail delivery, empowered to try all criminal and civil actions, including capital cases, and with removal over £5 and jurisdiction in error from the county courts. From the action of the courts of oyer and terminer appeal lay to the King for judgments in excess of £100. In addition to these institutions of common-law justice, the 1683 statute provided for a Court of Chancery, to comprise the Governor and Council and to “be Esteemed and accounted the Supreme Court of this province.”⁷³

This burst of legislative creativity in the Assembly’s first session effected a transformation in the legal system of the colony. As the Duke had long foreseen, the calling of a representative legislature transformed the constitutional law of the province, but it did so in more than the obvious ways it had been the Duke’s purpose to avoid. The legal system established under Nicolls, with its strongly centralized administration, headed by the highly politicized Court of Assizes, and its decentralized doctrine, was, at least in theory, replaced by a new system which inverted the basic structural features. From the revived town courts through the justices commissioned for oyer and terminer, the essential adjudicatory business of the colony would now be done in courts at or below the county level. This arrangement was certainly desirable in providing superior access to the courts in the geographically dispersed province, but the advantage perceived by the legislature was more than merely logistical. Though the Governor and Council were to be “esteemed” the supreme court of the province, only equity lay within their jurisdiction; the omnipresent hand of the Court of Assizes would now be removed from the law. While the courts were growing less

(1924). The editing, by Dixon Ryan Fox, regrettably leaves much to be desired.

73. 1 NY Col Laws 128. It should be observed that although the Court of Chancery was to be considered the Supreme Court of the colony, it had no jurisdiction in error from the determinations of the courts of oyer and terminer, from which appeal lay only to the King in Council. In addition to the courts created or continued by the 1683 Act, Governor Dongan in 1685 established a court of exchequer, with jurisdiction to try actions between the Crown and its subjects in matters affecting the revenue, including title to land. See 3 NY Col Docs 389.

centralized, the law they administered was growing more uniform, as the Assembly concentrated the law-making power in itself and (as in the property provisions of the charter) began to establish private law principles applicable throughout the mixed geographic and ethnic domains that Nicolls and his successors had not even attempted to integrate. In both senses—that of occupation and of conciliation—the Assembly was fully engaged in settling the law.

Once again, however, political events in England interfered with the process of legal settlement taking place in New York. Although the Duke's Commission of Revenue was prepared to accept most of the Assembly's work and expected York to sign the Charter of Liberties for return to New York in late 1684,⁷⁴ changes in imperial policy and the status of New York overwhelmed the New Yorkers' attempts to settle their own affairs. Charles II and his advisers' plans for rationalization of colonial management and reduction of the autonomy of colonial governments, visible in Richard Nicolls' secret instructions in 1664, returned to the fore in the closing years of the reign. The immediate stimulus was the refusal of the Massachusetts Bay colony to obey the Navigation Acts.⁷⁵ With the revocation of the Massachusetts Bay charter in October 1684, a complete revision of the imperial constitution as it applied to the New England colonies became inevitable. The death of Charles II in January 1685 made New York a royal colony, and swept it within the ambit of this developing revolution. The Lords of Trade were thinking on terms very different from those of the Duke of York's Commission of Revenue; the charter the Duke had supposedly signed and sealed in October 1684 the King would feel differently about in March 1685: his Majesty "doth not think fitt to confirm the same. And as to the government of New York, his Majesty is pleased to direct that it be assimilated to the Constitution that shall be agreed on for New England."⁷⁶

74. According to at least one memorandum, the Duke had signed and sealed the charter by October. See [1680-84] CSPC no. 1885.

75. See D. Lovejoy, *supra* note 15, at 1-20, 122-159.

76. 3 NY Col Docs 357.

The accession of James II and the creation of the Dominion of New England altered the environment in which the New Yorkers worked.⁷⁷ The new constitution for New England could be agreed on only with painstaking care, and while the interim administration of Joseph Dudley was in power in Massachusetts Bay, Dongan remained in New York. The New York Assembly, which met for two more sessions after 1683, could be dispensed with more easily, however, and so representative government was suspended in 1685.

The integration of New York into the Dominion was only a matter of time. The strategic interests of the Crown were focused on the collision between New England and New France—a collision whose most dangerous points of contact were the Champlain corridor and the junction of the Hudson and Mohawk valleys. One of the Dominion’s great advantages was the enhanced ability it afforded to summon blood and treasure to defend those gates of empire. The annexation of New York by the Dominion in April 1688 was the culmination of the revolution in the imperial constitution begun with the revocation of the Massachusetts Bay charter.⁷⁸ By August Sir Edmund Andros was back in New York City, now as Governor of the Dominion, celebrating with New Yorkers the happy event of the birth of the Prince of Wales. The consequences of that moment were largely hidden from the participants. Andros’s presence seemed to confirm the completion of a revolution in the imperial constitution, but it was almost immediately nullified by a revolution in the British constitution provoked by the birth of the baby whose advent caused both drunkenness and a somewhat sullen mood of public celebration in New York. The ironies seem almost too perfect, for the liberties of Englishmen in New York were to be restored by a Dutch prince’s successful invasion of England, while a Dutch-affiliated merchant of New York City,

77. The most satisfactory account of the creation of the Dominion remains V. Barnes, *The Dominion of New England* 5-70 (1923).

78. For the warrant of annexation, dated March 25 1688, see PRO CO 389/9, at 466-67; [1685-88] CSPC no. 1674. For Andros’ instructions confirming the annexation, dated April 16 1688, see 3 NY Col Docs 543-49.

claiming to hold the province on behalf of the British crown, came close to dissolving the colony's political structure in the acid of civil war.

The Dominion's government collapsed, beginning in April 1689, with an uprising in Boston staged upon confirmation of the downfall of the Stuart monarchy at home. Within weeks, government in New York had collapsed as well, and the vacuum of authority was filled by an immigrant German merchant and militia captain, a member of the Dutch Reformed church, named Jacob Leisler, who claimed to be governing the province in the interest of William and Mary, pending definitive word of the new sovereigns' pleasure. But the foundations of Leisler's regime were never secure; both on Long Island and at Albany there was resistance to his pretensions to authority, and in New York City Leisler resorted to increasingly repressive measures directed at his opposition, which was led by some of the most important members of the Anglo-Dutch merchant community. By January 1690/91, some of New York's leading citizens were in jail, their estates had been confiscated or lay under threat of confiscation, and the soi-disant Governor seemed to some to be taking leave of reality. When Captain Richard Ingoldsby, the military representative of the newly-appointed Royal Governor demanded Leisler's surrender, Leisler was foolish enough to refuse, and an armed stand-off resulted, ending only in the arrival of the new Governor, Henry Sloughter, in March 1691. Sloughter's ire was deliberately inflamed by the local grandees who had suffered at Leisler's hands; by the end of May 1691 Leisler and his son-in-law had been executed after trial on treason charges, and confiscations and other retributive measures against his supporters were well under way.⁷⁹ The events of Leisler's

79. It is impossible to discuss political life in New York between 1691 and 1710 without taking constant account of the long-standing effects of the colony's social and political polarization during the Leislerian interregnum. The consequences of this polarization for the legal culture of New York will appear repeatedly throughout this study. But the rise and fall of Jacob Leisler himself had little immediate effect on those subjects which now concern us. Leisler's Rebellion has not lacked for historical treatment; fine general accounts of events and their local significance can be found in J. Reich, *Leisler's Rebellion: A Study of Democracy in New York, 1664-1720*,

Rebellion and the overthrow of the Dominion government in New York were to have lasting consequences for the political and legal development of the colony, but the changes were not reflected during Leisler's administration in the institutions for the administration of justice. The period of New York's incorporation in the Dominion of New England was too short for the complete replacement of the 1683 judiciary structure by the Dominion judiciary, although some commissions appear to have issued;⁸⁰ During his period of control Leisler confirmed the 1683 structure while replacing the judges appointed by Governor Dongan.⁸¹ It was not until the arrival of Governor Henry Sloughter in March 1691, in the immediate aftermath of the rebellion, that a new attempt was made to forge a system for the administration of justice in the colony. The outcome of this process, the judiciary act of 1691,⁸² was the primary institutional skeleton of legal development in New York for the rest of the colonial period.

Sloughter arrived in New York carrying instructions which ill prepared him to deal with the furious turmoil stirred by Leisler's rogue administration. His climactic first days in New York saw the final confrontation between his troops, commanded by Major Richard Ingoldesby, and Leisler's militia—a confrontation virtually inevitable since Ingoldesby's arrival in January. The vindictive wrath of the anti-Leislerians upon whom Sloughter relied for support of his government demanded an outlet, and the Governor remained essentially the captive of events beyond his political control through the following two

at 55-126 (1953); **R. Ritchie**, *supra* note 35, at 198-231. For a superb account of the events in New York in relation to the occurrences elsewhere in British North America in 1689, see **D. Lovejoy**, *supra* note 15, at 251-364.

80. An unambiguous record of a Dominion commission of the peace appears in *Ms. Deeds Richmond Co.*, liber A, f. 639 (Richmond County Clerk's Office). For further indications of Dominion commissions in New York, see **J. Goebel & T. Naughton**, *Law Enforcement in Colonial New York* 21-22 (1944).

81. See 2 *Doc Hist NY* 30-36.

82. "An Act for the Establishing Courts of Judicature for the Ease and benefit of each respective City Town and County within this Province," May 6 1691, 1 *NY Col Laws* 226.

months, until Leisler's execution on May 16.⁸³ The restoration of a normal political life in the colony was now beyond his, or anyone's, capacity; the restoration of legitimate institutions of government, however, was the most pressing order of business.

Sloughter's instructions, prepared in ignorance of the particular events in New York, had of course the aim of establishing legitimate institutions. But the defect of legitimacy at which they were directed was the defect with which William had been laboring at home—the problem of the extra-constitutional transition of the Crown. For an entirely different problem—the maelstrom of ethnic, religious, regional, and socioeconomic hostility whipped up by an interim revolutionary administration—heads at Whitehall had not been prescient enough to conceive solutions. Perforce, then, the reconstruction of the colony must be planned and implemented on the ground; as always, the quest for legitimacy strengthened the representative elements in the government.

This was at least as true with respect to the legal system as with other elements of the colonial government. Sloughter's supplementary instructions, drawn up in January 1689/90, testified to the Crown's particular concern with the administration of justice in the colony, conveying quite clearly Whitehall's policy: in pursuit of legitimacy Sloughter was to do as little as possible to disturb existing legal institutions, and in particular to avoid the political quagmire into which he would stumble by wholesale replacement of the judges.⁸⁴ The pressing

83. See **D. Lovejoy**, *supra* note 15, at 336-40, 354-58.

84.

You shall not displace any of ye Judges, Justices, Sheriffs or other officers or ministers within our said Province of New-York, without good and sufficient cause, to be signified unto Us, and to our Committee on Trade and Plantacons....

You shall not erect any Court of Office of Judicature not before erected or establish'd without our special order

You are to transmit unto us with all convenient speed a particular account of all Establishments of

need, in Whitehall's view, was for safeguarding the revenue, and this required the appointment of an attorney general and the regular convening of a court of exchequer, presumably much like the one established by Dongan in 1685. Any further alterations could be deliberated by the management at the home office, for whose convenience a report on the general situation was to be compiled and transmitted "with all convenient speed."

This was all very well, but in the circumstances actually prevailing in New York, it made no sense. Which were the "settled and established" courts and who were the judges with which Sloughter was forbidden to interfere—Dongan courts and Dongan judges, Dongan courts and Leisler judges, or Dominion courts and the scant handful of Dominion judges? No plausible answer could be derived from the instructions, while Whitehall concern to avoid disruption of a nonexistent local political balance was similarly irrelevant. The managers at home had, moreover, deprived Sloughter of the most important tool for reconstruction—his commission specifically excluded the Assembly from any role in the establishment of courts.⁸⁵ Again,

Jurisdictions Courts, offices and officers, Powers, Authorities, Fee & Priviledges, granted or settled within our said Colony to the end you may receive our especial directions therein....

Whereas we conceive it very necessary for our Service, that there be an Attorney Generall appointed and settled ... you are with all convenient speed, to nominate and appoint a fit Person for that Trust

And whereas it is necessary that all our Rights and Dues be received and recovered, and that speedy and effectual Justice be administered in all Cases concerning our Revenue, you are to take care that a Court of exchequer be called and do meet at all such times as shall be needful. And you are to inform Us and our Committee for Trade and Plantations ... whether our Service may require that a constant Court of Exchequer be settled and established there....

Supplementary instructions, dated January 31 1689/90, 3 NY Col Docs 685-91.

85.

We do further give & grant unto you full Power & authority with the advice & consent of Our said Council to

instructions prepared for one eventuality would be fatal in another; Sloughter no doubt saw quite clearly that any attempt to resolve the chaotic situation of the New York courts would provoke a storm unless it emerged from the new Assembly.

Sloughter proceeded with admirable caution and address. In his opening speech to the newly-convened Assembly, on April 5 1691, Sloughter placed as the prime order of business, directly after the adoption of the routine address of thanks to the King and Queen, the formation of "A Committee to review and report the Laws, Courts and Salaries of the Judges."⁸⁶ At a minimum this would provide for him the report his instructions required him to transmit to the management at home, and offered a vehicle for testing the Assembly's sentiments. Nothing happened, and the situation was too pressing to admit of further delay. On April 15, Sloughter sent a special message to the Assembly:

His Excellency and Council recommend the expediting of a Bill for the establishing of Courts of Judicature throughout this Province; as also to take into Consideration the Act of the late Assembly, entituled, *An Act for the Settlement of Courts of Justice* as a Form found very agreeable to the Constitution of this Government.⁸⁷

The Governor and Council had apparently resolved the situation to their satisfaction; if the Assembly reenacted the 1683 judiciary law they would approve it and the problem of the courts would be resolved through return to the *status quo ante*. If the Governor were not literally observing his instructions, he had a strong claim

erect, Constitute, and Establish such & so many Courts of Judicature and publique Justice within our said Province and the Territories under your Government, as you and they shall think fit and necessary for the hearing and determining of all causes as well criminal as Civil according to Law and Equity.

Commission, dated January 4 1689/90, 3 NY Col Docs 624-25.

86. 1 J Gen Assem 3; 1 J Legis Coun 2.

87. 1 J Gen Assem 4; 1 J Legis Coun 3.

to have observed their spirit. But the finesse did not succeed according to its intention.

A committee of the Assembly was delegated to study the problem; it was given two days to work, and at the end of that time reported. The Assembly thereupon ordered Attorney General Thomas Newton to draw a final version of the bill in the "Manner and Form" of the report.⁸⁸ The Governor and his Attorney General were no doubt surprised by one passage of the report, providing:

That there be a Supream Court held at the City of *New-York*, the first *Tuesday* in *October*, and the first *Tuesday* in *April*, which shall consist of one Judge and six Justices; which Court shall have all the Powers, Prerogatives, Pre-eminencies and Privileges, as the King's Courts of King's Bench, Common Pleas and Exchequer, have at *Westminster Hall* in *England*. *Provided always*, That ... there shall be likewise Liberty of Appeals, from the Supream Court to the Governor and Council, for One Hundred Pounds, and upwards, giving in Security as above.⁸⁹

The Assembly's committee had taken an unexpected step. It had abandoned one of the primary structural features of the 1683 act by establishing a single centralized supreme court, subordinating the decentralized system of courts of oyer and terminer, from which appeal would lie to the Governor and Council, rather than to the King. The Assembly was dissatisfied with the Attorney

88. See 1 J Gen Assem 4. Julius Goebel says that "except for the few members who had served as justices of the peace, no one [on the Assembly committee] appears to have had the least qualification for the task." J. Goebel & T. Naughton, *supra* note 80, at 25. With a rare insensitivity to technical matters, Goebel seems to have missed the significance of the committee's decision to create a Supreme Court, attributing the results of political creativity to simple incompetence. A more perspicacious reconstruction of the making of the judiciary act of 1691 is found in 1 P. Hamlin & C. Baker, *Supreme Court of Judicature of the Province of New York, 1691-1704*, at 49-57 (1959), and I have followed their approach here.

89. 1 J Gen Assem 5.

General's performance as a draftsman,⁹⁰ and the Assembly's Speaker, James Graham, who had been Attorney General of New York under Dongan and of the Dominion under Andros, finished the work himself. Graham worked speedily and apparently skillfully, completing a draft of the bill in less than one day. The bill was passed on April 27, and the Governor and Council approved it with minor amendments on May 4.⁹¹ Two weeks before Leisler's execution the Assembly had completed work on the resettlement of the courts.

The surprising speed with which the Assembly worked, along with the substantive decision to adopt the institution of a centralized supreme court, readily adopted by the Governor and Council despite its fundamental difference from the 1683 act they had at first recommended as a model, can be readily explained. The Assembly had adopted the judicial system of the Dominion of New England for use in New York.⁹² The inspiration for this change in policy, like so much else taking place in New York during April and May 1691, was anti-Leislerian politics. The Council was of course dominated by the enemies of Leisler, while Leislerians elected to the Assembly had not been allowed to take their seats. Pressure on Sloughter for Leisler's execution came from the Councilors Nicholas Bayard, Stephanus Van Cortlandt, and William Nichols, along with the Assembly's Speaker, the former Dominion Attorney General and draftsman of the Judiciary Act, James Graham.⁹³ For these leaders of the anti-

90. See 1 **J Gen Assem** 8.

91. The amendments were to provide for a term of eight days rather than five for the Supreme Court, for appeal to the Governor and Council rather than the Court of Chancery (identical personnel, but in strict verbal conformity with Sloughter's commission), and for expiration of the bill after two years. See 1 **J Legis Coun** 6. This last provision, which was to become relevant later, was probably intended as protection for Sloughter, who had violated the terms of his commission in allowing the Assembly to create the court system. After expiration, it was probably supposed, he could return the courts to the status of an executive creation.

92. The Dominion Judiciary Act of March 3, 1687 is included in 1 **Laws of New Hampshire** 190-94 (A. Batchellor, ed. 1904). For an examination of the text of the 1691 act, showing its descent from the Dominion act, see 1 **P. Hamlin & C. Baker**, *supra* note 88, at 56-57.

93. See **D. Lovejoy**, *supra* note 15, at 356-57.

Leislerian faction, now become the “court” party under the Sloughter administration, the establishment of a strongly centralized legal system under a single Supreme Court, with ultimate appellate jurisdiction in the Governor and Council, was a bulwark against the possibility of Leislerian agitation. The machinery intended to provide centralization in the interests of empire under the Dominion would now be adopted for more local political purposes.

There was more to the 1691 act, however, than the creation of an anti-Leislerian Supreme Court. The town courts, under suspicion from the time of Nicolls as an overly “democratic” institution, were replaced by a broad authority in the appointed Justices of the Peace, whose civil jurisdiction included claims of debt or trespass to the value of 40s. Juries were to be provided at the demand of either party, but the statute envisioned justices sitting without a jury, assisted only by a second freeholder of the venue.⁹⁴

The larger intermediate courts of the Colony were constructed by aggregating Justices of the Peace. The Act provided for a gathering of the Justices semi-annually in all counties (three times annually in Albany and quarterly in New York City) to act as General Sessions. Special commissions issued to some of the Justices at the Sessions to compose a Court of Common Pleas for the county, with final jurisdiction to determine all actions “Tryable att the Comon Law of what Nature or kind soever” valued at £20 or less; in New York and Albany the respective Mayor’s Courts substituted for the Courts of Common Pleas, and their traditionally somewhat more expansive jurisdictions were explicitly confirmed.⁹⁵ Appeal by writ of error or certiorari lay from the Common Pleas to the Supreme Court, whose jurisdiction in the final form of the bill included “all pleas, Civill Criminall, and Mixt, as fully & amply to all Intents & purposes whatsoever, as the Courts of King’s Bench, Comon Pleas, & Exchequer within their Majestyes Kingdome of England,

94. 1 NY Col Laws 227.

95. *Id.* at 228.

have or ought to have,"⁹⁶ for judgments in excess of £20. From the Supreme Court, appeal by error lay to the Governor and Council for judgments over £100, and from there to the King in Council for judgments over £300.⁹⁷ These arrangements for the lower courts of the province also aided the imposition of anti-Leislerian control. The broad range of powers given to the appointed Justices of the Peace, both as quasi-independent magistrates in the towns and as the aggregate Bench at Sessions of the Peace and Common Pleas, put the anti-Leislerian party in alliance with the Governor fully in charge of the administration of justice at every level.

The overall effect of anti-Leislerian judicial reform was to advance very significantly the process of legal homogenization throughout the province. Not only the creation of the Supreme Court, to be "Duely & Constantly kept att the City of New Yorke and not Elsewhere,"⁹⁸ reduced the geographical heterogeneity of the court system—the county structure adopted in 1683 now had associated with it a uniform system of larger trial courts, to which the Mayor's Courts of New York and Albany were finally assimilated. Regional differences in the basic institutions had, at least formally, come to an end.

A similar process with respect to the sources of the law can also be glimpsed in the events of 1691. For the first time, the jurisdictions of the courts were specifically demarcated according to the bounds of something called the common law,⁹⁹ which is

96. *Id.* at 229.

97. *Id.* at 230-31. A reasonably comprehensive view of the resulting court structure in New York is provided in Note, *Law in Colonial New York: The Legal System of 1691*, 80 *Harv. L. Rev.* 1757, 1761-69 (1967). Some caution should be expressed regarding the author's claim that the 1691 act amounted to "reception" of the common law, a point dealt with below.

98. 1 *NY Col Laws* 229.

99. There is a single reference to causes at common law in the judiciary act of 1683, in the definition of the jurisdiction of the courts of oyer and terminer, see 1 *NY Col Laws* 127, in order to distinguish its jurisdiction from that of the Court of Chancery, which was limited to causes at equity. The purpose seems to have been to use familiar words to limit the jurisdictional reach of the Governor and Council. Reference to common law was also made in the

referred to in vigorous language as a system administered by royal courts in England. For those who occupy themselves with the recreation of seeking the magic moment of “reception” of the common law, the language of the 1691 act may seem like the Holy Grail. Such an interpretation is too sweeping. Technical questions about which laws were in force in New York, and how they came to be that way, would persist throughout the eighteenth century; they could not be resolved, at least in the minds of the men who argued about them, by reference to a single event called “reception.” But if the 1691 act is not in itself this instantaneous process of reception, it is an important, indeed dominant, signpost of another more gradual process called Anglicization. Leisler’s Rebellion marked, among other things, the last attempt by the Dutch to retain a leading role in the culture, society, and government of the province.¹⁰⁰ The anti-Leislerian ascendancy comprised Anglo-Dutch merchant oligarchs like Bayard, Van Cortlandt, and Philipse along with the figures of English influence, but the language in which it did business, including the business of governing, was English. To describe the law and its administration was now an exercise in the use of English terms, and these brought along with them more firmly than ever the entire extensive suite of intellectual baggage which it is the human genius to pack into language. At the highest level of description, where legislators, governors, and royal managers wrote and read, ethnic privilege for the English gave the appearance that homogeneity had also been achieved in the law of New York.

The judiciary act of 1691 brought to a close the first period in the legal settlement of New York. From the administration of Nicolls in 1664 to the administration of Sloughter in 1691, the system seems, as we follow its development in the official records, to coalesce. In stages, the heterogeneities of region and ethnicity which posed such obstacles to Nicolls are smoothed

Charter of Liberties and Privileges, in connection with the declaration of property law principles, which are discussed in Chapter 3, *infra*.

100. This conclusion is well expressed and sensibly argued by Robert Ritchie. See **R. Ritchie**, *supra* note 35, at 238.

away. The processes of institutional and intellectual centralization do not proceed in parallel, nor are they uninterrupted, but measured by its endpoints over three decades, the process revealed by the records is coherent and comfortingly rational.

In one sense, this picture is accurate. The period from 1664 to 1691 does exemplify the process of legal settlement in both its aspects. Institutions did appear and flourish, populating a legal space previously empty, and this is the first meaning of settlement. In addition, those institutions did participate in reconciling differences of region and culture, tending towards the establishment of a homogeneous system of legal entities institutional and doctrinal. The process of reconciliation was not ultimately peaceful, for Anglicization involved the imposition of substantial social pressures; one resultant of those Anglicizing forces is the explosion known as Leisler's Rebellion.

Yet this story of settlement, like the alternative, unreal story of reception, is too neat, too rational, too little affected by contingency. Beneath the surface, as we have seen, the events which in the aggregate make up the outline of the smooth process of settlement are seen to be much less systematic. The settling of a legal culture, seemingly determined, appears instead to result from political, strategic, and economic contingency. Elements of technology contrived for one purpose were adapted to another, while the aleatory juxtapositions of metropolitan and imperial politics drove the unsystematic system in unanticipated directions. At the scale of generality in which we are left by the sources themselves, it becomes impossible to give abstract reasons for the phenomena of the law. Instead of imagining that, like lawyers, it is our business to explain why things had to be as they were, we must be prepared to content ourselves with a sufficient story about how they came to be.

The settlement of the courts in the 1690s was one half of the development in the legal system's social institutions. Though the process of structuring the courts was largely complete by 1700, the development of the legal profession—the cadre that

advocated for clients and sat as judges in the courts—was just beginning. The development of the provincial Bar revealed another set of contingent relations between local and Imperial politics and the evolution of the legal system. Political and constitutional controversies that seemed to have been resolved in the settlement of 1691 recurred under altered conditions. Ultimately it was the social cohesion of the lawyers that prevented disruption of the legal system in those renewals of controversy. The history of the New York Bar from 1691 to the coming of independence completes our picture of the settlement of the provincial legal institutions.

Chapter 2

A Settled Profession: the Provincial Bar

The institutional aspect of legal settlement in the province of New York involved more than the establishment of the courts. Integral to the process of settlement was the development of an indigenous legal profession—a cohort of specialists, differentiated from the rest of the community, capable of performing in and administering the institutions of the legal system, and collectively and individually reaping the profits of justice in the form of fees in office and as advocates in the dispute-resolution system. The progressive articulation of the elements of a self-renewing legal profession is a central theme in the story of legal settlement; with its completion the process of institutional settlement may be said to have reached its fulfillment.

The development of the legal profession over the course of the provincial period presents two primary themes. The first might be called the “localization” of the profession, as the New York Bar changed in distinct, largely generational stages from a purely immigrant cadre of unregulated practitioners to a locally-trained collection of counsel who by and large had inherited or expected to pass on their practices. The second primary theme, closely related to the first, is the political and intellectual coalescence by which this increasingly localized cadre also became an internally organized guild capable of resisting external

political control, intellectually developed enough to regard its doctrine and practice as distinctively New York, rather than English or British, law.

The formation of a legal profession in New York, as so much else, proceeded from English roots, and with less ambiguity of origin than was true, for example, with respect to the land law or the mechanisms for the settlement of commercial disputes. But while the construction of the Bar was in the first instance a major component of the Anglicization of the province, the domestication of the legal community contributed over time to the New Yorkers' recognition that they occupied a society distinct from that of the metropolis. Dependence on English ideas and personnel on the one hand, and continuous immersion in the fiercely partisan political life of the province on the other, were the basic underlying conditions within which the social and professional development of the Bar took place.

In the beginning, the words were English. To a greater extent than in the substantive areas of doctrine, events and institutions prior to 1664 had little influence over the early contours of provincial development. Neither the strengths nor the weaknesses of Dutch public administration—that is, neither the preference for dispute resolution by *goede mannen*, nor the tendency toward dictatorial control by directors-general from Kieft to Stuyvesant—encouraged the development of specialist lawyers in New Amsterdam,¹ while the New Englanders trans-

1. This statement does not imply the complete absence of Dutch lawyers from New Netherlands. Management under the Dutch, as under the English, required officials for the dispatch of legal business, and several advocates and notaries (the civil law equivalent of attorneys at law) were prominent in the affairs of New Amsterdam. In this connection one might mention Adriaen Van der Donck, who in 1653 was granted a license to practice as an advocate in New Netherlands, after having recited his law degree from Leyden and his admission to the Bar in Holland. See P. Hamlin, *Legal Education in Colonial New York* 84 n.3 (1939). Notary Allard Anthony was one of the wealthiest citizens of New Amsterdam at the time of the conquest and, as part of the policy of conciliation of Dutch institutions in the first years of English rule, was the first sheriff of New York City. Most of the small legal fraternity of New Amsterdam responded differently to the events of 1664; at least two of the city's notaries, Dirck Van Schelluyne and Lodewyck Cobes, moved to Albany and the surrounding Dutch com-

planted to Long Island, with their town courts and lay officials, shared the ambivalence concerning professional lawyers so marked in the life of the Bay Colony from which they sprang.² The image of unpopulated legal space from which settlement begins more succinctly expresses the professional environment of the new province than any other of its legal elements.

Dearth of population was the essence of the problem. Accompanying Richard Nicolls on his expedition in 1664 were three trained members of the English Bar, of whom Matthias Nicolls was to exercise the most important long-term influence on the legal life of the colony. These three constituted the entire corps of trained English talent in the new province, and a shortage of educated lawyers would prove to be one of the most significant environmental constraints on the institutional structure of the provincial legal system. The dominant importance of lay justices throughout the provincial history of New York has already been remarked.

Establishment of a system for English governance of the province under Nicolls, Lovelace, and Andros proceeded, as we have already seen,³ in a pattern of slow replacement of diversity by uniformity, both of institutions and of doctrine. This process, not surprisingly, concentrated the tiny coterie of English-trained lawyers at the center of the system, close to the person of the Governor and the institution of the Court of Assizes, which provided the only degree of legal uniformity of which the government was initially capable.

Even at the center of the system, the small size of the professional cadre dictated the absence of any institution that might be called a Bar, that is, a group of professionalized counsel available for retention by private parties for the prosecution or

munities. For an account of the Dutch legal community in the transition to English rule, see 5 J. Sullivan, *History of New York State, 1523-1927*, at 1874-90 (1927).

2. See G.L. Haskins, *Law and Authority in Early Massachusetts* 186 (1960).

3. See Chapter 1, *supra*.

defense of litigation. The records of the Court of Assizes available for the period from 1680 to 1682, for example, show only occasional references to the appearance of attorneys for parties, and many of these are cases in which the “attorney” is an attorney-in-fact.⁴ The pool of legal knowledge was small enough to require the participation of all the lawyers on the Bench and on the staff of the Court; thus in a 1682 case where the provision of legal counsel was a necessity of foreign policy, because a local sachem wished to bring an appeal of an adverse property determination, the Clerk of the Court, John West, was appointed “to manage and Plead this Cause in the Behalfe of the Indians.”⁵

That such a situation prevailed at the center of the province’s legal life implies, of course, an even more profound absence of lawyers elsewhere. The records of the Westchester County Court of Sessions show no participation by attorneys until well after 1690, for example, and while the withdrawal of a few trained Dutch advocates into their hinterland estates may have slightly improved the availability of counsel in the upper Hudson River Valley, where lawyers had been nonexistent before the conquest,⁶ the records are too scant and too scattered for the effect to be clearly observed.

The absence of a professional Bar comprised of persons trained in the institutions of the English law does not imply the absence of seasoned litigators. Men of affairs, merchants primarily, conducted their own litigation, and in their guises as executors, husbands, and attorneys-in-fact for correspondents abroad, for others as well. In this sense, the very phrase “legal profession” conveys a deceptive message, for a system which relies as heavily as the province did on lay justices can be expected to have lay institutions functionally equivalent to the Bar. The surviving records of the Court of Assizes contain no orders of admission or other proceedings for the regulation of

4. See *Proceedings of the General Court of Assizes*, NYHS Colls 1912, at 5, 7, 8, 19, 31, 32.

5. *Id.* at 32.

6. See *supra* note 1.

practice, and the earliest petitions for admission to practice followed the reorganization of the judiciary in 1691. For some purposes, therefore, it may make sense to conceive of the legal culture of the 1670s and '80s as one in which the business of lawyering was indistinctly divided from the other activities of merchants.

If the situation in the first twenty years of English rule in New York could be characterized as a virtual monopolization of trained legal assistance by the government, the political upheavals in New York at century's end altered the balance somewhat. The polarization of the provincial elite that followed Leisler's Rebellion had the effect of destroying the fragile coherence of the system that had made public use of the scarce intellectual resources available. Also taken into custody at the time of Edmund Andros' arrest in Massachusetts, for example, were three of New York's more distinguished English-trained lawyers—John Palmer, John West, and James Graham, Attorney-General of the Dominion. Graham was the only one of the three who succeeded in rehabilitating himself in New York, where, as we have seen, he was the Speaker of the anti-Leislerian Assembly and the major drafter of the Judiciary Act of 1691. But the initial disruptions of institutions and personnel were less significant for the development of the legal profession in New York than was the prolonged period of partisan rancor and retributive machinations that followed.

Other aspects of the legal consequences of the Leisler crisis have already been considered, but it is important to remark the particular effects on the lawyers of the province. The division of the provincial political society into two mutually antagonistic camps, engaged in warfare on all fronts including the courts, grafted a strongly partisan structure onto the roots of the nascent profession; after 1689 there was always a faction of the provincial legal coterie that was "out," excluded from office and influence. The pattern of New York political life—fully realized in later decades when, under Lewis Morris and James DeLancey, the provincial Supreme Court became a primary locus of opposition

to the regnant Governor—was formed in the Leislerian era. Long before the profession had become large enough and sufficiently intellectually robust to serve both the needs of administration and the needs of private litigants, the provincial government lost the ability to secure for itself a sufficiently coherent system of representation in its own courts.

The second major consequence of post-Leislerian polarization was that it prevented the coalescence of the Bar as a self-conscious professional interest group. A small professional monopoly in a community with a rapidly-expanding population of course enjoys substantial potential economic power; as we shall see, attempts to organize the monopoly and realize that power were a repeated phenomenon of the eighteenth century. But such efforts were unavailing in the twenty years following the Glorious Revolution and Leisler's Rebellion.

Although there was no structure of internal Bar discipline, access to the profits of litigation was controlled in some respects. Although no explicit order of the new Supreme Court setting requirements for the right of audience has survived, it appears to have been understood that permission to practice in the Supreme Court depended upon the issuance of a license by the Governor and examination by members of the Bar of the Court.⁷ The earliest surviving petition for the right to practice dates from 1695,⁸ and the endorsements on the document reveal that after the license was granted by Governor Fletcher after an examination of the applicant's qualifications was undertaken by two city practitioners. There is every reason to suppose, notwithstanding the particular success of William Huddleston in surviving the examination process, that Benjamin Fletcher

7. This restriction upon practice seems to have developed out of an order of the provincial Council entered in January 1683/4 that prohibited inhabitants of other colonies from pleading in the New York courts without license from the Governor. *See* 5 **Cal. Couns. Mins.** 41. The legal effect of that order was noticeably narrower than the general limitation on practice that seems to have been read into it.

8. 39 NY Col MSS 194, Hamlin App. III.

granted licenses to practice as he granted so much else in New York that lay within his power—in order to collect the fees.

In this context of a largely unregulated Bar riven by factionalism and hostility to the established government, the structure of the provincial legal profession became a problem for the imperial managers at Whitehall. The precipitating cause was the stream of complaint addressed to the Board of Trade by the Earl of Bellomont. Fletcher's successor in the Governorship endeavored to reduce the large grants of land, and associated political influence, that Fletcher had bestowed upon his anti-Leislerian supporters in the province.⁹ From the very beginning of his tenure, Bellomont grasped the importance of a renovated legal profession to the successful administration of justice and restoration of political order in the province. In December 1698, scarcely more than six months after arriving in New York, Bellomont wrote to the Lords of Trade:

... I have yet a business of greater consequence to apply to your Lordships about than anything I have hitherto writ to you of; which is the administration of justice [which] is the very soul of government, goes upon crutches in this Province, and deserves your Lordships immediate care and redresse above all things whatsoever.

Colonel Smith one of the Council is Chief Justice of the Province, but is no sort of Lawyer having been bred a soldier. He is a man of sense and a more gentleman like man than any I have seen in this Province, but that does not make him a lawyer. ... As to the men that call themselves lawyers here and practise at the Bar, they are almost under such a scandalous character, that it would grieve a man to see our noble English laws so miserably mangled and prophaned. I do not find that any of them ever arrived at being an Attorney in England. So far from being Barristers, one of them was a Dancing Master, another a Glover by trade, a third which is Mr Jamison was condemned to be hanged in Scotland for burning the Bible and blasphemy ...

9. See Chapter 3, *infra*.

and there are two or three more as bad as the rest; besides their ignorance in the law, they are all, except one or two, violent enemies to the government, and they do a world of mischief in the country...

Now that there is a prospect of doubling the revenue I am humbly of opinion we ought to have good Judges sent from England and King's Council to mind the interest of the Crown.¹⁰

Bellomont's facts were a trifle exaggerated; several barristers practiced in New York in the latter 1690s,¹¹ and if a dancing master had turned solicitor somewhere in the colony he did so without leaving a record of his passing. The themes of his argument, however, appropriately summarized the difficulties for administration posed by the state of the profession. Not only did the political polarization of the profession deprive the Crown's government of necessary legal assistance, it also threatened the credibility of the courts. Tangier Smith, conscientious and diplomatic as he was, could not be made to fit the role of Chief Justice in the English mold. And the achievement of Englishness, as the passage makes clear, was much on Bellomont's mind. Just as the Judiciary Act of 1691 had expressed the Anglicization of institutions and doctrines, Bellomont's desire for Whitehall intervention in the shaping of the New York legal world expressly looked to ending the "mangling" of "our noble English laws."

Perhaps the most important element in the situation, from Bellomont's point of view, was the need for a professional structure that would provide adequate legal resources for government. Along with the appointment of professional judges for the Supreme Court, Bellomont's major desideratum was a trained and loyal Attorney General. Loyalty may have been as much in his mind as training, to be sure, for in James Graham the Governor possessed a trained and seasoned counsel, who was,

10. Bellomont to Lords of Trade, December 15 1698, 4 NY Col Docs 441-42.

11. At least the following: John Guest, William Nicolls, James Emott, John Tudor, and Barne Cosens, all King's Council. See P. Hamlin, *supra* note 1, at 9 n.18.

however, politically unwilling to make war on the newly-created manors. "If your Lordships," Bellomont again advised the Lords of Trade the following summer, "will send over a good Judge or two and a smart active Attorney Generall, I will God willing ... breake all these Extravagant Grants."¹²

Bellomont's advocacy of change, echoed by his supporters in the General Assembly, was heeded in the metropolis, and the first years of the eighteenth century saw a deliberate attempt by Whitehall to increase the professionalism of the law officers of the province, beginning with the appointment of William Atwood as Chief Justice and Sampson Shelton Broughton, former librarian of the Middle Temple, as Attorney General in 1701. Atwood participated fully and intemperately in the political warfare of the day, playing the leading role in the 1702 treason prosecution of leading anti-Leislerian Nicholas Bayard and his political ally, John Hutchins, a venture in political persecution that ultimately cost him his office.¹³

The Atwood fiasco was not the conclusion of Whitehall attempts to professionalize New York's legal system. The next Chief Justice, John Bridges, was a distinguished bencher of the Middle Temple before his appointment in 1703, but his premature death after less than two years' service raised Roger Mompesson, originally sent from England in 1703 with a commission in admiralty and added to the Supreme Court Bench in 1704, to the central position in the province's legal life. He remained Chief Justice until 1715, uniformly admired for his ability, preeminently

12. Bellomont to Lords of Trade, August 24 1699, 4 *NY Col Docs* 549.

13. An account of the trial in *R. v. Bayard*, descended from a record made by the defendants' supporters, can be found in 14 *State Trials* 471. Atwood anonymously published in response *The Case of William Atwood* (1703), reprinted in 13 *NYHS Colls* (1880). For a discussion of the legal events surrounding the trial and its result, see **J. Goebel & T. Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure, 1664-1776***, at 83-85, 274-76 (1944). The convictions of Bayard and Hutchins were appealed to the Privy Council, which reversed and ordered the suspension of Atwood. See 9 *Cal Couns Mins* 226 (order of May 6 1703). Atwood left office and the province in disgrace. Attorney General Broughton, who had sought to prevent the prosecutions, stayed on.

a figure of that social stabilization associated after 1709 with the administration of Robert Hunter.

The transfusion of English expertise into the provincial legal profession represented by Broughton and Mompesson was accompanied in the early years of the century by the development of a native-born and English-trained cohort of young lawyers. The first native New Yorker to seek legal training at the Inns of Court was Robert Livingston, Jr., son of the First Lord of Livingston Manor, who apparently joined the Middle Temple in November 1706.¹⁴ Others followed soon after, as the mercantile and land-owning élite of the province began to educate their sons to the gentlemanly and useful profession of the law.

By the end of the first decade of the eighteenth century, then, the situation of the legal profession in New York was distinctly different from that prevailing ten years earlier. A corps of English lawyers and judges had infused greater professionalism into the courts, while a new generation of English-trained New Yorkers began working their way toward the forefront of the Bar. The slow process of social recovery from the polarization and factional conflict of the post-Leisler period began to bear fruit, and the general tone of Augustan calm that so distinguishes the era of Robert Hunter amid the generally apoplectic tone of eighteenth-century New York politics can be found, as well as elsewhere, inside the purlieus of the profession. One consequence of the more amicable atmosphere appears to have been the first opportunity for serious attempts to bring about a self-conscious professional organization. The formation of the Association of the New York City Bar in 1709/10 apparently marked a new stage in the cohesion of the profession; although the existence of the organization is attested by only a single document,¹⁵ and the nature and duration of its activities

14. Some caution is necessary, owing to the large number of Livingstons named Robert in each generation; it may have been his cousin. As Mark Twain said of the authorship of Shakespeare's plays, either it was he or someone else of the same name.

15. ms. ABCNY

are obscure, the Association represents the beginning of the long process by which the Bar asserted economic and professional discipline over the practice of law. Whatever the effectiveness of this first attempt, it was the precursor of many subsequent and highly visible measures directed at monopolizing the profits of justice for a licensed few.

Despite the substantial changes occurring in the first two decades of the century, the composition and distribution of the provincial legal profession impeded the formation of a stronger organization than the 1709 association. So long as there remained at the head of the profession English lawyers sojourning in New York as holders of Crown patronage, the Bar had an expatriate tone. New York was an interlude, though not necessarily brief or unimportant, in a career conducted with England in mind. Such lawyers and judges, like colonial legal administrators in other parts of the British Empire at other times, had less incentive to establish strong professional associations than native lawyers who hoped to build a practice that could be passed on like any other business. Many of the province's most able lawyers in this period returned to England after a period of office-holding or other labor,¹⁶ and whatever their other contributions to the development of the provincial legal order, they exerted little effort toward the long-term organization of the Bar.

For the younger generation of New Yorkers, mostly native but English-trained, who came to the Bar between 1710 and 1720, however, the law practices they built were the foundation of a lifetime's prosperity, to be preserved if possible to future generations. Not all of this new breed were, like the Robert Livingstons, members of New York's de facto aristocracy, adding another brick to the wall of the family fortune. Some—among

16. For example Leigh Atwood, who returned in 1705 after four years in New York; Barne Cosens, who departed in 1706 after nine years; John Rayner, who left in 1720 after twelve years as Attorney-General; Sampson Broughton, son of Attorney-General Sampson Shelton Broughton, who remained in practice in New York for six years after his father's death, and then returned. One should also take into account those lawyers, like the elder Broughton and Roger Mompesson, who died in New York during their term of office, but who evidently intended an eventual return home.

them James Alexander, one of the most distinguished—were not natives, but they were immigrants rather than sojourners, building practices they hoped would outlast their time.

This new generation of counsel came of age in the period after 1720; by the end of the decade they were, if not dominant, formidable in the profession. Such names as those of Alexander, Joseph Murray, William Smith, John Chambers, and Abraham Lodge are to be met with everywhere in the records of the Mayor's Court and Supreme Court in the latter '20s; by a rough estimation, more than half the business in the New York City Mayor's Court between 1728 and 1731 was conducted by men inactive ten years earlier.¹⁷ These younger lawyers were in the best possible position to profit from the increasing wealth and population of the province; they had the strongest possible incentives to control access to the profession beyond the limitations imposed by the nominal requirements of licensing and examination. It is not surprising, therefore, to see beginning in 1729 intense and substantially successful attempts to make the Bar's monopoly a better disciplined and more exclusive one.

The agreement entered into by six of New York City's most prominent lawyers in the summer of 1729 marked the beginning of the process. Like most agreements in restraint of trade, this one justified itself by proclaiming its obvious benefits to the consumer:

We the Subscribers taking into Consideration the great Number of persons who lately have obtained Licenses to practise the Law, and many others who are endeavoring throughout the province, or propose to obtain them, Several of whom are not sufficiently qualified for that business, and as they depend thereon for their Subsistence they naturally must as in fact they do, use low and undue methods for acquiring business to themselves which does & must tend to stir up litigious Suits and by their want of Capacity the Subjects are

17. This is the result of a crude frequency count of the names of counsel appearing in the Mayor's Court minutes for the periods 1718-21 and 1728-31.

deceived abused and mislead ... will reflect a general Odium on the profession of the Law ... have come to the following Articles of Agreement....¹⁸

In order to prevent the triumph of low and undue methods, and to save the profession of the law from general odium, the projectors imposed a simple solution:

That when any practitioner who has obtained his Licence since the last day of June 1725 is employed in any Cause We or either of Us shall not directly or indirectly be concerned on that Side, by advice or otherwise and if any such practitioner or his Client or any other person shall apply to either of us to be concerned [we] shall absolutely refuse to be concern'd ... & immediately send word thereof to the rest of us.¹⁹

However stereotypical the self-serving announcements of public benefit from monopolization may seem, the 1729 agreement represents a crucial stage in the formation of New York's Bar. Measures to restrain the growth of the Bar were now imaginable where a generation before the wish had been for the importation of more English lawyers. But the practitioners framing this wish, experiencing at first hand the economic incentives to a closer organization of the guild, were only able to bring to bear weapons of non-cooperation with their new profit-reducing colleagues; they did not adequately control the mechanisms of access to the profession. The projectors of the 1729 agreement had no power to change criteria for admission to the Bar, nor were clerkships in their offices the primary method of legal education. Their agreement, attempting to implement controls by a form of collective self-help, draws a clear portrait of the impulses of a mature Bar without the concomitant institutions. All but one of the parties to the 1729 agreement were

18. Agreement dated July 28 1729, Jay Papers, Box 3, 16-V (NYHS); see P. Hamlin, *supra* note 1, at App. IV, 158.

19. *Id.*

members of the new generation;²⁰ out of their impulse were to come the institutions their elders had left unbuilt.

If the non-cooperation policy embedded in the 1729 agreement seems to our eye unlikely to have achieved its end, the new generation at the New York City Bar had other measures in mind. If the Bar itself had insufficient control over its membership, why not turn to the political process? The Montgomerie Charter, which established a new frame of government for New York City in 1730, contained an extraordinary victory for the new generation lawyers—the right of audience in the Mayor’s Court was limited to eight named lawyers (five of whom were signatories of the 1729 agreement). The Governor was to have the power to appoint successors, but only when the number of members of this club dropped below six.²¹ This patented monopoly of practice in the major court of first instance in New York City formally persisted for fifteen years, despite increasing public execration.²²

Taken together, the 1729 agreement and the Montgomerie Charter indicate the position of the Bar in the early 1730s. The younger generation of New York lawyers, mostly native-born and foreign-trained, had grown into their maturity as competent managers of the increasingly profitable business of litigating the mercantile and real estate interests of the provincial élite, among them the lawyers and their families. But their attempts to control the profession itself by exertion of internal authority failed, primarily as a result of the insufficient institutions for bringing

20. William Smith, Samuel Clowes, Jr., Joseph Murray, James Alexander, and John Chambers. The only exception was Henry Wileman, who was in fact on the verge of retirement from practice in 1729, and whose inclusion smacks of an attempt to enlist an elder statesman on the side of the young turks.

21. The charter is reprinted in 2 *NY Col Laws* 575-639. The exclusive right to practice in the Mayor’s Court “during good Behaviour” was granted to James Alexander, Joseph Murray, John Chambers, William Smith, George Lurting, William Jamison, Richard Nicolls, and Abraham Lodge. *Id.* at 625.

22. See An Act for taking Affidavits in the Several Counties within this Colony to be made use of in the Supream Court, & Impowering the Attorneys of the Supream Court, to Practice in the Mayors Court of the City of New York, May 3 1746, 3 *NY Col Laws* 546, 547-48.

that authority to bear. The result was reliance on external political processes to shape the profession. And in New York, at any time during the colonial period, reliance on the political process meant dependence on the remarkably fractious vagaries of local politics. The 1730s, unlike the preceding period, were a superlatively fractious time, not least for the Bar.

The alignment of factional politics in New York during the 1730s owed much to the economic hard times on which the province had fallen, and even more to the political imprudences of Governor William Cosby. Promotion of the Philipse-Van Cortlandt interest in the province, including the appointment of the young James DeLancey to a seat on the Supreme Court during the Governor Montgomerie's tenure, had begun the process of alienating Lewis Morris from the administration. Cosby unwisely widened the rift, ultimately raising opposition in New York too powerful for any governor's safety. But Morris's position as Chief Justice of the Supreme Court presented, as at other times in the provincial history, the possibility that the judiciary itself could become the center of political opposition. Cosby's gravest mistake, and one on which he embarked immediately upon arrival in the colony, was to throw the legitimacy of the courts into question. Reviving dispute over the weaknesses of the legal establishment left over from the end of the preceding century, Cosby managed to turn the legal profession of the province into the battleground of partisan controversy. Although traditionally associated with the name of an otherwise obscure printer, John Peter Zenger, the true bearing of the struggle waged between Cosby and the Morrisites was over the role of Bench and Bar in provincial politics.

The trouble began in William Cosby's design to use his gubernatorial privileges to repair his personal fortunes.²³

23. The best account of the events surrounding the Zenger trial is found in Stanley Katz's editorial introduction to **James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger** 1-33 (S. Katz ed. 1963). Some additional material of value is contained in the contemporary history of William Smith, Jr., whose father was one of the major actors in the drama. See **W. Smith, Jr., The History of the Province of New York** 3-21 (M. Kammen, ed. 1972). See also Eben Moglen, *Considering Zenger: Partisan*

Immediately upon his arrival, Cosby claimed from Rip Van Dam, who as senior member of the Council had been acting as Governor, half of the salary Van Dam had collected in that office. This arrangement for division of the salary was contemplated in Cosby's instructions, but had not always been observed in New York. Van Dam, who had received slightly under £2,000, offered to divide with Cosby if Cosby would split the £6,400 he had received as perquisites of office before leaving England. This offer was presumably meant to be declined, but Cosby was unwise enough to refuse the hint it contained, and commenced a suit on his claim. Hoping to avoid a New York Supreme Court jury, which was unlikely to support a new and already unpopular governor against the dean of the mercantile aristocracy, and patently unable to bring suit in Chancery, where he would have presided as judge in his own case, Cosby chose instead to revive the exchequer jurisdiction of the Supreme Court, where he might have the advantage of non-jury trial before a Bench containing supporters enough to offset the hostility of Chief Justice Morris.

Exchequer jurisdiction had been exercised in New York before 1691,²⁴ and the Judiciary Act, as we have seen, specifically included words granting the traditional exchequer jurisdiction to the Supreme Court, but the official position was that legislation could not create courts, and in December 1732 Cosby therefore chose to establish an exchequer term of the Supreme Court, for the sole purpose of suing Rip Van Dam, by an ordinance of Governor and Council.²⁵ In April 1733, the Supreme Court heard Van Dam's counsel argue the absence of jurisdiction. The two pro-Cosby Justices, Philipse and DeLancey, decided in favor of the jurisdiction, over the dissent of Morris, who took the unfamiliar and therefore drastic step of publishing his opinion, denying the Governor's authority to establish a court of equity in

Politics and the Legal Profession in Colonial New York, 94 *Colum. L. Rev.* ?? (1994).

24. See 3 *NY Col Docs* 390.

25. See *Cal Couns Mins* 318-19.

the province by prerogative order.²⁶ Cosby's response was to remove Morris from the Bench, raising James Delancey, then twenty-nine years old, to the position of Chief Justice.

By this act, Cosby declared war to the knife on Lewis Morris and his allies, and threatened, for the first time since 1691, to destroy even the appearance of independence in the provincial judiciary. Morris and his allies, the lawyers James Alexander and William Smith, Sr.,²⁷ immediately began a campaign of political polemic intended to create "formed opposition" to the Government, centering around the issues of impartial administration of justice and the independence of the judiciary. Morris and his son were elected to the Assembly in November, despite skulduggery by the returning officer, and a Morrisite slate captured the New York City Common Council in October 1734. A war of pamphleteering ensued, opposing the Morrisite's *New York Weekly Journal* to William Bradford's *New York Gazette*, which acted as the administration's organ. The *Journal*, largely written by Alexander, was printed by John Peter Zenger, an emigrant from the German Palatinate and one-time apprentice to Bradford. Cosby, declaring to his English interest at the Board of Trade and

26. Morris, *The Opinion and Argument of the Chief Justice of the Province of New-York, concerning the Jurisdiction of the Supream Court of the said Province, to determine Causes in a Course of Equity*, 55 **New Jersey Historical Society Proceedings** 89-116 (1937).

27. William Smith, Sr., had arrived in New York in 1715, at the age of eighteen, when his father, a middling tradesman from Buckinghamshire, brought his family to the province in the hope of social and economic advancement. William Sr. was sent to Yale, whence he emerged with his A.B. in 1719. He was admitted to the New York Bar in 1724, went to London, and returned in 1727 a member of Gray's Inn. This, at any rate, is how it appears. Paul Hamlin expresses the opinion that some of the Inns were, in the course of the 1720s, permitting young lawyers residing in America to become members without eating their dinners, and believes Smith to have remained in New York throughout the period. See **P. Hamlin**, *supra* note 1, at 19. No documentary evidence of which I am aware definitively resolves the question of Smith's residence in London, nor is there any formal sign that Gray's Inn or Middle Temple dispensed with residency requirements for Americans in the 1720s. In any event, by the time he signed the 1729 association agreement aimed at all counsel admitted to the Bar more recently than himself, Smith had built a substantial practice centered around routine commercial litigation in the Mayor's Court, and together with Alexander was an influential member of the Presbyterian political grouping generally associated with the interest of Lewis Morris.

to Newcastle himself that the “virulent” and “seditious libels” of the *Journal* were intended to provoke him “to justify the proceedings of the court, my own conduct, and His Majesty’s authority, which ought not to be prostituted to the censure of the mob,”²⁸ sought to silence the opposition press by prosecution. DeLancey’s repeated attempts during 1734 to procure a grand jury indictment of Zenger failed—no grand jury empanelled in the city would cooperate. When Cosby arranged for the Council to seek the Assembly’s concurrence in the public burning of four issues of the *Journal*, the Assembly refused to comply. Finally, Cosby resorted to the most ham-fisted possible measures consistent with even a show of legality. He had Zenger arrested on the order of the Council alone, and had the compliant Attorney-General, Richard Bradley, bring a prosecution by information in the Supreme Court. DeLancey, at Zenger’s bail hearing, announced to the spectators in Court that “if a jury found Zenger not guilty, they would be perjured.”²⁹ On April 15 1735, Smith and Alexander, acting on Zenger’s behalf, pled absence of jurisdiction in the Supreme Court, claiming that the judges’ commissions were invalid, among other reasons, for not providing tenure during good behavior, thus renewing their prior objections in the exchequer proceeding against Van Dam. On April 16, the Chief Justice, clearly enraged by the tone of Zenger’s defense, said in court “You [Alexander and Smith] thought to have gained a great deal of popularity and applause by opposing this Court as you did the Court of Exchequer, but you have brought it to that point that either we must go from the bench or you from the bar,” and entered an order disbaring Zenger’s counsel.

Whether the Chief Justice’s measure was the result of his own youthful intemperance, or an intrinsic part of the Governor’s counterattack, it brought openly into view the critical weakness of

28. For Cosby’s letters to the Board, the Lords of Trade, and Newcastle, see 5 NY Col Docs 974; 6 NY Col Docs 5, 7, 21.

29. Or so Smith and Alexander claimed. See **The Complaint of James Alexander and William Smith to the Committee of the General Assembly of the Colony of New York 14 (1736)**.

the province's legal system. The Bar, without the internal cohesion of a mature professional guild, and thus dependent on the external political institutions for its privileges and internal structure—as exemplified by the use of the Montgomerie Charter to establish a lawyers' monopoly in the Mayor's Court—had no base from which to resist dissolution along lines of political faction, thus endangering the stability of the courts. The long-dormant dispute over the courts themselves, resulting from imperial refusal to acknowledge the constitutional status of the Judiciary Act of 1691, combined with this weakness of the profession to direct the full force of factional struggle against the institutions of justice.

Any hope of retreat from the precipice onto which Cosby and DeLancey had shoved the entire machinery of provincial justice now depended on the outcome of Zenger's trial, and his lawyers had been ejected from the Bar. Zenger prayed appointment of new counsel, and John Chambers, another of the Mayor's Court monopoly and Cosby's placeman in the office of Recorder of the City, was appointed by DeLancey. Chambers abandoned the provocative defense lodged by Alexander and Smith, pleaded the general issue, and devoted himself to the crucial question of the jury's composition. Alexander and Smith, distrusting Chambers' reliability in this highly political case, in which he stood on the other side of the factional gulf, secretly procured Andrew Hamilton of Philadelphia to conduct Zenger's trial defense, and did so without informing Chambers.³⁰

30. William Smith, Jr. says of Chambers in connection with the Zenger case that he was "more distinguished for a knack at haranguing a jury than his erudition in the law." 2 **W. Smith, Jr.**, *supra* note 23, at 19. It is probably impossible to tell, at this distance, whether Chambers was or was not a good lawyer when judged by the standards of his contemporaries. If he read the books in his law library, many of whose volumes now reside in the Columbia Law School Library, his erudition was as great as any other lawyer in provincial New York. A library list from the period *circa* 1760 is reprinted in **P. Hamlin**, *supra* note 1 at 180-81. The inventory of Chambers' library at the time of his death in 1764 is contained in the collection of his papers in the New York State Library. Smith's deprecation of Chambers' legal talent may owe more to the personal relation between Chambers and the two William Smiths than to any dispassionate estimate of his skill. Certainly it was he, rather than Andrew Hamilton, whose measures were primarily responsible for the outcome of the trial. Considering the factional

Chambers sought a struck jury, found that the Clerk had tampered with the ordinary process by which the venire was selected (the Clerk somehow mysteriously presented 24 former magistrates in the Cosby interest and tradesmen with whom the Governor did business, from whom Chambers was supposed to pick 12 petit jurors by striking) and secured an order from the Chief Justice requiring conformity with settled procedure. Chambers then picked a dozen jurors, the obscurity of whose names elsewhere in our records suggests that they were not part of the political society, and certainly were not allies of the Governor. With the selection of this jury, Chambers secured a favorable audience for Andrew Hamilton's eventual speech and brought about Zenger's acquittal.³¹

Hamilton's speech, and its defense of the proposition that jurors were judges of law as well as fact in libel cases, has been much reprinted and discussed as a seminal document in the history of free speech protections in the common-law world. Stanley Katz is surely right, however, in his judgment that "the Zenger case did not directly further the development either of political liberty or freedom of the press in America."³² From a doctrinal perspective, he is perhaps equally correct in stating that "[t]he role of the Zenger trial in the legal history of colonial New York was only slightly more significant."³³ But the Zenger trial's significance in the legal history of the province lay elsewhere. The outcome halted the slide toward partisan dissolution of the profession, and broke the back of Cosby's efforts to establish perfect political discipline over the courts. Alexander and Smith were silently restored to membership in the Supreme Court Bar in

environment, it was Chambers whose behavior more thoroughly conforms to our contemporary standard of professional responsibility than that of Smith and Alexander.

31. We can only speculate as to whether Chambers was irritated at his replacement by Hamilton on the day of trial, or whether he was merely relieved to avoid the responsibility of a politically inflammatory defense, likely to injure his chances of advancement in the administration interest.

32. Katz, *supra* note 23, at 33. The elegance of Katz's supporting argument in demonstration of this proposition cannot be surpassed, and I shall not try.

33. *Id.* at 29.

1737, less than a year after Cosby's death, and the vexing issue of the constitutional status of the provincial courts disappeared into the background for another three decades. Most importantly, the lawyers of the province took a critical step toward the creation of an independent professional community, capable of unified action in political defense of the legal system itself. The step was tentative—so much so that subsequent historians have largely missed it, distracted by the gusts of rhetoric concocted by Andrew Hamilton and James Alexander and aimed at the head of Governor Cosby. It lay in the small measures taken on behalf of a political pariah by a lawyer who, and we need not doubt William Smith, Jr., on this point, "had no inclination to serve him."³⁴ What John Chambers did in the Zenger case may not have been much, but it was enough.

In the aftermath of the Cosby administration, the generation that came to the Bar in the early 1720s took further steps to consolidate the province's legal community. No more formal measures of control were instituted in the 1730s, for which the declining economy and and heightened level of political feuding may be assigned as causes, but by the time the Mayor's Court monopoly was repealed in 1746, the most powerful measure had nonetheless occurred: without formal recognition, and perhaps without complete awareness, legal training was now primarily a local matter. Certainly study at the Inns of Court had not lost its cachet, for those capable of meeting the enormous expense entailed, but the academic environment of the Inns at mid-century was so depleted as to provide little independent inducement to a practitioner who intended to pass his professional career in the province. Young men intending a career at the New York Bar in the middle decades of the century saw a clerkship in the office of a New York practitioner as the essential educational and qualifying experience; the Inns were at best an expensive luxury, providing social standing in the

34. 2 W. Smith, Jr., *supra* note 23, at 19.

imperial order for the sons of provincial grandees just as they did for the eldest sons of the English gentry.³⁵

The domestication of the legal education system was the most important single process in settling the profession. Control over access to legal education meant effective internal control over the membership of the Bar. Law practices in New York had become, potentially at least, family businesses, in which the educational system could be turned to the advantage of sons, nephews, and other family connections. To this third generation of New York lawyers, the profession, and the very legal system of which it was a part, necessarily appeared rather differently than it had to their predecessors.

For William Smith, Jr., for example, the legal world of New York had all the familiarity and apparent solidity of the family patrimony. Born in 1728, he graduated from Yale in 1745, clerked in his father's office, and was admitted to the New York Bar in 1750. He established a partnership in the same year with one of his father's other clerks, William Livingston, and on the basis of his father's prominence, the Livingston family connection, and his own reputation for precocity was soon a successful member of the Bar.³⁶ By the end of the decade, Smith, Livingston, and John Morin Scott, also a pupil of the senior Smith, comprised the junior élite of the city legal world, as well as being closely associated in a number of political and cultural activities, including the formation of the Whig Club and the New York Society Library.³⁷ A measure of Smith's success at the Bar was his refusal of the Chief Justice's seat on the Supreme Court in 1763; the salary of

35. Of the 43 identifiable barristers who practiced in New York during the colonial period, only 12 were born in the province. See **P. Hamlin**, *supra* note 1, at App. II, 146. As best I can derive from the information compiled by Hamlin, at least 8 of those 12 were members of the Livingston family.

36. The best capsule biography of William Smith, Jr. is to be found in Michael Kammen's introduction to *Smith's History*. See 1 **W. Smith, Jr.**, *supra* note 23, at xvii-xxxvii; see also **D. Dillon**, *The New York Triumvirate: A Study of the Legal and Political Careers of William Livingston, John Morin Scott, and William Smith, Jr.* (1949).

37. See **D. Dillon**, *supra* note 36, at 13-30.

£500 was no more than half his earnings in practice, and he could not afford the place.³⁸

The education of the younger Smith was only the first of the signs that the provincial legal profession was entering its maturity at mid-century. Not only were Smith and many of his most prominent contemporaries trained in the province; the law they learned had become not English law, but the law of New York. Early in their careers, Smith and Livingston accepted the invitation of the General Assembly to compile the first official collection of the statutes in force in the province.³⁹ The fruit of their work was not an original codification, but rather a substantially accurate rendition of the text of those provincial enactments which had received the Royal Assent and were still in force.⁴⁰ Though primarily a work of textual and historical research rather than legal analysis, the *Laws of New York* represented an important intellectual development for Smith personally, and for the legal community. Smith's own interest in historical research was ignited by the project, which brought him into contact with the fundamental sources for provincial political history—five years later, at the age of twenty-nine, Smith published the first volume of his *History*, the first significant attempt to recount and analyze the development of New York. Unsurprisingly, given the training and interests of the author, events in the courts played a large narrative role in the *History*. For the larger community, the significance of the *Laws of New York* lay precisely in the successful delineation of the legal space unique to New York. The legislative canon having been authoritatively edited and produced, it now became possible to describe exactly what made New York law different from the metropolitan legal culture whence it came. If, as Julius Goebel observes, “the eighteenth century is well along before there are

38. See 1 **W. Smith, Jr.**, *supra* note 23, at xxix.

39. See An Act to revise, digest & Print the Laws of this Colony, November 24 1750, 3 NY Col Laws 832-35.

40. See **Laws of New York from the Year 1691 to 1751, Inclusive** (1752). The edition was continued in 1762, reflecting the enactments of the intervening decade.

signs that provincial law is conceived as something discrete,”⁴¹ Smith’s edition of the laws was the confirmation of the new conception. Not only had the process of settlement advanced to the point at which a map of New York’s legal space could be made, but the profession had advanced to the point of educating the cartographers.

The changed nature of the educational process in New York was not something the younger William Smith took for granted; sometime in 1756, while busily engaged in practice and working on his *History*, Smith drew up “Some Directions Relating to the Law,” actually a syllabus of study for the intending New York lawyer.⁴² Smith’s syllabus took for granted that youthful aspirants to the Bar would be largely self-educating. Smith certainly did not assume a college education as a prelude to legal study, but he began his curriculum with “the Sciences necessary for a Lawyer,” which included English, Latin, French, writing, arithmetic, geometry, surveying, bookkeeping, geography, “cronology,” history, logic, rhetoric, and divinity as well as the laws of nature, nations, and of England—in short, a liberal education. For those without the benefit of Mother Yale, Smith listed the common textbooks in each of his “Sciences.” A student’s legal education proper should begin with Wood’s *Institutes of the Civil Law*, some Puffendorf, Matthew Hale’s *History of the Common Law*, Fortescue, St. Germain, Bacon’s *Elements*, and Wood’s *Institutes of the Common Law*. “When these have been read twice or three times over with the Utmost diligence & Application,” Smith urged, the student should progress to complete Puffendorf, Grotius, Wood’s civil institutes, and Domat. Then to Bacon’s Abridgement and, ultimately, the reports.

It seems reasonable to assume that Smith intended his “Directions” for the benefit of his own clerks. He and William

41. See J. Goebel & T. Naughton, *supra* note 13, at 72.

42. Some Directions Relating to the Law, William Smith Papers, Commonplace Book, Miscellanea A, NYPL, reprinted in P. Hamlin, *supra* note 1, at App. VIII, 197-200.

Livingston evidently took seriously the obligation of education that devolved on working lawyers with respect to their clerks—following in this respect, of course, the path laid down by their own preceptor, the elder Smith.⁴³ The syllabus plainly expressed an idealization of the educative process, and one which we may suppose even Smith doubted would be fully realized in any working lawyer's chambers. But in its confident assumption that all the volumes listed would be within ready reach of a New York law student, Smith's "Directions" further expressed the intellectual and professional self-confidence felt by the leaders of the New York Bar in the mid-'50s.

The new emphasis on legal education also had an economic, guild-related function—a relationship not unknown in later ages of American law. As the Bar shifted toward manufacturing rather than importing lawyers, control of domestic output became the basic measure for ensuring the long-term profitability of the lawyers' monopoly. The year 1756 saw a renewed attempt by the city's prominent counsel to control the size of the guild; unlike the measures of 1729, the later arrangements were aimed at the number of clerks permitted to the city's practitioners, and the ease with which individual lawyers could have their clerks admitted to the Bar. The institution of control was a new association of the City Bar, formalized in November 1756.⁴⁴ These "Articles of Agreement to establish a Quarterly Meeting of the Attornies at Law in the City of New York" provided for a uniform schedule of fees and taxable costs, for which purpose a committee of six was appointed, including Livingston, Smith, and Scott.⁴⁵ But the aims of the association were not limited to the setting of fees; a

43. The strength of William Livingston's views on the subject may be surmised from a tirade on the abuses of the clerkship process published over the signature "Tyro Philolegis" in *The New-York Weekly Post-Boy*, August 19, 1745, reprinted in P. Hamlin, *supra* note 1, App. VI, 167-70.

44. See "New York City Bar Agreement," November 26 1756, ABCNY, reprinted in P. Hamlin, *supra* note 1, App. IV, 162.

45. The other members were John Alsop, Benjamin Nicoll, and Whitehead Hicks. James Duane was named the first Clerk of the Association. As in 1729, the association thus seems to have been the work of the rising stars of the profession, eager to protect their practices against erosion from below.

corollary agreement, apparently in circulation at the same time,⁴⁶ provided for stringent limitations on law clerks:

Whereas this Province is at present sufficiently supplied with Attorneys at Law, the number of which will in a few Years, if some obstruction is not given to the unrestrained admission of clerks, very greatly increase, ...

First: that no Person within fourteen Years from the date hereof [shall] be taken as a Clerk by any Attorney, with a view to have him, after his Clerkship expires, admitted as an Attorney in any Court within this Province, excepting that each of the Subscribers shall be at Liberty to take one of his Sons as a Clerk.

Secondly: That after the expiration of the said Term ... no Attorney shall take any Person for his Clerk unless such Person shall have had a Liberal Education in some University or Colledge, having resided there four years and obtained a Batchelors Degree.

In addition to these provisions, the agreement also required that every clerk pay a premium of £200 for his indentures, and serve a clerkship of at least five years. Admission to the Bar was to occur only after the applicant had been publicly examined by at least six members of the Bar, and had signed the restrictive agreement. Enforcement was to be provided by informal sanctions: "if any one of the Subscribers shall infringe ... all the rest shall treat him on all occasions with Contempt, and take every advantage against him which strict practise will admit of." The theme of professional self-confidence sounds here *fortissimo*, unrealistically. The absolute ban on the production of new lawyers unrelated to

46. This second bar agreement, dated "October 1756," is something of a mystery. The only extant copy, in the James Alexander Papers, NYHS, bears no signatures. It seems plainly to be related to the agreement executed weeks later, and is certainly the model for the 1764 agreement discussed at p. 98, *infra*, but evidence of its implementation is lacking. Perhaps the draft contained in James Alexander's files represents an agreement that fell through; certainly even if it did come into force, it was not sufficient to restrain the relevant parties, as the existence of the 1764 agreement attests.

the current practitioners was surely impossible of attainment. Similarly, almost two centuries would pass before a college degree became prerequisite to law practice in New York; fourteen years hardly provided a sufficient transition period. For William Livingston (Yale, 1741), John Morin Scott (Yale, 1746), and William Smith, Jr. (Yale, 1746), however, it undoubtedly sounded like a very good idea.

Although the 1756 clerkship agreement was impractical as a conspiracy to restrain trade, and may well have been abandoned by its own proponents, its aspirations for the educational attainments of the Bar were not quite so unrealistic. King's College began graduating students in 1758; from that point until 1776, 31 of its 119 B.A. graduates would take up the practice of law. Of King's graduates during the colonial era, more became lawyers than became doctors and ministers combined.⁴⁷ Until Smith's brilliant blind pupil Peter Van Schaack opened his law school in Kinderhook in 1786, the principle of education through clerkship would reign supreme as the only route to a place at the New York Bar for an aspiring young man, but the assumption of a liberal education upon which Smith's "Directions" rested would become increasingly better justified.

Another milestone in the consolidation of the legal profession was passed in 1758, when the Supreme Court for the first time in the province's history was composed entirely of lawyers. Chief Justice James DeLancey's brilliant youth was long behind him, and years of political machination had taken off whatever legal edge he had once possessed, but he and his successor Benjamin Pratt, along with the graying Daniel Horsmanden, John Chambers, David Jones, and after 1763 the elder William Smith, comprised a Bench whose professionalism was unprecedented in New York, or for that matter elsewhere in British North America. The elimination of lay judges from the highest court in the province was of more than symbolic significance; while professionalization of the Bench hardly

47. The raw numbers upon which these aggregations are based can be found in **P. Hamlin**, *supra* note 1, at App. I, 133.

prevented the Supreme Court from acting as a locus of political opposition in the hands of a figure like DeLancey, it went a long way toward the resolution of the problem of political legitimacy that had dogged the provincial courts throughout their history. Along with the stability brought at the same time to the roles of the Crown's law officers in the province, the changes in the composition of the Bench further evidenced the maturation of the profession.⁴⁸

The long-term problem of securing adequate legal representation for the Crown was largely resolved as a result of the professional activities of William Kempe and his son John Tabor Kempe, successive Attorneys General from 1752 through the close of the provincial era. The elder Kempe came to New York in 1752, selected as provincial attorney general over the vehement objections of Governor George Clinton, who intended the position for his ally against the DeLanceyites, William Smith, Sr. Smith was actually appointed attorney general in August 1751,⁴⁹ but as so often, New York functioned as a critical resource of trans-Atlantic patronage for the Duke of Newcastle, and Smith was promptly displaced by Kempe.⁵⁰ Kempe, a barrister of the Middle Temple, had been active in the Duke's electoral interest in Sussex, and it was for these services and expenditures that contemporaries believed, no doubt rightly, that Kempe was rewarded with the office in New York.⁵¹

Kempe was an active attorney general, not least because the new incumbent needed substantially to repair his fortunes in the office. Certainly he began his career with a burst of activity in the prosecution of misdemeanors by information, apparently in part from a desire for the resulting fees. Prosecution of offenses

48. The political stability of the Bench would not long survive the deaths of James DeLancey and George II, which opened the controversy over good behavior tenure and judicial independence, discussed in Chapter 5, *infra*.

49. See 6 NY Col Docs 766.

50. For the details of the political and patronage situation prevailing at the time of Kempe's appointment, see S. Katz, *Newcastle's New York* 191-98 (1968).

51. See 2 W. Smith, Jr., *supra* note 23, at 176.

against the revenue laws formed perhaps the most important part of this business, allowing for lucrative proceeds to the prosecuting informer and the attorney general as well as satisfaction at Whitehall. The resulting disgruntlement in the mercantile community played a substantial role in bringing about legislation limiting the power of the attorney general to exhibit informations at the instance of informers.⁵²

Kempe's apparent recognition of the utility of prosecution by information as a device for raising personal revenue was not unprecedented; similar attempts by Richard Bradley in the mid-1720s also produced a provincial statute, subsequently disallowed by the Privy Council, aimed at preventing abuse of informations. The recurrence of the controversy hints at the recurrent problem—the inadequacy of the arrangements for the fiscal support of the Attorney General. It appears that the Attorney General may have had a salary of £150 after 1733,⁵³ but it is clear that out of whatever salary and fees Kempe managed to collect he had to defray all costs of prosecution. Additional financial support for the office was a primary necessity for the further professionalization of the Crown's legal representation in the latter 1750s, just as it had been earlier, and a solution evaded Kempe during his five years in office.

When William Kempe died unexpectedly in July 1759, the office of Attorney General seemed likely to fall once again into the morass of provincial partisan controversy. Instead, in a genuinely

52. Kempe seems to have received more than two hundred complaints in his first year requesting the filing of informations in cases of assault, trespass, and other misdemeanors not primarily concerning the revenue as well. See **J. Goebel**, *supra* note 13, at 376. Smith reports the hostility of the mercantile community, and connects this sentiment with the passage of An Act to prevent Malicious Informations in the Supreme Court of Judicature for the Colony of New York, December 7 1754, 3 **NY Col Laws** 1007. See 2 **W. Smith, Jr.**, *supra* note 23, at 176. The informations controversy, and its effect on the development of provincial criminal procedure, is discussed in more detail in Chapter 4, *infra*.

53. See **J. Goebel**, *supra* note 13, at 734 n.328. Goebel's evidence for the continuance of this arrangement into the 1750s is slim, and of course it must be remembered that such salaries granted on the English exchequer were often paid in warrants on customs revenue—a most uncertain security.

remarkable development, Kempe's successor in office, appointed a mere ten days after his death, was his twenty-four year old son, John Tabor Kempe. There is some evidence that the appointment was intended in substantial measure to relieve the dire financial straits in which the elder Kempe left his family.⁵⁴ The younger Kempe studied with James Alexander, and had appeared in the New York courts on his father's business as early as 1756,⁵⁵ but his appointment was nonetheless extraordinary, and could only have been realized through the strong support of James DeLancey.⁵⁶ Initial appearances to the contrary notwithstanding, DeLancey had made a brilliant appointment. The younger Kempe served as Attorney General through the British evacuation of New York in 1783, and it was largely his energy and activity that raised the level of the Crown's legal representation in the province, despite the increasing disorder in the legal system after the mid-1760s.

Kempe's financial situation impelled him to more vigorous measures to secure additional compensation. Shortly after his appointment in 1759 he traveled to England, apparently to make good his interest with his father's patron, Newcastle, and to seek additional revenue. He returned with an annual grant of £150 sterling on the civil list;⁵⁷ in 1768 he undertook another such

54. Benjamin Nicoll apparently wrote to James DeLancey:

If young Mr. Kempe, who is left with a large family to maintain, has any thoughts of succeeding his father, I waive my pretensions totally ... on the contrary, let me ask it as a favor that he may be appointed, who, though young, has a good capacity and is already pretty well versed in the law. He has a large family upon his hands, nothing left by the father, and must be in distress.

See 1 T. Jones, *History of New York during the Revolutionary War, and of the Leading Events in the other Colonies at that Period* 31 n.1 (E.F. DeLancey, ed. 1879). I am unable to trace the original letter from which Jones quoted.

55. See *R. v. Margaret McDougall*, SCJ Mins, April 20, 1756.

56. The best description of the non-legal aspects of John Tabor Kempe's career is Crary, *John Tabor Kempe's Rise from Poverty to Riches*, 14 *William & Mary Q.* 176 (1957). For the events surrounding Kempe's appointment, *id.* at 179-80.

57. Or so he stated on his application for temporary relief in 1783. See 46 *American Loyalists*, Audit Office Transcripts 68 (transcription 1900, NYPL).

voyage, this time securing an additional annual appropriation of £200 in warrants against customs revenue in New York. In addition, after 1762 annual appropriations statutes regularly contained grants of £140 New York, compensating the Attorney General's "extraordinary services."⁵⁸

Along with direct subventions and fees for undertaking Crown litigation, the provincial Attorney General derived much of his income from fees paid by land patentees. The 1709 statute that established the basic public fee schedule for the province granted the Attorney General "For the Draft of A Patten Confirmation Grant or Charter one pound Ten shillings."⁵⁹ In 1710 this statute was disallowed by the Crown and was replaced with an ordinance of the governor that raised the patent fee to £3. But the provincial government adhered to the repeated royal instructions not to grant any single patentee more than 2,000 acres, which led to the use of multiple nominees in most grants.⁶⁰ A practice grew up of charging each patentee the full fee in such large grants, which Kempe and his predecessors apparently justified on the ground that multiple patenting was reducing the funding available for other law-enforcement purposes.⁶¹ To this system Kempe added the additional refinement of charging fees based on the quantity of land transferred when smaller parcels

This grant on the civil list may represent a continuation of the arrangement Julius Goebel observed in force after 1733. See *supra* note 53.

58. See 4 NY Col Laws 627, 734, 800, 849, 912, 963, 1026. New York currency generally exchanged in New York at roughly 60% of sterling. Other information in this paragraph concerning Kempe's compensation is taken from his own statement in 1783, a circumstance which naturally induces some elements of doubt. See 46 Audit Office Transcripts, *supra* note 57, at 68.
59. An Act for Regulating and Establishing fees," May 24 1709, 1 NY Col Laws 638, 650. This fee of 30s. per document was, not surprisingly, at least three times the fee the Attorney General could charge for entering a *nolle prosequi*, or for permitting the filing of a writ of error.
60. For further discussion of this legal approach and its repercussions, see Chapter 3, *infra*.
61. So Kempe explained in an official report on fees delivered to Lieutenant Governor Colden on August 20, 1764, Kempe Papers, Box V, NYHS.

were granted to multiple patentees, up to £10.⁶² It is very difficult to determine how much Kempe raised by these means; in declaring his losses as a loyalist entitled to support and compensation in 1783, Kempe variously estimated the annual fee income of the office as between £500 and £1000.⁶³

In addition to his measures for increasing the Attorney General's fees, Kempe undertook to reduce the burden of litigation costs limiting provincial enforcement activity. In general, despite English practice to the contrary, costs in criminal cases were not routinely borne by the defendant. Although prior Attorneys General appear to have expected to recoup prosecution expenses in felony cases from the counties in which the prosecutions occurred,⁶⁴ Kempe like his predecessors found that he had to bear most of the costs of criminal prosecutions out of his own perquisites. As he wrote to Governor Henry Moore in 1766:

there is no way of compelling offenders of any Sort even when of ability and convicted, of defraying the charges of bringing them to Justice, nor will the Courts here appropriate any part of the Fines laid for offences to this service, nor often recommend it to them to pay the costs previous to afferring the Fines.⁶⁵ When there is an acquittal of the person charged or the Offender is poor nothing can be hoped for and not often is anything to be obtained on conviction.⁶⁶

Kempe's response to the situation was to begin demanding a form of recognizance from complainants by which they and their

62. *Id.*; 7 NY Col Docs 925.

63. See 46 Audit Office Transcripts, *supra* note 57, at 68, 173-74.

64. For a further discussion of the somewhat complicated question of costs and fees in criminal cases, see Chapter 4, *infra*.

65. This practice, of partial remission of fines in consideration of the defendant's payment of the prosecution's taxed costs, was the English practice intended to overcome the force of the maxim that the Crown neither gave nor received costs. See 2 *Hawkins' Pleas of the Crown* c. 25, §3 (1787 ed.)

66. PRO CO 5/1098, f. 558.

sureties obliged themselves for such costs and fees “as are usually paid in the province by clients to the council for attendance.”⁶⁷ Additionally, Kempe secured an addition to the schedule in Governor Moore’s 1768 ordinance of fees for the “Attorney General’s Fees in the Supreme Courts where a Defendant voluntarily compounds with the Attorney General in order to obtain a *nolo prosequi* or mitigate his fine.”⁶⁸

The result of Kempe’s various measures was to provide the provincial government, and its masters in Whitehall, with stable professional representation throughout the last two decades of the colonial period. The fiscal basis of the office, while not lavish, offset somewhat the increasing burden on the prosecutorial system as public order in the province declined.

The final movements toward professionalization of the Bench and Bar visible in the late ‘50s and early ‘60s were not entirely frictionless. Although the familial connections between New York’s legal and mercantile élites were extremely close, and one can as usefully speak of the Smith-Livingston as the DeLancey-Philipse interests, the final capture of the highest institutions of justice in the province for the sons of the robe inevitably provoked a tension between legal and mercantile communities—a tension that amplified the ordinary routine complaining of clients and provided an opening for the insertion of the inevitable wedge of partisan discord. The strong flavor of merchant against lawyer in the election campaign of 1768, with its slogan of “No Lawyer in the Assembly,” represented the crystallization of uneasiness largely resulting from the shift in power that had taken place over the preceding decade.⁶⁹

67. See, e.g., Kempe Lawsuits, *sub noms.* Desbrosses, Rodman, NYHS.

68. Ordinance of Fees, July 1768, ms. ABCNY (unpaginated).

69. For the details of the 1768 campaign, see D. Dillon, *supra* note 36, at 100-17. Morton Horwitz has argued that these political expressions of anti-lawyer sentiment in New York represented the eighteenth-century consensus, which lawyers would only overcome by making a deal with merchants in the closing years of the century—a deal in which lawyers altered doctrine throughout the new nation in pro-commercial ways. See M.J. Horwitz, *The Transformation of American Law, 1780-1860*, at 140-59 (1975). But the political tone of the latter 1760s is in this respect atypical. It makes more

The unfinished business of clerkship regulation remained, however, and in January 1764 another Bar agreement was promulgated. The signatories were essentially the members of the 1756 association, along with those of their former clerks who had in the meantime established independent practices. The attempt to foreclose new admissions to the Bar for fourteen years—the height of impracticality in the proposed 1756 arrangement—was dropped, and the education requirement was substantially altered:

WHEREAS this Province is so well supplied with Attornies at Law that it is thought proper in some measure to prevent the unrestrained Admission of Clerks for the future, and therefore the Subscribers have agreed to observe the following Articles...

1st That no Person henceforth shall be taken by any of the Subscribers as a Clerk, unless he shall have been educated at some University or College for two Years at least—and shall pay down the sum of two hundred Pounds—and be bound to serve a Clerkship of five Years—Nor shall any Attorney take another Clerk till three Years Service of the first Clerk is expired so that no Attorney shall have more than two at a Time.

2^d: That no Attorney shall recommend any Person to practice in any of the Inferior Courts except such as shall be entitled to a recommendation by this Agreement nor shall any Clerk be recommended to practice in the Supream Court or Inferior Courts until he shall have signed this Agreement.

3^d: That any of the Practicers shall be at Liberty to take as a Clerk a Son of Benjamin Nicoll, Esq^t: or of

sense to see this particular form of partisan antagonism as the outcome of past changes in the relations between the counting-house and the Bar. For other objections to the Horwitz interpretation of the relation between New York lawyers and merchants in the second half of the eighteenth century, see Moglen, *Commercial Arbitration in the Eighteenth Century: Looking for the Transformation of American Law*, 93 *Yale L.J.* 135 (1983).

any of the Attornies signing this Agreement
without any pecuniary Consideration.⁷⁰

The very adoption of the 1764 agreement testifies to the greater acceptability of the arrangements, but the precise provisions selected will bear closer scrutiny. The requirement of a liberal education, though not as strong as that proposed in 1756, was still an extraordinary announcement. The practice of law in New York was to be a learned profession in a new, American, sense—presupposing a level of educational attainment never required of aspirants to the English Bar. The establishment of King’s College had much to do with making this requirement practicable; already by 1764 King’s had educated or graduated more than a dozen students aspiring to a legal career, and the Anglican portion of the city’s social and economic élite had an alternative to the dangers of religious fanaticism posed by Yale.⁷¹ The restriction on the number of clerks simultaneously indentured to each member of the Bar did serve a guild purpose in restricting the Bar’s growth, but not severely, allowing as it did, at least theoretically, for a doubling of the size of the Bar every five years. The generation now in control of the Bar had sons of its own to educate to the family business, as the third clause made clear, and prohibiting growth of the Bar was not the issue it had been in 1756. Instead, the agreement’s clerkship provisions looked to securing the educational quality of the clerkship, prohibiting lawyers from taking on more clerks (and collaring more premiums) than they could productively supervise. This approach embodied a recognition of the ultimate importance of the domestic means of legal education—an importance which the generation of Livingston, Scott, and the younger Smith had insisted on since their arrival at the Bar. Granting themselves the right of exemption from the premium required for legal indentures raised an economic barrier to entry

70. Agreement dated January 5 1764, William Smith Papers, New York—Law Society, NYPL. The enforcement provision of this agreement provided for the same sanctions, through withdrawal of professional courtesy, that had accompanied prior agreements of the Bar.

71. This rough count of King’s graduates and non-graduates intending law practice in 1764 is implied by Hamlin’s figures. See *supra* note 47.

to the profession (compensating each practitioner in advance for losses from additional competition in future years), but it also recognized that the best educational opportunities for the son of a New York lawyer might be found in an office other than his father's.

Like the 1756 draft agreement, and unlike that of 1729, the preamble made no apology for the attempt to restrict the profession: no bewailing of reduced quality of practice, no dire warnings of danger to clients. It was instead the confident announcement of a professional guild that took for granted its authority over its own membership. The drafting of the second clause, which applied informal controls on admission of clerks in the inferior courts, testified by omission to the Bar's satisfaction with the machinery for admission to the Supreme Court. The examination system evidently met the requirements of the fraternity. The inferior courts provision contained another interesting message: it sounded the intention of the city Bar to bring the right of practice in the county Sessions throughout the province under its implicit control. Although we may suspect that the 1764 agreement was occasionally honored in the breach during the twelve years preceding the war, the informal nature of its enforcement procedures makes it difficult to ascertain whether it was enforced at all, or with what degree of success.⁷² Of the educational attainments of the men admitted to practice after 1764, however, we can be reasonably certain: between 1764 and 1775 more than three dozen college graduates were admitted to the Bar, amounting to more than three quarters of the total admissions.⁷³

With the developments of the early '60s we may reasonably speak of the legal profession in New York as having reached its full maturity. In complete control of the highest levels of the

72. The association did have a secretary, James Duane, but a search of his surviving legal papers in the New-York Historical Society reveals no records of the association's functioning after 1764.

73. This statistic includes only those members of the Bar admitted after 1764 whose date and place of graduation is verified by Hamlin. See P. Hamlin, *supra* note 1, App. I, at 139-41.

common-law courts, as well as the process of legal education, having established institutions of self-regulation and made a strong attempt at guild discipline for the reaping of the profits of its monopoly, and having built an expectation of inter-generational transfer of professional status, the lawyers of New York could look with confidence on the stability of the social institutions they had created. The intellectual tone of the profession, too, bespoke the Bar's mature self-confidence. With the publication of the second volume of Smith's *Laws* in 1762 the sense of New York's provincial law as distinct from English or even imperial law gained a more solid foundation. Smith's *History*, widely discussed and much admired, gave to the province not only a political history remarkable for the temperance of its treatment of past factional crises, but also, and much more importantly for the Bar, a *legal* history as well. In the animated constitutional discussion of the Debating Society, or the technical problems discussed in the New York Moot after its founding in 1770, the vigor of this pursuit of a New York identity is plainly visible. The legal space that had been empty a century earlier, as Richard and Matthias Nicolls surveyed the difficulties of governing their newly-conquered province, was now filled.

Perhaps too thoroughly. The very solidity of the New York Bar contained an irony, for in the unsettling times that lay ahead the lasting verities around which the leaders of the Bar organized their profession in the 1760s would pass away. The social disruption spreading through the Hudson River Valley would never fully subside, only to burst into civil war after 1776. The guild of the Bar, comprised to a large extent of men bred to the profession and raising their sons to follow after them, concentrated as it was on the development of a professional identity as New Yorkers within the Empire, was thoroughly adapted to an environment that would not last. William Smith, Jr., who epitomized the confident and learned generation that set the capstone on the arch of the provincial law, would die in 1780 as Chief Justice of Quebec; the institutions he and his contemporaries built would be inherited, under vastly altered circumstances, by men like Alexander Hamilton who exemplified

some of the qualities they admired, but who came from different social molds.

The patterns of institutional growth thus far discussed reflect the basic forces shaping legal development in provincial New York. The Imperial managers in New York and at home who developed the legal structure of the province had a single basic problem to solve: the government of an extensive and ethnically diverse territory on stringently limited resources. By the late 1680s, it had also become clear that the province, which contained both the Champlain corridor from Canada and the only waterway to the continental interior across the Appalachian divide, was one of the primary strategic assets in the imperial confrontation between Britain and France. The government of a multiethnic province in a strategically crucial area is a complex task, made more difficult in New York by the range of political institutions existing at the conquest: Long Island towns on the New England model; a multinational port city, already containing a large slave population; the patroonships; the Albany oligarchy; the Delaware tobacco planters; the far-flung settlements of Nantucket, Martha's Vineyard, and the Maine coast. Although some of the geographically disparate territories were removed from the jurisdiction of the provincial government, cultural diversity was a permanent condition of the social order.

Given the constraints on the use of force, primarily the inconsiderable budget available, the first generation of colonial managers endeavored to build an overarching legal structure that would retain the popular consent without which government could not be centralized at all. The process of centralization did occur in the legal system, in perceptible stages. The proprietor's agents had to permit a very significant diversity of doctrine at the beginning of the process: the city's articles of capitulation and the adoption of the Duke's Laws committed the government to maintenance of Dutch inheritance laws in some places and New England customs in others. The courts themselves, however, could be brought under managerial control. The lower levels of justice could at least be administered by appointed Justices of the

Peace, who though members of the local community would have some obligation to the government. The central court began as an aggregation of all the available JPs, supplemented very authoritatively by the Governor and his lawyers. Later the Court of Assizes could be supplemented and replaced by Courts of Oyer and Terminer consisting of the Governor's appointed elite judges. Diversity in local substantive and adjective doctrine was tolerated *faute de mieux*, while the courts themselves were strongly centralized.

In time, such a structure led to an increasingly English character for the legal system. One of the conceptual advantages of the common law in such a situation is its capacity to tolerate local legal diversity in the guise of custom. But the processes of convergence within the legal system were accompanied by external social processes making the province more "English." Immigration and political patronage, as well as the desire of leading New Amsterdam citizens to do well under the new regime, combined to bring about a process in which non-English elements of New York society conformed to English models, or through intermarriage brought the communities closer together. Dutch and English people lived in propinquity at home too, sharing both long history and recent experience. Wars between England and the Netherlands were unpopular in both countries during the seventeenth century.

The process of ethnic replacement at the top of the provincial pecking order was not without significant strain. Leisler's Rebellion, the great dividing line in the early provincial history, contains significant elements of intercommunal aggression. The settlement of 1691, however, imposed an English shape on the subsequent developments. The court system became, by formal implication from the wording of the Judiciary Act, a common law system. Other doctrinal contributions now were assimilated to the status of customary law within that system.

This announcement of the existence of a common law legal order was not a self-conscious act of reception. It only epitomized many of the positions taken by the short-lived Assembly under the Duke. No one regarded these as new or controversial propositions. They reflected the mentality of the English lawyers who drafted legislation that multiethnic legislatures were willing to adopt. They also reflected the activities of the English-trained judges who had been coordinating provincial adjudication at the higher levels for almost thirty years. The basic systems of civil and criminal procedure converged quite easily on English models, often tolerating alternative institutions like arbitration by co-opting them into the common law process.

Despite the apparently easy compromise of the ethnic tensions in the legal order, the settlement of 1691 could not defuse the legal consequences of the struggle for ethnic dominance. After 1691, political contention in New York resolved itself into a confrontation between militant but loosely organized aggregations, suggestively similar to the “Rage of Parties” that structured English politics in the same period. Successive Governors became identified with one of the parties, and the pattern of bipolar local confrontation was grafted onto the pattern of wary confrontation between legislature and executive characteristic of Anglo-American politics in the 1680s.

In this environment, two consequences followed for the structure of the courts. First, the legislature and executive disagreed about the locus of the constitutional power to establish courts; this threatened the stability of the justice system. Serious contention erupted recurrently throughout the provincial history—over Chancery on several occasions, over first Exchequer and then the Supreme Court under Cosby, over appointment to good behavior tenure in the 1760s. Second, the courts were a potential alternative power center in the bipolar political game. One governor’s appointments might become leaders of the opposition under a successor with a different set of affiliations. Chief Justices Lewis Morris and James DeLancey showed in their long political careers the possibilities of the system. It was ironic

and appropriate that DeLancey's baptism under fire came as a consequence of Cosby's dismissal of Morris—the outcome of the resulting contest discouraged repetition of the experiment.

The evolution of the Bar occurred within this institutional framework. In the context of the development of the Bar, we really should speak of Americanization rather than Anglicization. For the clear pattern of the Bar's history is its increasing and self-confident localism. Native-born lawyers were shouldering their way to the front of the practice by the 1720s, joined by younger immigrants like James Alexander, beginning their legal careers in New York.⁷⁴ By the 1740s their practices were becoming the preferred mode of legal education for the New York practitioner. The New York Bar at mid-century—and even more significantly in 1763, when the British Empire triumphantly laid claim to North American supremacy—was a local organization. It was educating its own in King's College and city apprenticeships. The rich profits to be made in restricting practice had been tasted in the statutory monopoly in the Mayor's Court from 1731 to 1746; while political monopolization ill-suited conditions in a province with a rapidly-expanding population, the profession had developed guild organization throughout the century, and the leaders of the City practice were hoping in the 1760s to achieve two ends: to bring the circuit business outside the city as firmly into their own control as they could, and to secure for their sons competitive advantage in the practice. The Bar had a developed intellectual tradition, exemplified and led by the figure of William Smith, Jr. Historian, compiler of the corpus of provincial law, founder and patron of the Society Library, leading lion of the Bar while his father sat on the Supreme Court—Smith, not yet thirty, was a fitting symbol of the glittering future of the New York Bar. James DeLancey had seemed a prodigy to the last generation, but DeLancey's flash and swagger bears no comparison with the industry, literary craft, and erudition of Smith. The Inns of Court

74. It is worth noticing that Alexander emigrated to New York from Scotland because he was an active Jacobite from a socially significant family, likely after 1716 to be unwelcome or worse at home. Imperial and dynastic politics did much to form the legal life of New York in the eighteenth century when they set James Alexander roaming.

star of the 1730s was eclipsed by the educational product of Yale and the family law office.

The legal system of the British Empire had done much good for the members of the New York Bar by 1763. Familial and professional connections united the lawyers to the merchant families of the city and the proprietors of lands in the settlements to the north. Prosperity in peacetime trade and wartime privateering was one source of their wealth; the business of the manors was another. Land speculation was a place to put profits, and also a place to invest one's talent—James Alexander's practice on behalf of his own and his partners' investments was often the bulk of his business.

New York's lawyers administered a system of rules that structured the social relations of their connections—the rules of commerce and real property. Subsequent chapters examine how these bodies of legal doctrine, along with the rules of the criminal law, developed through the provincial period. Each of these stories of doctrinal development has unique features. The land law developed in intimate relationship to the pattern of physical settlement of the colony. Its history was affected by the strategic and political constraints on New York's geographic expansion. The commercial law of New York was affected by the macroeconomic trade regulation of the British Empire, which both presented legal obstacles to peacetime commerce and licensed piracy under the guise of wartime privateering. New York's commercial law thus developed in cycles corresponding to the progress of military confrontation between Britain and its imperial rivals. The criminal justice system developed, as such systems often do, by compromising the demand for public order against the public's willingness to bear the necessary costs. Cultural diversity put strains on the public order system, which was often engaged in punishing disobedience to or by public officials.

Despite the contingent differences in these areas of doctrinal development, the varying systems of practices and rules involved

in real estate, commerce, and the punishment of crime also show important similarities of development during the provincial period. In each, there is a distinct early period of rapid convergence on English technical norms, with some customary modifications, most often to accommodate conflicting Dutch practices. By 1700, criminal process and the technical law of commerce seem to have reached a stable incorporation of English and local norms, at least at the formal level. The land law, as we shall see, provides an illuminating exception. A land system had come into being by 1700, directed at making the pattern of physical settlement one favorable to the political goals of the Duke and then the King. But the doctrine supporting this land system was only formally stable, in the sense that realities on the ground tended to its rapid erosion.

Events after 1763 destabilized New York society and the legal system. Imperial policy adversely affected the legal interests of both the merchant and landowning elements of the society. Significant social dislocation followed the end of the wars of empire; rioting and related public disorder put an increasing burden on a criminal justice system that could not significantly expand the resources for enforcement. Controversy within the legal community or between lawyers and others was often heated.

But the Bar was not a radical institution in New York at any point in this process of destabilization. The generation symbolized by William Smith, Jr., can have no more appropriate symbol than Smith himself under house arrest at Livingston Manor after 1777, living out in seclusion the war he had dreaded against the King to whom he remained loyal. There, without much of the material he had been collecting for years, Smith tried to complete his *History*—the history of a province with whose revolt Smith did not sympathize. But Smith, with his second volume as with his first, planned to close the *History* before reaching his own time. Now he had not the heart to bring his narrative past 1762, the last year of the glorious war and the heyday of an Empire now being torn apart. For Smith, everything

that had followed was a protracted and catastrophic
unsettlement.⁷⁵

75. It should be noted that William Smith, Jr., gives a different reason for the terminal date of his second volume. More, he says, could not be published without "a surfeiting egotism" by one who was a participant in the events. See 2 **W. Smith, Jr.**, *supra* note 23, at 273. Smith had already shown in choosing the terminal date of his first volume a disinclination to engage in controversy with living figures, see Moglen, *supra* note 23, at ??, and there is no reason to doubt his discretion. I submit that it is reasonable to infer the possibility of additional reasons for reluctance, which need not have been fully conscious. Many dates other than 1763, including other changes of gubernatorial administration, could have been chosen to signify something as flexible as his date of entry to public life. Yet he choose to end where he did. Smith's dedication of his published second volume, from Quebec in 1824, speaks in stilted formal fashion of a reluctance to publish the sad history of what was no longer part of the Empire.

Chapter 3

The Law of Settlement: Land Law and the Manors

“There is nothing,” said Blackstone, “which so generally strikes the imagination, and engages the affections of mankind, as the right of property.”¹ In choosing thus to open his discussion of the law of real property, Blackstone captured the central importance of land in eighteenth-century English society, as well as the equal significance of the land law in the larger system of the common law. Where, as in seventeenth-century England, land was not only the major source of wealth, but also the basis of political authority, the rules which regulated its possession, alienation and use were the keystones of the social structure. From this social context arose the land law that the lawyers of New York knew and used throughout the provincial period.

At the same time, the principles evolved through the application of those rules escaped the initial bounds of land law, and the land law became a seed-bed for the development of other areas of the law.² This generative aspect of the land law was particularly pronounced in British North America, where the physical settlement of the country was the first order of business,

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1. 2 W. Blackstone, *Commentaries* *2 (1766).
 2. The creative power of the land law in the context of the early common law is a basic theme of the remarkably powerful treatment of the subject in S.F.C. Milsom, *Historical Foundations of the Common Law* 99-239 (2d ed. 1981).

and the rules which regulated the process of physical settlement became the template for the rest of the legal order. In New York, these developments took place in the context of a land-holding pattern unique in colonial America—that of the manors of the Hudson River Valley. The manor lords of New York built and maintained the system of rules which governed the disposition and employment of their own great fortunes; the effect on the settlement of the law was entirely out of proportion to the number of people who inhabited the manors themselves.

From the original Dutch settlement of New Netherland, the prospect of apportioning the land upriver from New Amsterdam into large manorial estates was present in the minds of colonial managers. The Dutch West India Company's creation of the patroonship system, which offered substantial land grants and administrative and judicial autonomy to any stockholder prepared to plant fifty immigrant families in the new colony, was a response to initial disappointment with the profits of the wholly-owned commercial settlement as originally envisioned.³ The articles of capitulation in 1664, seeking to secure the support of the Dutch inhabitants of New York, assured Dutch landholders that their titles to property and their inheritance customs would be respected by the new government. As in other respects, the articles functioned as a source of substantive law in the colony, pluralizing the system of land tenure, like other elements of doctrine, in the interests of peaceful administration. At the same time, however, that Governor Nicolls was protecting titles and inheritance for Dutch owners throughout the colony, he was also moving to reduce the autonomy of the remaining patroonship; in 1664 and 1665 he took several steps in this direction, including that of depriving the patroon of Rensselaerswyck of his right to maintain a local court.⁴

3. See Chapter 1, *supra*.

4. See 7 *Annals of Albany* 97-98 (J. Munsell, ed. 1859); S. Nissenson, *The Patroon's Domain* 272 (1937). This step seems to have been undertaken primarily for strategic reasons. Albany was, as noted in Chapter 1, the most crucial military possession of the British in North America, and the only location of a permanent garrison in the seventeenth century. Institutions of local government under even partial Dutch control were difficult to tolerate,

If Nicolls found the independence of Rensselaerswyck troublesome, he was equally disturbed by the other form of independence prevailing elsewhere in the colony—the disrespectful truculence of the Long Island English towns. Of these towns Nicolls wrote in 1666 that “Democracy has taken so deepe a Roote in these parts, that the very name of a Justice of the Peace is an Abomination.”⁵ For political and ideological reasons already discussed, the colony’s new managers strongly desired an alternative structure for landholding and local governance. Administrative control over new physical settlement patterns made it possible to encourage the development of these alternate structures, within the constraints set by the need to conciliate rather than overawe local dissenting interests, ethnic and religious. From the combination of imposed rules determined by the proprietor’s agents and the negotiation with possible centers of resistance emerged the pattern of geographic settlement and the contours of the legal regime.

Part of Nicolls’ solution to the political problems he faced lay in the creation of “independent patents,” or “manors,” four of which were established in 1665 and 1666. These were Pelham; David Gardner’s Isle of Wight (1665); Constant and Nathaniel Sylvester’s Shelter Island (1666); and John Winthrop, Jr.’s Fisher’s Island (1666). Certainly a territorial motive played a part in the granting of the patents. Shelter Island and the Isle of Wight were claimed by Connecticut, while Thomas Pell himself had been commissioned by Connecticut to purchase Pelham from the Indians on behalf of Connecticut. Nicolls no doubt intended to use the patentees to solidify New York’s control over the disputed areas. The patent under which Thomas Pell was granted the

and divided control, including the patroon, was intolerable. The actual disposition made by Nicolls was to convert the patroon’s right to hold court into the right to nominate three members of a new consolidated court for Albany, Rensselaerswyck, and Schenectady. Since the Governor nominated the rest of the six-member court, this significantly reduced the possibility of Dutch obstruction of English measures at the strategic pivot of the colony. The outcome of Nicolls’ measures was a long struggle between successive governors and the Van Rensselaers, ending only in 1685. See p. 114 & note 17, *infra*.

5. Richard Nicolls to Earl of Clarendon, April 7 1666, 2 *NYHS Coll* 119 (1869).

manor of Pelham was representative in providing that Pelham would be independent of all other townships, and would fall solely under the administrative authority of the Governor and Council and the jurisdiction of the General Court of Assizes.⁶ Pelham was not a manor in the traditional English legal sense, lacking as it did both a court baron, for the conducting of tenurial, civil, and administrative adjudications, and a court leet, which exercised petty criminal jurisdiction over the inhabitants of the feudal English manor.⁷ Through this arrangement, Nicolls hoped to secure the support of larger landholders, while at the same time centralizing authority as a bulwark against New England-style democracy.

The early success of this system prompted its continuance by Governor Francis Lovelace, who succeeded Nicolls in August of 1667. Among Lovelace's grants under the independent patent concept was one to John Archer, for the settlement of Fordham, in 1671.⁸ In 1673, Lovelace went one step further, and ordered the establishment of a local court in Archer's manor.⁹ This court, effectively equivalent to a court baron, was not an integral part of Archer's patent; it was, rather, an additional privilege granted at his special request. Nonetheless, this granting of judicial rights associated with the ownership of land marked the beginning of the English experimentation with quasi-feudal jurisdictional privileges in New York, an experiment which gave rise to the colony's four greatest manors, and which continued down to the opening of the eighteenth century.

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6. Thomas Pell's Patent of the Manor of Pelham (October 1666) (Deed Book A, 240-43, Westchester County Clerk's Office, White Plains, N.Y.). Pelham was, in the language of the patent, an "intire infranchised Townshipp Manor and place of itself," and was thus freed of any revenue or administrative burden imposed by other towns.
 7. The functions of these manorial courts can be seen in F. Maitland, *Select Pleas in Manorial and Other Seignorial Courts* (Selden Soc., No. 2, 1888).
 8. The original patent is reprinted in 1 J. Scharf, *History of Westchester County, New York, Including Morrisania, King's Bridge, and West Farms* 159-60 (1886).
 9. "Order about Fordham," April 20 1673, 13 NY Col Docs 471; 30 NY Col Mss 125; 31 *id.* 42.

Whatever the enthusiasm felt by Nicolls and Lovelace for the use of independent manors as the basis of the colony's political structure, they found little favor in the mind of Edmund Andros. His land policy, which involved the creation of no manor or independent patent between 1674 and 1680, resulted in part from a shift in the proprietor's emphasis. The instructions issued to Andros demonstrated that the Duke and his advisers understood the difficulty of increasing the colony's population, and regarded measures for the encouragement of planter immigration as the primary order of business. Andros was told to heed "the rules and propositions given to planters by those of New England and Maryland" so that prospective colonists might have "equall encouragement to plant" in New York.¹⁰ The proprietor was prepared for hard-fought competition over inhabitants; attempting to induce settlers elsewhere in North America to remove to New York was also to be official policy, as shown by instructions to "receive and give all incouragement to any inhabitants that will come with their famelyes and goods, of whatsoever kind or country they be, from any of the other plantacions, to dwell with you at New Yorke" in the 1670s.¹¹ In response, Andros devised and prepared to implement a headright system of settlement and land distribution in the province. In August 1675 he secured approval from his Council for an offer to any free European immigrant of sixty acres homestead, plus fifty acres per head for family members and an equal provision for servants after the expiration of their indentures.¹² Although this promotional proposal was dis-

10. See 3 NY Col Docs 216-218. These instructions were not made easier to follow by the fact that New England and Maryland followed diametrically opposed approaches. The allotment system for the distribution of town land in New England could not have been further from the Maryland model, which consisted at this stage of a manorial system closely parallel to the measures undertaken by Nicolls and Lovelace. See H.W. Newman, *The Flowering of the Maryland Palatinate* 61-67 (1961). In effect, these instructions left Andros free to conceive his own design, in keeping with the general policy of engaging in competition for prospective immigrants to other colonies.

11. Sir John Werden to William Dyer, November 30 1676, 3 NY Col Docs 245.

12. See 13 NY Col Docs 485.

seminated in England and Scotland, it failed to produce the flood of immigrants that the Duke and his Governor desired.¹³

The attempt at a fundamental restructuring of the land system in New York could not ignore, however, the consequences of prior decisions, both Dutch and English, inconsistent with the reforms. The problem of Rensselaerswyck, for example, never entirely at rest since 1664, was agitated again under Andros's administration. After the Treaty of Westminster and the resumption of English government in 1674, the Van Rensselaers petitioned the Duke for a patent restoring their lost administrative and judicial powers, including control of Albany itself. Andros was instructed to investigate and report "as favorably for them as justice and the laws will allow."¹⁴ Although Andros attempted to withstand the patroon's political influence in New York and London, he was unsuccessful, and in July 1678, following a review by his own legal advisers,¹⁵ York ordered Andros to issue a patent granting the patroon everything except the fort of Albany itself.¹⁶ Faced with instructions extremely detrimental to the Duke's own interests, Andros—who never hesitated to assert himself in any situation—took the only alternative to obedience: he ignored the order entirely, leaving the settlement of the Rensselaerswyck problem to another occasion.

While Andros's insubordinate approach to the Rensselaerswyck issue may have stemmed in part from the tension between his administration and the less Anglicized provincial Dutch leadership, along with the particular strategic and political problems necessarily accompanying the retrocession of Albany, it demonstrates as well the Governor's general distrust of the

13. Collation of the available contemporary estimates suggests that the provincial population, about 8,000 at the time of the conquest in 1664, had risen to little more than 10,000 by 1678. See **E.B. Greene & V.B. Harrington, *American Population before the Federal Census of 1790*** 88-89 (1932).

14. 3 NY Col Docs 224-25.

15. See "The case of the Colony of Rensselaerswyck 27 April 1678" and "The Report of the Petition by his Counsell, John Churchil and Keneay Finch, London 4 June 1678," Rensselaerswyck Misc. Mss, NYHS.

16. 3 NY Col Docs 269-70.

previous system for the hierarchical distribution of power through manorial grants. This distrust remained a fixed element of policy through the end of Andros's first Governorship; the resumption of manorial growth required a change in personnel, and in the objectives at which future governors would aim.

It was under the administrations of Thomas Dongan and Benjamin Fletcher, from 1682 through 1698, interrupted by the turmoil of Leisler's Rebellion, that Nicolls' and Lovelace's early measures blossomed. In choosing to create a General Assembly in the colony in 1683, the Duke by no means abandoned the policy of repressing "democratical" sentiment, particularly from the Long Island towns. From the proprietor's point of view, the creation of the Assembly only shifted the venue of the dispute; after 1683 Dongan again sought a counter-weight to localist agitation in the stability of the manorial system. In 1685 he confirmed the Van Rensselaer holdings, and while the new patent for Rensselaerswyck deprived the patroonship of its claim to Albany,¹⁷ it did grant an even larger tract than the original Dutch provision, over one million acres in extent, along with a full set of feudal jurisdictional privileges, including the right to hold both court leet and court baron.¹⁸ In 1686 Dongan created Livingston Manor, raising to the dignity of a New York princeling the colony's adroitly self-dealing former Secretary, Robert Living-

17. This step, which eliminated the Van Rensselaer pretensions to a role in the government of Albany, brought to an end the conflict over Rensselaerswyck's fundamental status. Trading a restoration of the patroon's administrative and judicial rights for relinquishment of claims to Albany proper was a compromise with which the patroon had to be content, particularly inasmuch as Robert Livingston, as part of the campaign for his own land acquisition, was threatening the integrity of Rensselaerswyck, mounting a claim for partition of the domain in right of his wife, the once-widowed Alida Schuyler Van Rensselaer.

18. In granting to the Van Rensselaers, and later to Livingston, the jurisdictional privileges of lordship, Dongan was circumventing the Assembly, which in the judiciary act of 1683 had organized New York's court system with no provision for independent local jurisdictions. See "An Act to Settle Courts of Justice," November 1 1683, 1 NY Col Laws 125; S. Nissenon, *supra* note 4, at app. D. The restoration of the Rensselaerswyck local courts after the relinquishment of claims to Albany makes clear that the objection to Rensselaerswyck's courts in 1665, when Nicolls disestablished them, was strategic rather than legal in character. See note 4, *supra*.

ston,¹⁹ and in 1687 he completed the process begun earlier by Nicolls when he extended full manorial rights to Thomas Pell. In the same period, the governor gave independent patents of the older more limited sort to Frederick Philipse and Stephanus Van Cortlandt; under Fletcher's administration these patents would become the roots of Philipsburgh and Van Cortlandt Manors, the last two of the four great New York manorial estates.²⁰ Governor Dongan's grants were made on the most favorable terms. Along with the greatly expanded privileges of the new manor lords went only the most minuscule costs; the quitrents reserved in the patents, for instance, were but a fraction of those which the law required.²¹ No doubt Dongan expected that the newly-created manors would offer him strong support in political struggles with the General Assembly.

The Assembly's first session, in the autumn of 1683, produced a range of legislation marking the consensus developed during two decades of direct proprietorial governance. The broad constitutional provisions of the Charter of Liberties and Privileges, along with the creation of counties and the passage of the 1683 judiciary act, have already been discussed. The charter

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19. The story of Livingston's rise, a testament to the eternal utility of a bilingual education, is well told in **L.H. Leder, *Robert Livingston, 1654-1728, and the Politics of Colonial New York*** 3-53 (1961).
 20. Philipse and Van Cortlandt could in all probability have had full manorial grants for the asking; they were among Dongan's most important supporters. Sung Bok Kim, speculates that neither proprietor wanted a manorial patent at that early date—both were still in the process of filing claims for lands adjacent to the areas they already held. See **S.B. Kim, *Landlord and Tenant in Colonial New York*** 28-71 (1978).
 21. Quitrents were those rents permanently reserved on freehold land in lieu of other services to which the feudal law had typically given rise. In New York, the Duke's Laws established a fixed quitrent of 2s. 6d. per hundred acres annually, see 1 NY Col Laws 81, though these were rarely if ever collected. Livingston's 160,000 acres were charged 28s. per year; Rensselaerswyck's quitrent, previously fixed at 150 bushels of wheat (about 40s.), was reduced to one-third of its old value. It has been argued that the desire for quitrent revenues was one motivation for the creation of the manors. See Goebel, *Some Legal and Political Aspects of the Manors in New York* 16-17 (1928). This interpretation seems erroneous in light of the low nominal rates assessed and the absence of any prospects for complete enforcement. Rather, the low level of the quitrents confirms that the managerial expectations were of political rather than fiscal benefit.

also contained provisions of substantive law—provisions taken seriously enough by the delegates to the first Assembly to have been entrenched in the New Yorkers' first attempt at an organic statute for the colony. Almost all of these provisions of substantive law raised to quasi-constitutional status in the charter concerned the law of real property. The legislature's intention in the exertion of control over the substantive content of the land law reveals much about the position of affairs in 1683.

The first and most important of the legislature's provisions in the area of the land law was declaratory: "THAT from hence forward Noe Lands Within this province shall be Esteemed or accounted a Chattle or personall Estate but an Estate of Inheritance according to the Custome and practice of his Majesties Realme of England."²² This provision, if taken at face value, would have had the technical effect of ending some of the chief differences between Dutch and English land law—although the 1664 articles of capitulation guaranteed Dutch titles and inheritance practices,²³ the effect of this language would have been to interfere with the Dutch pattern of partible inheritance in intestacy, as well as affecting conveyance methods in Dutch communities. While there is abundant evidence that these effects did not follow, even during the short juridical lifetime of the charter, this provision represents the one significant move in the 1683 legislation toward the recognition of English common law as the controlling legal authority in the province. That this language was included in a statute adopted by an Assembly with significant Dutch membership suggests the importance attached in 1683 to the creation of a more homogeneous and predictable set of property rules, whatever the tolerable level of heterogeneity may have been in other doctrinal areas. The pressure of physical settlement, including a desire to expand the population of the province for strategic as well as fiscal reasons, was an important spur to the early consolidation of the land law, for private owners

22. 1 NY Col Laws 114.

23. See Chapter 1, *supra*.

hoping to increase the value of their holdings by development as well as for the provincial government.

While the Assembly was exalting common-law approaches to inheritance in one passage of the charter, it was rejecting other elements of the common-law régime just as forcefully in another, providing:

THAT All Lands and Heritages within this province and Dependencyes shall be free from all fines and Lycences upon Alienacons, and from all Herriotts Ward Shipps Liveryes primer Seizins yeare day and Wast Escheats and forfeitures upon the death of parents and Ancestors naturall unaturall casuall or Judiciall, and that forever; Cases of High treason only Excepted.²⁴

The effect of this provision was to achieve approximately the same practical result as the Restoration Parliament's Act of 1660 eliminating the military tenures in the English land law, though the technical means employed differed somewhat.²⁵ It is appealing to speculate that the Assembly's decision to include this provision in the charter stemmed from uneasiness over the Duke's intentions; was this a deliberate attempt to block the creation of "feudalism" in New York, or was it simply the adoption of a legal reform already undertaken in England of which the New Yorkers had theretofore been deprived? We have no record of the deliberations of the first Assembly, and executive comment on the charter during the period of its consideration at Whitehall was not directed to the property provisions. The other property provisions of the charter—prohibiting the sale of land in

24. 1 NY Col Laws 115.

25. See "An act for taking away the court of wards and liveries, and tenures *in capite*, and by knights-service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof," 12 Car. II c. 24 (1660). This statute converted all military tenures to free and common socage, a refinement which the New Yorkers neither required nor employed. The New York provision assimilated the prohibition on forfeiture of estates for felony to the prohibition of entry fines and other quasi-feudal incidents, a move not taken by Parliament in 1660 for evident reasons. Forfeiture for felony may have troubled the New Yorkers particularly because Andros had made use of it in his usual high-handed fashion in the 1670s. See, e.g., p. 39, *supra*.

execution of judgment, voiding the private sale of the property of *femes covert*, and assuring the traditional dower rights of widows—enacted venerable principles of the common law. Their enactment gives no sign of a legislative attempt to wrest control of the land law from the proprietor.

In addition to the provisions made in the charter, however, the Assembly took steps fundamental to the settlement of the land law in the colony. The most important was the creation of a land registration system. Officially styled an act “to prevent frauds in conveyancing of lands,” the statute provided that all

grants Deeds Mortgages or other conveyances be entered & recorded in the Register of the County wherein such lands or Tenements do lye within six months after the dayes of their respective dates. Provided always ... Thatt none of the aforesaid grants ... shall be entered or recorded, untill the party or partys who did Seale and deliver the same shall make acknowledgment thereof before some one of his matues Justices of the Peace, or thatt the same bee by Sufficient Witnesses proved ... and Certificates thereof Entered on the backside of the said Deeds.²⁶

Local records were to be transmitted annually to New York City for inclusion in the central land records of the province. In addition to providing a powerful source of fees for officialdom, the registration act aimed to make the ascertainment of title in the generality of cases a problem of search rather than litigation; the effect on the law was to reshape the conditions of use of traditional English legal technology for the trying of land title. The essence of registration, however, was an adaptation to conditions of settlement. The common law’s historic disdain for land registration and preference for the magic of descent without record, depended upon the community’s informal recording system—the stable population of inhabitants conscious of who owned what. Behind the dignity and ponderous tread of the medieval writ of right there stood the ultimately commonplace

26. Act of November 3 1683, 1 NY Col Laws 141-42.

figures of those members of the grand assize whose knowledge of the history of the dispute was practically decisive. But colonial conditions are conditions of settlement—the population of an underpopulated landscape and the equivalent appearance of legal relations in a location with no usable legal past. Recording is the technology of the volatility of settlement, as information which in settled communities is dispersed throughout the population must be given a central location and a durable form.²⁷

Capturing the chain of land transactions among settlers was one step in establishing the land law on an appropriate local foundation, but such a chain could not stretch back far enough. The regulation of land transactions between settlers and Indians was even more important than the regulation of transactions among Europeans, for every purchase from Indians was matter of diplomacy as well as trade, potentially affecting the tenuous strategic balance upon which so much hung for all the residents of the province. By late 1684 the system which governed Indian land transactions for the remainder of the colonial period had been formed by the Assembly:

BEE itt Enacted by this Gen'Il assembly ... that from henceforward noe Purchase of Lands from the Indians shall bee esteemed a good Title without Leave first had and obtaineid from the Governour signified by a Warrant under his hand and Seale ... and Satisfaction for the said Purchase acknowliged by the Indians from whome the Purchase was made.²⁸

Intended as a system for the control of the delicate process of acquisition of Indian land (and one which again strengthened the patronage position of the governor, whose warrant to negotiate with Indians now became the most indispensable asset of the

27. Similar dependence on recording of all sorts to overcome the inherent volatility of colonial settlements occurred in Virginia during the seventeenth century. See **E.S. Morgan, *American Slavery, American Freedom*** 177-78 (1975).

28. "A Bill Concerning Purchasing of Lands from the Indians," October 23 1684, 1 **NY Col Laws** 149.

would-be developer), the Indian purchase system also became a key element in establishing the long-term dominance of the manor lords. Not only was the mercantile élite of the colony engrossing the best land of the Hudson River Valley in the 1680s—the system of Indian purchase guaranteed that land left outside the current patents could only be acquired on a large scale, for the processes and costs of negotiation with the indigenous possessors were prohibitive for all but the best-organized investors, and fees to provincial officials were a substantial addition.²⁹ Homestead purchasing from Indians would never occur on an individual basis in New York. In this, as in other respects, the technical design of the land law permitted government to negotiate large issues of policy in an open-ended fashion, by continuing incremental adjustments.

The executive pattern of seeking conservative political structures through the creation of manorial rights continued in the new legislatively-created environment, in fact at a heightened pace, in the aftermath of the Glorious Revolution and Leisler's Rebellion. Under the governorship of Benjamin Fletcher, from 1692 to 1698, prominent anti-Leislerians, including Philipse and Van Cortlandt, had their earlier independent patents converted into full-scale manorial grants. Although Fletcher's policies were consistent with the practices of earlier administrations, the scale on which they were pursued and the character of the beneficiaries, most of whom were members of his Council or his collaborators in funding the colony's participation in King Wil-

29. Approaching Indian, particularly Mohawk and other Iroquois, authorities with proposals for land purchase was a delicate and specialized matter, in which influence with the tribes was of the greatest value. These services were expensive in the largest sense. But fees alone would have precluded individual attempts to purchase in the Indian market. In the latter part of the eighteenth century, for which contemporary estimates of expenses are available, fees alone seem to have run at £15 to £25 sterling per thousand acres. See Goldsbrow Banyar to William Johnson, May 9 1754, 1 **William Johnson Papers** 401-02; Goldsbrow Banyar, "Fees on Grants of Land, January 27 1772, PRO CO 1103/5/211-12; "Information to Farmer and Mechanics intending to remove from Europe to America," William Smith Papers, Box 3, NYPL (apparently written sometime during the 1760s). These fees are of roughly the same magnitude as purchase prices in the same period.

liam's War, made accusations of corruption inevitable.³⁰ Strong as the position of the manor lords appeared in the last decade of the century, there were nonetheless formidable opponents of the system of property rights which had grown up in New York; in 1698 one of those opponents was to assume the governorship.

The advent of Richard Coote, Earl of Bellomont, in April 1698 marked a turning-point in the development of the land law in New York. For the first time, the colony's governor actively opposed the principles of land tenure which had come to play such an important role in provincial politics. Like his predecessors Bellomont was concerned with increasing the population and prosperity of New York; unlike them, however, the new governor came to see the manors themselves as a major obstacle. Bellomont's original concern was, unsurprisingly, the overheated partisan atmosphere of provincial politics. The anti-Leislerian faction in New York had become closely identified with the Tory administration at home; the advent of Whig government not only brought Bellomont to the governorship, but also provided an appropriate context for combination between the Governor and Leislerians seeking once again to punish their opposition in the colony. The favoritism and corruption of Fletcher's approach to land policy provided the foothold for Leislerian attacks, and the best opportunity were his grants in Indian country. In December 1697, long after the news of Bellomont's appointment, Fletcher granted to a combination of Albany anti-Leislerians strips fifty miles long and two miles wide on either bank of the Mohawk River northwest of Albany.³¹ To the Albany *handlaers*, necessarily concerned about any developments that might adversely affect their relations with the

30. A reprise of the contemporary accusations of corruption, in the context of an interpretation by an historian sharing the opinions of Fletcher's opposition, may be found in **I. Mark, *Agrarian Conflicts in Colonial New York, 1711-1775***, at 23-29 (1940). For a somewhat more balanced view of the politics of the Fletcher and Bellomont administrations, providing the most perceptive account of post-Rebellion politics in New York, see **L. Leder**, *supra* note 19, at 77-180.

31. Schaghticoke patent, 2 NY Col Mss (**Land Papers**) 262. The patentees were Godfredius Delius, Dirk Wessels, Evert Bancker, William Pinhorne, and Peter Schuyler.

Iroquois, the Mohawk patent was an outrage. Even before Bellomont's arrival the burgers of Albany were in full cry against the grant, and Bellomont was readily enlisted in the struggle.

Sympathetic to Leislerian claims against Fletcher on partisan grounds, Bellomont initially sought to govern through a coalition of moderate anti-Leislerians, including Stephanus Van Cortlandt, Robert Livingston, and James Graham.³² Such men might well be willing to lend their support in reversing Fletcher's most extreme or corrupt measures, but Van Cortlandt and Livingston were hardly likely to support any broader attack on the manorial system. At the same time, Bellomont began to see the campaign against Fletcher's land grants as a measure of fundamental social reform, not merely a highly effective form of partisan warfare. The permanent problem of frontier defense and the expensive garrison Bellomont proposed to solve by granting relatively small holdings on the frontier, scaled according to rank, at the conclusion of active service, thus producing settlements of yeoman reserves along the boundary of British North America.³³ Recognizing that the colony's prosperity hinged on greater agricultural development of the Hudson River Valley, Bellomont squarely confronted the anti-development consequences of the manors that already existed. "What man," he asked, "will be such a fool to become a base tenant to Mr. Dellius[,] Collonel Schuyler, [or] Mr. Livingston ... when for crossing Hudson's River that man can for a song purchase a good freehold in the Jersies?"³⁴

In pursuit of this fundamental restructuring of the province's political economy, Bellomont resolved to destroy all grants larger than 2,000 acres, without regard to the owners' partisan loyalties. Believing that the great land magnates were "generally much hated" by the people, Bellomont introduced in Council in 1699 a bill to vacate grants to several of Fletcher's anti-

32. See L. Leder, *supra* note 19, at 129-47.

33. See Bellomont to Lords of Trade, April 17 and August 24 1699, 4 NY Col Docs 502-05, 553.

34. Bellomont to Lords of Trade, November 28 1700, 4 NY Col Docs 791.

Leislerian supporters. Although Rensselaerswyck, Livingston, Van Cortlandt and Philipsburgh manors were not included in the act, Bellomont made clear that he would reach them in due course. Despite his certainty, the Governor had misjudged the political temper of the colony. Even James Graham, the moderate Attorney General, was unwilling to support the measure, and half the Council (Livingston, Van Cortlandt, and William Smith of St. George Manor) understandably opposed it as well; Bellomont needed to use his own casting vote at the Council board in order to proceed at all. With considerable difficulty he secured the passage of the first vacating act,³⁵ but he was convinced by the degree of opposition not to proceed further through legislation without strengthening his hand. "If your Lordships," he told the Lords of Trade, "will send over a good Judge or two and a smart active Attorney Generall, I will God willing ... breake all these Extravagant Grants."³⁶ Such appeals to the home authorities for support in his struggle met with little success in the face of skillful lobbying from the proprietors whose rights he was attempting to extinguish. At the beginning of 1701, with the vacating act still languishing in London awaiting royal approval, Bellomont died. As the new century began, it seemed that the manor lords had won; New York was dominated by fewer than three dozen manors, each possessing a kind of legal and political independence unique in British North America.

Measures of change in the land law system in the first decade of the century further encouraged the growth of large-scale land development, disfavoring the path toward individual freehold ownership. The first was the quitrent system. A quitrent of 2s. 6d. sterling per 100 acres was imposed under the first Andros administration, but lapsed after 1691, allowing the grants made by Fletcher to carry trivial quitrents, on a scale similar to Rensselaerswyck, where the patroon paid an annual quitrent of fifty bushels of wheat on his entire domain. When

35. "An Act for ye Vacateing Brakeing & Annulling several Extravagant Grants of Land made by Coll Fletcher the late Govr of this Province under his Matjje," May 16 1699, 1 *NY Col Laws* 412.

36. Bellomont to Lords of Trade, August 24 1699, 4 *NY Col Docs* 549.

Robert Hunter was appointed governor in 1709, however, the quitrent was revived at its old rate, and remained in force thereafter.³⁷ The quitrent burden was substantial on any sizeable tract of undeveloped, unproductive land; only those possessing opportunities and resources for rapid development would find the investment in such land competitive over the medium term with investment in mercantile ventures.

The quitrent policy after 1709 met the need to raise revenue locally to fund governmental operation. At the same time, it was also intended to reduce the size of unproductive holdings. Encouragement of smaller holdings, or at least discouragement of the immense jobbery that marked the Dongan and Fletcher administrations, led to repeated instructions to governors throughout the first half of the eighteenth century limiting the size of land grants to 2,000 (subsequently 1,000) acres per patentee.³⁸ This policy objective was much harder to achieve. The administrative limitations were subverted by the use of large numbers of nominees, whose names were attached to papers solely as a fictional contrivance to evade the rules. Even where no dummy patentees were included, numerous partners would be necessary to undertake the investments required for large-scale purchasing. The quitrent burden increased the attractiveness of partnerships, particularly in deals involving land that lay outside the domain of current settlement, where a substantial period of unproductive waiting must pass before development. Technical features of the land law, directed at reducing the number of small holdings, encouraged instead the formation of partnerships, which paralleled—often both in structure and membership—partnerships for commercial investment. The further technical result, since the patentees became joint tenants of the entire purchase, was vast domains that could only be developed under the rules applicable to English joint tenancies, including the need for cumbersome procedures to partition the estate in order to realize on the investment. For this technical problem a technical

37. See 4 NY Col Docs 395; 5 *id.* 179-80; 1 Doc Hist NY 251.

38. See 4 NY Col Docs 549, 553-54; 5 *id.* 54, 140-42, 652-53; 81 NY Col Mss 91.

solution was necessary, and in 1708 the Assembly fundamentally altered the rules regarding partition of joint tenancies. A majority of the joint tenants resident in the colony could force a partition; after a notice period the property would be surveyed and divided into as many lots as there were joint tenants. These would then be parcelled out by a lottery witnessed by “three Indifferent persons.”³⁹ By these and other means the system of large patent holdings continued to enjoy significant technical advantages over competing alternatives, and the system of lordship continued its territorial growth, reciprocally settling its relationship to technical legal doctrine.

But the victory of the manor lords was more apparent than real. Even as Bellomont found himself politically outmaneuvered, the manors were entering a period in which they were to lose their quasi-feudal features. Lordship was giving way to landlordism, and the land law in New York was undergoing quiet but fundamental change. An ironic sign of the process can be found in the will of Stephanus Van Cortlandt, who died four months before his adversary Bellomont, in November of 1700. Under the major provisions of his will, after the death of Van Cortlandt’s wife the property was to be distributed in fee simple among all his children in equal portions.⁴⁰ By thus disposing of his land, Van Cortlandt effectively extinguished all his manorial rights. He not only divided the property itself; by devising it in fee simple, rather than in fee tail, he gave his children the power freely to alienate their inheritances at the expense of those intangible privileges, such as the right to hold local courts, which were the distinguishing features of the manorial tenure. In the same year Frederick Philipse, the first proprietor of Philipsburgh, left a will to similar effect,⁴¹ dividing the manor in fee simple

39. “An Act for the easier Partition of Lands in Joint Tennancy or in Comon,” October 30 1708, 1 **NY Col Laws** 633. This act expired by its terms in 1715, and was twice renewed, remaining in force throughout the colonial period. *See id.* at 882, 1006-07.

40. Will of Stephanus Van Cortlandt, dated April 14 1700 (Museum of the City of New York).

41. Will of Frederick Philipse, dated October 26 1700, Philipse Papers PA815 (Sleepy Hollow Restorations Library).

between his son and grandson. The question remains, however, why two such staunch defenders of manorial privilege would have given away voluntarily and in private the recently-acquired rights they were publicly struggling with Bellomont to preserve. The answer lies in the way in which the manor system had come to operate during the last decades of the seventeenth century.

In the first place, the jurisdictional independence of the manors had come under considerable practical attack by the end of the 1680s. The statutes of 1691 established counties and provided for their government through a court of general sessions comprised of the justices of the peace for the individual towns, and these county governments could not afford to forego the tax revenue derivable from the manors lying within their jurisdiction. Rensselaerswyck and the northern part of Livingston Manor amounted to nearly two-thirds of Albany County in the 1690's, while Van Cortlandt and Philipsburgh together comprised roughly half of Westchester. The manors, however, refused to appoint the assessors and collectors required for the enforcement of county revenue measures, and in 1691 the legislature empowered the county justices of the peace to appoint such officials directly, a clause which was repeated in revenue acts year after year until 1711.⁴² Kiliaen Van Rensselaer was particularly obstinate in denying county jurisdiction over Rensselaerswyck. In 1705 the legislature passed an act specifically detailing the provisions for administrative offices within the manor. It required the manor's freeholders to elect a supervisor, treasurer, assessor and collector, all of whom would be responsible for the same functions performed by township officials elsewhere in Albany County. A year later, excoriating "all shifts and tricks" used by Van Rensselaer to "evade the force of ... any former Act," the legislature declared that Rensselaerswyck "can by no reasonable construction be intended to be Divided from the said County."⁴³

42. See 1 NY Col Laws 258-62, 272-73, 275-76, 317-21, 369-75, 398-99, 446, 495, 746-47.

43. "An Act for defraying the Comon & necessary Charge in the Mannor of Renslaerwick in the County of Albany," August 4 1705, 1 NY Col Laws 584;

Competition from other jurisdictions reduced the vigor of the purely judicial as well as the administrative side of the manorial right. The records of the business of the manorial courts are at all times extremely scant,⁴⁴ but the period after the legislature reorganized the county judiciary in 1691 is devoid of indications of the activities of any manor court.⁴⁵ Although the proprietors who did not dissolve their manorial jurisdictions at the opening of the eighteenth century continued to reserve the right to hold their local courts,⁴⁶ contemporary records show that as early as the mid-1680's tenurial issues of the sort which were the staple business of the court baron were being decided by the provincial judiciary at the proprietors' request.⁴⁷ Because the form of tenure known as copyhold never developed in New York,⁴⁸ the continuance of courts baron was not essential to the land titles of the manors' inhabitants; the provincial courts of general jurisdiction were soon adequate to those forms of action by which land title was tried and possession regulated.

"An Act for the better raising, Levying and defraying ye necessary Charge of the Mannor of Renslaerwick in the County of Albany," October 21 1706, 1 NY Col Laws 603-04.

44. The absence of records of local jurisdiction is in part explained by the fact that the court baron was not a court of record. If courts baron were held in the early period, their traces would likely be of the indirect sort, primarily taking the form of appeals to superior jurisdictions. Julius Goebel reports one such appeal from the court of Fordham Manor in 1676. Goebel, *supra* note 21, at 19.
45. *Id.*; S. Kim, *supra* note 20, at 104.
46. See, for example, a printed lease for the sloopmaster Andrew Gardner, holding land in Livingston Manor in 1708, which states that the lessee "shall be subject and obedient to the Laws rules and jurisdiction which is or shall be hereafter made and Established in and by a court Leet and Court baron when the same shall be Erected ... within the said Manor." Lease dated March 25 1708, Livingston-Redmond MSS, (microfilm ed., Franklin Delano Roosevelt Library, Hyde Park, N.Y.), Roll 3.
47. The earliest record known to me is of an ejectment action brought by Kiliaen Van Rensselaer against one of his tenants in the court of oyer and terminer in 1686. See *Van Rensselaer v. Tewnison*, May 16 1686, 34 NY Col Mss 5.
48. Copyhold was so called because the tenant held his estate by copy of court roll—that is, as a result of the entry of the grant transaction or adjudication on the records of the lord's court. Although technically an unfree tenure, copyhold received substantial special protections from English courts in the seventeenth and eighteenth centuries. See 2 W. Blackstone, *Commentaries* *95-98 (1766).

At least as important to the decline of lordship as the interference of other political institutions, however, was the continuing competition for tenants, which was to shape the institutions of the land law throughout the eighteenth century. Bellomont's question to the Lords of Trade captured the essence of the problem: Why should any man become a tenant in New York when freehold land was so easily available elsewhere? For proprietors, answering that question required a shift in attention away from the privileges accorded them in their grants and towards the conditions of their own tenants. The lease, rather than the patent, became the central instrument for the definition of property relations. Landlords and prospective tenants became contracting parties; they met, though not on equal terms, in a market in which both parties had bargaining power. The contractualization of the land law in the eighteenth century occurred not in the courts, but on the spot, in response to the real, quotidian problems of landlords and tenants. It is impossible to understand the significance of the later actions of courts and legislatures without a clear understanding of the private orderings which underlay those decisions.

To begin with, the manor lord hoping to attract leaseholders had one significant advantage over the patenting government or private vendor of a freehold estate: He could provide the sorts of material assistance to struggling newcomers that could make the difference between success and failure. Manor lords sometimes made direct payments to destitute potential tenants who seemed good risks,⁴⁹ while the provision of an initial rent-free period was common, if not standard, practice.⁵⁰ In addition, the landlord

49. See William Corry to George Clarke, December 5 1740, June 12 & October 8 1756, 72 *NY Col Mss* 160, 73 *id.* 28, 133; Philip Skene to John Tabor Kempe, June 24 1766, Letters A-Z, Box 1, John Tabor Kempe Papers (New-York Historical Society); S. Kim, *supra* note 20, at 170.

50. William Smith, Jr. commented that the length of these periods varied with the "situation and quality of the land, and the generosity, ability or views of the landlord." William Smith, Jr. to Mr. Thom, Nov. 14, 1774, William Smith Papers, Box 4 (New York Public Library). Philip Livingston, an able if not generous landlord, offered at the end of the 1730's first nine years and then three to six years rent free. Philip Livingston to Jacob Wendell, Oct. 17, 1737, Feb. 27, 1739, May 10, 1739, Livingston Papers (Museum of the City of New York).

might offer first-year provisions, farming equipment, and livestock (hogs, sheep, cows or horses) to the prospective tenant, under terms which called for the tenant to pay the landlord back at a later period.⁵¹ Moreover, landlords might make general improvements to the estate which would make the prospect of farming within the manor much more attractive. Most important among these common improvements was the construction of mills for the use of the tenants. A sawmill was virtually a *sine qua non* for any construction of houses, barns and other buildings around the manor, while the gristmill was the center of the operation of any successful farming community. New York landlords were quick to perceive the advantages of providing mills,⁵² and construction of facilities for tenant use was a major promotional activity throughout the eighteenth century.⁵³ Beyond assuring the availability of material assistance, however, the landlord needed to meet the concerns of his prospective tenants about the terms of the lease itself. A tenant-at-will or tenant for term of years might well view with alarm the possibility of breaking the soil and developing his land, only to find himself dispossessed when he reached an age at which he was no longer able to begin again from scratch. The desire for more secure lease terms was a major contributor to the development of leasing practices in the manors.

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51. With respect to livestock, landlords frequently used the so-called half-increase system, by which the tenant and the landlord split the increase in the stock. See **S. Nissenson**, *supra* note 4, at 70-71; 3 **Early Records of the City and County of Albany and Colony of Rensselaerswyck** 472-73, 488-90, 507-08, 558-59 (J. Pearson, ed. 1916). This system was apparently extremely popular with tenants. See *New York Weekly Journal*, July 15 1734 (advertisement for tenants).
 52. Philip Livingston, for example, considered "a saw mill ... the first thing without which we can't Pretend to settle." Livingston to Jacob Wendell, October 19 1739, Livingston Papers, *supra* note 50.
 53. In the 1780's Alexander Hamilton served as counsel in a dispute between Robert Livingston, Jr., third lord of the manor, and Chancellor Robert R. Livingston, of Clermont, arising from the Chancellor's construction of a grist mill for his tenants' benefit on Roeloff Jansens Kill, to which the third lord believed himself entitled under his grandfather's will. See 3 **J. Goebel & J. Smith, The Law Practice of Alexander Hamilton** 8-50 (1980).

In responding to this desire, the proprietors of Rensselaerswyck pioneered, beginning in the mid-1680's, the "durable" or "perpetual" lease. This lease conveyed a permanent, inheritable interest in the land, reserving only the right to a perpetual rent. Although drawn to follow Dutch forms,⁵⁴ the Rensselaerswyck lease conveyed an estate close to that known as "fee farm" under the common law,⁵⁵ and was so treated by the courts. The standard Rensselaerswyck lease before 1680 had been for a term of six years,⁵⁶ and it seems likely that difficulties experienced by the patroon in competing for tenants precipitated the move to the perpetual lease.⁵⁷ In this instance a combination of Dutch with English technology, available for adoption primarily as a consequence of the hybrid ethnicity and experience of the lords of Rensselaerswyck, effectuated the necessary variations in rules to meet the demographic conditions of settlement. Elsewhere in the colony, the proprietors were less sanguine in their sentiments about durable leasing arrangements.

54. See **S. Nissenson**, *supra* note 4, at 58-61.

55. The fee farm was a grant reserving only rent-charge. See 2 **W. Blackstone**, **Commentaries** *43; 2 **E. Coke**, **Institutes** *44. The Rensselaerswyck leases contained no provision allowing for distraint or reentry on default of rent, and thus called only for a "rent-seck," which under English law was not accompanied by a reservation of any right of entry. Nissenson states, however, that the leases, taken in the context of Dutch law, did reserve the proprietor's right to reenter the land if rent was not paid. **S. Nissenson**, *supra* note 4, at 66.

56. *Id.* at 44.

57. Sung Bok Kim adduces, in addition to this reason for the longer lease terms at the end of the seventeenth century, the reason that proprietors, newly granted representation in the legislature, wanted to create estates sufficient to enfranchise their tenants. **S. Kim**, *supra* note 20, at 176; *id.* at 117 (applied to other manors lords as well as the Van Rensselaers). The difficulty is that there was no requirement to create any specific number of voters; the grants of representation were not dependent upon population. The manor lords could have held the seats as pocket boroughs had they wanted to.

Indeed, it appears that Kim mistakes the cause for the effect, insofar as it was only after leases for two concurrent lives had begun to appear that the legislature made it clear that "whereas Doubts have Arisen whether a person haveing an Estate of ffreehold in possession for his Life, or for the Life of his Wife, should be allowed to vote," such estates were of sufficient dignity to confer the franchise. Act of October 18 1701, 1 **NY Col Laws** 452, 453. The proprietors bargained for terms with tenants, and the legislature then made a *post hoc* decision about suffrage.

In Livingston Manor, for example, it would appear that the durable lease was tried at first in combination with tenancies-at-will. By 1718, Robert Livingston appears to have settled on a lease for two concurrent lives (those of the lessee and his wife) as the best arrangement; of the leases granted in the manor between 1718 and the revolution, roughly three-quarters were of this type.⁵⁸ Van Cortlandt Manor displayed another, less consistent, variety of terms. Since under the will of Stephanus Van Cortlandt the estate was destined for division on the death of his widow,⁵⁹ the pattern which Gertrude Van Cortlandt followed until her own demise in 1724 was to avoid making leases which would bind the heirs. Occasionally she offered lands on short terms if she found a tenant willing to take an abbreviated lease.⁶⁰ After the partition of the manor, which took place between 1732 and 1734, great portions of the property were sold off, and the varying needs of those descendants who retained property dictated a profusion of terms.⁶¹ Also in contrast to the practices of the northern manors, Frederick Philipse and the later proprietors of Philipsburgh eschewed the durable or extended lease. Instead, Philipse set the pattern of offering parole leases, which amounted to tenancies-at-will.⁶² Despite the apparently poor terms, Philipsburgh Manor was settled more rapidly than the other great manors, at least in part because the proprietors allowed extensive customary protection to grow up around the tenancy-at-will, so that

58. See **S. Kim**, *supra* note 20, at 177.

59. See p. 126, *supra*.

60. Account Book of Estate of Gertruyd Van Cortlandt, 1726-1740, NYPL; A Book of the Estate for Geertry'd Van Cortland alias Beekman, Van Cortlandt Papers, V2302-V2303, Sleepy Hollow Restorations Library.

61. In general, the Beekmans leased for three lives, the Schuylers and Philip Verplanck appear to have done likewise, while the Delanceys and Warrens made parole leases. See **S. Kim**, *supra* note 20, at 186.

62. Considerable testimony as to Philipsburgh leasing practices, by among others Frederick Philipse III, James De Lancey, and John Tabor Kempe, appears in Evidence on Memorial of Fred Philips, PRO AO 12/19, 385-405. The use of oral leases recognized by the landlord and other tenants was functionally equivalent to copyhold in the period before its recognition in the common law courts. Both copyhold of that era and the parole tenancy-at-will lay outside the possessory protections of the common law: the tenant had no legal recourse against the landlord if he recovered possession in a peaceable fashion.

Philipsburgh tenants may well have had the sort of rights traditionally associated with copyhold tenure.⁶³ In addition to the central question of security of tenure, two other elements of the law of landlord and tenant played a major role in the bargaining between parties: the tenant's right to sell the improvements made to the property, and the nature of the landlord's remedies for arrears of rent. The two issues were related, and their interplay represented another way in which private ordering eclipsed the public aspects of eighteenth-century land law.

Perhaps the most important amelioration of the disadvantages of leaseholding, once security of tenure was achieved, was the tenant's right to acquire the value of such improvements as he made to the property. Improving the land by cultivating it and building on it created equity; through the sale of his lease the tenant wanted to be able to realize that equity. The landlord too was interested in the improvement of the property, and not infrequently required the tenant to undertake certain improvements. Leases generally mandated that the tenant construct a house; Robert Livingston, Jr., third lord of the manor, required that new tenants construct a barn within ten years.⁶⁴ Additional conditions might be placed on the use of the land; Livingston contracted with one tenant to sow twenty-four bushels of winter wheat each year.⁶⁵ Whether the improvements were mandated by the landlord or independently undertaken by the tenant, New York law gave the landlord a right to a "quarter-sale," or a proportion of the proceeds from the sale of the lease.⁶⁶

63. See S. Kim, *supra* note 20, at 235 (comparative rate of growth of manors); Evidence on Memorial of Fred Philips, *supra* note 62, at 393-94, 397-98, 401-05 (comparisons of Philipsburgh practices to "the nature of copyhold").

64. In one case, Livingston required that the barn be 20 by 40 feet having "outlets on both sides for stables for horses." Lease between Robert Livingston, Jr. and Andries Janse Reese, June 1, 1752, Livingston Manor Papers, NYHS.

65. *Id.*

66. The quarter-sale reservation was known to the English law, but it would, in the context of a perpetual lease such as that offered by the Van Rensselaers, have been a restraint on alienation in violation of the medieval statute *Quia Emptores*, 18 Edw.I (1290). Whether *Quia Emptores* was applicable in New

The quarter-sale provision was sometimes replaced by a requirement that a tenant wishing to sell his lease give the landlord a right of first refusal, at “the lowest price.”⁶⁷ The landlord’s right of first refusal served several purposes: it gave him some control over the reliability of the entering tenant, but beyond that it gave the landlord a last chance to recoup any outstanding arrears of rent, and even, perhaps, to ensure that the incoming tenant was not part of a collusive assault on the landlord’s legal claim to his boundaries, always a matter of concern in an era of constant challenges to land titles.⁶⁸

Where quarter-sale reservations were employed, the proportion of the sale price taken by the landlord varied considerably. The Livingston practice, followed by several other proprietors, was to require payment of one third of the first sale of improvements on any particular plot; other landlords took one quarter of the sale price.⁶⁹ On subsequent sales of leases for the same property, landlords generally, though not always, took a reduced proportion of the sale price.⁷⁰ Along with his quarter-sale interest in the equity created by improvements, the landlord had a security interest as well. Landlords quickly came to view tenants’ improvements as security for payment of rent, and where tenants failed to meet rent obligations the landlord, long before

York remained a highly technical and vexing question through the early national period. See *Van Rensselaer v. Hayes*, 19 N.Y. 68 (1859) (holding statute did apply in colonial New York).

67. This was certainly true in the Claverack portion of Rensselaerswyck. See 5 Deed Book Series 104, 424; 6 *id.* 423-25; 8 *id.* 334, Albany Co. Clerk’s Office. For evidence that the first refusal right was also in use in Livingston Manor, see **S. Kim**, *supra* note 20, at 222 n.206.
68. Cadwallader Colden, for example, hoped through the use of his right of consent to lease sales to prevent collusion between tenants and title challengers. Colden to James Alexander, dated on receipt Oct. 20, 1740, James Alexander Papers, Box 47, NYHS.
69. See **S. Kim**, *supra* note 20, at 226-27.
70. Robert R. Livingston of Clermont and Frederick Philipse III, for example, took one fifth and one sixth of such sales, respectively. *Id.* at 227. Not all landlords reserved quarter-sale rights; the Beekmans in Cortlandt began only in 1775 to require a one-tenth share. See Lease between Henry & Gertrude Beekman and Abiel Fuller, Mar. 16, 1775, Van Cortlandt Papers, V2208, Sleepy Hollow Restorations Library.

any question of quarter-sale arose, had available the power of distraint—he could enter the land and seize improvements to the value of the rent due.⁷¹ Despite the presence of this remedy, most of the proprietors had great difficulty collecting their rents,⁷² and were nevertheless reluctant to invoke their legal remedies.⁷³ A landlord who had a reputation for harsh collection policies might well find himself unable to get tenants.⁷⁴ Thus, the development of the land law in the first half of the eighteenth century followed a pattern in which concern for private ordering, for individual agreements between tenants and landlords, displaced the earlier concern for public ordering, for the constitutional, jurisdictional and political consequences of land tenure, which had been dominant in the seventeenth century.

The primary importance of private ordering in the development of rules for the use and occupation of real property in New York after 1700 by no means excluded land disputes from the legal system. In New York, as in everywhere else in British North America in the eighteenth century, only basic actions for the collection of debt were more common than lawsuits over land title. Of the 42 cases in which James Duane was retained between 1760 and 1772, for example, for which both Duane's files and the court record are available, 15 were cases in ejectment; all but half a dozen of the remainder were actions for debt on a bond or

71. Reservation of a right of distraint distinguished the “rent-charge” from the “rent-seck” at English law. See *supra* note 55. The statute 4 Geo.II c. 28 (1731) gave all English grantors of land with reservation of rent-seck the right to distraint, but in New York (outside the operation of that statute) the lease had to reserve the right explicitly.

72. See **S. Kim**, *supra* note 20, at 208-15, for a survey of collection rates. Kim concludes that, with few exceptions, landlords were hard pressed to collect half the rent due, year after year.

73. *Id.* at 217-18.

74. There were, of course, exceptional landlords who were prepared to risk tenant loyalty in the interest of prompt collection. John Van Cortlandt wrote in 1768 to one tenant with whom he had apparently no history of prior problems: “Unless you settle your Rent Immediately on Receipt of this you must Expect to be Compeled shortly.” John Van Cortlandt to Benjamin Golden, November 9 1768, Letterbook of John Van Cortlandt, NYPL.

assumpsit.⁷⁵ The records of other practitioners tell a similar story.⁷⁶

As in England, most of the actions brought for the purpose of resolving a controversy over land ownership were actions in ejectment. Ejectment, which permitted the litigation of freehold title, developed by a series of ruses out of the cause of action *ejectio firmæ*, fashioned in the fourteenth and fifteenth centuries for the protection of termors, who were unable to make productive use of the older real actions. *Ejectio firmæ* gave the lessee a version of trespass to be used to recover the remaining portion of his term when he had been forced out by someone other than his lessor. The speed and simplicity desirable when the lessee—whose term might easily expire during the lengthy process of the real actions—sought to recover possession represented an irresistible attraction to owners, and by the opening of the seventeenth century *ejectio firmæ* had become ejectment, a fictitious lawsuit in which the demandant claimed to have made a lease to one Doe, who then entered on the claimed property pursuant to the lease and was there ejected by one Roe, said to be an agent of the tenant. The result, once the current occupant had been notified of the proceedings, was a simple and relatively expedient way of reaching the issue whether plaintiff had been empowered to make a valid lease, that is, whether he rather than the defendant was entitled to possession of the

75. This sample of cases was assembled by matching surviving practice files, James Duane Legal Papers, NYHS, against minutes of the New York Supreme Court (microfilm, Queens College). Only cases for which pleadings or notes of evidence and related minutes entries could be located are included. Because relatively complicated land disputes are more likely to leave extensive files in counsel's office, along with a more extensive and readily matched trail in the court minutes, the number given in the text undoubtedly undercounts the frequency of debt litigation in proportion to land cases.

76. Not without exception, however. Of the 193 cases listed in John McKesson's register of cases (NYHS) from 1763 to 1786 for which a confirming record can be located, only 8 are ejectment actions or are otherwise related to land title. McKesson's practice, so far as the surviving records will show, was almost entirely commercial in character.

property at issue.⁷⁷ The encrusted layers of make-believe which clothed every use of ejectment to establish land ownership are rightly described as “an illustration of what Maitland called the ‘Englishry of English law’,”⁷⁸ but they were just as acceptable in the increasingly Anglicized legal community of New York, where the Does, the Jacksons, and the Fairclaims entered at the demise of the real party in interest and were evicted with the same bloodless vigor that Roe, Styles, and Shamtitle showed at home.

The difference was that, in the context of a working system of land registration, litigation by ejectment was neither necessary nor productive for the resolution of disputes that could be solved by reference to the chain of past conveyances. In New York ejectment did the work of framing boundary disputes, reconciling conflicting grants whose patents all too often referred ambiguously to landmarks rather than courses and distances, or which showed the consequences of less than painstaking survey work. Patentees had always an interest, at the time of issuance, in the least definite possible description, for land that had to be paid for was more expensive than land that could be snuck into one’s possession under cover of an indefinite grant. But at the point of contact between two such grants, a heavy precipitation of lengthy litigation could be expected. It was in such circumstances, for example, that James Duane represented patentees of land in Albany and Ulster counties whose resistance to claims from neighboring patentees, brought in a single ejectment action, took fourteen years to resolve. Defendants’ costs for the last four years alone, from April 1765 to November 1768, came to more than £180.⁷⁹ Where competing claims arose from grants under both New York and neighboring colony patents, ejectment became the

77. For the development of ejectment in England, see **A.W.B. Simpson, *An Introduction to the History of the Land Law*** 135-41 (1961).

78. **S.F.C. Milsom**, *supra* note 2, at 162.

79. File, James Jackson *ex dem.* Jacobus Terboss et al. v. Richard Nichols, Duane Legal Papers, Box A, file I1 (NYHS). *See also* File, Denn *ex dem.* Van Wyck v. Alexander, James Alexander Legal Papers, Box 63, File 7 (NYHS), a dispute over the southern boundary of the Second Nine Partners patent, in which Alexander represented himself and his partners from October 1746 through at least April 1753.

vehicle for the judicial attempt to accomplish what intercolonial diplomacy could not. At the boundary between Westchester County and Connecticut (and, after mid-century, at the Taconic-Berkshire border between New York and Massachusetts) Doe and Roe conducted their puppet war for speculators who claimed under titles from two different colony governments.⁸⁰ Increasing appearance of such cases in the files of practitioners in the 1750s and '60s provides an ominous indication of new stresses on the land law system of New York.

When, in 1700, Stephanus Van Cortlandt and Frederick Philipse voluntarily extinguished the legal incidents of their lordships, they were responding to forces which were only to grow stronger during the eighteenth century. The most important expression of those forces was the constant competition for tenants, which led the great proprietors to keep themselves constantly informed of the terms and conditions being offered by their neighboring competitors. Robert R. Livingston of Clermont was voicing the common practice when he wrote to his son in 1762 that "I have lett out" several properties "on the same terms the Patroons ... lett his as also Lydius."⁸¹ By mid-century the practice, though not the theory, of the land law was based on the contractual premises embodied in such documents as leases, and not on the status premises embodied in patents or quasi-feudal grants. Land had become commoditized; landlord and tenant bargained for rules set in a competitive market. In New York plentiful land and scarce labor created a new legal regime, very different from the one established under English conditions. Yet, by and large, the rules were not significantly altered. In one sense, the conciliation of realities and rules was successful. But the doctrinal settlement also created potential zones of instability, where rules sharply diverged from the actualities. Events in the third quarter of the eighteenth century put enormous pressure on

80. See, e.g., John Doe *ex dem.* Philip Verplanck et al. v. Ezekiel Griffin, Duane Legal Papers, Box A, Files V2-3 (NYHS) (Westchester, tried October 21 1763).

81. Robert R. Livingston to Robert R. Livingston, Jr., Mar. 1 1762, Robert R. Livingston Collection, Box 1, NYHS. "The Patroon" was John Van Rensselaer, the proprietor of the manor of Claverack.

the surrounding circumstances of the land law system, intensifying border conflicts and altering the strategic and economic context of life in the Hudson River Valley. Those pressures forced rule changes, not all of which the legal system was able to accommodate.

In the period between 1750 and the beginning of the revolution the basic competition for tenants intensified, though altered in fundamental character by two new elements in the situation of the large proprietors—agitation at the eastern boundaries of New York, particularly with Massachusetts, and renewed executive opposition to the manorial land system within the province, primarily attributable to the boundless energy and limitless hostility of Cadwallader Colden. The manor lords' attempts to retain the loyalty of their tenants under these new and more dangerous circumstances substantially affected land practices on the ground; at the same time, the pressures placed upon the provincial land system overflowed into the courts—precipitating changes in the system of land litigation—and beyond, resulting in the outbreaks of violence in the Hudson River Valley between 1751 and 1757, and again in the "Great Rebellion" of 1766.⁸² The doctrinal consequences of this

82. Some historians have seen in the pattern of unrest in the 1750s and 1760s a revolt by oppressed tenants who were attempting to overthrow a régime of property law which legitimated class robbery. See, e.g., I. Mark, *Agrarian Conflicts in Colonial New York 1711-1775*, at 50-84, 115-63 (1940). This interpretation has been subjected to searching, and largely successful, criticism by Sung Bok Kim, who views the disturbances as resulting from the assaults by Massachusetts on the land titles of New York proprietors, which eroded the loyalty of some tenants and threatened the stability of other tenants' holdings. See S. Kim, *supra* note 20, at 281-415. Kim, whose studies of the economics of tenancy lead him also to the conclusion that the tenure system was "capitalistic" rather than "feudal" in the eighteenth century, concludes that the results of the system were "benign." *Id.* at 280. Although Kim's account of the roots of agrarian violence in mid-century New York is ultimately convincing, his insistence on the benignity of the land law seems misguided. The documents associated with the disturbances in the Hudson River Valley show the inescapable evidences of anti-landlord feeling on the manors during this period. See, e.g., Mark & Handlin, *Land Cases in Colonial New York 1765-1767: The King v. William Prendergast*, 19 *N.Y.U.L. Quarterly R.* 165, 169-94 (1942) (records of treason trial succeeding "Great Rebellion" of 1766). To say that a status, or public-law, conception of property came to be replaced by a private, contractual conception of property in the course of the eighteenth century is not to suggest that the

extraordinary tumult were comparatively slight, and it is this relative inflexibility of the legal system itself, behaving with comparative autonomy in a period of enormous social stress, which may be taken to indicate the completion of the process of legal settlement, at least as regards the land law itself.

After 1750, boundary disputes between the manor proprietors and Massachusetts land developers eager for tenants to open up the Berkshires caused violent disruptions in the pattern of life in the northern manors. The difficulties arose, as so often, from the original ambiguities in the royal patents establishing both colonies. The Massachusetts Bay charters, both of 1629 and 1691, left the western boundary of the domain unsettled; the intervening grant of New York, whose eastern boundary was confirmed in 1674 and 1676 as lying at the Connecticut River, had no effect on the pretensions of the Bay Colony government, which continued to act as though its charter granted it dominion to the Pacific Ocean.⁸³ The Connecticut River settlements—Springfield, Northampton, Deerfield, and Northfield—represented the practical westward boundary of the Bay Colony until the conclusion of Queen Anne's war, but after 1715 the Berkshire hills began to seem attractive territory, and the area lying between the Housatonic and the Hudson became an inevitable focal point of intercolonial controversy. In 1705, Governor Cornbury awarded Peter Schuyler and eight other patentees the "Westen Hook," a tract reaching from the Housatonic to the eastern boundary of Claverack (the lower manor of Rensselaerswyck), establishing the eastern boundary of

resulting régime was without significant inequities. Correctly ascertaining the relative importance of class antagonism and competition between rival land claimants as causes of agrarian unrest in colonial New York is a delicate task for which our knowledge is still too incomplete; it should be clear that conclusions as to the development of the land law do not in any sense prejudge the outcome of that analysis.

83. The Board of Trade, concluding a review of the charters in 1757, hoping to establish the boundaries from the grants, commented that "the description of the limits of those grants, is so inexplicit, and defective, that no conclusive inference can be drawn from them with respect to the extent of territory intended to be granted by them." 8 NY Col Docs 224.

New York settlement.⁸⁴ In 1722, responding to petitions for land grants in the area from Springfield, Westfield, Hadley, and Hatfield, the Massachusetts General Court established the townships of Upper Housatonic (Stockbridge) and Lower Housatonic (Sheffield), ordering a settling committee to plant 120 families in each.⁸⁵ From this point on, jurisdictional conflict in the area was inevitable.

Settlement in these and other new Massachusetts towns was impeded by war from 1744 to 1748, but by December 1749 the Massachusetts council was urging the rapid settlement of the lands between Stockbridge and Pontoosuck (Pittsfield), along with the area between Sheffield and the Taconic hills, further delay being “prejudicial to the Interest of the Province.”⁸⁶ Philip Livingston, who had been attempting throughout the 1740s to make interest with land speculators in western Massachusetts, in the hope that by purchasing land within the Bay Colony jurisdiction he could protect the flank of his own holdings in the disputed area,⁸⁷ died in 1749, leaving to his son Robert, Jr. what was soon to be the most hotly contested real estate in New York (or perhaps it was in Massachusetts). Refusals to pay rent and violent actions on both sides characterized Livingston Manor from 1751 to 1754, as tenants, supported by speculators with the official blessing of the Bay Colony government, preferred to be Massachusetts freeholders than tenants of Robert Livingston, Jr. In April 1753 the General Court officially annexed portions of Livingston Manor to Hampshire County.⁸⁸ There were crop

84. See “Names of the Patentees of the Westen Hook,” March 5 1705, Albany County Misc. Mss., Box 3, NYHS; Indian deed, dated May 2 1703, Schuyler Papers, Box 2, NYHS.

85. 3 **Journals of the House of Representatives of Massachusetts** 194 (1919-64); 4 *id.* 31, 56-57. See 1 J.G. Holland, **History of Western Massachusetts: The Counties of Hampden Hampshire, Franklin, and Berkshire** 163 (1855).

86. 26 **Journals Mass. House Rep.** 128.

87. See S. Kim, *supra* note 20, at 287-90.

88. See 29 **Journals Mass. House Rep.** 137-140, 164; 3 **Acts and Resolves of Massachusetts Bay** 656.

burnings, death threats, and forcible evictions.⁸⁹ By July 1754 there were riots within the domain of the manor proper, including the destruction of some 1,200 trees near Livingston Manor's Ancram ironworks. Raids by Livingston and his opponents on one another's towns resulted in at least two kidnappings and several beatings. At the end of the month, Governor Clinton issued a proclamation officially pitting the force of the New York government against the Massachusetts claimants, ordering all law enforcement officers in Albany and Dutchess counties to arrest those who had kidnapped Livingston's tenants, and to prevent "like Riotous proceedings for the future."⁹⁰ A copy of the proclamation was sent to Massachusetts Bay's Lieutenant Governor, Spencer Phips; Clinton demanded the extradition of all persons concerned in the riots, including those Massachusetts magistrates who had abetted the activity, and warned that New York would no longer accept Massachusetts attempts to acquire New York lands by subversion of New York tenants.⁹¹

By February 1755 violence had spread to Claverack, Massachusetts militia commissions had been issued to New York tenants, and the sheriff of Albany County had been seized by these forces and carried off to appear in court in Springfield.⁹² James De Lancey, the Lieutenant Governor, wrote to Massachusetts Governor William Shirley, warning that the situation might soon result in "a civil war between the two governments."⁹³ There were more kidnappings and killings through the spring, followed by a general disengagement of the two provincial governments during the summer, after which the slow processes of restoration began.⁹⁴ In August 1757 the Board of Trade rendered a decision fixing the boundary twenty miles

89. See **S. Kim**, *supra* note 20, at 290-310.

90. See 3 **Doc Hist NY** 749-757.

91. 77 **NY Col Mss** 144; 30 **Journals Mass. House Rep.** 64.

92. See **S. Kim**, *supra* note 20, at 310-325.

93. De Lancey to Shirley, February 17 1755, 3 **Doc Hist NY** 779.

94. See **S. Kim**, *supra* note 20, at 325-43.

due east of the Hudson River.⁹⁵ This placed New York's eastern boundary at the eastern limit of Livingston Manor, and brought an end to agitation within this domain. For John Van Rensselaer, who claimed an extent for Claverack twenty-four miles east of the Hudson, the solution was not as satisfactory. Claverack was not to be quietly possessed by its lord at any time thereafter.

Agrarian unrest subsided in New York in 1757, with the end of the Livingston Manor riots, only to resume again in 1766. Even the first outbreak was sufficient, however, to unsettle the social situation of the manor proprietors and to reveal a fatal and fundamental weakness in the land law system. Not only had the proprietors been given an object lesson in the dangerous possibilities that lay in turning their own tenants into agents for the subversion of their grants, they had also seen the helplessness of the land law system in the face of conflicting intercolonial claims. The first problem could only be met by a continuing renegotiation of the terms of tenancy; the second would remain an irremediable feature of the imperial legal order.⁹⁶ Only Article III, §2 of the Federal Constitution of 1787 could resettle the jurisdictional issue; the legal position of the manor lords would never again be fully satisfactory. The situation was bad enough, but it was made worse by the mounting of an adroit, patient, and uncompromising attempt to destroy the manor system from within, using the legal environment which had hitherto been its most solid protection.

Cadwallader Colden's long career in the politics of New York was marked by an implacable hostility to the system of land distribution in which, as surveyor general, he was so deeply involved.⁹⁷ Stubborn and vain, impressed with the talents of no

95. 7 NY Col Docs 223-224, 273-74.

96. In addition to the accounts of some incidents I have given here, the political history of New York's boundaries is rich in demonstration of the legal system's helplessness to resolve the problem of intercolonial boundaries. The subject is brilliantly presented in **Philip J. Schwarz, *The Jarring Interests: New York's Boundary Makers, 1664-1776*** (1979).

97. Born in 1688, Colden emigrated to Philadelphia from Scotland, where he had been trained as a physician, in 1710. Robert Hunter brought him to

one save Sir William Johnson, whose virtues he understood better than anyone else, Colden brought impeccably royalist principles to bear on his analysis of political life in New York, and saw the manor lords, in curious though forceful terms, as “the principal Demagogues in oppressing the Administration.”⁹⁸ The destruction of the manors, in Colden’s view, would liberate land for the rapid population of New York and provide a permanent revenue through quit-rents, rendering the governor and administration independent of the factional politics of the Assembly. After 1746 the only local support for Governor George Clinton in his struggle with James De Lancey,⁹⁹ and himself head of the government in 1760-61, Colden saw the opportunities presented by the situation in the Hudson River Valley for the destruction of the system he so loathed. Like another, less fortunate, amateur litigant, he knew as much law as any gentleman in England, and with the assistance of the Attorney General, John Tabor Kempe, with whom he was joined in financial as well as political interest, Colden began his assault on the manors just as the boundary riots were coming to a close.

From 1759 through the end of 1762, Colden was directly and personally involved in a series of actions designed to break up Claverack, the lower manor of Rensselaerswyck. Like the other lords, John Van Rensselaer had inherited property which was gathered under the loosest possible construction of ambiguities in the original grants to the patroonship. The north-

New York, appointing him in 1720 to his life-long post as surveyor general. Burnet appointed him to the Council in 1721, where he also remained until his death in 1776. On five occasions after 1760, Colden served as Lieutenant-Governor in control of the province—a total of more than six years in office. Mathematician, botanist, physician, and philosopher, he was also a confirmed hater of lawyers, though he trained two sons to the Bar. For a fine general biography, see **A.M. Keys, *Cadwallader Colden*** (1906). The only disadvantage of Keys’ work is its insensitivity to the detail of legal questions; it is in this respect perhaps not unlike Colden himself.

98. Colden to Secretary Popple, December 15 1727, 5 **NY Col Docs** 844-45; *see* Colden to William Shirley, July 5 1749, 4 **Colden Papers, NYHS Coll 1920**, at 122-23.

99. *See S. Katz, **Newcastle’s New York** 176-84* (1968). Katz’s work remains the only lucid description of the politics of the Clinton administration, which ought perhaps to be called instead the Age of De Lancey.

east corner of Claverack had never been accurately determined, and the manor's legitimate extent could be as small as 23,800 acres or as large as 281,600. The slight difference of a quarter-million acres provided room for at least the thin edge of a wedge to be inserted, and a series of petitions for authority to purchase from the Indians provided the opportunity. In one, Colden's daughter and son, along with the Attorney General himself and Goldsbrow Banyar, the province's deputy secretary, asked in May 1761 for a grant of 13,000 acres east of Kinderhook, within what Van Rensselaer claimed as Claverack. A long series of legal actions finally came to rest before the Governor and Council in October 1762,¹⁰⁰ ending inconclusively, with an opinion dismissing the various petitions on the ground that the petitioners' evidence, much of it gathered in deposition of the Massachusetts developers who had inspired the resistance in Livingston and Claverack before 1757, had not demonstrated that the lands claimed were actually vacant.

Recognizing that the colony's Supreme Court, under the control of De Lancey and the landed interest, would never undertake the legal reduction of the manors, Colden saw the Governor and Council in their role as a potential court of appeals as the institutional key to his campaign. The technical requirement was to provide for the reexamination of factual issues resolved by Supreme Court juries in appeals to the Governor and Council, and in 1764, as Lieutenant-Governor, Colden encouraged the attempt to lodge an appeal on the merits from a jury verdict in the famous case of *Forsey v. Cunningham*.¹⁰¹ Success in such an endeavor, the proprietors realized, would afford Colden, or any future governor so minded, the legal

100. Much of the litigation was conducted by John Tabor Kempe on behalf of the anti-Claverack interests, and by James Duane on behalf of the patroon. See Unsorted Legal Mss, Kempe Papers, NYHS, and File, *The King v. John Van Rensselaer*, Duane Legal Papers, Box A, File V1-V2, NYHS.

101. The proceedings in *Forsey*, the Privy Council appeal, and the controversy that surrounded it, which John Watts (himself a proprietor in Van Cortlandt Manor, speaking in his usual understated tones) said would end in "the worst System on Earth", NYHS Coll 1928, at 391, are discussed in Chapter 5, *infra*.

mechanism necessary to the extinction or reduction of their grants.

It is not surprising, given the intense internal and external pressures on the manor system, that the proprietors of the great estates were seeking to ensure the support of their tenants at the close of the 1750s. The measures they took, which continued the drift away from lordship in the direction of landlordism, were insufficient to prevent another explosion in 1766, but they did much to remove the vestiges of quasi-feudal privilege which still clung to the institutions of large-scale ownership in New York.

As we have seen, the proprietors of Philipsburgh Manor were distinguished throughout the eighteenth century by their adherence to the parole lease, or tenancy-at-will, as the only available tenure. In 1760, in a sharp break with that tradition, Frederick Philipse III offered all his tenants the opportunity to convert their parole leases into leases for three lives.¹⁰² There seems to have been little response from Philipse's tenants; perhaps the offer functioned more to define the rights which had grown up around the parole tenure in Philipsburgh than to replace them.¹⁰³

At the same time that Frederick Philipse III was offering improved security of tenure to his tenants, the proprietors of Claverack and Rensselaerswyck proper were wrestling with remnants of the manorial past. Under the will of Kiliaen Van Rensselaer, made in 1718, the heirs to Rensselaerswyck were permitted only to make such leases as would be determined "upon the death of the grantor upon forfeiture of the manor ... to the next heir in taile."¹⁰⁴ Similar restrictions were placed, under the will of his brother, Henry of Claverack, upon the heirs to that

102. Printed notice to tenants, dated Feb. 7, 1760, Philipse Papers, PX2345a (Sleepy Hollow Restorations Library).

103. There is no record, either in the surviving Philipsburgh lease books or in Frederick Philipse III's testimony in support of his request for compensation from the Crown, *see supra* note 62, of any leases for three lives issued as a result of this offer.

104. Will of Kiliaen Van Rensselaer, June 18 1718, Townsend Coll, Box 1.

estate. In 1762, John Van Rensselaer, Henry's heir, was advised by his lawyers that perpetual leases which had been issued to Claverack tenants were invalid under the terms of his father's will. As the tenant in tail, John was without authority to make a lease for longer than his own life. Within a year after receiving this advice, Van Rensselaer barred the entail on his estate, recovered the property in fee simple, and confirmed his tenants' leases; at roughly the same time Stephen Van Rensselaer, proprietor of Rensselaerswyck, did the same.¹⁰⁵ When we recall that 1762 saw the climax of the Colden-Kempe assault on Claverack, events within and without the manor may seem to form a close correlation.

The history of the perpetual lease in the Rensselaer dominions also provides a succinct demonstration of the influence of tenants on the land system of the province. Offered in the 1680s to secure settlers, it was rejected by Kiliaen Van Rensselaer in his estate planning arrangements as too inflexible and insufficiently remunerative. Tenants whose rents could not be raised within their own or their spouses' lifetimes were overly independent from the old patroon's point of view. But the difficulties of securing tenants were not over in 1718, and so a new cohort of perpetual leases populated the landscape for another generation. When the leases came into conflict with the formal legal status of the land in the 1760s, it was the formal arrangements of the old patroon that had to give way. In barring the entails limiting their estates, the Van Rensselaer cousins were undertaking a process conventionally known among lawyers as resettlement. The phrase is resonant for us, for the whole series of incidents reveals the process by which the colonial law of real property came to be settled and resettled.

Events from 1751 to 1766 marked the completion of the settlement of the land law in New York. The principles on which the manors had originally been created—both the technical association of jurisdiction with ownership and the political correlation between concentration of ownership and support for

105. See **S. Kim**, *supra* note 20, at 175-76.

executive government—had been thoroughly eroded by the process of physical settlement, dominated as it was by competition to get and retain tenants. The lords had become landlords, whose stability at the pinnacle of the provincial society rested on their ability to attract and maintain tenants, whose productive exploitation of the soil rendered to the lords as rents what in other colonial societies were paid as taxes to the royal government. Ultimately the lords sought an alliance with their tenants against the disruptive forces of boundary warfare and political attack from an executive no longer convinced that its own self-interest lay in support of the large proprietors against settlers who preferred to own and pay taxes than to lease and pay rent to the patroon. In fashioning such an alliance the landlords of the Hudson River Valley tried to shape the land law in their own interests, surrendering their authority to hold courts and retaining their power to write leases—giving up the trappings of legal autonomy in return for the actualities of superior bargaining position. Over the course of the colonial period they moved the land law toward the quarter of their new hope, and by its end they had little to expect from royal government but interference and hostility. Their tenants, on the other hand, having used their own tools for shaping the law, had brought the bargained-for exchange to the control of legal and physical settlement. The guarantor of their exchange was the legal machinery of the local land law. Destabilization by conflict between the Imperial and local political regimes promised tenants illusory gains, and delivered actual misfortunes.

In this environment, the closure of the courts in late 1765 as a consequence of the Stamp Act Crisis was radically destabilizing. Tenant resistance broke out in the form of rent strikes and forcible dispossessions, particularly in the lower Hudson Valley, in Van Cortlandt and Philipse domains. Though some of the rioting in Van Cortlandt Manor seems to have been occasioned by tenant grievances over leasing practices, the most serious threats to order emanated from the Philipse Highland Patent, an area of conflicting land claims long under dispute. The failure of the land law system to resolve such disputes, previously experienced

in the areas of Livingston and Van Rensselaer country involved in boundary conflict with Massachusetts, had produced another harvest of disorder. Livingston Manor and the Van Rensselaer possessions were mostly quiet through the spring of 1766, but rioting in the lower areas was perceived to threaten even the homes of landlords in New York City, already convulsed with the urban resistance to the Stamp Act. When the courts reopened in the spring of 1766, local governments proclaimed themselves unable to deal with the armed rioters, variously numbered between 300 and 2000 by contemporary and historical estimates.¹⁰⁶ By mid-June, Governor Moore had called upon the military to reinforce the civilian government, and a regiment en route from Albany to New York City marched down the Valley with the purpose of dispersing rioters and restoring order. Confronted at one point by skirmishers who seriously wounded three soldiers, troops hotly pursued the rioters, who either surrendered or fled the colony. By the end of June resistance had collapsed, and the government began preparing treason prosecutions against the leaders.¹⁰⁷

The rioting of 1766 was the most significant such outbreak during the provincial period. Both the riots and the period of relative quiet that followed are reflections of the land law settlement in its strengths and weaknesses. The technical and political limitations of the land law's powers of conciliation were repeatedly revealed in the history of boundary conflict and resulting civil disorder. Factional conflicts within the New York political system as well as conflicts on an Imperial level—between British and local claimants, as in the long-running Oblong controversy, or between claimants holding grants from different colonial governments—imposed strains for which doctrinal development could offer no remedy. The problem was incomplete sovereignty, in the sense that no institution within the

106. The complex events collectively known as the "Great Rebellion" of 1766 are described in **Kim**, *supra* note 20, at 346-415. The particular and substantial issue of the numbers involved in rioting is discussed *id.* at 394 n.139.

107. For a more complete narrative account of the legal aftermath of the riots of 1766, see Moglen, *Treason and Riot in the New York "Rebellion" of 1766: the Trial of Elisha Cole* (forthcoming).

provincial system was able to make its adjudications final and back them with sufficient force. New York's provincial government could prevail more often than not before the Crown, perhaps in part for the reason given by Timothy Dwight, at the end of the eighteenth century: "being a royal Government [New York] was ever favoured by the court of Great Britain in its various claims of territory & was almost certain of success in the final adjustment let the object claimed be what it might."¹⁰⁸ But the province's long-term success in boundary negotiations could not prevent the destabilizing consequences of disputes, as rival claims encouraged tenants to resist landlords.

Despite the intractable and occasionally explosive consequences of the land law's inability to deal with problems created by boundary contention, the successes of the land law settlement were more considerable than the events in the Hudson Valley from 1750 to 1766 seemed to suggest. The development of the provincial land resources proceeded through the eighteenth century by a process of physical settlement mediated by law that compromised competing interests within the provincial system. Notwithstanding significant centrifugal forces, including ethnic tensions and occasionally violent political factionalization, the provincial government created and administered a system of land tenure that achieved the primary Imperial purposes. The strategically crucial terrain of the Hudson River Valley was kept relatively stable under the politically reliable control of large-scale owners. The tenant-farming system continued to attract settlers to New York, despite the apparent advantages of free-holding systems on New York's borders. The provincial government derived both revenue for its operations and benefits to confer on political allies from its control over the acquisition and development of land outside the borders of existing settlements.

108. See 2 **T. Dwight**, *Travels in New England and New York* 411 n.10 (Barbara Miller Solomon ed. 1969) quoting his own ms. of "Vergennes No. 8". On the appropriateness of this conclusion concerning New York's political strength in boundary contests, see **Philip J. Schwarz**, *The Jarring Interests: New York's Boundary Makers, 1664-1776*, 227-33 (1979).

None of these purposes, to be sure, was achieved completely, or without offsetting disadvantages. The essence of the land law settlement was the flexibility inherent in the institutions and doctrines established in the late seventeenth century, which permitted a continuous mediation between managerial goals and the purposes of the nongovernmental participants, including the large landlords and, to a lesser extent, their tenants. The key to this flexibility was the process whereby the apparently traditional, largely inflexible, structure of manorial organization—adopted in the late seventeenth century to solve political problems of the early provincial managers and to gratify the ideological prepossessions of the proprietor—was replaced by a contractualized system of private ordering, centering on the lease. Competition for tenants organized the land law of the manors themselves, while the public-law elements of the system concentrated on the control of the large-scale pattern of settlement. This compromise worked, but in a pattern familiar from other episodes in the common law's history, it worked in part by disguising its innovations. Formal doctrinal change was far less evident than actual alteration of relations in practice. By the close of the provincial period, the divergence between formal doctrine and common practice was in certain respects profound.

Viewed in this context, it is not surprising that the direction of post-revolutionary legal change was to bring formal doctrine more into line with provincial practice. Some alterations did occur, but of these most had the effect of ratifying results already reached in the long process of developing rules through private ordering, while others appeared intended to bolster the power of landlords in their own market. The end of entail and primogeniture, for example, was little more than an acknowledgement of practical realities in the land market, while the early legislation on tenures and landlords' rights actually expanded upon early colonial precedent.

The initial steps taken by the legislature of New York State to alter the land law were extremely tentative.¹⁰⁹ Not until 1786 was any substantial legislation enacted. At this time, the legislature passed an act declaring that all estates in fee tail existing in the state, or created by conveyances taking effect in future, would be converted into estates in fee simple.¹¹⁰ The same act did away with the common law rule of primogeniture, proclaiming instead a rule of partible inheritance in cases of intestate succession.

The abolition of entail was, as we have seen, far from radical in the context of New York land law. Throughout the century entail had become increasingly inconvenient to landlords who wanted the flexibility to compete for tenants in a market which might require leases of longer term than a tenant in tail could offer. What appeared to be a bold break with the feudal past was but a belated recognition of existing conditions.

With the revision of the law undertaken by Samuel Jones and Richard Varick,¹¹¹ completed in 1789, the substantive development of the land law took another small stride, through the enactment of the major English statutes bearing on the land law, as adapted by Jones and Varick to the needs of the new state. The revision included "An Act concerning Tenures,"¹¹² which contained the substance of the ancient statute *Quia Emptores* and the statute of Charles II, never made applicable to the colonies, which abolished in England the feudal tenures derived from military service.¹¹³ In drafting the act, however, the New York revisors made sure that the rights of New York landlords which

109. Virtually the only change made before 1786 was one which transferred the right to collect quit-rents from the Crown to the State. *N.Y. Laws*, 3d Sess. c. 25, § 14 (1779).

110. "An act to abolish entails, to confirm conveyances by tenants in tail, to regulate Descents, and to direct the Mode of Conveyances to Joint-Tenants," Feb. 23, 1786, *N.Y. Laws*, 9th Sess. c. 12.

111. See *N.Y. Laws*, 9th Sess., c. 35 (1786) (appointment of revisors).

112. Act of Feb. 20, 1787, *N.Y. Laws*, 10th Sess., c. 36.

113. For the statute *Quia Emptores*, 18 Edw.I, see note 66, *supra*; the statute abolishing the incidents of feudal military tenures was 12 Car.II c. 24 (1660).

descended from original manorial grants, rights which could not be granted or exercised under the English statutes, would nonetheless be saved.¹¹⁴

These few examples indicate the path that the land law took in New York in the period immediately following independence. The growth of the law throughout the century had been powered by the practical needs of the great proprietors, who had built the rules on a contractual foundation—a foundation which was itself composed of the results of countless negotiations between those who had land and those who provided labor. Independence and the altered political environment which it brought did not substantially disturb that continuity. It was to take another half century, in which New York experienced enormous immigration and economic growth, and suffered another series of anti-rent rebellions, before the vestiges of the provincial land system were entirely effaced.

The balance of successes and failures in the settling of the land law illustrates the central theme in the larger story of legal settlement in New York. Doctrinal structures and institutional arrangements evolved under the pressure to compromise local political outcomes with Imperial policy. Within the limited domain of provincial sovereignty, the compromises were largely successful; adjustments between landlord and tenant, commercial city and agrarian countryside, Dutchmen and Englishmen, found their way into a legal system showing on its face less flexibility for such conciliations. At the geographic boundaries, however, the forces of destabilization could not be effectively conciliated by legal settlement, because the geographic boundaries were also boundaries of the legal system. In the borderlands Imperial policy and Imperial politics displaced the settling function of the law. Even when, as most often, New York as a political unit

114. The New York act explicitly saved “any rents certain, or other services incident to or belonging to tenure in common socage, due or to grow due to ... any mean lord ... or the fealty of distresses incident thereto.” Act of Feb. 10, 1787, *N.Y. Laws*, 10th Sess., c. 36, § 5. This permitted the manor lords to continue to exercise such rights as were contained in their patents which went beyond the rights grantable under New York law. See **R.L. Fowler**, *History of the Law of Real Property in New York* 82 & n.3 (1895).

prevailed in the ultimate disposition of Imperial favor, displacement of the mediating function of the law weakened the legal settlement throughout the society. Ultimately, the settling function of the law was undercut by the Empire that had begun the process of legal settlement in the first place. Though the basic practices and institutions of the land law were robust enough to survive even the disorganizing consequences of a military rebellion and political revolution between 1776 and 1783, the land law failed to keep the peace on the ground in the strategic and economic center of the province during the 1760s. This failure contributed significantly to the collapse of public order and the unsettling of another aspect of the provincial legal system, the mechanisms of criminal justice, in the ten years preceding independence.

Chapter 4

Ordering the Settlement: The Law of Crimes

Physical settlement in New York, as everywhere else in British North America, required the construction of a new system of criminal justice. Colonial communities, like all others, required processes of social control, while the very conditions of colonization—including great individual mobility, relatively low population densities, volatile economies on the margins of the larger imperial economic system, and the proximity of potentially hostile indigenes—rendered the social control alternatives to the legal system comparatively weak. New York's peculiar social conditions, most importantly the high degree of ethnic and religious heterogeneity and concomitant factionalization of the colony's political life, further weakened the influence of institutions, such as churches, capable of providing extra-legal social control. Under these conditions, we should expect the legal system, and particularly its punitive components, to play a prominent role in underwriting the social order.¹ The importance of the criminal justice system in the legal life of colonial New York fully bears out the expectation; closely integrated into the structure of local government, the institutions of the criminal law

1. This common-sense relationship between the legal system and the alternative guarantors of social ordering is explored, in the guise of a proposed general principle that "law varies inversely with other social control," in **D. Black, *The Behavior of Law*** 107-11 (1976).

played a dominant role in the organization of the community throughout the provincial period. The criminal law system crucially abetted the process of physical settlement; the contours of its evolution are an important figure in any portrait of the process of legal settlement as well.

Precisely because the social interests underwritten by the system of criminal law enforcement are so basic to the formation and maintenance of communities, the essential features of the system emerged comparatively early, and remained largely stable throughout the provincial period. In this sense, it is possible to begin from a delineation of certain fixtures of the system— institutional and substantive arrangements whose continuity permits analysis of the changes the system underwent in the course of the eighteenth century. The settlement of the criminal law occurred primarily by a process of evolution as the structure fixed in the first decades of English rule underwent a process of incremental growth. Any satisfactory account of the settlement of the criminal law in New York, therefore, must begin from a sound understanding of the stable aspects of the system, and the basic social constraints, practical and intellectual, informing their creation.²

2. The historian undertaking to capture the large contours of the provincial criminal law system is indebted to two monographs. The work of Julius Goebel, Jr. and T. Raymond Naughton, completed in 1944, and of Douglas Greenberg, published thirty years later, presents a substrate of research that no worker in the field can afford to ignore, much less duplicate. See J. Goebel & T. Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure, 1664-1776* (1944); D. Greenberg, *Crime and Law Enforcement in the Colony of New York, 1691-1776* (1976). An earlier version of Greenberg's argument, with more comprehensive citations to the sources, can be found in D. Greenberg, "'Persons of Evil Name and Fame': Crime and Law Enforcement in the Colony of New York" (Ph.D. Diss., Cornell University, 1974). Very different in method and content, these two monographs not only provide an excellent basis in the analysis of the existing documentary sources; they also clarify, by their sharp mutual confrontation, the interpretive issues that must be addressed if a clear portrait is to emerge from the data they describe.

The contrast between Goebel and Greenberg could not be more complete, or more instructive. Goebel and his coauthor set out to describe the doctrinal evolution of the criminal law of colonial New York, with special reference to the procedural mechanisms that could be reconstructed from court minutes. The goal of the effort was to achieve the highest possible level of descriptive technical detail. The implicit claim is that every available minute entry has

The general structure of the courts, which remained essentially unchanged after the 1691 judiciary act,³ is the most important of these fixed aspects of the system of criminal justice. The lowest level of criminal jurisdiction in the province was the petty criminal jurisdiction of the single justice of the peace, which substituted entirely for the town courts that had existed in various permutations before 1691. Justices in each county were to sit together in General Sessions twice a year in most counties, three times annually at Albany, and quarterly in New York City, where the court was styled "General Quarter Sessions of the Peace." The provincial Supreme Court, to be "Duely & Con-

been reviewed and made to yield its full harvest of technical significance. This approach to the sources is made explicit by Goebel in his introduction to the jointly-researched volume. See **J. Goebel & T. Naughton**, *supra*, at xxxvii-xxxviii. It was perhaps a weakness marring Goebel's astounding erudition and industry that he believed only work produced in this fashion could be of any use to legal historians. See, e.g., *id.* at xxix-xxxvi. For Greenberg, on the other hand, the opportunity provided by the records was differently realized. His study too was based on a consideration of all surviving records of the provincial courts in which criminal prosecutions were recorded. His outlook on the sources, however, was aggregate and quantitative. Rather than seeking to reconstruct doctrinal detail from the indications contained in the report of proceedings, he was primarily interested in hypotheses about the changing nature of the province's social organization traceable through the constructed series of prosecution and judgment statistics. Each of these methodological pronouncements has its virtues. Both studies involve profound research effort. Greenberg's population of remaining transcribable records amounts to 5,297 cases. See **D. Greenberg**, *supra*, at 41 table 3. Goebel, in keeping with his general predilection, never reports the number of cases examined, but a survey of his index indicates that roughly 1400 cases are individually cited and discussed. If Greenberg's particular data reductions are not exactly as we would have made them ourselves, and we shall see below instances where only a different cut at the data would yield satisfactory answers to important questions, we must content ourselves with what he can tell us. If Goebel and Naughton have eschewed the information provided by aggregate volumes of cases or gross conviction rates, and have generally refrained from conceptualizing the outlines of the criminal justice system, we must do that work for ourselves, realizing that we cannot expect to challenge their substantive statements about what the qualitative generalities of practice were. Thus taken together, these works are far stronger than either apart. Out of the information provided by each we can begin to bring together a picture of the particular importance of the criminal law system to the settling processes in colonial New York.

3. "An Act for the Establishing Courts of Judicature for the Ease and benefit of each respective City Town and County within this Province," May 6 1691, 1 **NY Col Laws** 226.

stantly kept at the City of New Yorke and not Elsewhere,"⁴ retained plenary jurisdiction in all criminal cases, in keeping with its assimilation of all the powers of King's Bench, Common Pleas, and Exchequer. Subsequent development occurred primarily through ordinances from the governors, because the Assembly was never to succeed after 1699 in legislating the establishment of courts in the province, a practice which royal instructions, even in 1691, prohibited. The primary area of gubernatorial alteration of the 1691 design lay in the establishment of circuit riding by the Supreme Court justices, who under Bellomont's ordinance of 1699 were to appear at least annually in all counties, assisted by two or more of the justices of the peace for the county, with a commission of oyer and terminer and general jail delivery.⁵

Everywhere except at the bar of the Supreme Court in New York, criminal justice in the province rested wholly or in part on the justices of the peace. English practice was followed to the extent of designating some of the JPs as "of the *quorum*," though conditions throughout the colonial period were such that even justices of the *quorum* were unlikely to possess legal training. By this army of lay judges, however, the smaller criminal justice of the province was done. Aggregate figures for the *per capita* distribution of JPs can be estimated for the early 1690s and early 1760s—although the number of inhabitants per justice apparently declined during the period, even in 1763 it remained at the relatively high level of one JP for each 350 inhabitants.⁶ Sitting

4. 1 NY Col Laws 229.

5. 8 MsMinsCouncil 127. The text of Bellomont's ordinance is reprinted in 2 NYLaws App. (1813 rev.). For the form of commissions under the ordinance of 1699, see J. Goebel & T. Naughton, *supra* note 2, at 28-30, 45-46 nn.218-19. For convenience, and in keeping with English practice, I shall hereafter refer to the annual sitting of Supreme Court Justices on circuit, associated with JPs of the *quorum* in commissions of oyer and terminer and general jail delivery as "Assizes," a usage common among eighteenth-century New Yorkers.

6. A surviving list of JPs in 1763 shows a total of 328 JPs, 134 of the *quorum*, for all counties outside New York City. NYMiscMss, Box 8, no. 32. The aggregate population of the colony in 1763 was roughly 114,000. It should be noted that the derived figure of one JP per 350 inhabitants somewhat understates the actual ratio, since the population figures include the city.

together in the General Sessions of the Peace, these JPs took cognizance of misdemeanors, criminal trespass, and felonies up to and including petit larceny. Although commissions of the peace continued to include other felonies less than capital within the cognizance of the General Sessions, except when sitting for the trial of slaves the JPs apparently followed English practice, and transferred all felony prosecutions to Assizes.⁷

Though the courts were designed to rest on a solid foundation of hierarchical control and broad distribution of lay justices, the infrastructure of the other elements of the criminal justice system was much less efficient. The resources available for policing and confinement were always scarce, and the operation of the system in numerous respects reflected compromises imposed on the process of adjudication by shortcomings in these other components of the system.

The records are replete with demonstrations of the gross inadequacy of the colony's jails. In Ulster County, for example, the sheriff appears to have made complaint of the insufficiency of the jail at virtually every Sessions.⁸ Even the minutes of the Supreme Court reflect the constant complaint of those officers responsible for the safe-keeping of defendants.⁹ Sheriffs were of course anxious lest the inadequacy of the jails lead to escapes for which, as always at common law, they would be liable in damages. Concerned about a pair of counterfeiters whose arrest in Dutchess County had been reported as imminent, Attorney

For the 1693 figures, and the county by county distribution of JPs in 1763, see **J. Goebel & T. Naughton**, *supra* note 2, at 91 & n.159.

7. For a discussion of the English roots of the limitation on felony jurisdiction in Quarter Sessions, see *id.* at 92-95. Goebel's reconstruction of the confused process by which English JPs relinquished any jurisdictional authority over felony has been substantially confirmed by more recent specialized scholarship. See **J.S. Cockburn**, *A History of English Assizes, 1558-1714*, at 86-93 (1972).
8. See *Ms. Mins. Ulster Co. Sess. 1738-50, passim.*
9. On October 9 1697 "Emot moves in the name of the sheriff that the Judges do move to the city the insufficiency of the City Hall and prison." **MinsSCJ, 1693-1701**, at 127. For similar complaints in other counties, see **J. Goebel & T. Naughton**, *supra* note 2, at 337 n.36.

General John Tabor Kempe wrote to Clear Everitt, the county sheriff, in 1761:

I know not what Conditions your Gaol is in, but trust that you will keep them secure that they may make not their Escape from Justice. The Reason of my mentioning this to you, is because several Criminals have broke Gaol and made their Escape lately from some of the Counties ... and I should be very sorry should you be liable to be punished ... for the Escape of a Felon.¹⁰

Nor were sheriffs the only source of agitation regarding jail conditions. Greenberg reports almost 240 complaints from the court records and common council minutes throughout the period.¹¹ The legislature took occasional action,¹² and there were even attempts to use the machinery of the criminal law itself against public officers who negligently permitted the decay of the jails,¹³ but then as now jail construction was politically popular

10. Letter dated May 1 1761, Kempe Papers, Box BSW 1, NYHS.

11. See **D. Greenberg**, *supra* note 2, at 168 & n.21.

12. See, e.g., Act of October 17 1730, 2 **NYCoLLaws** 645, a bill for public works in the city declaring that “WHEREAS ... the Common Gaols of the same are now very much out of Repair, and it appearing there is an Absolute Necessity not only to repair but to Enlarge the said Prisons and Gaols” money would be appropriated for new construction; Act of June 24 1719, 1 **NYCoLLaws** 1025, empowering JPs to impose local assessments for the construction and maintenance of jails.

13. In an apparent attempt to force implementation of the Assembly’s 1719 statute giving JPs the power to impose taxes for spending on the jails, see *supra* note 12, Attorney General Richard Bradley brought informations against justices in Albany and Queens County in 1723 for failure to levy taxes for the improvement of the jails. See **MsMinsSCJ**, March 17 1723/24; Parchment 102 G 8 (NYHR) (information against Queens JPs). Although the Attorney General prudently sought a change of venue to Westchester County and a trial at bar—thus ensuring that trial would occur in the City, under the watchful eyes of the entire court, but with jurymen drawn from Westchester—the defendants in the Queens prosecution were acquitted. See **MsMinsSCJ**, October 9 1723. The Albany case hung fire for several years, and allegations of improper conduct were made in the Assembly against the Attorney General. See 1 **JGenAssemb** 569, 599. The case was finally set down for trial on circuit in 1729, after six years delay, the defendants were acquitted, and the Attorney General astonishingly sought and was granted leave to file new informations. See **MsMinsSCJ**, December 2 1729. The case appears again in the minutes, still untried, in August 1734, but no trial appears ever to have taken place. Thus, after at least fifteen years, was

only so long as no one had to be taxed to pay for it, and the general public parsimony so characteristic of colonial America ensured that the complaints would never die down.

While the inadequacy of the jails had rather scant effect on sentencing practice, since imprisonment was comparatively infrequent in colonial New York¹⁴—as elsewhere in British North America in the eighteenth century—the inability to incarcerate defendants securely during the pretrial period significantly affected the nature of the prosecutorial and adjudicative system. Thus although JPs at Sessions relinquished jurisdiction over offenses more serious than petit larceny, and because holding for trial at assizes was often and in many places insecure, pressure for summary jurisdiction in criminal matters steadily increased after 1691, leading to legislation to create summary criminal jurisdiction in 1732.¹⁵ These statutes provided that persons accused of misdemeanors, breaches of the peace and other crimes below grand larceny could, if unable to furnish bail within 48 hours, be tried summarily without a jury and be sentenced to corporal punishment. In the country the committing justice was directed to certify the cause to two other justices, the three to act together in trying the offender. In New York City the mayor, deputy mayor, or recorder, acting as *quorum* with two or more aldermen, provided the bench for summary proceedings.

Summary jurisdiction met social necessities in a fashion apparently preferable, from the provincial point of view, to the investment in facilities sufficient to hold vagrant prisoners for

ended the quixotic experiment with prosecuting the local judges for failing to raise local taxes to support the jails. The incident not only sheds light on the difficulty provincial managers experienced in securing adequate jails—a difficulty severe enough to goad them to such unlikely measures—it also demonstrates graphically the tension between central authority and the JPs.

14. Greenberg reports that of his 5,297 cases only 19 involved sentence of imprisonment. **D. Greenberg**, *supra* note 2, at 125 n.53.
15. For reason of legislative convenience, two acts were used—one to create summary jurisdiction in New York and the other in the rest of the province. *See* 2 **NYCollLaws** 766, 745. Even this was not sufficient confusion, for Albany and Suffolk were mysteriously excluded from the latter act, a situation not remedied until 1736. 2 **NYCollLaws** 933.

trial before Sessions or Assizes—it was renewed in 1736 and 1744,¹⁶ and slightly expanded in 1762 and 1768.¹⁷ The records are too scant to provide a detailed account of the working of summary jurisdiction in the province,¹⁸ but the preambles of the relevant statutes make clear that the Assembly expected the jurisdiction to be employed primarily against vagrants or other persons without roots in the community—persons, in particular, who could not find two sureties to enter into recognizances in the amount of £20 for the prisoner’s appearance at trial, which was the standard approach to pre-trial release in all but capital cases.¹⁹

One might anticipate, in light of political developments in the 1770s, that despite the utility of summary trial New Yorkers would nonetheless have objected to the breadth of the deprivation of the sacred right of jury trial. The records of provincial discourse, legal and political, are almost entirely devoid of such objections, despite the many other occasions during the colonial period on which perceived executive interferences with the jury right were met with heated opposition. A clue to this absence of protest may perhaps be found in an incident in the spring of 1769. The governor received a complaint from a substantial Suffolk landowner that one of his servants had been subjected to flogging by summary conviction before three local JPs. The Attorney General, John Tabor Kempe, wrote to the justices, rebuking them fairly sternly for inspiring hostile local comment in their summary enforcement proceedings. He

16. See 2 *NYColLaws* 920, 933.

17. See 4 *NYColLaws* 669, 969. These acts provided that obtaining goods under false pretences in New York City and larceny up to £5 throughout the province were triable by summary jurisdiction. Small fines, not to exceed £3 in the city and 40s. in the country, were authorized by these statutes, while non-resident defendants were liable to banishment upon summary conviction.

18. There are apparently no surviving records of summary criminal dispositions in any county outside New York City. For the city, manuscript minutes of the “Meeting of the Mayor, Deputy Mayor and Aldermen” for the period from 1733-43 are bound with the rough manuscript minutes of the Quarter Sessions, 1722-42/3, NYHR.

19. For the general approach to bail throughout the period, see J. Goebel & T. Naughton, *supra* note 2, at 497-506.

reminded them that the act was intended for use against vagrants and others unable to maintain themselves in jail, to prevent a charge on the county. The summary jurisdiction, he wrote, "must not be extended beyond that, as it destroys the trial by Jury." Kempe went so far as to state that "it may at least be doubted whether the Act be not in itself void for its repugnancy to the Laws and first Principles of the Constitution,"²⁰ though he had expressed no such official doubts the preceding year, when the jurisdiction had been extended. The entire incident suggests that summary justice was acceptable in New York as a matter of class justice, restricted to the mass of propertyless defendants, helpful as a measure of public economy, and if not theoretically at least practically distinct from other infringements on the jury right.²¹

Another persistent feature of the system of criminal justice, which also appeared to contemporary opinion as a serious systemic weakness, was the high rate of resistance to the authority of the law's enforcers. In New York, as in several other colonies for which evidence is available,²² the substantive pattern of criminal law enforcement included high rates of prosecution for contempt of public authorities, including particularly those public officials such as sheriffs who performed the policing role, that of introducing offenders to the criminal justice system. According to Greenberg, roughly 6% of the surviving prosecution

20. Letter to Benajah Strong, Selah Strong, and Richard Woodhull, dated June 9 1769, J.T. Kempe Letters, NYHS.

21. For a comparative assessment of the motives leading to expanded use of summary jurisdiction in the criminal procedure systems of British North America during the eighteenth century, see Moglen, *Taking the Fifth: Reconsidering the Origins of the Privilege Against Self-Incrimination*, ?? *Mich. L. Rev.* ??, ?? (1994).

22. See, e.g., A.P. Scott, *Criminal Law in Colonial Virginia 171-74* (1930); D.J. Spindel, *Crime and Society in North Carolina, 1663-1776*, at 56 table 2 (1989). Unfortunately Scott's evidence is impressionistic, and Spindel's data, for a variety of technical reasons, must be used with great care. See Moglen, Book Review, 1 *Georgia J. Southern Leg. Hist.* 175 (1990). To the extent that comparisons can be made, Spindel's quantitative data concerning rates of prosecution for contempt offenses are within the range (5-10%) suggested for New York by Greenberg, while the cases recounted by Scott as representative reveal many of the same patterns found in the New York prosecutions.

records charge contempt of authority, and of those more than 70% were for assaults on officers of the law.²³

In New York, however, in addition to the forms of small-scale interference with the minions of the law, there were also recurrent intervals of large-scale riotous resistance to local governmental power. As Goebel succinctly puts it, “[t]he impression one gains from the records of the criminal courts for the period after the French and Indian War is one of a general and nearly continuous state of riot throughout the province.”²⁴ While this is an exaggeration for effect, organized opposition to the local powers of law enforcement is a leitmotif in the history of the province, beginning in the Leislerian period and certainly intensifying in the decade before independence. Rioting against landlords in the upper Hudson Valley occurred sporadically in the 1750s and ‘60s, breaking out with particular force in the riots of 1766.²⁵

Whatever may ultimately be said about the causes of agrarian rioting in New York in the eighteenth century, resistance to local legal authority represented by the many individual contempt prosecutions stemmed, in the largest sense, from the system’s enormous reliance on lay justices of the peace. The breadth of the justices’ authority was astonishing, involving as it did not only criminal enforcement but also a full range of administrative business quite outside the realm of the criminal law:

By provincial statute, by usage and by imitation of English practice, a staggering complex of duties was gradually loaded upon or assumed by the officials. They supervised churchwardens,

23. See **D. Greenberg**, *supra* note 2, at 89 table 12, 158.

24. **J. Goebel & T. Naughton**, *supra* note 2, at 86.

25. Concerning the land riots in and around Livingston manner in the 1750s, see ch. 3; for two quite distinct views of the “great rebellion” of 1766, see **S.B. Kim**, *Landlord and Tenant in Colonial New York* 346-416 (1978); **I. Mark**, *Agrarian Conflicts in Colonial New York, 1711-1775*, at 131-63 (1940). On the legal consequences of the 1766 outbreak, see Moglen, *Treason and Riot in the New York “Rebellion” of 1766: the Trial of Elisha Cole* (forthcoming).

constables, coroners, tax collectors and assessors, road commissioners and overseers of the poor. They had some part in the enforcement of laws relating to ferriage, militia, fortifications, poor relief, fencing, roads, traffic, peddling, revenue, maritime matters, Indians, slaves, hunting and game, nuisances, fire, health, and medicine.²⁶

If the New York JPs were truly, in Maitland's phrase, the "rulers of the county," they lacked the great advantage of centuries of inculcated deference to the squirearchy from which English JPs were drawn. Lay officials charged with a multiplicity of duties will be sure to step on a multitude of toes, and no one (administration included) expected JPs to operate with perfect efficiency, honesty, or fairness. One can only speculate that the result, particularly in the fractious political environment of provincial New York, was the provision of fertile soil for individual acts of resistance and contempt.²⁷

Violent resistance to the criminal law's officers may have been a serious constraint on the system's development, but violence was hardly limited to attacks on constables. New Yorkers, like some but not all of the other colonists in British North America, had a strong apparent propensity to assault.²⁸ All observers agree that the criminal dockets of the colony were strongly tilted in the direction of crimes of personal violence short of homicide.²⁹ The system of criminal justice thus evolved to deal

26. J. Goebel & T. Naughton, *supra* note 2, at 110.

27. It would be highly desirable to provide a more thoroughly-grounded account of the relationship between the role of the JPs in local government and the rate of resistance to law enforcement. Unfortunately we have no adequate comparative study of the JPs and their role in local government in British North America. Some comparative series of prosecution rates for contempt of authority are available, see *supra* note 22, but these are not even mathematically comparable, owing to discrepancies in coding practice, and at best provide little substantive insight. Thus are we impoverished by the decline of qualitative legal history in the Goebel mold.

28. See, e.g., D.J. Spindel, *supra* note 22, at 57 table 3.

29. Greenberg's numbers are here in accord with all available literary evidence known to me. Assault was the most heavily prosecuted single category of offense in provincial New York; assault offenses amounted to more than 21% of the total of surviving prosecution records. D. Greenberg, *supra* note 2, at

primarily with crimes of personal violence, directed both at the citizenry and at the institutions and officers of the law itself.

Along with the external structural characteristics of the society within which the criminal law system was embedded, there were the long-term internal characteristics of the system so consistently observed throughout the period from 1691-1776 that they can be called commitments. Difficult though it might be to offer direct literary evidence that the system's managers consciously regarded these commitments as essential features of the system, their conduct leaves us in no doubt of the shared assumptions.

First and most general among the commitments was that to the Englishness of the system. Of the essentially English nature of the law's institutions, procedures, practices, and doctrines, increasingly sophisticated but always in an unswervingly Anglicizing direction, it was Goebel's purpose to convince the community of historians, and he has done so. The creation of the provincial Supreme Court in 1691 was itself the outcome of a process of Anglicization, centralizing the institutions of justice and reducing to homogeneity the initially highly heterogeneous legal institutions of the Anglo-Dutch period, from 1664 to the end of Leisler's rebellion. The institutions of local government created after 1691, including the replacement of the town courts of Puritan Long Island by appointed JPs, marked not only a step in the political reduction of "New England democracy," but also a triumph of English procedures over the substantive unfamiliarity of the New York environment. The attempt to find a single indivisible moment of reception in the American legal past has perhaps ruined more legal histories than any other vain form of

54 table 5. Rates of prosecution were roughly equal in city and country. In the city, theft offenses rivaled assaults in frequency of prosecution, while in the country offenses against public order (Greenberg's category for riot and some nonviolent offenses against justice) were slightly more heavily prosecuted. *Id.* Disaggregation of Greenberg's figures, and some chronological correction for riot indictments in the 1760s, would probably establish that even here assaults were the dominant class of offenses. It is not surprising that theft offenses were the predominant class of offenses charged against female defendants. *Id.* at 50 table 4.

effort, but it can be confidently asserted that the New Yorkers who enacted the "Charter of Liberties and Privileges" in 1683 and who restated it in 1691 sought to establish their entitlement to the rights of Englishmen, and regarded convergence on common-law institutions in that light.³⁰ For Goebel, the Englishry of New York's criminal law was the consequence neither of reception nor of imitation, but was instead the outcome of this continuing process of securing Englishmen's rights by Englishmen's procedures:

What takes place cannot be described as a development in the sense of an evolution where the ideas are native born and are molded by the courts into rules which in turn become the substance of future procreation. Rather is the process one of becoming familiar with and adopting a gradually increasing number of details from the existing body of common law dogma, the practice of English courts and the professional traditions. ... From the standpoint of English lawyers or officials this must have seemed simply a process of imitation, but the colonists, who were under some limitation and control in their law-building, would have been justified in regarding what their courts were about in the light of our own figure, as a process of accretion, for as Englishmen they regarded themselves as entitled to the common law, and the courts were simply making it their own as the need arose. Indeed, the eighteenth century is well along before there are signs that provincial law is conceived as something discrete.³¹

If the criminal law's participation in the Anglicizing process, however, had depended solely on those to whom the commissions of the peace issued, the commitment to Englishry would have rested on a very insecure footing. Ethnic diversity and geographic dispersion were, as they always were in the

30. On the Charter of 1683 and its relation to the Anglicizing process, see *id.*; Lovejoy, *Equality and Empire: The New York Charter of Liberties, 1683*, 21 *WMQ* 3d ser. 493-565 (1964).

31. J. Goebel & T. Naughton, *supra* note 2, at 72.

provincial history of New York, powerful barriers to easy consolidation of cultural control. Procedural institutions for the political direction of the system were necessary, and it is no surprise that the institutions elected were English to the marrow.

Contemporary common lawyers expect centralized control over the criminal adjudication process to be expressed through the appellate courts, but broad appellate jurisdiction is not the only approach to ensuring uniformity of application in difficult or controversial cases.³² The English alternative to criminal appeal was transfer of difficult or important cases into courts comprised of judges of the central courts. The use of jurisdictional transfer in New York was so crucial to the entire functioning of the judicial system that we must regard transfer jurisdiction not just as a species of Englishry, but as a basic commitment in its own right.³³

Transfer jurisdiction in New York followed essentially the model relating English Quarter Sessions and Assizes at the opening of the eighteenth century. The step taken after 1692 to establish circuit-riding by the Justices of the Supreme Court allowed both the development of a *nisi prius* jurisdiction in civil cases and a criminal jurisdiction that combined central authority in the person of the Assize Justice with local authority in the persons of the associated JPs, and local knowledge, represented

32. Americans in particular find it hard to recollect that not until 1907 did Great Britain provide for a general appellate jurisdiction in criminal cases.

33. This central importance of transfer jurisdiction is inevitably difficult to express through the medium of aggregate quantitative analysis. Studies like Greenberg's, which deal primarily in the statistical analysis of populations of cases drawn from several courts, are notoriously insensitive to the relations among courts. Greenberg, despite the example of Goebel and Naughton which is constantly before him, nowhere discusses the mechanisms of transfer jurisdiction, and does not provide any of the quantitative generalizations upon which a larger view of Goebel's qualitative analysis of transfer might be predicated. Indeed, we may even suspect that Greenberg's insensitivity to transfer has caused him to identify as different cases indictments found at Sessions and tried at Assizes or at the bar of the Supreme Court. See **D. Greenberg**, *supra* note 2, at 209-10 n.13 (use of "the standard IBM 'Sort' program" to generate a list of party names for analysis of recidivism). Greenberg's problem is made more severe by the fact that transfers are frequently not noted in the records of either court. Only precise qualitative analysis of the minutes discloses the connected nature of the cases. See **J. Goebel & T. Naughton**, *supra* note 2, at 150.

by the jury of the vicinage. Initiation of criminal prosecutions, whether through indictment or presentment, occurred at General Sessions. Thereafter, capital cases and cases presenting special legal or political difficulties were transferred to the Assizes or to the bar of the Supreme Court itself. Transfer might occur in several procedural guises: by delivery of the indictment to the Assize at the hands of a justice or clerk of the peace (transfer *a propria manu*), by writ of certiorari, by framing a Crown information upon presentment in the country, or by defendant's recognizance at Sessions to appear and answer the indictment at Assizes or the Supreme Court bar.³⁴ Where the JPs at Sessions decided on their own that a case lay beyond their competence—which primarily meant that the defendant was charged with capital offenses, or with one of the other offenses which, although not capital, were reserved to the royal courts in England, such as perjury or forgery—transfer ordinarily occurred *a propria manu*, though such transfer was comparatively infrequent in English practice.³⁵ The other major route of transfer for felony was the issuance of a writ of certiorari; misdemeanors were ordinarily removed through the recognizance device on motion of the justices, though few minor cases apparently lodged in the superior tribunals without writ.³⁶ Certiorari was available to the Attorney General as of right in all cases, and, as in England, Sessions might in the discretion of the justices grant removal by certiorari at the instance of the defendant.³⁷

The commitment to the transfer mechanism in New York strengthened not only the power of the central court, but also the prosecutorial power of the Attorney General. Although the resources available for centralized prosecution were always

34. The technical details are as always splendidly reconstructed *id.* at 147-63.

35. See 2 **M. Hale, Pleas of the Crown** 210, 213-14. (1778 ed.); **J. Goebel & T. Naughton**, *supra* note 2, at 148.

36. *Id.* at 152-53.

37. For the English practice see 2 **Hawkins' Pleas of the Crown** c. 27, §§27-39 (1787 ed.); for examples of defendants' removal in New York, by certiorari or by habeas corpus—the alternative route—see **J. Goebel & T. Naughton**, *supra* note 2, at 155-56 & n.71-72.

slight, the Attorney General's control was enhanced not only by the automatic transfers, but more importantly by the discretionary authority to remove trial for supervisory reasons. This single power accounts for the inward-looking use of the criminal justice system to police its own officers, for the indictment of public officials for neglect or failure of duty was the primary means of exertion of administrative control, and to these prosecutions the removal authority was *sine qua non*. Greenberg reports 199 prosecutions of public officials for nonfeasance or malversation, amounting to slightly under 4% of the case population. Convictions resulted from 78% of the indictments, more than two thirds of which were brought against officials in the counties.³⁸

The prosecution of public officials was only one of the expressions of a broader commitment of the provincial criminal justice system—a constant and evident use of the prosecutorial apparatus for the purpose of imposing or restoring political stability, or at least stability as it appeared to the regnant governor. It is essential to any complete interpretation of the development of the criminal law in colonial New York that the province was recurrently the scene of controversial and tumultuous political trials, in which the government protected itself against disruptive opposition through the mechanism of criminal prosecution. The trials of Leisler, Bayard, Zenger, Prendergast, and others marked crucial episodes in the political history of the province, and if their effect on the technical details of doctrine or procedure was no more profound than those of isolated trials usually are, they nonetheless exemplified the tone of a system whose development was much inflected by the continuous political ferment of this most fractious colonial polity.

The commitment to the use of public prosecution for the achievement of political objectives assured recurring tension over

38. D. Greenberg, *supra* note 2, at 89 table 12, 54 table 5. Once again Greenberg's insensitivity to venue of trial is costly. The effectiveness of transfer as a prosecutorial device for administrative control would best be tested by comparing the outcomes of removed and unremoved cases.

the Attorney General's discretion in the employment of informations in the prosecution of misdemeanors. Offenses such as libel, bribery, and violations of revenue laws might be prosecuted by information in the name of the Crown; other offenses might be brought before the courts by information when the Attorney General chose to proceed in the interest of a private complainant. In eighteenth-century English practice, these two prosecutorial functions were distinct; the Attorney General exhibited informations in the King's name, and did so without any check on his authority. The Master of the Crown Office acted as prosecutor on behalf of private complainants, and from late in the seventeenth century his discretion in bringing such informations was strictly limited by the statutory requirement that King's Bench approve the filing of Crown Office informations.³⁹ In New York, where the Crown Office remained undeveloped, the Attorney General retained complete discretionary control over both prosecutions by information in the King's name and prosecutions brought by informer-complainants.⁴⁰ For the latter functions the Attorney General was entitled to fees; in the instance of violations of the revenue laws particularly, as well as some other offenses, the informer-complainant was also entitled to a share of the fines collected. Economic incentives thus existed to commence prosecutions by information which the segments of the community represented on grand juries would not have countenanced. The political character of some prosecutions undertaken by Attorneys General ensured that voices would be raised against this short-circuiting of the grand jury system, even in ostensibly nonpolitical cases.

Prosecution by information presented two distinct pathologies in the political control of the prosecutorial system.

39. See 4 & 5 Wm. & M. c. 18 (1692). The statute required submission of affidavits in support of motion for permission to proceed by information. The effect was to transfer the prosecutorial discretion wholesale from the Crown Office to King's Bench. Since the Act of 1692 did not mention the colonies, it was not in force in provincial New York.

40. The use of the information as an alternative to indictment was specifically accepted in the Judiciary Act of 1691, which provided for Supreme Court removal of "any Judgement Information or Indictment" from the inferior courts. See 1 NY Col Laws 229.

Exhibiting an information in the name of the King afforded administration an opportunity to prosecute political opposition without the checking function of presentment to a grand jury. As in the seditious libel prosecution of John Peter Zenger in 1735, this mode of procedure removed the moderating influence of the grand jury in political prosecutions.⁴¹ The exhibition of private informations, in which both the Attorney General and the complainant had a financial stake in the outcome, threatened, at least in the opinions of the mercantile establishment, the development of an organized extortion system. Pressure to restrain the system of prosecution by information was thus a recurrent feature of the landscape, and one of the few areas in which significant change in criminal procedure doctrine was undertaken by the provincial legislature.

The first attempt at reducing the Attorney General's discretion in exhibition of informations occurred under the Burnet administration. In 1727 the Assembly passed a statute, later disallowed at Whitehall, that would have required the consent of the Governor and Council in all cases of prosecution by information, and fined the Attorney General £100 for initiating prosecution without such permission.⁴² Governor Burnet, in his report to the Privy Council accompanying the statute, characterized this measure as "levelled at the Attorney General," and attributed its passage to mercantile hostility to Richard Bradley's prosecutorial activities, which Burnet intimated he too thought motivated primarily by a desire for pecuniary gain.⁴³

41. This and other aspects of the Zenger case are more thoroughly discussed in Chapter 2, *supra*.

42. An Act for Preventing Prosecutions by Informations, November 25 1727, 2 **NY Col Laws** 406. The proceedings of the Assembly, material in light of the claims made by Bradley and Burnet to the Board of Trade, can be found at 1 **Jour Ass NY** 566, 568.

43. "This is levelled at the Attorney General who has indeed been very vexatious and industrious to make use of trifling pretenses to bring him business in a very mean and sordid manner." PRO CO 5/1092/62. Bradley's report to the Board of Trade, to the same effect but of course without the intimation of cupidity on his own part, can be found in PRO CO 5/1092/64. The opinion of counsel, Francis Fane, to the Board of Trade advising disallowance of the ordinance is in PRO CO 1054/279, dated June 5 1728.

The disallowance of the 1727 Act by no means ended the controversy. In 1734, during the height of partisan conflict between Cosby and the Morrisites that would end in the prosecution of Zenger, the Assembly passed a measure restrictive of Crown informations, which failed to secure assent by the Governor and Council.⁴⁴ Again in 1743, the Assembly considered two measures restraining Crown informations, apparently in response to another spate of prosecutions of local sheriffs and JPs for failure to raise taxes for support of the jails, one of which passed the Assembly but failed, as might have been expected, in the Council.⁴⁵ These matters rested for another ten years, until a further outbreak of hostility to informations prosecuting private complaints finally resulted in legislation in 1754.

This episode, too, began with opposition from the City's mercantile elite to the Crown Office activities of an Attorney General spurred to activity in part by the profit motive. William Kempe, at the beginning of his career, saw an opportunity to fund himself and his office through reduction of the backlog of informer prosecutions left by his predecessor.⁴⁶ This activity, according to William Smith, Jr., "excited the disgust of some merchants of distinction, by lending too easy an ear to trifling complaints, and informers of very slight character."⁴⁷ As the language of Smith's contemporaneous commentary suggests, merchants who might have expected a sympathetic hearing from their peers in the grand jury disliked the power information prosecution afforded "slight characters." This was true not only with respect to evasions of the revenue laws. A further political controversy developed out of Kempe's prosecution of four socially well-connected young men for sexual assault on a young woman of humble antecedents. The defendants—John Lawrence,

44. See 6 NY Col Docs 17-18.

45. For earlier prosecutions of this kind, see *supra* note 13. On the proposed legislation, see J. Goebel & T. Naughton, *supra* note 2, at 376.

46. The relation between prosecutorial discretion and the underfunding of the Attorney General's office is discussed in Chapter 2, *supra*.

47. 2 W. Smith, Jr., *History of the Province of New-York* 176 (M. Kammen ed. 1972).

Jr., Charles Arding, Cornelius Livingston, and Henry Oudenarde, a moneyed and well-wired quartet—had allegedly not only raped Mary Anderson, but had tried to frame her mother on charges of receiving stolen goods in order to discredit the two as witnesses against them.⁴⁸ Acquitted at trial, the defendants and their supporters went on the offensive with an indictment for maladministration against Kempe, who successfully defended the propriety of prosecution by information in the Supreme Court, and succeeded in quashing the indictment.⁴⁹ During the pendency of the indictment against Kempe, the Assembly produced an act designed to reduce the number of informations based on private complaint, by requiring all such informations to be approved by the Supreme Court, after the informer posted security for costs upon acquittal or *nolle prosequi*.⁵⁰

Although the net outcome of the long controversy over prosecution by information in New York was convergence on English practice, the course of events reminds us that the adoption of English practice often resulted from motives and circumstances quite different from those prevailing in England. The political significance of the Attorney General's use of informations in New York led to a coalition of JPs, merchants, and other comparatively high-status denizens, for whom the grand

48. The facts of the case are set forth in the pleadings, Pl. K. 501 (NYHR). See also J. Goebel & T. Naughton, *supra* note 2, at 262-63.

49. Kempe's argument and the proceedings on his indictment can be found in **Ms Mins SCJ 1754-57** (Engrossed), at 82, 87, 118, 155. Discussing at length the decision in *R. v. Burchet*, 1 Show. KB 106, Kempe argued that there was neither violation of rights nor inconvenience to the subject in proceeding by information, since "here is a trial per pais, fair notice, liberty of pleadings dilatory as well as Bars, here's Subpoena and attachment; as much time for defense, no charge for the prosecutor makes up the record."

50. An Act to prevent Malicious Informations in the Supreme Court of Judicature for the Colony of New York, December 7 1754, 3 **NY Col Laws** 1007. The Act's preamble recited the statute of 4 & 5 Wm. & M. as a basis for the provincial enactment, presumably in order to strengthen chances of its survival at Whitehall. Although the Act did not differentiate in terms between informations brought *ex officio* by the Attorney General in the name of the Crown and those which would have been brought by the Crown Office at home, subsequent judicial construction seems to have removed the ambiguity. See 2 **W. Smith, Jr.**, *supra* note 47, at 177. The appeal to which Smith refers, *Gomez v. R.*, has left no further record in the minutes of the Supreme Court.

jury was a useful and controllable institution. The goal was reduction of the Attorney General's prosecutorial discretion, particularly when informants of lower social standing could make use of that discretion to achieve otherwise impossible results in confrontation with their betters. The device eventually adopted for control of that discretion could be made to seem English, thus placating technically-minded reviewers at Whitehall, but its English features belied its provincial purpose.

Having established some central, continuing features of the provincial criminal law system, it is now possible to consider the regional and temporal variations illustrative of the system's development under the constraints described. It should be said at the outset that the scale of temporal variation is comparatively slight, for the substantive changes over the course of the period are few, albeit highly significant. This need not be a matter of great surprise, for it recapitulates the criminal law's larger tendency toward inertia over most of the common law's history. The reason, at least with regard to New York, is succinctly stated by Goebel, who observes that novelty in the criminal law

comes slowly and sporadically, the provincial bar having but a casual connection with its growth, since it is only the Crown that is entitled to be invariably represented. The felonies were still a preserve as restricted to defense counsel as were the hunting grounds of the Indians to the colonists, and in the misdemeanor field the lawyers' pickings for a long time were as lean as the quitrents paid to the King.⁵¹

Nonetheless, despite the absence of counsel's ingenuity as an engine of legal change, there were necessarily alterations, some of which have already been discussed. As so often in considering the history of provincial New York, however, it is the difficulty in eroding the apparently ineradicable regional differences that first captures the historian's attention.

51. J. Goebel & T. Naughton, *supra* note 2, at xxv.

For the purposes of discussion of the criminal law, as in general, the major geographic divisions in the colony separated New York City from the outer counties, Long Island from the Hudson valley, and, to a lesser extent, Albany from the remainder of the valley. These divisions are of course reflected in differential rates of prosecution for particular offenses, but also in the differing relationships between the institutions of criminal justice and other local governmental structures.

As to Albany, one of the distinctive characteristics of New York throughout the colonial period is the presence of the permanent military garrison protecting the strategically critical gateway. The presence of the military had innumerable effects on provincial politics, but it also produced problems of public order for which the criminal law was a partial solution. Desertion was a substantial problem in itself, to which the civil authorities responded by the frequent legislation prescribing the death penalty for desertion.⁵² The leisure activities of soldiers were no less likely to cause friction, even in the absence of felonious intent; the records of the Albany Mayor's Court suggest the breadth of the problem. Albany's younger female residents, in particular, suffered depredation at the hands of soldiers, as in 1701 when Luykus Gerritse complained of the attempted rape of his daughter Maria, who had apparently been gathering huckleberries in the woods at the wrong time. An inquest of women having failed to establish penetration, the matter was referred to the military authorities for punishment, an instance of the difficulty in coordinating civil and military jurisdiction over such matters which no doubt accounted in part for the ineffectiveness of prosecution.⁵³

Offenses against public order in the province were also geographically concentrated, particularly in the upper Hudson

52. Desertion statutes were enacted, for example, in 1699, 1700, 1723, 1726, 1729, 1732, and 1734. See 1 *NYColLaws* 417-18, 434; 2 *id.* 135, 348, 501, 748, 858.

53. See 4 *Annals of Albany* 128-29 (J. Munsell, ed. 1859). For other examples of problems in prosecuting soldiers in Albany and sailors in the city, see D. Greenberg, *supra* note 2, at 121-23.

valley and in the country north of Albany. Almost 80% of the prosecutions for violation of public order located by Greenberg occurred in the counties;⁵⁴ New York City itself was surprisingly free from large-scale riotous disturbances during the eighteenth century, anti-Stamp Act agitation aside. The sporadic episodes of disorder that mark the life of the province after 1750 were primarily concentrated in the areas where, as other scholarship has shown, border disputes and contention between rival groups of settlers created both constant social friction and the possibility of substantial economic returns to the instigation of tenant resistance. Further north, in the Vermont country, settler resistance to the assertion of control by New Yorkers holding contested grants gave rise to the organized anti-governmental violence of the "Green Mountain Boys," whose subsequent rehabilitation as heroes of the revolution has tended to obscure the original context, of which this posted notice is a sample:

Advertisement. £25 reward. Whereas James Duane & John [Tabor] Kemp[e] ... have, by their Menaces and Threats, greatly disturbed the public Peace and repose of the honest Peasants of Bennington ... which Peasants are now, and ever have been, in the Peace of God & the King ... Any Person that will apprehend these common disturbers ... and bring them to Landlord Fay's ... shall have £15 Reward for James Duane and £10 for John Kemp paid by, Ethan Allen.⁵⁵

The problems characteristic of New York City were substantially different. The higher density of population, at every stage in the growth of the province, led to different patterns of deviant behavior, and different social concerns in the definition of behavior serious enough to merit the intercession of the criminal law. Only in the city, for example, did theft offenses rival assault

54. D. Greenberg, *supra* note 2, at 54 table 5.

55. James Duane Mss., Box 2, 1767-72, II, 149 (ms. 454) (NYHS).

offenses in frequency of prosecution.⁵⁶ But the primary differences between the uses of the criminal law in city and country hinged not on the comparative frequency of offenses against property (which represented, after all, only the eighteenth-century equivalent of Willie Sutton's famous insight that one should go where the money is), but rather on the other outcomes of demographic difference.

Perhaps the most striking of these differences was the greater significance of the slave presence in the city. New York had a large slave population in the eighteenth century, in sharp relative decline in the decades immediately preceding independence; in this latter period, for the first time, the proportion of the city population in slavery significantly exceeded that in the country.⁵⁷ The majority of the slave population of the province was engaged in personal service and light industrial occupations, rather than in agricultural production. The effect was to create in the city, where the density of slave population was greatest, the province's only major experience of the problem of slave criminality.

Several features of the problem of slave crime in New York City during the eighteenth century should be remarked. First, it is important to observe that at no time, so far as existing quantitative evidence can go, were slaves represented among criminal defendants in proportion to their presence in the population at large.⁵⁸ This does not, of course, imply anything firm about the actual rate of deviant conduct by slaves, since

56. Greenberg finds an equal number of prosecutions for the two classes of offenses throughout the period. A more chronologically sensitive series would be extremely helpful. See **D. Greenberg**, *supra* note 2, at 54 table 5.

57. The slave population in New York declined from a high point of roughly 21% of the population in the census of 1749 to about 12% of the population at independence. The equivalent figures for New York City at the same times were 21% and 14%. **E.B. Greene & V.D. Harrington**, *American Population before the Federal Census of 1790* 96-103 (1932).

58. Greenberg concludes that blacks, almost all of them slaves, account for only 7.4% of the prosecutions represented in his population. **D. Greenberg**, *supra* note 2, at 43.

incentives acting against reporting by masters and in the direction of private corporal punishment were significant.⁵⁹

A second, equally significant but perhaps less surprising feature of the treatment of slave criminality was the recurring phenomenon of conspiracy panics. In 1712 and again in 1741 New York City was convulsed by panic at the rumor of imminent slave insurrection. Both cases appear to have resulted from the combination of isolated acts of violent slave resistance and the expansive effects of group hysteria; both resulted in executions resting on the flimsiest foundation.⁶⁰

The crisis of 1712 began on the night of April 6, when in the early hours of the morning approximately two dozen slaves gathered and set fire to a small barn in an orchard located in the Out Ward, at the northern edge of the city. As white neighbors turned out to fight the flames, they were attacked by the arsonists;

59. It is possible that the absence of summary jurisdiction records results in a systematic understatement of prosecutions of blacks. But after 1712 slaves were primarily prosecuted for serious offenses at Sessions under special commissions, for which records are not less complete than for other classes of defendants. The surviving summary jurisdiction records in New York City contain only a handful of slave prosecutions, primarily of vagrants (presumably runaways) not identified as belonging to any owner. This cuts against the notion that record distortion is substantially responsible for the observed rate of prosecution. Further research is unlikely to shed much light on this question.

60. The literature on the slave conspiracies in New York history is abundant. For the events of 1712, see Scott, *The Slave Insurrection in New York in 1712*, 45 *NYHSQ* 43 (1961); J. Goebel & T. Naughton, *supra* note 2, at 118-19. The literature on the convulsion of 1741 begins with the account provided by Daniel Horsmanden, who largely concerted the legal response. His *Journal of the Proceedings in the Detection of the Conspiracy formed by Some White People in Conjunction with Negro and Other Slaves for Burning the City of New-York in America and Murdering the Inhabitants*, originally published in 1744, was reprinted in 1971, under the title *The New York Conspiracy* (T.J. Davis, ed.). In addition to Horsmanden's account, see the excellent account in T. Davis, *A Rumor of Revolt* (1985); Szasz, *The New York Slave Revolt of 1741: A Re-Evaluation*, 48 *NY Hist.* 215 (1967); Annette K. Dorf, *The Slave Conspiracy of 1741* (M.A. thesis, Columbia University, 1958); E. McManus, *A History of Negro Slavery in New York* 126-39 (1966).

It should be observed that the slave conspiracy scares in New York bear some important similarities to events in Salem in 1691/92 and the Indian conspiracy scare that accompanied the beginning of Bacon's rebellion in Virginia in 1676.

nine were killed and seven more wounded before the sounds of shooting alerted the entire neighborhood, and the slaves fled. Over the next two days the fugitives were systematically hunted through the woods of Manhattan by soldiers from Fort George, and by the city and Westchester militia. Six slaves killed themselves to avoid capture. By April 20, seventy slaves were in jail awaiting trial.

The trial of alleged slave conspirators in 1712 was conducted under the terms of a 1708 statute providing that slaves accused of murder, homicide, or of conspiring to kill be held by three or more JPs (one of them of the *quorum*) who could hear such cases without a jury and impose sentence of death.⁶¹ The Attorney General, May Bickley, prosecuted under the terms of the statute, but before the April sitting of the Quarter Sessions, and then again in June 1712 at the bar of the Supreme Court. By the time Bickley was finished, twenty-seven slaves had been condemned and at least twenty had been executed. But Bickley's use of the summary procedure permitted by the 1708 statute provoked much hostile comment. The partisan strife which affected almost all public business in the province triumphed once again, and Bickley, whom Governor Robert Hunter called "a busy waspish man," seems to have used the opportunity to settle scores among the white population. Hunter, reporting to the Board of Trade, concluded that the criminal investigation

grew up to a party quarrel and the slave far'd just as the people stood affected to masters, more have been executed, in a cruel manner too, then were concern'd in the fact, and I'm afraid some who were no way privy to the conspiracy.⁶²

61. "An Act for preventing the Conspiracy of Slaves," October 30 1708, 1 *NYColLaws* 631. The precipitating cause of this enactment was the murder of a Queens landowner, William Hallet Jr., by his slaves. This isolated act of murderous rebellion, while it stimulated the passage of the summary capital punishment statute, was not accompanied by the sort of rapidly-widening conspiracy investigation that was to occur in 1712 and 1741.

62. Hunter to Board of Trade, June 23 1712, 5 *NYColDocs* 339-41. Hunter believed that at least one slave, John Regnier's Mars, had been condemned on "very defective" evidence solely as a result of a quarrel between Bickley and Regnier. Hunter's comment on the cruelty of the executions was just.

He reprieved several slaves awaiting execution, and took no pains to conceal his indignation against Bickley; by mid-June Bickley had been forced to resign from the post of Recorder of the City, which was far more profitable than his post as Attorney General.

In the aftermath of the events of 1712, the Assembly somewhat altered the provision for slave tribunals, providing for special trial for the additional offenses of arson, rape, mayhem, murder of a slave, or attempt or conspiracy to commit one of these offenses. Trial was to occur before three JPs and five other freeholders, without the involvement of the grand jury and of course without a petit jury.⁶³ Records of such proceedings in the thirty years following the uprising of 1712, if any, have not survived, and while the legislative response to the 1712 affray suggested approval of the legal proceedings, the disgrace of Bickley hinted rather at social revulsion.

Indeed, the next major outbreak of slave criminality and urban hysteria would be treated somewhat differently in the courts. In the spring of 1740/41, after a particularly brutal winter and amidst rumors of a Spanish or French invasion of the economically weakened province, a rash of suspicious fires destroyed Fort George—the Governor's residence—and destroyed or damaged a number of homes and warehouses in the center of the city. Attention was immediately focused on the slave population, along with a small number of whites, keepers of dram shops and apparently fences who handled property stolen by slave burglars. Under the leadership of Justice Daniel Horsmanden of the Supreme Court, also Recorder of the City, an investigation followed in which, despite the fact that the 1712

Several slaves were burned alive, others broken on the wheel, and one seems to have been hanged alive in chains and left to starve.

63. "An Act for preventing Suppressing and punishing the Conspiracy and Insurrection of Negroes and other Slaves," December 10 1712, 1 *NYColLaws* 761. The act also formalized for the first time the master's legal right to punish slaves for any or all offenses "at Discretion, not extending to Life or Member." *Id.* at 762. The prohibition on self-help dismemberment was genteel by the standards prevailing in the southern colonies.

statute covered arson, grand jury indictment and petit jury trial were used to condemn the accused. The entire Bar of the City joined in the prosecution effort, and the lawyers who happened not to be appearing in a particular case were often to be found on the petit jury that returned convictions.⁶⁴ The trail of confessions substantially lengthened after a general offer of pardon was made to any slave who stepped forward to incriminate others; at the height of the process, more than half the adult male blacks in the city were in jail. By the time the hysteria petered out in late 1741, despite the fact that no person had been killed or injured in any of the fires, thirteen blacks had been burnt alive, along with seventeen other blacks and four whites who were hanged. Once again, subsidence of public panic brought with it a reduction of public support for the measures employed, and despite Horsmanden's valiant effort to glorify the entire operation, detailed in his *Journal of the Proceedings in the Detection of the Conspiracy formed by Some White People in Conjunction with Negro and Other Slaves for Burning the City of New-York in America and Murdering the Inhabitants*, "the thing," as he complained in his preface, "dies away and is almost forgotten."

The slave conspiracy trials of 1712 and 1741, whatever they may have to teach us about the particular shape of communal hysteria in colonial America, played a major role in separating criminal justice for slaves from the rest of the provincial system of criminal law. Unlike the slave courts of Virginia, however, in which counsel seem to have been frequently employed,⁶⁵ there was no involvement of retained defense counsel in the slave courts of the province from their establishment to independence. As the criminal law affected slaves, it was law made by the legislature, the prosecutors, and the judges, shaped in times of heightened anti-black animus, and unqualified by the efforts of counsel to secure fair trials for slaves, or fair dispositions of what

64. Thus, for example, William Smith, Sr. took time away from the prosecution in the second week of June to sit on the petit jury that convicted five slaves, later executed. See T. Davis, *supra* note 60, at 116.

65. See P. Schwarz, *Twice Condemned: Slaves and the Criminal Laws of Virginia, 1705-1865*, at 198-99 & n.8 (1988).

was, after all, the valuable property of masters. The rate of slave prosecutions *per capita* seems nonetheless to have declined steadily through the eighteenth century, particularly if the cluster of cases in 1741 is excluded, reflecting primarily the decreasing importance of slave labor to the New York economy.

As the imbroglios of 1712 and 1741 demonstrate, public order in the city seemed fragile to its inhabitants; a plot to burn the entire city, murder all the white men and abduct all the white women, instigated by an undercover Roman Catholic priest and abetted by white tavern-keepers was apparently a sufficiently credible story to justify many executions. The linkage between the dram shops and the massive criminality of The Great Negro Plot reflected a more continuing public concern. The New York City Quarter Sessions also heard at every sitting large numbers of prosecutions for the keeping of disorderly houses. This, along with the closely related offense of illegal relations with slaves, was predominantly charged against women. But although the inevitable mental association is with the business of prostitution, this was by no means the entire or even the most significant bearing of the offenses. The sale of liquor to slaves and the maintenance of dram shops in which disreputables could gather in order to concert mischief were at least as worrisome to the city fathers as the provision of commercial sex. It is not particularly surprising that more than 85% of the prosecutions for keeping disorderly houses were in the city,⁶⁶ given the reduced density of custom available in rural locations. Before large-scale rioting in the Hudson River Valley began in the 1750s, it was in the city that the criminal law had the greatest role to play in the maintenance of public order; one of the key elements in the history of the provincial criminal law is the shift from urban to rural foci of violent resistance to governmental authority.

The regional differences within the province were matched, so far as the discrepancies in the criminal law system were

66. **D. Greenberg**, *supra* note 2, at 54 table 5. If Greenberg had provided an indication of the proportion of the remaining offenses prosecuted in Albany, this would have advanced matters significantly.

concerned, by a persistent apparent distinction between Dutch and English inhabitants. Greenberg documents significant differences in the offenses for which Dutch and English New Yorkers most often faced prosecution.⁶⁷ While the proportions of Dutch and English defendants⁶⁸ charged with crimes of assault and violation of public order were essentially equal,⁶⁹ English defendants were more than three times more likely to stand accused of theft offenses and almost twice as likely to be charged with maintaining a disorderly house.⁷⁰ Dutch defendants, on the other hand, were more than twice as likely to be charged with contempt, and Dutch public officials were almost twice as likely to be indicted for defalcations in office.⁷¹

67. It must be said at the threshold that Greenberg's identification of Dutch denizens of the colony depended entirely on recognition of Dutch surnames in the records. This is at best a poor proxy for Dutchness, likely to misidentify many female defendants altogether and to relegate any number of partially Anglicized Dutch citizens to the status of nominal Englishmen. Greenberg is aware of the problem. Ideally, the analysis of the ethnic incidence of criminal law enforcement should proceed on the basis of historical databases containing all available vital records information for the province, including family descent patterns. A crucial beginning of this infrastructural transformation in the practices of social history is provided by the Colonial Albany Project, a collaborative attempt to assemble all available biographical information on all inhabitants of provincial Albany. For some initial uses of the CAP database, see Bielinski, *The People of Colonial Albany, 1650-1800: The Profile of a Community*, in **Authority and Resistance in Early New York** (W. Pencak & C.E. Wright, eds. 1988). Large-scale progress in this direction will be slow at best, however.

68. The baseline distribution of charges, according to Greenberg's nomenclatural definition of Dutchness, shows that English denizens comprised 73.4% of defendants overall throughout the period, Dutch denizens 13.1%, Africans 7.4%, other Europeans 4.8%, with the remainder a statistically insignificant sprinkling of Jewish and Indian defendants. **D. Greenberg**, *supra* note 2, at 41 table 2.

69. Overall, 22.4% of English defendants were charged with assault offenses, and 20.4% with crimes against public order. The equivalent figures for Dutch defendants were 22.5% and 19.5%. *Id.* at 58 table 6.

70. Of English defendants, 15% were charged with theft offenses, while only 4.3% of Dutch defendants were so charged. For disorderly house charges, the relevant figures were 4.2% and 2.5%. *Id.*

71. Contempt offenses were charged against 11.4% of Dutch defendants, as against 5.7% of the English defendants. For indictments of public officials, the rates were 6.8% and 3.5%. *Id.*

Some conjectural explanations of the ethnic differences in prosecution patterns can be attempted. The decreasing proportion of the urban Dutch population, along with the comparatively stable economic circumstances of Dutch families early settled in the province may account for the low rate of theft prosecutions against Dutch denizens, while the comparatively high rate of contempt prosecutions (more than 70% of which, it must be restated, were for assaults on constables) suggests immediately the continuing difficulties in establishing Anglicized control over predominantly Dutch areas of the Hudson Valley. Prosecutions of Dutch office-holders may conform to the same pattern, particularly if on discrete analysis it appears that indictments of Dutch public officials were more often for contumacious refusals to serve in office than for active malversation.⁷² A concrete example of the continuing difficulty in securing allegiance of Dutch office-holders to English ways even in the second quarter of the eighteenth century can be found in an undated letter written to Attorney General William Kempe (father of John Tabor Kempe) by several Dutchess County landowners, complaining that a local JP named Van Wyck had imposed abusive summary punishments contrary to law, declaring that “he Valued no English Law no more than a Turd.”⁷³

In considering patterns of change in the provincial criminal justice system over the course of the eighteenth century, it is necessary to take into account two forces external to the legal system which profoundly affected the law’s development over time. These vectors are demographic and strategic—the first more or less continuous, the second sharply disruptive.

72. Greenberg suggests such an interpretation, and instances “refusal to serve” cases as demonstration. *Id.* at 66. Whether this is a satisfactory account, however, depends precisely on the close combination of qualitative and quantitative analysis that neither Greenberg nor Goebel offers.

73. Kempe Papers, Box IV, William Kempe Letters, “Davenport-Flood.” I have found no record of criminal process in the county or in the Supreme Court predicated on this complaint.

Like most of the other British North American communities, New York experienced explosive population growth in the course of the eighteenth century. Provincial population, which stood at 18,067 in 1698, had grown by almost an order of magnitude, to 168,007, in 1771.⁷⁴ Annual population growth rates throughout the province thus amounted to 3.2%; Dutchess County, one of the most rapidly-growing areas of the province, grew at an overall rate of 7.1% annually from the first census in 1714 through 1771, achieving double-digit rates of annual population increase from 1731 to 1746.⁷⁵ This demographic expansion entailed both settlement of new areas within the province, including expansion into Charlotte and Tryon counties north of Albany, and also the increasingly dense settlement of the Hudson valley in Ulster, Dutchess and Westchester counties and the urban growth of the city itself. The effect of increasing population density was to strain the resources of government on the ground, as the falling proportion of JPs to population makes clear.⁷⁶ The criminal justice system's response to spread of geographic settlement and rapid population growth was therefore an important element in the process of legal settlement. Since resource expansion in the criminal justice system was less rapid than the expansion of population and physical settlement boundaries, low-level criminal justice became relatively more expensive through the provincial period. Recourse to summary procedure, which increased as we have seen throughout the eighteenth century, was thus a primary legal settlement device.

The strategic situation in the province significantly affected social development in ways important to the shape of the criminal law. The persistent threat of French invasion and depredation at the hands of French-allied Indians constrained the process of geographic expansion, despite demographic growth, throughout the first half of the century. Not only did fear of hostile activity prevent all but the hardiest settlers from venturing

74. See E. Greene & V. Harrington, *supra* note 57, at 92, 103.

75. See E. Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* at 24 (1981).

76. See *supra* p. 158.

west of the Catskills or north of the Albany-Schenectady line, it also provided the strongest possible incentive for administration to retain the goodwill of the Iroquois nations by restricting encroachment on their land in the valley of the Mohawk.⁷⁷ The removal of the threat posed by the French after 1763 altered the bearing of demographic growth on the governmental resources of the colony, by encouraging the dispersion of population. At the same time, it removed a force militating in favor of social cohesion and against the strong tendencies to resistance of civil authority. The New York garrison, in particular, lost what little attraction it had previously held for upriver New Yorkers, stimulating the quartering and militia controversies that were so prominent a feature of provincial politics in the decade preceding independence. The garrison's use against civilian New Yorkers during the rioting of 1766 increased hostility still further.

In this context, the history of the provincial criminal law seems to divide into discrete portions, with the line of division falling in the 1750s. For Greenberg, this line corresponds to the point at which several roughly contemporaneous changes in enforcement patterns become visible in the records:

Generally speaking, serious, and especially violent crimes assumed a more important role from 1750 to 1776 than they had in the period 1691-1749. Thefts and cases involving disorderly houses were both up slightly, and acts of personal violence and violations of public order rose sharply ... In the city, theft increased from 16.9% of all prosecutions between 1691 and 1749 to 24.1% between 1750 and 1776. Acts of personal violence swelled to an even greater extent, growing from 12.5% to 27.6% of all cases. ... [I]n the counties, a contrary configuration of prosecutions appears to have developed. Thefts *declined* in the counties, and acts of personal violence rose only slightly. Violations of public order, however, picked up markedly, increasing from 27.0% to 33.7% of all cases. ... [R]iots and the like were the most frequent source of prosecution

77. This effect of the strategic situation on the development of the provincial land law is discussed in chapter 3.

in the countryside, while they accounted for a relatively small percentage of cases in the city. Insofar as the decline in contempt cases is concerned, there do appear to have been parallel changes occurring within and without the city of New York.⁷⁸

For Goebel, the break at mid-century demarcates a critical alteration in the nature of the trial process in the county courts:

It is a circumstance worthy of notice that after 1750, the minute books of the country Sessions show the most sparing use of corporal punishment for, in general, fines are the usual penalty. This may be partly accounted for by the fact that after 1750 it was rare that a traverse of an indictment was pushed to trial. Usually the defendants confessed or pleaded *nolo*, and unless the offense was an extremely grievous one only a fine would be inflicted.⁷⁹

Thus the two accounts of the development of the provincial criminal law agree to an observed alteration in the nature of the process during the last quarter century of the colonial period, and, not surprisingly, their different orientations cause them to pass in mutual non-recognition. Taken together, however, the two observations are mutually corrective, and allow us some insight into the forces producing the changes of the 1760s and '70s.

We should observe, to begin with, that Greenberg's alterations in prosecution patterns are *relative*. He proceeds as though he were documenting *absolute* changes in prosecution, and characteristically infers changes in underlying patterns of criminal behavior. Accordingly, having observed that theft prosecutions as a proportion of all prosecutions rose in the city and declined in the country after 1750, Greenberg supposes that he requires an explanation of a decrease in countryside larceny.

78. D. Greenberg, *supra* note 2, at 138-140.

79. J. Goebel & T. Naughton, *supra* note 2, at 708 (footnote omitted).

An explanation that takes account of the undoubted demographic and strategic changes seems ready to hand, and he grabs for it:

Theft, which rose so dramatically in New York City and declined so precipitously in the countryside, is essentially an offense that depends upon intensive settlement. In other words, a high rate of theft might be expected in a society where population density is high. In such a situation, the temptations for thievery are greater, since highly concentrated population necessarily implies an equally high concentration of the goods and services which most attract thieves. ... Early in the century, when thefts were at their highest in the counties, it was more likely that people would live in towns and villages than on isolated farms. Under intermittent threat of war with the French and Indians, people found it necessary to live in widely scattered but intensively settled clusters. After 1750, and especially after 1763 ... settlement became more extensive than intensive.⁸⁰

This approach seems very neat, but it has nothing to do with the numbers. Greenberg's data actually demonstrated only a relative alteration in prosecution energies, which may or may not have been correlated with a change in underlying conduct. The first question is whether any technical alterations in the system might account for a change in the relative prosecution rate for theft offenses in the countryside. The answer is yes. As previously noted, the Assembly in 1768 provided for treatment by summary jurisdiction of thefts to the value of £5, which were no longer to be subject to the grand larceny jurisdiction of Assizes.⁸¹ The effect was to remove most or all of what might be called "lesser grand larcenies" from the courts of record altogether. A more finely divided time series might help to assess the magnitude of this contribution, since even in the absence of any summary jurisdiction records, the drop in theft offenses prosecuted in the Sessions could be traced to the 1768 enactment.

80. D. Greenberg, *supra* note 2, at 143-44.

81. *See supra*, p. 162.

The larger number of thefts of goods with a greater value than £5 in the city is not a mystery requiring complex elucidation. A relative change in prosecutorial activity in the countryside, moreover, is further to be ascribed not to a reduction in theft activity, but to an increasing urgency in the prosecution of violence directed against public order, as the river counties erupted in riotous activity through the period from 1750 to the opening of the Revolution.

Goebel's observation of a much reduced rate of trial in the counties after 1750 is in keeping with this shift in prosecutorial and adjudicative resources. Recognizances and fines upon what amounted to a plea bargain, particularly in the large number of cases in which *nolo contendere* was pled to the indictment (a feature which Greenberg's insensitivity to technical matters causes him to ignore altogether), were doing the work after 1750 that would have been done by trial and sentence to corporal punishment in the earlier period.

Nor was this set of alterations purely the consequence of the system's confrontation with more serious and widespread threats to public order than had previously been experienced. It also was responsive to the continuing problem in the financing of the criminal justice system. As Goebel rightly points out, "[i]mprisonment was not favored in the country because it was costly"; we have already observed the constant agitation over the unwillingness of the taxpayers to maintain the province's jails. Flogging might of course be heavily resorted to in summary cases, where vagabonds and other social no-accounts would feel the lash, but for the respectable classes of society nothing quite met the case like fines, "the sanction par excellence of provincial criminal justice."⁸²

The tendency of the fiscal motive to provoke alterations in law enforcement too easily attributed by contemporary social historians to larger and more socially interesting causes, can also be seen in the pattern of bastardy prosecutions in provincial New

82. J. Goebel & T. Naughton, *supra* note 2, at 709.

York. New York courts dealt with bastardy following the pattern laid down in a series of English statutes beginning with the post-Reformation removal of the matter from ecclesiastical jurisdiction. These statutes provided that two JPs should make orders upon examination for the support of the child and punishment of the mother and reputed father, and should take security for the performance of the order or appearance for prosecution at Quarter Sessions.⁸³ New York practice certainly resulted in a large number of orders made out of Sessions by pairs of JPs; though the records are ordinarily silent, a tradition among the Dutchess County clerks of enrolling such orders provides a window on the realities of the practice. And, as with the decline in theft prosecutions in the countryside, throughout the province, as Goebel notes, “[p]resentments of bastardy become very rare after the middle of the eighteenth century.”

Bastardy is not an offense falling within the categories coded by Greenberg, and apparently never amounted to more than five percent of the presentments at any time. But it is easy to imagine the classes of explanations that might be advanced for the sudden disappearance of the presentments. The decline of morals regulation and general loss of “ethical unity” in the era of the Revolution, for example, have been invoked by other historians to account for similar developments.⁸⁴

In fact, the change is attributable to the adoption of the recognizance device for assuring support. Without alteration in the provincial statutory regime, single JPs began to bind reputed fathers over to answer at Sessions, skipping the prior examination called for in English practice. If, either before the JP or at Sessions, bond was given to indemnify the parish for the costs of support, the matter was dismissed. Failure to appear or to post the required bond entailed forfeiture of the recognizance by the father and his sureties. Only the increasing number of appeals at General Sessions from the entry of recognizances betrays the

83. See Stats. 18 Eliz. c.3, 7 Jac. I c.4. Quarter Sessions itself might make orders on presentment by statute 3 Car. I c.4, §15.

84. See **W. Nelson, Americanization of the Common Law** 110-11 (1975).

activity, and without accompanying presentments only the observer knowing what to look for can continue to observe bastardy enforcement in New York.⁸⁵ Once again, patterns of enforcement shifted at mid-century, particularly outside New York City, as the institutions of criminal justice reoriented themselves to deal with resource constraints and the growth of social disorder. The latter movement all too soon escaped the power of the criminal law to confine, as the structure of colonial authority collapsed in the tumult of the Revolution.

From the preceding examples, illustrative rather than exhaustive in nature, the contours of the history of the criminal law in colonial New York can be seen to emerge. From the redesign of the hierarchy in 1691, the criminal justice system played a crucial role in the process of Anglicization, as the provincial elite solidified its control over the post-Leislerian society. The fundamental commitments to Englishry in substance and the use of transfer jurisdiction to achieve centralized political control played essential roles in the establishment of uniform and legally homogeneous authority throughout the province. Resistance to the Anglicizing government and its officials became an important part of the criminal docket, securely defining the continuing impulses toward legal heterogeneity as deviant and sanctionable conduct. Transfer jurisdiction, in particular, conveniently brought the supervision of reluctant, obstructive, or fractious local officials within the paradigm of criminal enforcement. Not only in the unusual frequency of highly visible political trials, but in other respects as well, the criminal law of the province became highly politicized.

These activities by no means displaced the less political functions of ordering the settlement's social life through attempts to control activities directed at the misappropriation of property and the employment of interpersonal violence. But in these latter connections the history of the provincial criminal law is a history of limited success under significant constraint. No attempt at the

85. For the inevitable close and accurate description of the technical detail, see J. Goebel & T. Naughton, *supra* note 2, at 102-04 & nn. 191-93.

estimation of underlying crime rates seems justified by the available reductions of the sources, but it seems clear that provincial New York was troubled, and increasingly so through the eighteenth century, by levels of violence that often verged on significant social disruption. A sense of vulnerability to this violence is expressed in the slave panics of 1712 and 1741, and by the increasing resort to summary jurisdiction to restrain the behavior of the propertyless and rootless elements of a rapidly growing population.

Along with the other fundamental commitments determining the conditions of development, the system of criminal administration in the province was shaped by the prevailing reluctance to spend on social goods—the goods provided by the criminal law in particular. Procedure was inflected at every stage in the process by the fiscal constraints imposed by reluctant taxpayers. The motive to reduce public expense not only dictated the forms of trial and punishment, particularly for the less respectable members of the provincial population, but also provided a strong substantive bias in the treatment of activities such as begetting children out of wedlock likely to result in increased social welfare expenditure. After mid-century, under the pressure of escalating social disorder, many of the system's practices were altered, legislatively and through the activity of its individual administrators, in directions familiar to twentieth-century observers, as trials were displaced by the equivalent of negotiated dispositions of many classes of offenses.

Like the land law, and the system of commercial regulation to be considered in the next chapter, New York's criminal justice system converged early on English procedural and substantive models. Even more dependent than the land law, however, on the enforcement activities of local lay justices, the criminal law system made provision for the control of those JPs who were ethnically or politically at odds with the central government. The processes of jurisdictional transfer, though solidly English in form, served a special local function in New York, by affording central authority an opportunity to police the activities of po-

tentially refractory JPs. Procedural assurances were insufficient, however, and the criminal law itself was often invoked to punish officials for nonconformity with local (English) norms, or to punish contumacy. Settlement of the criminal law did not occur without coercion of the system's personnel.

The criminal law process, particularly when its results are viewed quantitatively, reveals the profound importance of ethnic diversity in the construction of the provincial legal order. Sharp regional and ethnic distinctions in the pattern of prosecution show the differing stresses imposed on the order-keeping system by the various components of the provincial society. These diversities are most easily grasped in dichotomous terms: slave/free, Dutch/English, city/country, tenant/freeholder. But the primary message of importance is the diversity itself, rather than the particular categories constructed by the methodology of statistical survey. Goebel's comment that the course of the New York criminal trial can be plotted with the *Clerk of Assize* in one hand and *Trials per Pais* in the other is true so far as it goes, though the English forms covered very different realities. The process of negotiation between imposed forms and local needs tested the flexibility of the system.

Political factionalism was one of the forces that decreased flexibility precisely where it was most required. Though the recurrent uses of the criminal justice system to punish political adversaries of government made rather little technical law, perceived political abuse of the system was a recurrent feature of provincial life. Controversy over the discretionary power of the Attorney General to proceed by information was but one outcome. Not only did this particular point of contention affect the way New Yorkers thought about the institution of the grand jury, it also decreased support for the system of public prosecution.

This particular development also reflects the second of the forces working to impede the settlement of the criminal law—the expensiveness of the system of criminal justice, and the public

unwillingness to pay. Population growth and geographic expansion were not accompanied by proportionate increases in the resources available to the system. The corps of JPs grew relatively smaller through the provincial period; resources for the confinement of persons either before or after trial were always inadequate. Even if sheriffs complained of the inadequacy of their jails in part ritualistically, to protect themselves against damages for escape, evidence of the resource constraints on the system can be found in the increasing use of summary process and reliance on fines during the course of the eighteenth century.

Legal failures brought on by Imperial economic and strategic policy in the period after 1750 created shock waves the criminal justice system was supposed to absorb. Boundary conflict and tension between landlords and tenants that the land law could not reconcile produced recurrent large-scale threats to public order in the Hudson Valley; the Stamp Act resistance created similar conditions in New York City. Quantitative and qualitative analyses of the sources jointly reveal the systemic changes that followed. Prosecutorial resources shifted away from crimes against property to crimes against public order. In the 1760s, formal legislative response took the form of unprecedented expansion of the JP's summary jurisdiction—a further consequence of the need to do more with less. Also significant, and more familiar to the experience of twentieth-century observers, is a concomitant set of administrative changes. These led to imposition of fines in preference to other forms of coercion, and the use of various forms of negotiated disposition to reduce strain on the resources needed for trials. Bastardy prosecutions disappeared, for example, not because the community ceased to care about enforcement of sexual mores and reduction of welfare budgets, but rather because the use of recognizances and indemnity bonds allowed the system to compromise all the litigation in a fiscally advantageous way. Plea-bargaining is one time-honored response by a criminal justice system facing more disorder than the public will pay to suppress by more formal, and more expensive, means.

Stress on the criminal justice system in the last years of the provincial period revealed the internal weaknesses, the lines of cleavage, along which the order-keeping structure cracked after 1776. But the erosion of settlement in the criminal law was a consequence rather than a cause of the changes elsewhere in the legal system. The legal and constitutional structure of the Empire, and the policies Imperial officials pursued in New York, deformed the land law settlement—the resulting disorder became a problem, and a distorting one, for the system of criminal justice. The same steps, of early legal convergence followed by provincial maturation followed by progressive destabilization under adverse Imperial policy, occurred in the system of commercial law. These developments also posed a threat to public order, as the commercial system of the seaport seemed headed for inevitable shipwreck in the later 1760s. Attempts at resettling the commercial law occurred, as merchants and lawyers attempted to stave off disaster. Temporary success rewarded those efforts, to which we now turn, until a renewal of destructive Imperial policies in the mid-1770s, mostly directed at events outside New York, renewed the pressure. Then, along fissures opened during the provincial period, public order collapsed, and a revolution began.

Chapter 5

Commercial Law in War and Peace

In the same sense in which the land law was the doctrinal embodiment of the Hudson Valley or Schoharie County, the commercial law was the expression of New York City. The seaport was commerce embodied—its shape, schedule, hierarchy, and justice were all adapted to mercantile existence. The city's government was primarily mercantile, and its law, in far more than the narrow accepted meaning of the phrase "commercial law," was formed by the forces acting on a community that lived and died by the conditions of maritime trade.

The goal of the commercial law is usually to achieve orderly predictability as the background to economic fluctuation, and in that sense, commercial law aspires to a settled nature, even as we expect it to conform to the "felt necessities" of changing economic life. The overriding need for certainty and invariability of outcomes in the area of commercial law presents perhaps the profoundest impulse towards legal settlement in colonial legal systems—without an early delineation of the fundamental rules of commerce, subsequent social development must necessarily be retarded.

Superficially and in retrospect, the process of settling commercial legal arrangements in British North America appears

to have been comparatively simple. Much of the legal infrastructure for commercial relations within the area of European cultural dominance was internationalized centuries before the commencement of North American settlement. Admiralty, the law of negotiable instruments, the substantive law of agency and the adjective law of foreign attachment—all of these critical elements of the commercial system could be adopted in new venues of commercial activity with small need for adjustment. Colonial commerce, dependent on trading relationships with more economically powerful trading partners, had to bow to their terms. If wholesale adoption of metropolitan doctrines and institutions was the obvious route to commercial viability settlement would seem to be a single act of transplantation.

Furthermore, the problems of ethnic diversity that posed obstacles to the construction of a provincial legal order in other respects were of less significance in the development of the commercial legal system. Commercial relations transcended such differences the world over, and with respect to the population of New York itself, despite the sporadic hostilities of the mid-seventeenth century, there were few commercial relationships in Europe more enduring than that between England and the Netherlands. On all accounts, we might expect the history of commercial law in New York to represent the leading edge of legal settlement—a quick merger of Dutch and English practices into a single system, closely calibrated to that of British metropolitan traders, gaining stability, despite the vagaries of colonial economies and imperial wars, from the less volatile pace of Atlantic commercial development.

Certainly this description captures some elements of the provincial experience, but on the whole the course of legal change was rather different. Uniformity across geographic and ethnic divisions was achieved in the early period, and by the early eighteenth century the materials for a settled commercial legal order were in place. But the colonial economy, in both its domestic and international components, inhibited stabilization of

the legal regime. This tendency resulted from three primary causes—the prevalence of illegal trading in provincial New York, the perennial instability of the monetary system, and the procedural difficulties of imperial legal relations. Each played a significant role in hobbling movement toward a more stable and certain commercial law in the province at various times throughout the provincial period, and in the climactic period of colonial agitation at the latter end of the 1760s, all three together acted to destroy the stability of the system until the post-revolutionary reorganization.

The commercial law *strictu sensu*—the law of bundles, bills, and bottoms—was also closely related to other questions not capable of stable resolution. Regional and class tensions between debtors and creditors, exacerbated by the volatility of the money supply, put significant political strain on the legal order at crucial points in the provincial history—an analog of the social forces acting to destroy the stability of the land law in the Hudson River Valley in the 1760s. As well, the continuing constitutional controversy over the courts, often at the forefront of provincial political life, had sporadic unintended and severe effects on the provision of stable mercantile justice.

These centrifugal impulses, unlike most of the forces militating for diversity and uncertainty in law, were less apparent in the early period of provincial development than they were at the end. Geography provided a strong initial argument for centralization of commercial activity. The province Richard Nicolls was sent to conquer and govern in 1664 extended north from the mouth of the Delaware to the southern coast of Maine, taking in the offshore islands of New England. While many factors—not least the logistical difficulties of defending and administering this extended and discontinuous territory—underlay the comparatively rapid divestiture of portions of the Duke's chartered domains, the provincial boundaries at the end of the seventeenth century essentially enclosed that portion of the hinterland for which New York City served as the natural entrepôt.

Trade patterns in the period of Dutch control set several of the parameters of commercial development that would continue under English rule. Fur trade was the Dutch West India Company's most important enterprise in New Netherlands, as demonstrated by the colony's great seal, with its single beaver as the central image. The fur trade drew two lines of force through New Amsterdam—transshipment of furs brought south down the Hudson River in shallow-draft sloops, and the forwarding of supplies, including the essential trade goods as well as subsistence supplies, upriver. In addition, the trade with the Caribbean that was to be a permanent part of the New York commercial environment were laid down by the Dutch: carrying flour and other foodstuffs as well as timber to the islands, returning with cargoes of molasses and "fractious" or "unworkable" slaves spared the quick and painful death of the sugar islands for physically less tortuous employment as laborers and domestic servants in New Amsterdam.

The legal and administrative mechanisms of this trade, unlike those of the later period under English rule, presupposed the Dutch West India Company trading monopoly, both in New Amsterdam and in the Dutch Caribbean. With few exceptions, if a merchant is defined as one engaged in foreign commerce, there was one merchant in New Amsterdam—the Company itself. At the highest level of organization commercial law in New Amsterdam consisted of the decisions of the Director-General, subject to the review of the Dutch West India Company and its Amsterdam Chamber.

Though consistent trade policy avoided some of the classes of litigation integral to the later shape of provincial commercial law, this by no means implies that the domestic economy of New Netherlands operated without recourse to the courts. The staples of commercial litigation in the Dutch period were the same as those prevailing under English rule in New York, or in any comparable mercantile community. First and foremost, there was debt litigation. Debt collection was always the preponderant work of the courts, whether under Dutch or English rule. Local

conventions and payment systems determine the precise form that debt litigation takes—what documents or practices indicative of indebtedness are sufficient to prove the claim, for example. Conventions determine also the procedural context of collection—whether, as in agricultural communities short of specie like seventeenth-century Virginia,¹ debts are only collectible at a certain season of the year—but the business moves through the courts at all times, with tedious regularity.

Along with debt collection, the courts of New Netherlands confronted all the problems of contracts that break down before reaching the comparatively polished stage of simple non-payment. Claims for non-performance of contract obligations, delivery of unacceptable goods, and inadequate or harmful performance of service obligations are the common consequences of an interdependent economy, and the courts of New Amsterdam, the patroonships, and Beverwyck all expended substantial effort in the resolution of such disputes.

At the scale of magnification presented by court records—where individual commercial disputes are transformed into judgments mostly by processes unrecorded in detail—it is difficult to discern the substantive differences among legal systems. If the director of Rensselaerswyck sues for collection of an account, presenting his own books as evidence of the debt, and the defendant confesses his indebtedness but alleges set-offs, the resolution under Romano-Dutch law, as recorded in two lines of court minutes, will not exemplify any obvious differences in doctrine from the resolution of a similar dispute under the common law. But while the appearance of the substantive resolutions in such cases hardly seem to vary from year to year, regardless of the titular substitution of His Excellency the Duke of York for their High Mightinesses of the Dutch West India Company at the apex of the political order, the procedural context of commercial disputes in the courts changed after 1664, as the

1. Virginians in the 1640s used promissory notes stated in pounds of tobacco, payable “at the next crop” to satisfy both private and public obligations. Even fines imposed in the courts were collectible only in this fashion. See Edmund S. Morgan, *American Slavery, American Freedom* 177 (1975).

one quintessentially English institution made its appearance. Yet even the jury failed by its presence to make a sharp discrimination in the commercial legal order of the new province. Despite the adherence to juries, the English also continued to use the primary medium for specialized fact-finding in the Dutch courts—arbitration.

The use of arbitrators to investigate and dispose of cases with complex factual elements is perhaps the most striking feature of civil procedure in early New York. Dutch practice was certainly a predominant influence; such mechanisms also had the advantage of spreading the burden of adjudicating disputes over a larger segment of communities too thinly populated to maintain extensive permanent judicial establishments. Referring lawsuits from courts to arbitrators or referees² effectively increased the “carrying capacity” of courts which, in the circumstances of low population density and small economic surplus, were easily overburdened. When New Amsterdam acquired a court, in 1653, for example, it was one whose structure was based on that of Amsterdam’s own municipal court, composed of a schout, who acted in the roles of sheriff and prosecutor; two burgomasters, who served as administrative officers; and five schepens, the equivalent of aldermen.³ This court met down to the time of the English occupation, and again during the Dutch reoccupation in 1673-74. The reference of claims to “good men” for reconciliation or settlement was a major element in the procedure of this court. Similar uses of reference to *goede mannen* prevailed outside the jurisdiction of New Amsterdam, in the patroonship of Rensselaerswyck.⁴ Most often the referees were appointed by the

2. A distinction should be drawn between the processes of “arbitration” in the strict sense, arising from an agreement between parties to carry future disputes to an informal forum of adjudication, and “reference,” in which a court refers a proceeding originally commenced before it to the disposition of others. The procedural distinction is sometimes important; where it is not, I have used the word “arbitration” to describe both processes.

3. C.P. Daly, *History of the Court of Common Pleas for the City and County of New York* xix, xxiii (1855). In Holland the burgomasters and schepens served different functions; in New York they formed one governmental entity. The officials in Amsterdam were elected; in New York, however, they were appointed by Stuyvesant.

court,⁵ sometimes they were selected by the parties,⁶ and occasionally one of the members of the court was delegated to attempt a settlement.⁷ If an agreement could not be reached between the parties, the judgment of the referees could be appealed to the court as a whole, which would then render a final decision. This form of challenge was apparently quite rare.⁸

Among the many problems of governance and control presented to the new English management after the Dutch surrender in 1664, the mechanisms of commercial justice did not rank among the more complex. New Amsterdam's Court of Schout, Burgomasters and Schepens could become New York City's Mayor's Court without violence to the fabric of English governance, and the same arrangement reestablished the civil justice of Albany. No move was made to interfere with the use of reference or arbitration, although juries were, with self-conscious Englishness, empanelled in those lawsuits that actually went to trial.

Nor was the continued use of arbitration solely a show of deference to Dutch sensibilities.⁹ The Duke's Laws, which were

4. See, e.g., **Minutes of the Court of Rensselaerswyck, 1648-1652**, at 69, 99, 127 (A.J.F. van Laer ed. & trans. 1922). The Rensselaerswyck records also show the use of agreements to arbitrate future disputes. See, e.g., *id.* at 79.
5. Schout v. Elzers, in 1 **Records of New Amsterdam** 54 (B. Fernow ed. 1897); Boot v. Goderis, *id.* at 77; Gompelmans v. Schellinger, *id.* at 202.
6. Steyn v. Martyn, *id.* at 97; deKuyper v. Jansen, *id.* at 176.
7. Verbeeck v. Pos, *id.* at 186. See also, Aiken, *New Netherlands Arbitration in the 17th Century*, 29 **Arb.J.** 145 (1974) (additional early cases of arbitration).
8. Only one such case appears in the period 1653-54, out of several dozen instances of reference. Jensen v. Spysers, 1 **RNA** 71.
9. It should be noted that the English tradition itself was by no means void of precedent for the use of arbitration and reference. Arbitration played a significant role in the medieval common law, epitomized by the fifteenth-century comment that "Arbitration is used for the Common Weal, that is to say to appease disputes and wronge between the people." Y.B. 8 Edw.IV, Mich. pl. 9, 35 (1468, *per* Yelverton, J.), and the mercantile community in England took advantage of its possibilities from an early period. See generally, Sayre, *Development of Commercial Arbitration Law*, 37 **Yale L.J.** 595 (1928) (commercial arbitration before the eighteenth century). The English procedure through the end of the seventeenth century was to enforce penal bonds requiring obedience to arbitration awards, see *id.* at 598-608, and when

only in force in the English areas of Long Island, Staten Island, and Westchester, provided that:

All actions of Debt or Trespasse under the value of five pounds between Neighbors shall be put to Arbitration of two indifferent persons of the Neighborhood to be nominated by the Constable of the place; and if either or both parties shall refuse (upon any pretense) their Arbitration: Then the next Justice of the peace ... shall choose three other indifferent persons; who are to meet at the Dissenters charge from the first Arbitration and both plaintiffs and Defendant are to be concluded by the award of the persons so chosen by the Justice.¹⁰

The English settlements on Long Island, as we have seen, were primarily outgrowths of Connecticut communities across Long Island Sound. In those towns too there was a substantial tradition of arbitration,¹¹ and the Duke's Laws provision on arbitration, like most of the rest of the contents of that code, was drawn from other New England sources. Colonial systems at low population densities tended, in short, to converge on arbitration as a mechanism for the settlement of smaller or more routine civil disputes. Traditional or religious reasons could be, and were, adduced in support of such measures, and these should by no means be ignored, but the evident utility of the institution—which lay in the use of contributed skilled labor to bolster the carrying capacity of the formal court systems—provides an

the use of penalties was statutorily forbidden after 1697, Parliament speedily provided an act to permit the direct judicial enforcement of arbitration results. See 9 Will.III, c. 15 (1698). Thus the English tradition of arbitration helped to make the Dutch predilection for reference comprehensible to the new authorities in New York.

10. 1 NY Col Laws 7.

11. The growth and decay of arbitral procedures in colonial Connecticut is discussed in B. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* 101-36 (1987).

independent explanation of the popularity of arbitration in early Anglo-America.¹²

While the advent of English government thus inspired comparatively few significant changes in the procedure of commercial dispute resolution in the years immediately following the conquest, it did have profound consequences for the organization of commercial life and the direction of commercial enterprise. These much larger changes in the economic life of the new province established, by the turn of the century, many of the prevailing themes of commercial legal development through the rest of the provincial period.

Primarily, of course, English control brought about such sweeping changes because at the level of imperial trade regulation it replaced one system of law by another. Here again, it is necessary to distinguish the various elements that are ordinarily blended in our label of “commercial law.” For international trade to be viable at all, certain of the basic mechanisms of exchange and dispute resolution had to be generally accepted—these elements of the classic *lex mercatoria* were effectively internationalized among Europeans and, as we have seen, were not strongly affected by the shift from Dutch to English rule. But the very national, imperial, objectives that commanded a largely uniform approach to commercial procedure also commanded a diversity at the highest level of commercial regulation—the rules about with whom one might trade, in whose ships, and for what commodities. However little flour merchants in Manhattan might change the way they collected their debts after 1664, to be embedded within the British Empire, subject to its law of trade regulation, altered the economic environment fundamentally. These changes, and the resulting mediation between commercial law at the low level—the local rules of commercial organization and dispute resolution—and commercial law at the high level—imperial

12. Another view of the general history of arbitration in early America is provided in Mann, *Formalization of Informal Law: Arbitration Before the American Revolution*, 59 *N.Y.U.L. Rev.*, 443-81 (1984).

legislative control over trade routes, shipping, customs, and currency—established the outlines of New York’s commercial law up to the Revolution.

Initially, and most visibly, absorption into the British Empire altered the existing pattern of trade relationships through the imposition of new legal controls. New Amsterdam lay at the junction of three major trade connections. First in importance was the fur trade with the aboriginal inhabitants of the continent. Woven cloth and iron implements were exchanged for furs in a trade so mutually profitable that it entirely reoriented the indigenous trade and warfare patterns everywhere north of the Ohio and east of Lake Winnipeg. The Dutch, in possession of the only transportation route to the continental interior competitive with the French-controlled St. Lawrence, anchored the southern portion of that trade. Second in importance was the trade with the settlements of the Dutch Caribbean. Even using twentieth-century agricultural technology, as any contemporary visitor will note, the smaller islands of the Caribbean provide little encouragement to the cultivation of grain or the raising of livestock; intensive cultivation of sugar cane—the great cash crop of the islands—made the development of self-sufficiency in basic foodstuffs impossible. So the Hudson River Valley, from the beginning of Dutch rule, was marked out as the breadbasket of the Caribbean settlements. New Amsterdam bolted, baked, and packed in barrels, then went down to the sea in ships. Nor were sugar, molasses, and flour the only commodities to be exchanged. New Amsterdam’s merchant ship-owners carried labor to the islands, and the slave trade swelled the African population of New Amsterdam itself to roughly 20%, almost entirely enslaved, by 1664. To these two profitable lines of export trade, there was added the dependence of the inhabitants of New Netherlands on imported manufactured articles—a dependence which they shared with the other European and indigenous inhabitants of North America. The hinterland of New Netherlands was undeveloped compared to that of New England, but New Amsterdam was its source for the goods that made life in the wilderness liveable.

Each of these basic trade relationships sustaining New Amsterdam's commercial community would be significantly affected by the imposition of British imperial control. The export market for furs and the source of manufactured goods for the province formally shifted from the Netherlands to Britain. Although it could hardly be extinguished overnight, and was never in fact effectively controlled before 1763, direct trade with Holland, along with the rest of the European continent, was formally prohibited from the moment of Stuyvesant's surrender. Some of the Dutch merchantile elite in New York would adjust to this new trading pattern, but after 1664—and particularly after the Dutch reoccupation and peaceful cession in 1673—the disruption of the long-standing commercial relations with Holland provided an opportunity for other, primarily British and French Huguenot, traders to establish themselves in the mercantile hierarchy of New York.

The disruption of the island trade was an even more significant force acting to change the legal environment of New York's commerce. The Caribbean was an economic unit, and its division into permitted and prohibited zones of trade was a political artifice that traders, measuring potential profit against risks of unpleasant interference, never chose to acknowledge. The Dutch Caribbean, formally interdicted as a source of sugar after 1664, was a particularly promising area of commercial development, not only because of its social and linguistic connections to New York, but also, and primarily, because the loss of Dutch possessions on the mainland left no Dutch source for temperate-zone agricultural products. There were no trackless forests in Holland with which to meet the sugar industry's need for timber. From the very beginning, New Yorkers had special inducements to engage in trade that violated the provisions of imperial law. Though the particular inducements would vary from decade to decade, as would the governmental enthusiasm for suppression, the illegality of a large portion of New York's trade remained a given throughout the provincial period, and no description of the legal elements of commercial relations can safely ignore the point. The demographics of the city itself

provided an early demonstration of the social importance of the new legal regulation of trade. Supplying African slaves to the Dutch sugar islands was now more complex and less profitable, while the supply of Africans to the British Caribbean was secure in other hands. African slaves arrived in New York primarily as a by-product of New Yorkers' profitable trade between Africa and the Caribbean. The African population of New York began to fall as this trade was reduced—from 20% in 1664 to roughly 14% in 1674. This latter level remained roughly stable throughout the provincial period.

Along with the external reorientation of business relations there was a concomitant internal reorganization between the conquest and Leisler's Rebellion. The rigid public economic control exercised by the Directors-General of New Amsterdam gave way to one of the most striking idiosyncrasies of English public administration. Twentieth-century Americans, long since educated to the principle contained in the Sherman and Clayton Acts—and more frequently honored in the breach than in the observance—that government is a foe of monopoly economic power, find it hard to appreciate just how thoroughly inculcated the opposite principle was in the theory and practice of Anglo-American government from the Tudor period through the first third of the nineteenth century. The exchange of chartered monopoly rights in return for public investment—either through direct payment to the granting authority or through the gratis provision of goods and services the government would otherwise have to provide—was always a major part (sometimes the only apparent part) of the business of government. As a potential source of prerogative taxation, reducing the Crown's need to call or cooperate with Parliaments, the practice of granting monopolies in the domestic economy attracted severe and destructive attention as Tudor gave way to Stuart rule, inspiring, in the *Case of the Monopolies*, one of Edward Coke's most remarkable works of constitutional fantasy. But the complex of practices and beliefs long outlived Charles I.¹³ The two decades

13. For a perceptive description of the role played by this approach to governance in the granting of corporation property in New York City during

following the English conquest saw the legal basis of commercial life reorganized on more monopolist lines, as government secured political support and public investment in exchange for exclusive economic privilege. This process, proceeding in parallel with the creation of the manorial system we have earlier discussed, turned the political strategy of the late seventeenth century into the infrastructure of eighteenth-century law.

Thus, along with the traditional monopoly of the fur trade exercised by the Albany *handlaers*, the period from 1664 to 1680 saw the creation or confirmation of a monopoly on flour bolting and packing on behalf of the city grain merchants, a monopoly on the Hudson River carrying trade in favor of city merchants holding a special government license, and a regulation requiring all goods produced upriver to be sent to the city for reshipment. When, in 1678, the Albany *handlaers* objected to the shipping monopoly of the city merchants, alleging their traditional right to organize export of furs for themselves, Governor Andros tartly inquired whether they wanted a foreign trade or a monopoly of the fur business.¹⁴ From this environment of monopoly privilege, artisans and laborers were excluded. Combinations of carters and coopers were actively suppressed by the City's Common Council and the Governor,¹⁵ as the system of monopoly grants for the protection of commerce were allied to the power of the commercially-controlled city government to set prices and wages in the trades essential for the movement of goods. Here the doctrinal development followed the path of interest-group politics.

In all these alterations to the large-scale law of commerce we observe the legal foundations of the process of "Anglicization." Regulation of the channels of trade toward

the eighteenth century, see the chapter entitled "The Political Theory of a Waterlot Grant", in H. Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1830*, at 60-68 (1983).

14. For further discussion of these various regulations in their political context, see Chapter 1, *supra*, p. 42.

15. *See id.*

Britain, and the exchange of special economic privileges for support of the English government of the province, encouraged the growth of English and French traders in New York, unconnected to the previous business patterns, seeking to build or extend their fortunes in the new fields of the new empire. The new regulatory climate also provided the strongest possible incentives for the prominent Dutch mercantile families to come to terms with English rule. The strong Dutch mercantile flavor of the short-lived Leisler regime, at odds with the Anglicized segments of the city elite, provided a clear seismic indication of the subterranean fractures developed during the process.

Special commercial privileges in the city during the 1670s and '80s opened fault lines that would be important to later social and legal contests. Hostility on the part of Long Islanders, compelled to sell their grain to the city's agricultural processing monopoly and to ship their other goods through the city's port facilities, increased tension with the provincial government, always suspicious of these "ungovernable Puritans" in the first place. Leisler's regime was no more successful in this area than the Dominion government that preceded it, nearly coming to blows with Long Island militia unwilling to submit to expanded government by the merchants of the city.

While the substance of large-scale regulation of trade altered significantly between 1664 and 1691 as a result of imperial legislation and local managerial policy, the records of adjudication reveal no obvious discontinuities in the treatment of quotidian commercial disputes. The toleration of diverse substantive law in a uniform system of English jurisdictions, the hallmark of the administration of justice in the period,¹⁶ is scarcely reflected in the dispatch of commercial business. New York commercial cases, in their substance if not their linguistic detail, would have appeared pretty much the before a court in London, Boston, or even Quaker Philadelphia. Thus, for example, the Court of Assizes in 1682 reversed the Mayor's Court judgment in favor of the holder of a note of hand for £30.

16. See Chapter 1, *supra*.

Appellant claims breach of warranty on goods sold, and produces witnesses to the bargain, whose testimony apparently was more convincing to the Bench than it had been to the jury in the Mayor's Court. Only the fact that the goods sold consisted of "a negro," "warranted to be Sound and well Butt Proveing otherwise," provides a distinguishing mark of time and place.¹⁷

Along with the routine of debt collection, and the ancillary commonplaces of commercial claim and defense, the courts faced the litigation generated by the actions of government officers in the trade system. Claims against customs officials and sheriffs, founded on allegations of wrongful imposition of duties or improper actions in execution of judgment, appeared in the guise of actions for trover and conversion, alleging, for example, that the Deputy Collector wrongfully detained eighty-five gallons of rum, or the sheriff took and converted to his use £26.15s worth of hats.¹⁸ Such suits against officers were a part of the pattern of commercial life, but they could easily shade over into acts of deliberate political defiance, as, for example, the indictment of the Mayor for treason because he had rendered judgment in the Mayor's Court refusing enforcement of a gambling debt.¹⁹ The Court of Assizes had no difficulty dismissing the indictment, and issued a general order reciting that:

Severall persons have of Late Presumed Contrary
to the Knowne Laws and practice of the Realme of
England to Exhibite and Puffer Divers Causelesse

17. See *Smeedis v. Okson*, October 1682, *Proceedings of the General Court of Assizes*, in *NYHS Coll* 1912, at 32. The slave died in the custody of the seller, to whom he had been returned. Appellate review in the Court of Assizes amounted to trial de novo, as the taking of live testimony in this case demonstrates. This proposition, that the Governor in his highest court originally exercised the right to review findings of fact, would become a hotly-contested issue in the mid-eighteenth century. See *infra*, p. 256.

18. See *Assize Proceedings*, October 1681, *supra* note 17, at 18-19. In the former case, brought by the prominent merchant Peter De Lanoy, the shipment of rum was held not dutiable, being en route to Virginia, and the Mayor's Court judgment against the Deputy Collector was affirmed. In the second, the sheriff produced the writ of execution and the judgment of the Mayor's Court under which he acted. The subsequent verdict and judgment of the Mayor's Court jury, holding the sheriff liable, was reversed.

19. *Id.* at 22.

and Vexatious Accusacons and Indictments into the Courts within this Government against Severall Magistrates and Others Concerned in the Publique affaires of the Government which Causeth Greate trouble and Disturbance

and requiring that all such accusations “be first heard and Examined before two Justices of the peace.”²⁰

The increasing jurisdictional sophistication of the provincial court system by no means implied the disuse of arbitative procedures in commercial and other disputes. Two cases in the Mayor’s Court in 1675, for example, show the court referring complex accounts.²¹ The use of reference in this period was not confined to the Mayor’s Court. The existing Court of Assizes records disclose two instances between 1680 and 1682 of arbitration involving large commercial transactions.²²

20. *Id.* at 24. Historians intemperately eager to locate the single fateful moment at which “Reception” of the common law occurred in New York may be driven by the wording of this order to conclude that reception occurred sometime prior to 1681—an elegant demonstration that nonsensical questions tend to produce nonsensical answers.

21. In one case “to bring the same into as briefe a method for finding out the difference, as possible they can,” and in the other “in order to the stating or bringing them to a narrow Compass, for the Courts more facile understanding the merritt of the cause.” *Phillips v. Cousson*, *MCM*, June 24 1675, f. 72; *Stevenson v. DeHaert*, *MCM* Sept. 7 1675, f. 72. Both are reprinted in **R.B. Morris, *Select Cases of the Mayor’s Court of New York City, 1674-1784***, at 257-58 (1935). In the former case, presumably because of the “great difficulty Therein,” the court nominated four referees, while in the latter only two were needed. In both cases, it should be noted, the function of the referees was to advise the court, and not, by the language of the records, to make a judgment between the parties. In a similar case in 1683, after the examiners of the accounts reported to the court, further testimony as to the facts of the disputed sales transaction was taken; the court fashioned the judgment and apportioned the costs. *Wattson v. Saunders*, *MCM* July 3 1683 & August 7 1683, ff. 61, 64. Morris, it should be noted, collects his cases as examples of the old personal action of account, but the procedure followed in the cases makes clear that this classification is incorrect. The more advisory use of referees was clearly not the invariable practice of the period; *See Moyne v. Sharpe*, *MCM* August 3 1680 & September 10 1680, n.p.

22. One case appealed a result in debt on account for £156, which the court referred (on motion of the original plaintiff and consent of defendant) to four referees, who reported a judgment for £139.5s.9d and costs. *Wilson v. Norman*, *Assize Proceedings*, October 1682, *supra* note 17, at 29. The suit involved an account between merchant and customer for goods sold and

The period following Leisler's Rebellion saw not only the completion of the process of institutional settlement, culminating in the Judiciary Act of 1691, but also a major expansion of the commercial life of the province. The opening of the worldwide struggle between French and British empires radically altered, and significantly improved, the position of the provincial traders. New York, though located at one of the strategic hinges of the North American confrontation between Britain and France, was largely spared depredation in King William's War, owing primarily to the anti-French activities of the Iroquois, who had allied to the British Empire the uniquely brutal combination of warfare and forced trade that underlay the attempt of the Five Nations to monopolize the southern Great Lakes fur trade.²³ New York contributed no substantial levies of men or resources to the campaigns against Canada between 1689 and the conclusion of temporary peace in 1697, thus sparing itself both the human and economic costs incurred in New England. British fleet operations in the Caribbean, however, afforded the New Yorkers a more profitable form of patriotism, supplemented by the smaller-scale but equally profitable overland trade supplying the enemy at Montreal. The maritime commerce of the province exploded—New York's shipping roster almost quadrupled, from about 35 ships in 1689 to 124 in 1700, while total trade—in the opinion of the Governor—doubled in the wartime decade.²⁴ The trade explosion brought specie into the province, while the

delivered between 1677 and 1681—a reminder of the long credit necessarily extended by New York merchants, a subject further discussed below. The losing defendant posted bond for a further appeal to the King and Council, but a search of the Privy Council records shows, rather unsurprisingly, that no appeal was docketed in London. The other case was an appeal from a successful action at law to enforce an award of £310. *Cardwell v. Golding*, October 1682, *id.* at 31. The original award was upheld. Again, security for further appeal was given, but apparently no appeal was prosecuted.

23. Despite several recent additions to the monograph literature, the most insightful comprehensive analysis of the strategic situation in North America at the end of the seventeenth century remains **B. De Voto, *The Course of Empire*** 131-75 (1952).
24. Bellomont to Lords of the Treasury, May 25 1698, 4 **NY Col Docs** 317. See also Mason, *Aspects of the New York Revolt of 1689*, 30 **NY Hist** 174 (1949); **H.A. Johnson, *The Law Merchant and Negotiable Instruments in Colonial New York, 1664 to 1730***, at 9-10 (1963).

absence of war debt held the emission of paper money, and resulting inflation, to a minimum.

Thus, when in 1691 the institutions of justice, including commercial justice, attained their more or less final form in the province, the state of the mercantile economy was far more positive than the immediate political circumstances. For the anti-Leislerian, Anglo-Dutch component of the mercantile elite, best represented by the councilors Frederick Philipse and Stephanus Van Cortlandt, political authority waxed with economic profit. But the expansion of trade and the political triumph of the anti-Leislerians acted against the stability of commercial law, as illegal trading became the centerpiece of the provincial economy.

Wartime disorganization of ocean commerce was always a time of opportunity. French privateering activity in northern waters afforded New Yorkers a boost in their legitimate carrying trade in competition with New England, but the opportunities to windward of the law were even more significant. The primary difficulty for the New York merchant, throughout the entire provincial period, was shortage of circulating currency.²⁵ Imperial control over money supply, exercised according to mercantilist principles, provided a steady drain of specie from the provinces. Customs duties and quitrents were payable only in specie, thus ensuring, in perfect Imperial theory, that both real and movable property in the colony would sweat a steady stream of gold for Imperial repatriation. In practice, there were some impediments. Quitrent collections were nominal at best in most periods, and the use of warrants against customs revenue as currency of payment for Imperial expenses kept some substantial portion of the customs receipts in the province. But British merchants, while willing to extend short credit to their American correspondents, ultimately had to be paid in specie. The wartime supplies trade to the Caribbean fleet contributed to the rapid expansion of trade and the money supply, but this was an

25. The most useful analysis of the monetary infrastructure of the colonial economies remains C.P. Nettels, *The Money Supply of the American Colonies before 1720* (1934).

insufficient source of hard currency trade. There were those with more money to spend than the Royal Navy, however, and the anti-Leislerian elite of the province, including Governor Benjamin Fletcher, went into business supplying the pirates of the Atlantic.

Complicity between the colonial governments and the syndicates of maritime organized crime was hardly new;²⁶ indeed, the pirates were driven to New York in part by the reduced hospitality of the New England ports, wherein they had found a satisfactory reception among the Godly until the creation of the Dominion of New England. For shipwrights, outfitters, shop-keepers, tavern-keepers, and all those, who, like Pleasant Riderhood, saw seamen as their “natural prey,” a pirate ship laden with wealthy criminals in need of shore leave was as good as a feast. For Philipse, Van Cortlandt, William Nicolls, and William “Tangier” Smith (soon to be Chief Justice of the province), along with their political patron and business partner, the Governor,²⁷ supplying the pirates was a fortune in the making. It is impossible to establish how much money piracy poured into the New York economy before the end of King William’s War and the recall of Benjamin Fletcher, but Fletcher’s successor, Bellomont, estimated that it amounted to more than £100,000 a year.²⁸

As in so many other matters, the appointment of the Earl of Bellomont as New York’s Governor signaled a reversal of fundamental policy on trade in the province. Fletcher’s pursuit of personal profit and anti-Leislerian political support had

26. See 1 H.L. Osgood, *American Colonies in the Eighteenth Century* ch. 16 (1924).

27. For the best discussion of Benjamin Fletcher’s relations with pirates, see J.S. Leamon, *Governor Fletcher’s Recall*, 20 *WMQ* 3d ser. 527-42 (1963).

28. Bellomont to Secretary Popple, July 7, 1698, cited in J.R. Reich, *Leisler’s Rebellion: A Study of Democracy in New York, 1664-1720*, at 137 (1953). By way of comparison, Nettels calculates that roughly £44,000 was spent in New York for provisioning Her Majesty’s military during the entire period of Queen Anne’s War. Allowing for some exaggeration in Bellomont’s estimate of £100,000 per year, the overwhelming profitability of dealing with the pirates, and the critical importance of piracy to the New York economy, is clear.

determined not only his extravagant land grants, but also his permissive attitudes toward illegal trade and the encouragement of piracy. Viewing with disgust the consequences of the commercial policy pursued by Fletcher, Bellomont told the Lords of Trade after six months in New York that piracy and illegal trade, carried on in violation of the Navigation Acts, were the “beloved twins” of the commercial elite of the province.²⁹ Bellomont’s alternative to the illegal trade currently sustaining the prosperity of the province was the bolstering of the fur trade to England, and the project, several times renewed in the early eighteenth century, to import Palatine German settlers to build a naval stores industry in the Hudson River Valley.

This was not the approach favored by those, including Frederick Philipse—the richest and most powerful merchant in the province—whose commercial fortunes were grounded on the existing illegal trade. Much piratical activity having shifted east of the Cape of Good Hope, to the western Indian Ocean and the Red Sea in the aftermath of peace in the Atlantic, the greatest of New York merchants began the practice of supplying pirates *in situ*, sending supply ships east of the Cape. Not only was trading with pirates plainly illegal, but any trade east of the Cape was barred by imperial trade legislation. Nonetheless, in a remarkable variation on the myth of the “triangle trade,” the New Yorkers managed at the turn of the century to create a quadrilateral trade pattern whose fourth corner lay at transient locations on the Red Sea lanes. Rum could there be sold to pirates at enormous advances; returning vessels touched at Madagascar and purchased slaves, these to be exchanged in the sugar islands for molasses to be distilled in New York.³⁰

The prosperity of the 1690s, based as it was on a combination of war profiteering and encouragement of piracy,

29. Bellomont to Lords of Trade, December 14 1698, 4 NY Col Docs 438. For the other side of the file, reflecting the complaints from the provincial opposition, see *id.* 320, 416, 490, 604, 623.

30. Documentation of this unusual variation of the so-called triangle trade, which is generally glimpsed more often in the writings of historians than in the shipping registers can be found in 4 NY Col Docs 304, 412, 446, 475.

inculcated an instability in the regime of commercial law at the highest level even as it made more easy the administration of the law at its more basic level, in the resolution of individual disputes. The institutional mechanisms of commercial justice were nearly complete. The Judiciary Act of 1691 and the subsequent orders establishing the itineracy of the Supreme Court Justices consolidated the system of civil justice on English models, while the Mayors' Courts of New York and Albany acquired a consistent county court jurisdiction, supplementing their indispensable roles in the commercial litigation of the province. The Judiciary Act, by endowing the Supreme Court of Judicature with the jurisdiction and powers of Exchequer, thus sinking the separate Court of Exchequer created by Dongan in 1685,³¹ brought the enforcement of administration's fiscal interests in the trade system into the the same courts, and before the same juries, that resolved the rest of the commercial docket. Although a patently desirable measure from the purely institutional point of view, the enforcement of the Crown's commercial policy by New York juries, whose prosperity depended in the largest measure on illegal trade, was not likely to be effective.

Prosperity, however achieved, meant expansion of the money supply, and liquidity was necessary to the success of commercial dispute resolution. One study finds that the Supreme Court of Judicature resolved its cases expeditiously in the period from 1694-1696, requiring less than three months on the average to bring cases before juries, and resolving less than 15% of its docket by default judgment.³² Both the speed of resolution, and

31. The history of the exchequer jurisdiction prior to 1691 is discussed in Chapter 1, *supra*.

32. See Rosen, *The Supreme Court of Judicature of Colonial New York: Civil Practice in Transition, 1691-1760*, 5 *Law & Hist. Rev.* 213, 221, 229 (1987). Rosen attempts to compare these generalizations, drawn solely from analysis of the Supreme Court minutes, to equivalent figures from the 1750s. Rosen excludes from her calculations cases in ejectment, for unrelated technical reasons. With the ejectment cases removed, as inspection of the minutes demonstrates, the residue of the civil docket consisted very largely of actions sounding in debt and trespass (case), and *qui tam* actions under the acts of trade and navigation.

more significantly, the low number of default judgments, reflect the presence of money in the community; in other periods, as we shall see, contracted credit produced deadlock in the legal system. When there was simply no money with which to pay, debt litigation clogged the courts, and defendants had comparatively little reason to contest their creditors' actions.

In other respects, too, the incoherence of trade regulation left undisturbed the traditional dispute-resolving procedures and doctrines of the provincial courts. The minutes of the Supreme Court of Judicature for the period 1691-1704 show a familiar pattern of commercial arbitration, for example.³³ Similarly, Herbert Johnson concluded in his study of the law of negotiable instruments that “[w]hile written evidences of indebtedness underwent considerable change during the years from 1664 to 1730, the amount of change in the laws applying to the bill of exchange is negligible. . . . and we may safely claim that the bill of exchange possessed all of its modern attributes by 1664, and continued to have these characteristics throughout the colonial history of New York.”³⁴

What was true of the law pertaining to bills was largely true of the whole as one looks at the commercial system in May 1701, at the death of the Earl of Bellomont. Like the rest of British North America, New York was in one of the periodic respites in the century-long struggle between British and French Empires. Its maritime commerce, inflated by the licit and illicit economic opportunities of wartime, was strong. Trade to the West Indies,

33. In one suit an objection was made to jurors on the ground that they had earlier served as arbitrators in the same dispute. *Gysbert v. Miseroll*, August 6 1695, **NYHS Collections 1912**, at 78. In another case a dispute between ship-master and merchant came on for trial, was referred, one of the parties raised objections to the award, which was overturned, and the case went off again to a jury. *vanSwieten v. Grevenraedt*, October 11 1701, April 12 1702, **NYHS Collections 1946** at 57, 100. Rosen, *supra* note 32, at 229, reports no cases in the Supreme Court resolved by arbitration between 1694 and 1696. So far as the minutes will disclose, this is correct, but the exclusive focus of Rosen's attention on the Supreme Court of Judicature somewhat hampers her conclusions. The Mayor's Court minutes in the same two-year period show roughly a dozen instances of arbitration or reference.

34. **H.A. Johnson**, *supra* note 24, at 40.

concentrated on the exportation of grain and meat in exchange for sugar and molasses, along with the trade to indigenous America through the Iroquois—seeking simultaneously to become the butchers of and retailers to the Far Tribes—were the commercial staples of the province. The wartime expansion of shipping produced employment for artisans and seamen, while the expansion of the money supply resulting from wartime provisioning contracts and the expenditures of pirates had increased credit without the production of ruinous inflation, largely because New York, unlike Massachusetts Bay, had not issued large quantities of paper money to finance direct participation in the war. The Mayor's Court and Supreme Court provided commercial justice with comparative expedition, using both procedures and substantive rules that represented a smooth conjuncture of Dutch and English practices. Although juries decided the largest proportion of commercial litigations, the mercantile community and the courts continued to rely on the judgments of referees and arbitrators to resolve particularly complex questions, or to provide factual expertise in the intricacies of mercantile enterprise. Though operating, like the merchants of all other colonies, in constant need of a more capacious money supply, the merchants of New York had evolved a payment system built around formal obligations and bills of exchange that both facilitated local transactions and permitted New Yorkers access to the larger pool of credit in the Anglo-American world. The free assignability of debt obligations, not achieved in England itself until 1704, existed in New York as a contribution from Dutch law, though shortage of specie for discounting meant that most evidences of debt remained in the possession of the first payee until taken up by the maker.³⁵ Bellomont's attempt to harness Leislerian political forces to his program of reversing Fletcher's policies, in the encouragement of illegal trade as well as in the grants of large tracts to the manor lords, had failed.³⁶ Unlike Boston, which had already begun to experience the bouts of inflation and high casualty rates that

35. See H.A. Johnson, *supra* note 24, at 34.

36. This second, but equally important element of Bellomont's policy is discussed in Chapter 3, *supra*.

would be its portion in the wars of empire,³⁷ the social order of New York was not being eroded at its economic base, and the legal system reflected that happy truth.

But the New Yorkers' apparent success in constructing a syncretic commercial law, largely English but partly Dutch, to settle the commerce of this intensely mercantile province only imperfectly concealed the fundamental tensions on which the system was constructed. The large-scale law of New York's commerce, setting the ground rules of international trade and credit, and the legal power to control the all-important money supply, was beyond provincial control. The most profitable portions of New York's trade were either entirely illegal, depending on the evasion of the acts of trade and navigation and the encouragement of piracy, or were products of the vicissitudes of imperial war in the Caribbean and the North American interior. The consolidation of commercial justice at the lower levels set the stage for the completion of the process of settlement, through the development of legal mechanisms for large-scale trade regulation. But here the way was blocked by Empire. The commercial law regime, solid though it was to external inspection, rested on political and strategic premises that New Yorkers could not control. The history of the next seventy years, as the population and trade volume of the province increased, required the commercial law system to absorb the unavoidable shocks of participation in the British Empire. Ultimately, the shocks would grow too great, and the system that seemed all but settled in 1700 would dissolve under the strain.

During the period between the wars of King William and Queen Anne, and despite the continuing partisan strife stirred up in the Fletcher and Bellomont administrations, the merchant-dominated Assembly made some attempts further to consolidate the commercial system. Legislation to establish standard weights and measures—long needed to establish the credibility of New

37. For a remarkable tripartite comparative history of the communities of Boston, New York, and Philadelphia in their responses to the war crises from 1685 to 1763, see G.B. Nash, *The Urban Crucible: Social Change, Political Consciousness, and the Origins of the American Revolution* (1979).

York goods in the export trade, as well as to facilitate the domestic industries, including construction—passed in 1703.³⁸ The usurious extension of credit to seamen—a practice again attributable to the attitudes of the waterside keepers of taverns and lodging-houses, to whom seamen were as wildebeest to the lion—called for the revival of the act prohibiting the enforcement of promissory notes against sailors,³⁹ while the practice of dilatory removal of actions in debt from the Mayor's Court to the Supreme Court, which increased the costs of collection in the period of post-war contraction, was blocked in the interest of the city's merchant creditors.⁴⁰ These comparatively narrow measures were accompanied by the first of many attempts to bring within the compass of the provincial legal order the critical problem of monetary stability. In the fall of 1709, with the renewal of hostilities in North America imminent, and the likelihood of war charges much increased, the Assembly forbade the exportation of specie from the province, with uncertain results.⁴¹

But specie drain was never a wartime problem in New York—what Empire took away it could also give. Once again, until the conclusion of the Peace of Utrecht in 1714, supplying Her Majesty's forces and waylaying French shipping in Atlantic and Caribbean waters brought money streaming back into New York. Again New Yorkers, despite the crucial strategic value of their territory at the gateway between Empires, sought to

38. See An Act to Ascertain the Assize of Casks, Weights, Measures and Bricks within this Colony, June 19 1703, 1 NY Col Laws 554.

39. See An Act for Reviving an Act for Encouraging of Seamen, October 11 1709, 1 NY Col Laws 680.

40. See An Act to prevent the Removal of Actions of Twenty pounds from the Mayors Court of New York and Other Courts, October 11 1709, 1 NY Col Laws 681.

41. An Act to prevent the Exportation of the Gold and Silver Coin out of this Colony, September 24 1709, 1 NY Col Laws 678. The act exempted currency to the value of £5, carried by "any Traveller or Passenger by Land or by Water" to the neighboring colonies. It expired two years after enactment, forestalling disallowance at Whitehall. Enforcement rested with the Mayor or Recorder of New York. Neither the records of the Mayor's Court nor those of the Common Council in the period from 1710-12 reflect enforcement activity.

minimize direct participation in the terrestrial conflict, the better to concentrate on opportunities for profit at sea; again Massachusetts bled and New York fattened. The provincial Vice-Admiralty records only survive from the period after 1715, and so we lack prize-by-prize demonstration of the efficacy of the provincial maritime campaign (in which war was merely marketing, carried out by other means), but of its overall success there can be no doubt.⁴²

Fortunately for New Yorkers, peace brought with it no diminution in prosperity and no increase in political disquiet. There was a minor trade recession in 1718-20; otherwise the Hunter and Burnet administrations proceeded in their course undisturbed by imperial destabilization of the economic order. Trade to the Caribbean expanded throughout the fifteen years following the peace, and while, in the West, the Iroquois had abandoned the shining dream of a monopoly of the Great Lakes trade that had driven them through three decades of massacre, torture, and the most remarkable feats of wilderness warfare, English versions of the trade goods demanded by indigenous people remained cheaper and better-manufactured than French. Thus, even without ultimate military success by its indigenous allies, Albany remained a formidable competitor for Montreal's dominance in the fur trade.

Indeed, the reign of George I in New York was the bright noonday of the provincial epoch. The favorable postwar economic situation was certainly one of the primary reasons, as was the persevering and graceful leadership of Governor Robert Hunter, who, after the formation of the Whig administration at home, adroitly converted strong metropolitan support into effectively unchallenged leadership in the province.⁴³ Among the key elements of Hunter's political success, in turn, was the alliance he formed with Lewis Morris, the leading force in the

42. Hunter reports, NYCD.

43. For a perceptive account of the politics of Hunter's administration, see **M.L. Lustig, Robert Hunter, 1666-1734: New York's Augustan Statesman** 64-159 (1983).

Assembly, whom Hunter elevated to the Chief Justiceship of the Supreme Court. William Smith, Jr., whose father was Morris's contemporary, said in his history of the province that "[t]ho' he was indolent in the management of his private affairs, yet, thro' the love of power, [Morris] was always busy in matters of a political nature, and no man in the colony equaled him in the knowledge of the law and the arts of intrigue."⁴⁴ Hunter and his successor, William Burnet, turned this most dangerous of potential opponents into a firm prop of the provincial government;⁴⁵ in doing so they avoided a danger latent in the political and legal order since 1691—the conversion of the court system into a locus of political opposition. Later administrations were to be less wise in this respect, to the manifest detriment of provincial government, and the stability of the law.

In the period from 1715-1720, the earliest covered by extant records, Morris also served as judge of the Vice-Admiralty Court of the province—a position less than strenuous in a period of peace and rather lax enforcement of the laws of trade and navigation.⁴⁶ The provincial money supply continued to be adequate, if not lavish, partially owing to a prudent issue of provincial bills of credit to cover the wartime public debt,⁴⁷ and the result was a comparatively low level of debt litigation, averaging less than a dozen cases a year in the Mayor's Court before the economic contraction of 1718-20.

44. 1 W. Smith, Jr., *The History of the Province of New York* 140 (M. Kammen, ed. 1972).

45. The best survey of the complex political career of Lewis Morris is E.R. Sheridan, *Lewis Morris, 1671-1746 : A Study in Early American Politics* (1981). Sheridan's precise focus on political biography is unfortunately less helpful in illuminating Morris's activities at law.

46. The entire recorded output of Vice-Admiralty during the first two years of Morris's tenure can be found in *Reports of Cases in the Vice-Admiralty of the Province of New York and in the Court of Admiralty of the State of New York, 1715-1788*, at 1-5 (C.M. Hough, ed. 1925). The minutes for the remainder of Morris's tenure and the first three years of his regularly-commissioned successor, Francis Harison, have not survived. There is no reason to suppose the docket to have been any more extensive in 1718-20 than it was in 1715-17.

47. See Acts of September 4 1714 & December 23 1717, 1 NY Col Laws 815-27, 938-91.

Along with legislation aimed at expansion of credit, the Assembly also passed in 1714 a reform of the debt litigation system that was to have important effects in subsequent decades. In a commercial system short of specie, in which the primary payment mechanism was bonded debt, often in the increasingly important form of penal bonds containing effectual liquidated damages provisions for twice the actual value of the debt, a strong incentive existed for piecemeal litigation, as parties to a string of transactions had little choice but to sue on each bond individually.⁴⁸ Not only did this situation increase the volume of litigation, it also threatened unjust outcomes in situations of set-off or partial payment. To reduce the volume of litigation, lower costs of collection, and decrease the advantage to the first plaintiff to reach the courthouse, the act of 1714 provided that any defendant sued for debt “upon Bonds Bills, Bargains, Promises, Accounts or the like” might allege in his answer any offsetting instruments of debt, upon which judgment might be entered (by jury verdict or otherwise) for either side in the amount of the net balance. The act specifically provided that if defendant’s set-off exceeded plaintiff’s claim the resulting judgment would be a debt of record, on which execution might be had by *scire facias*.⁴⁹ The effect of the statute, in practice, was to encourage parties to regularize their accounts by reducing their reciprocal portfolios of debt instruments to a single judgment in any of the provincial courts, frequently by confession of judgment of the net amount of multiple debt instruments. The minute books of the courts are accordingly a poor vantage from which to appreciate the operation of the system. Observation reveals an increase in the default judgment rate in debt cases, along with a fall in the total volume of apparent debt litigation, but not the underlying

48. The same problem existed with respect to the primary alternative payment system, the less formal promissory note, which came increasingly into use in New York after the passage of the Promissory Note Act, 3 & 4 Anne c. 8 (1704). The Act was not formally in force in the colonies, but Mayor’s Court pleadings mention the Act, and make the recitations common to its use, at least as early as 1710, *see, e.g., Churchill v. Hood*, MCM June 27 1710, an elegant demonstration of the force of English commercial practice in securing uniformity of colonial commercial law.

49. An Act for preventing the Multiplicity of Law Suits, September 4 1714, 1 NY Col Laws 827.

mechanism. Practice papers, however, can restore the remaining detail. For examples of the use of the 1714 act as a debt consolidation device, the papers of James Alexander, who used it heavily for the regulation of his own portfolio of others' bonded debt, are particularly helpful.⁵⁰

In addition to the reform of debt procedure in 1714, the Assembly chose in 1717 to make its first foray into the legal control of interest rates, instituting a six percent limit on legal interest for five years.⁵¹ The contraction of the economy, incipient in 1717, had significantly raised the cost of money by mid-1718, and the limit was raised to eight percent.⁵² The act expired by its terms in 1722, and was not renewed. A second response to the slowing economy, which brought with it the eternal threat of a collapse of credit incident to the contraction of the money supply, prompted the Assembly to make "Lyon dollars" (actually Dutch coins) legal tender in the province—the only designation of foreign currency as legal tender in the provincial period.⁵³

Along with changes in the basic operation of the system of private debt, the era of political good feelings in New York allowed a more deliberate exploitation of the postwar commercial

50. See, e.g., Alexander v. Howell, October 1736, Box 44, file 3, James Alexander Papers, NYHS; Alexander v. Crees, July 1742, 44/2; Alexander v. Ferris, October 1742, 44/1. Deborah Rosen, comparing minutes of the New York Supreme Court of the 1690s and 1750s, claims a fundamental "transition" in civil practice in New York, based on the substantial replacement of jury verdicts by default judgments between her two short periods of observation. Rosen understands that default in debt cases may result from the use of judicial process as a recording device, see Rosen, *supra* note 32, at 233-34, but her narrowly exclusive focus on the Supreme Court minutes for two benchmark periods prevents her from estimating its significance or illuminating its procedural basis. She does not refer to the 1714 statute.

51. An Act for the Restraining the taking of Extravagant and Excessive Usury, May 27 1717, 1 **NY Col Laws** 909. It should be noted that this and subsequent usury statutes in New York provided for treble damages recoveries by victims of usurious lending.

52. See 1 **NY Col Laws** 1004.

53. See Act of November 19 1720, 2 **NY Col Laws** 5. The best capsule summary of the coinage used in provincial New York is Fernow, *Coins and Currency of New York*, in 4 **J.G. Wilson, Memorial History of the City of New York** 309 (1892).

possibilities through changes in the large-scale legal organization of trade. Consolidation of the commercial advantage in the Indian trade offered by the superior quality and lower price of English-made trade goods required measures to close off the trade between Albany and Montreal, whereby New York's traders found themselves in competition with their own goods at one remove. Governor Burnet, of whom William Smith, Jr. said that "[o]f all our governours none had such extensive and just views of our Indian affairs,"⁵⁴ secured among the first legislative measures of his administration a statute prohibiting the export of Indian trade goods to the French, enforced by seizure and forfeit of such goods and a penalty for illegal trading in the enormous sum of £100.⁵⁵ Though Burnet's measure was prudent in the long term, securing to the New Yorkers the full strategic advantage of British industrial superiority in the period before the eruption of the final imperial war with France, it met with strong opposition from the Albany traders, bent on pursuing their traditional trade with the enemy at Montreal, and enforcement—dependent as it was upon officers and juries in the Albany country—was lax at best.⁵⁶

Along with his attempt at negative regulation of imperially disfavored trade, Burnet also undertook positive measures to secure commercial advantage in the western trade by establishing a provincial trading post at Oswego.⁵⁷ Burnet later convinced the Assembly to support the Oswego post by application of excise revenue, though this application of customs receipts, and the controversial prohibition of trade in Indian goods with the French, triggered wholesale rejection of Burnet's far-sighted

54. 1 **W. Smith, Jr.**, *supra* note 44, at 166.

55. An Act for the Encouragement of the Indian Trade and rendering of it more beneficial to the Inhabitants of this Province and for Prohibiting the Selling of Indian Goods to the French, November 19 1720, 2 **NY Col Laws** 8.

56. See 1 **W. Smith, Jr.**, *supra* note 44, at 167-68.

57. See Johnson G. Cooper, *Oswego in the French-English Struggle in North America, 1720-1760* (unpublished PhD. dissertation, Syracuse University, 1961).

western policy by management at Whitehall.⁵⁸ The fate of Burnet's attempt at the legislative reorganization of the Indian trade illustrates the forces operating to limit the effectiveness of local commercial law in the context of imperial control over the large-scale regulation of trade.

The general continuation of prosperity through the 1720s once again made transactional dispute resolution relatively easy. A new generation of native-born lawyers began to take over commercial litigation in the Mayor's Court; the generally profitable business they did there formed the basis for the first real steps in the direction of an organized Bar for the province.⁵⁹

Merchants and lawyers continued, too, to make use of reference and arbitration to resolve the factual complexities of commercial disputes outside the courtroom. Prominent among the advantages of reference was its speed. The rule referring a case might require "the report of the Parties ... on or before Tuesday next."⁶⁰ When a commercial account was adjusted by reference in October 1730, the rule requested "all Convenient Speed" of the referees; the rule was entered on October 6, the report was available one week later, and the defendant was ordered to pay the judgment and costs within four days, under penalty of attachment for contempt.⁶¹ Further refinement of procedure can be observed in the cases of the 1740s, by which time it had become the practice for the defendant to confess judgment in the amount of plaintiff's claim, the confession explicitly limited to security for his obedience to the referees'

58. See Act of November 26 1727, 2 NY Col Laws 372.

59. The evolution of the Bar during the 1720s is considered in more detail in Chapter 2, *supra*.

60. *Mathews v. Morris*, reprinted in R. Morris, *supra* note 21, at 553.

61. *Connor v. Kippin*, *id.* Arbitration was of course not inconsistent with the involvement of lawyers. The plaintiff in this case was represented throughout by John Chambers, whose fee, amounting to 15% of the amount of the debt recovered, was included among the costs of suit taxed to the defendant.

award.⁶² If the plaintiff was found liable to the defendant, the referees' report became a debt of record, on which the defendant could recover by the process of *scire facias* under the 1714 statute.⁶³ Another indication of the importance of arbitration in this period can be found in the area of marine insurance. The New York practice was for merchants themselves to serve as underwriters, several subscribing the capital on each policy.⁶⁴ Merchants frequently arranged for the insurance in New York on cargoes belonging to their correspondents elsewhere.⁶⁵ Arbitration clauses were a standard feature of marine insurance policies in eighteenth century New York; the practice was originally English, though one which apparently decreased in England during this period.⁶⁶ The clauses evidently were effective in keeping marine insurance matters in the hands of

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62. *Waters v. Bowne*, July 21, 1747, reprinted in *id.* at 562. Since confession of judgment is sometimes recorded in the minute books without indication of the reference on which it is based, the default judgment statistics in debt cases include an uncertain number of contested cases decided extrajudicially. Only the lawyers' records provide an indication of the real state of affairs. See, e.g., *Alexander v. Shoddy*, March 1732, Docket Book B, James Alexander Papers, NYHS. Alexander, indefatigable as always in the collection of his own debts, here left final determination of the amount owing to the sole arbitration of James DeLancey. Default in New York Supreme Court served as security for payment of the award. Cases such as these provide reason for caution in the use of apparently reliable quantifications of data contained in the minute books.
63. See *Duryee v. Horsfield*, July 15 1755, reprinted in **R. Morris**, *supra* note 21 at 563.
64. The pooling of underwriting occurred informally in the first half of the century, though by 1760 there were competing "assurance offices" in Manhattan, serving a clearing-house function for merchants seeking to underwrite or insure, though probably not directly involved in underwriting risk. See **V.D. Harrington**, *The New York Merchant on the Eve of the Revolution* 153-55 (1933).
65. Letter, Gerrard G. Beekman to Joseph Jackson, Oct. 19, 1761 in **1 Beekman Mercantile Papers 1746-1779** at 392 (White ed. 1956) (hereinafter cited as **Beekman papers**); Same to Southwick & Clark, April 6, 1762, **1 Id.** at 406; John Watts to Thomas Astin, Jan. 30, 1762, **NYHS Collections 1928** at 285.
66. **J. Weskett**, *A Complete Digest of the Theory, Laws, and Practices of Insurance* xxii (Dublin, 1783), cited in **J. Goebel**, **2 Law Practice of Alexander Hamilton** 397 n. 24 (1969).

arbitrators, and they undoubtedly accounted for much of the arbitration *per se* during the period.⁶⁷

Other evidence from outside the court records indicates the degree to which there remained considerable social pressure within the mercantile community to arbitrate disputes. In March 1731, for instance, William Channing twice bought advertisements in the *New York Gazette* denying the claim of William Vesey that he refused to submit their disagreements to arbitration. He was, the advertisement proclaimed, prepared to leave “all Things in Dispute to the final Determination of any Merchant or Merchants in this City.” Somewhat later, in 1756, Waddell Cunningham was engaged in a prolonged negotiation between *Aspinwale & Doughty*, merchants in New York, and *McQuoid & Haliday*, his own correspondents in Liverpool. In the midst of the preliminary maneuvering, he wrote to Liverpool:

I have the pleasure of a letter from Mr. Wm. Haliday ... with the sundry proofs, of your affairs in dispute with Messrs. *Aspinwale & Doughty*. I have had them examined on the subject, but tho I have sent for an answer, they think proper to defer it, my reason for writing them was, least they sho'd deny in Court I offer'd Arbitration, which I am sure will have A great weight both with the Court, & Jury, if it shou'd come to Tryal.⁶⁸

To get to trial without an offer to arbitrate, or to bear the burden of refusing such an offer, was a liability for the merchant litigant. Cunningham no doubt anticipated that an involved commercial dispute would be tried to a struck jury, likely to have some experience in such matters; such a jury would evidently, in his opinion, consider refusal to arbitrate evidence of unfair play.

67. For example, of the references or arbitrations mentioned in Gerrard G. Beekman's letter book for the period 1746-1770, all but one concerned insurance matters; the exception was a prize case. See 1 *Beekman Papers* 6.

68. Cunningham to *McQuoid & Haliday*, June 28, 1756, in *Letter Book of the Firm of Gregg and Cunningham* 61 (unpublished ms. in the New York Historical Society).

The prosperity of the 1720s came to an abrupt end in 1729, to be succeeded by more than eight years of serious economic difficulties. One contribution to the decline was enhanced competition in the food export trade to the Caribbean mounted by the merchants of Philadelphia. Rapid development of the Pennsylvania hinterland provided enhanced production, and Philadelphia emerged from the economic doldrums as New York descended into them.⁶⁹ One aspect of New York's competitive disadvantage resulted from a weakness in the order of commercial regulation—since the Bolting Act of 1694 had abolished the city monopoly on flour production for export the flour trade had been essentially unregulated.⁷⁰ Unmerchantable and fraudulent goods repeatedly damaged the reputation of the New York product.

In addition to enhanced commercial competition from the other breadbasket settlement—a force acting to depress New York's economy in the long term—the recession of 1729 was precipitated in the short term by a collapse of the credit system, largely attributable to the shortage of money. Throughout the provincial period, with money scarce at the best of times, the economies of the seaports were houses of paper, debt piled on debt. New York merchants dealing with English correspondents were generally allowed twelve months' credit; in the wholly illegal but critically important direct trade with Dutch merchants, terms were nominally less advantageous, generally only three months' credit, though reliable customers were rarely cut off for taking more time to pay. On the local side of his business, the merchant had to extend credit to his own customers, no matter how great the encouragements to cash trade. Some articles—sugar and its derivatives, flour, tea—were generally sold for cash, but almost all other goods were sold on six to twelve months'

69. A comparative review of the economic situation of the port cities during this period is provided in **G.B. Nash**, *supra* note 37, at 102-28.

70. See An Act against unlawful by laws and Unreasonable forfeitures, March 24 1694, 1 **NY Col Laws** 326.

credit.⁷¹ In ordinary practice a merchant had not even time to dispose completely of one shipment's inventory before the next arrived and the first needed to be paid for; any circumstances increasing the difficulty of collecting his debts threatened disaster. John Watts' comment that "of people in Commerce ... the greater part live by Credit" reminds us of the precariousness with which the credit system supported even the highest standards of living in the province.⁷²

This context made the continuance of an adequate money supply a matter of economic life and death for the provincial mercantile class. A reduction of the usually sparse quantity of money in circulation meant that consumers could not find cash to pay their retail debts, catching both the retail tradesman and the importing merchant between the millstones. Again in distinction from Pennsylvania, New York emitted negligible quantities of paper money during the 1720s; roughly £24,000 in outstanding bills of credit were canceled upon expiration during the decade, and only £16,000 were issued.⁷³ The result appears to have been a classic credit famine and cascading collapse of the commercial system in 1729. The jails began to fill with debtors who could not or would not pay, and by the fall of 1730 the situation had grown desperate.

For the first time, the Assembly met the credit crisis with a temporary act for the relief of insolvent debtors in the familiar eighteenth-century mold. Those arrested for debts totaling less than £100 might regain their liberty by making an assignment of all assets—save household goods and tools of trade to the value

71. The essential guide to the conduct of business in colonial New York remains Virginia Harrington's study on the period from 1750-1775. It is, after sixty years, still unrivaled for thoroughness and accuracy; its only drawback is its comparatively narrow chronological focus. Because equivalents of the letter books and other counting-house sources on which Harrington drew are largely unavailable for the decades before 1730, it may be doubted whether her work can be significantly improved upon. For the credit policies of New York merchants in the late provincial period, see **V.D. Harrington**, *supra* note 64, at 101-04.

72. Watts to James Napier, June 1 1765, **NYHS Coll 1928**, at 355.

73. See **V.D. Harrington**, *supra* note 64, at 352.

of £10—for the benefit of creditors and executing a pauper's oath; in keeping with the prevailing theory, release from confinement was not a discharge from the preexisting debts, which remained enforceable against after-acquired assets.⁷⁴ Additional provision was made for the release on similar terms of those imprisoned for debts under 40s., since such small debtors could be confined on summary process before a single Justice of the Peace. The act expired by its terms after one year;⁷⁵ in New York, as everywhere else in the common-law world in the eighteenth century, insolvency was treated by the law as an exceptional condition, ordinarily indicative of speculation and unworthy of lenient treatment, except under even more exceptional conditions calling for temporary intervention. Insolvency was not seen as an ordinary risk incident to commerce, and this perspective inhibited the legal management of the consequences of insolvency through collective organization of creditors.

Along with the act to deliver the jails, the Assembly undertook one other measure of pro-debtor reform in the legal system as a result of the 1729 collapse. As a companion to the relief statute, the legislature prohibited the collection of penalties on bonded debt. Collection on any penal bond was to be limited to principal, lawful interest, and taxable costs. Attorneys bringing actions for collection and sheriffs' officers acting to levy execution were made independently answerable for failure to attach to all papers addressed to defendants a schedule itemizing the legitimate components of the claim or judgment.⁷⁶ Since the

74. An Act for the relief of Insolvent Debtors within the Colony of New York with respect to the imprisonment of their persons, October 29 1730, 2 *NY Col Laws* 669. For a rather general survey of statutes for the relief of insolvent debtors in colonial America, see P.J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (1974).

75. Despite the explicit expiration clause, some evidence suggests that the act continued to function beyond 1731. At least three cases in the Mayor's Court minutes as late as 1734 show administrations of the pauper's oath and release from imprisonment for debt specifically founded on "the Act of 1730." See, e.g., *Huggins et ano. v. Stimson*, *MCM* April 2 1734, at 399.

76. An Act to prevent the Taking or Levying on Specialties more than the Principal Interest and Cost of Suit and other purposes therein Mentioned, October 29 1730, 2 *NY Col Laws* 676. The "other purposes," primarily

penal bond was the primary form of obligation in use, in part precisely because it allowed the creditor to finesse the issue of the interest rate, the Assembly's action represented an extremely disruptive attempt to control the price of money at a time of acute shortage. Rather unsurprisingly, the act was disallowed by the Crown at the end of 1731.⁷⁷

Coeval with the onset of the economic crisis, though neither could be regarded as a complete response, were two other important changes in the law applicable to commercial relations. For the first time in 1729, the Assembly required the itinerant traders of the province to acquire a license, and pay a yearly fee of £5, with an additional £5 for "each Horse or other Beast bearing or drawing burthen."⁷⁸ The act exempted those selling goods of their own produce or manufacture, as well as "any Tinker Glazier Cooper Plumbers, Tayler or other Person usually Trading in mending and making of Cloths Kettells, Tubs or House hold goods," and reserved to New York City and Albany the right to exclude such licensed peddlers from those communities. The intention, in short, was to rationalize the country trade in

comprised a confirmation of the power of clerks of court to issue writs of replevin without judicial intervention, presumably as a gesture in the direction of creditors' interests. *See id.* at 678. An interesting question arises as to the ascertainment of the maximum lawful interest under the statute. The English Usury Act of 1660 was obviously not in force in New York, and the Mayor's Court never gave countenance at any time to the occasional pleading that set up the English act against recovery on a penal bond. The last provincial statute setting the usury limit, that of 1718, expired in 1722. *See supra*, p. 225. It seems most likely that the 8% limit set in 1718 was still regarded as the maximum legal rate, though it no longer had any statutory basis. I have found no litigation during the short lifetime of the 1730 act that clarifies the contemporary understanding of the situation. For an indication that lending in New York during the 1720s had been an attractive investment at the implied 8% limit, see Governor Clarke to Lords of Trade, June 2 1738, 6 NY Col Docs 116.

77. The report of counsel to the Board of Trade recommending disallowance of the statute is apparently lost, a search in the Privy Council records at the Public Record Office having proved fruitless.

78. An Act for Licensing Hawkers and Pedlers within this Colony, July 12 1729, 2 NY Col Laws 571.

imported articles—a result ultimately favorable to the merchant importers of the City.⁷⁹

The year 1730 also saw the grant of a new charter to the City of New York. The Montgomery Charter provided a clear foundation for the exercise of governance and proprietary control by the Mayor and Common Council of the City, removing various uncertainties resulting from the prior charter, issued under the Dongan administration in 1686.⁸⁰ As concerned the system of commercial adjudication, the Charter's most important consequence was the limitation of the right of audience in the Mayor's Court to eight named attorneys, who were, in effect, to enjoy exclusive access to the profits of justice accruing from the collection of debts and other business in the most important commercial court in the province.⁸¹ Hard times expanded the volume of debt litigation in the courts through the decade of the 1730s, and not until another wartime boom brought prosperity back to the city was the stranglehold on the profits of debt litigation broken.

The credit collapse of 1729-30 ushered in a period of stagnant trade. The maritime commerce engine of the city's economy shut down; shipbuilding ground to a virtually complete halt, idling craftsmen and seamen. As one newspaper correspondent put the case in 1737:

Our shipping are sunk. And our Ship-building almost entirely lost. Our Navigation is in a Manner gone; and Foreigners are become our Carriers, who have been continually draining us of

79. The act expired after one year, but was repeatedly revived and remained in force throughout the remainder of the provincial period. *See, e.g.*, 2 **NY Col Laws** 758, 988; 3 **NY Col Laws** 60, 417, 873.

80. The Montgomery Charter is reprinted in 2 **NY Col Laws** 575-639. Consideration of the Charter's manifold consequences is beyond the scope of the present study. The best account of the Charter's content and effect is found in **H. Hartog**, *supra* note 13, at 13-43.

81. The Mayor's Court Bar monopoly, and its relevance to the rise of an organized legal profession in the province, is discussed in Chapter 2, *supra*.

that Money, which formerly was paid to our seamen.⁸²

Even if the situation was not quite this desperate, the Caribbean trade had certainly failed. Slave cargoes reached a low for the period following Queen Anne's War, and the overall level of per capita imports during the period from 1728-36 seems to have declined by roughly 10% from the level in the preceding decade.⁸³

The sources of the revival of commerce, beginning in 1738-39, were the traditional pair: illegal trading and war. Free trade zones in the Dutch and Danish Caribbean—at St. Thomas, Curaçao, St. Eustatius, and Surinam—provided access to French sugar, both higher in quality and lower in price than the Jamaica product, as well as a market for flour and lumber.⁸⁴ The emission in 1737 of £48,350 in provincial bills of credit (the largest single increase in the money supply before the French and Indian War) provided liquidity for the trade expansion,⁸⁵ and the Anglo-Spanish war that began in 1739—the only war in human history named after a severed ear—again opened before New York eyes the vistas of commerce raiding and trading with the enemy.

82. New-York Weekly Journal, March 28, 1737.

83. See Governor Clarke to Lords of Trade, February 17 1738, 6 *NY Col Docs* 112. For the calculation of per capita import levels, see **G.B. Nash**, *supra* note 37, at 124. The computation is complicated by transcription errors in the census of 1737; extrapolation is difficult because the provincial white population seems to have been falling in the mid-'30s, probably as a consequence of out-migration to other colonies caused by unemployment. See Nash, *The New York Census of 1737: A Critical Note on the Integration of Statistical and Literary Sources*, 36 *WMQ* (3d ser.) 212 (1979). As an alternative gauge of the depths of the maritime depression, Beverly McAnear, on the basis of ship clearance records, estimates that trade with New England fell 50% and trade with the West Indies more than 20% during the 1730s. B. McAnear, *Politics in Provincial New York, 1689-1761*, at 359-60 (unpublished Ph.D. dissertation, Stanford University, 1935).

84. The Danish port at St. Thomas only opened to British-American vessels in 1735. By 1737, illegal trade to the Caribbean neutrals was visibly producing a renewal of activity in New York, however unwelcome to the Crown's customs officials. See Archibald Kennedy to Board of Trade, January 10 1737/8, PRO CO 5/1059/GG19.

85. This issue supplemented another £12,000 in bills issued in 1734. See **V.D. Harrington**, *supra* note 64, at 352.

The renewal of war in the Atlantic had an immediate and striking effect on the legal system of New York. Even as the merchants had their wartime specialty, so had the lawyers. The Vice-Admiralty Court of the province decided one case in 1730, and rendered not a single decision for the next eight years. In May 1739, Lewis Morris, Jr., replaced Daniel Horsmanden as Judge, and thereafter the Court entertained a truly astonishing torrent of business.⁸⁶ From 1739 through the opening of war with France in 1744, Morris adjudged the condemnation of 32 prizes, bringing at auction more than £150,000.⁸⁷ It was pardonable exaggeration on the Governor's part when he informed the Board of Trade at the end of 1741 that New York "was never in so flourishing a condition as it is now."⁸⁸

Unfortunately for the New York merchants, the sword sometimes cut both ways. Vessels engaged in illegal trade with the Spanish possessions were legitimate prizes under the order of general reprisal, and merchants trying to make a profit at both ends of the war were liable to find themselves defendants rather than claimants in the prize court. For the lawyers, however, this was good fortune. When, within a few months of the opening of the war, Captain Vincent Pearse in *H.M.S. Flamborough* seized two ships in New York harbor for illegal trading, the owners' counsel argued that Vice-Admiralty had no jurisdiction since the vessels

86. See **Reports of Cases in the Vice-Admiralty**, *supra* note 46, at 13. It is a testament to the sagacity and power of the Morris family that this appointment, the first judicial appointment for the Morrisites after Governor Cosby removed Lewis Morris, Sr., from the Chief Justiceship of the Supreme Court in 1732, in the midst of the Zenger episode (discussed in Chapter 2, *supra*) would constitute the richest single piece of judicial patronage available in the province. The Morris family, as always, knew to get in on the ground floor.

87. See 1 *Mins. Vice-Adm. Ct. NY, 1715-46*, United States District Court, SDNY.

88. Clarke to Board of Trade, December 15, 1741, 6 **NY Col Docs** 207-09. Clarke's jaunty tone concerning the state of the province has a somewhat more sinister ring when one recalls that his letter followed by less than five months the executions of thirty black men and four white men and women in the hysteria following the alleged "New York Conspiracy," discussed in Chapter 4, *supra*. The edgy, nearly desperate tone of the city after the disastrously harsh winter of 1740 leading to the "negro plot" hysteria is remarkably captured in Thomas Davis' elegant narrative reconstruction of the events of '41. See T.J. Davis, **A Rumor of Revolt** 12-34 (1985).

were seized in New York water, rather than on the high seas. When Morris denied the motion, counsel secured writs of prohibition from the Supreme Court. Although the jurisdiction of Vice-Admiralty was ultimately vindicated, it required appeals to the Privy Council—otherwise extremely infrequent in New York. A good bout of expensive litigation all round, contributing to the wartime prosperity, at the very least, of the New York Bar.⁸⁹ Even among those few surviving practice records from the period, the papers of three counsel reflect their involvement in the *Flamborough* cases.⁹⁰ The eighteenth-century equivalent of the Predators' Ball continued, without abatement and at a higher pitch, after the opening of war with France in 1744. Before the peace of Aix-la-Chapelle temporarily suspended worldwide hostilities between England and France in 1748, ship registrations had risen from 53 to 157, sixty more privateers had been commissioned, and another 213 prizes, worth roughly £450,000, were condemned in Vice-Admiralty and auctioned off in New York.

The profitability of the war at sea only reinforced the traditional sentiments of the City's mercantile elite that territorial warfare with the French in Canada was a job for someone else—let Massachusetts borrow and bleed. This was not the view of Governor George Clinton, however, and the disagreement over

89. For Privy Council disposition of the cases of *Pearse v. Cummins* and *Pearse v. Kay & Hubbard*, see 3 **Acts of the Privy Council, Colonial** nos. 527-28, PRO PC 2/97/13-14, 305-10, 344-45. For the original Vice-Admiralty proceedings, see 1 *Mins. Vice-Adm. Ct. NY, 1715-46*, at 110-16.

90. See James Alexander Papers, Box 45 & Register of Cases, NY Sup Ct 1741-42, at 42, NYHS; William Livingston Book of Precedents, 1329/276-87, NYSL; John Chambers MSS, 9885/436, NYSL. For technical details of the litigation, see **J.H. Smith, Appeals to the Privy Council from the American Plantations** 518-20 (1950). For the infrequency of Privy Council appeals from New York, see the statistics collected by Smith, *id.* at 667-71. It should be noted that there was simultaneous litigation in 1739-41 over the jurisdiction of Vice-Admiralty to adjudicate seizures in New York water for violation of the Navigation Acts. Here the New York Supreme Court's writ of prohibition was eventually upheld by the Privy Council, on the ground that Vice-Admiralty was not a court of record within the meaning of the acts. See *Kennedy qui tam etc. v. Sloop Mary & Margaret*, **Reports of Cases in the Vice-Admiralty**, *supra* note 46, at 16; 3 **Acts of the Privy Council, Colonial** no. 538; **J.H. Smith**, *supra*, at 515-17.

war policy precipitated the break between Clinton and his closest political ally, the most powerful native of the province and spokesman for the merchant aristocracy, Chief Justice James DeLancey.⁹¹ DeLancey exercised enormous influence in the Council and General Assembly, where as many of as half the members in some sessions were his relatives or stood on his interest; in 1747, through the metropolitan influence of his brother-in-law Peter Warren, DeLancey was commissioned as Lieutenant-Governor of the province. But the fulcrum of DeLancey's power was his commission as Chief Justice. Originally raised to that eminence by Cosby, in order to regain control of the Supreme Court from the Morrisites in the midst of the Zenger controversy, DeLancey consolidated the office as a haven for political opposition when he secured an unwise commission from Clinton in September 1744 granting him tenure in office during good behavior.⁹² The commission sowed the seed of future political disaster in two respects: not only did it permit DeLancey to use the organs of justice to subvert imperial policy for local or political purposes, it also created a precedent for good behavior commissions of judges, ensuring the eventual eruption of controversy over the traditional appointments to serve at pleasure, which were all the Governors' instructions ever authorized them to make.⁹³ Both crops were to be harvested

91. The most complete and perceptive account of provincial politics in the period from 1743-53 remains **S. Katz, *Newcastle's New York: Anglo-American Politics, 1733-1753***, at 164-244 (1968). Although I here put more stress on disagreement over war policy than Katz's own account, which emphasizes DeLancey's long campaign to acquire complete political control in New York, in which the break with Clinton was a carefully-prepared tactical measure, *id.* at 166-76, this is entirely a matter of emphasis. From the point of view of the mercantile community, DeLancey's reignition of factional politics in the province had a legitimate policy goal—the furtherance of their own economic interests—while renewed political opposition centered in the Supreme Court had effects on the legal system of the province quite independent of DeLancey's personal ambitions.

92. *See Cal Couns Mins* 345 (September 13, 1744).

93. Instructions since the time of William III had contained a provision prohibiting governors from arbitrary or capricious removals of sitting judges. It was clear, if not explicit, constitutional law in the province, as elsewhere in British North America, that this did not authorize commissions *quamdiu se bene gesserint*. For the joint opinion of the law officers of the

shortly, to the detriment of legal stability.

In keeping with the general eighteenth-century pattern, the temporary outbreak of peace in 1748 brought about a contraction of credit in the wake of the withdrawal of privateering and victualling opportunities for New York merchants. Levels of debt litigation again increased sharply,⁹⁴ and the jails began to fill. By the fall of 1750 the situation was serious enough to warrant the passage of another act for relief on insolvent debtors, and the Assembly substantially reenacted the act of 1730, again to be in force for one year only.⁹⁵ This one-year jail delivery once again proved insufficient to cope with the effects of a continuing shortage of credit, and in the fall of 1751 the act was extended until January 1 1753, but significantly the availability of relief was limited to debtors imprisoned in the City.⁹⁶ Only the emission of £45,000 in provincial bills of credit in 1755 and the renewal of New York's naval war in 1756 would restore sufficient liquidity to the credit system to relieve the congestion of the courts and futile destructiveness of cascading debt litigation.⁹⁷ In the meantime,

province to this effect in the aftermath of Clinton's administration, see 6 NY Col Docs 792.

94. A sample of 250 cases from the Mayor's Court minutes evenly divided between the period 1745-48 and 1750-53 shows litigation of debt on specialties (bonds, excluding bail bonds; promissory notes; and bills of exchange) rising from 5% to slightly more than 15% of the Mayor's Court docket. Some of this litigation certainly involved protested bills of exchange drawn on merchants outside the province, and thus no reliance on the precise figures is warranted, but the overall pattern relating litigation levels to the local supply of credit is significant.
95. An Act for the Relief of Insolvent Debtors with Respect to the Imprisonment of their Persons, November 24, 1750, 3 NY Col Laws 822. The act differed from the 1730 act in few significant respects. The upper limit of eligibility for relief was lowered from £100 to £50 in total indebtedness, while the exclusion for household goods and tools of trade was lowered from £10 to £5. The price level in the province had by no means fallen so drastically since 1730. The provisions of the 1730 act regarding small claims debtors were not reenacted.
96. See 3 NY Col Laws 866.
97. For these reasons, the comparison of summary statistics concerning default rates in civil litigation from 1694-96 (a period of wartime prosperity) and 1754-56 (a period of peacetime recession and credit famine) in demonstration of a long-term "transition" in the procedures of adjudication, see Rosen, *supra* note 32, should be viewed with the utmost skepticism.

and with an eye to the mitigation of the catastrophic effect of imprisonment for small debts on workers thereby deprived of their opportunity to support their families, the Assembly raised the upper limit on debt litigations cognizable by single Justices of the Peace from 40s. to £5, and provided that defendants having families should no longer be arrested; process was instead limited to summons.⁹⁸

Other legislative measures were taken to encourage the revival of trade. The most important was the regulation of the production of flour, in order to combat the competitive disadvantage at which unreliable quality had put New York's exports for at least a quarter century. The legislature's apparent surprise at finding New York's flour suffered from a bad reputation is perhaps disingenuous, but its recitation of the justification for intervention deserves quotation:

WHEREAS in all well Regulated States the greatest care is taken to have their Staple Commodities put under proper Regulations, and as the Flower of this Colony (its Greatest Staple) has in a Great measure lost its Reputation abroad, Therefore in order to retrieve & preserve the Same,⁹⁹

each bolter or baker was to have a mark, registered with the local authorities, to be applied to each barrel of flour or bread for

98. An Act to empower Justices of the Peace to Try Causes from forty Shillings to Five Pounds, December 7 1754, 3 NY Col Laws 1011. The act expired in 1758, but the small claims jurisdiction it created was very popular, and the act was renewed and the jurisdiction expanded throughout the remainder of the provincial period. See 4 NY Col Laws 296, 372, 736; 5 NY Col Laws 304.

99. An Act to prevent the Exportation of Unmerchantable Flower & the false Tareing of Bread and Flower Casks, November 24, 1750, 3 NY Col Laws 788. The act expired in 1752, was renewed for six additional years, *id.* at 883. In 1769 the Legislature found that notwithstanding the prior acts "such great abuses have been committed in the Manufacturing of Flour, that this great Staple of the Colony has in a very considerable Degree lost its reputation in all places to which it has usually been exported," and ordered additional inspection of the method of manufacture, as well as providing for a standard export barrel. See Act of May 20 1769, 4 NY Col Laws 1096. The reputation of New York flour seems to have shared with the status of the middle class in the minds of certain historians the property of constant unrelenting fall (or rise) without prospect of limitation.

export, and each such cask was to be inspected by officers locally appointed for the purpose, who were specifically instructed to bore into the cask to ascertain fairness of packing and quality of goods.

However much hope the Legislature may have placed in the power of an honest bread barrel, in gunpowder rather than flour lay the real basis of recovery. "War is declared in England—Universal joy among the merchants," William Smith, Jr., observed. It was July 1756, and from that moment the recession was over. For a few at the political and social pinnacle of the commercial system—such as John Watts, able to bring to bear the influence of the DeLancey-Warren interest—the enormous influx of British troops and seamen would create opportunities for vast profits in supplying His Majesty. But war was a game any New York merchant could play, as the next sentence in Smith's diary pointed out: "Privateering engrosses the Coffee House."¹⁰⁰

New York, the strategic pivot of the continental war, saw an influx of thousands of soldiers and seamen, as Britain threw resources in unprecedented quantities into the ordeal that would resolve what Parkman called "[t]he most momentous and far-reaching question ever brought to issue on this continent ... Shall France remain here, or shall she not?"¹⁰¹ More than 23,000 troops arrived in New York and Boston during 1757-58 alone, along with 14,000 seamen attached to the fleet headquartered in those ports after 1758.¹⁰² But vast as were the sums to be made in victualling such forces, it was as always the private war at sea that carried real prosperity down through all levels of the maritime economy. By January 1757 there were thirty privateers at sea with ten ships under construction in the yards for speculative employment; in March 1758, DeLancey wrote to Pitt of "a madness to go

100. 2 *William Smith Papers* 412, NYPL.

101. F. Parkman, *Montcalm and Wolfe* 26 (1962).

102. G.B. Nash, *supra* note 37, at 235. After more than eighty years, Parkman's account of the strategic situation of the British Empire in the latter stages of the war has been superseded, save on literary grounds, by L.H. Gipson, *The British Empire Before the American Revolution: The Victorious Years, 1758-1760* (1965).

privateering" in New York.¹⁰³ Ultimately more than 220 privateers were granted letters of marque and reprisal in New York; Vice-Admiralty condemned 401 prizes with the usual beneficial effect on the welfare of the Bar, and, according to one historian, more than £2,000,000 flowed into the pockets of privateering investors and crews.¹⁰⁴ Wages for merchant seamen rose, as manpower diverted itself into privateering; shipwrights and other construction workers were unable to meet the demand for their services, and thus the laborers and artisans of the city, and the tradesmen with whom they spent their wages, had their crumbs from the feast of the merchant princes.¹⁰⁵

New Yorkers might have anticipated that the height of wartime growth would bear the usual relation to the depth of postwar depression. By 1761, when the focus of the war shifted southward, and New York saw the last of the fleet, the contraction was under way. New wealth cushioned the merchants, however, and at first the complaints of commercial slowdown were gentle, spoken as it were with the mouth still half full. "Our Consumption at this Season is very slender," wrote John Watts at the beginning of 1762, "& the Tipling Soldiery that used to help us out at a dead lift are gone to drink [their rum] in a warmer Region, the place of it's production."¹⁰⁶ All might have been well,

103. 7 NY Col Docs 343.

104. See J.G. Lydon, *Pirates, Privateers, and Profits* 157-59 (1970).

105. The opulence in which the profits of war enabled the New York mercantile elite of the '60s to live is well-described by Virginia Harrington, *supra* note 64, at 11-46. It is one of the few unintentionally misleading features of Harrington's account that she does not indicate how recent was the foundation of this prosperity, and how disproportionately the mercantile elite had profited from the war boom. One might infer from Harrington's description that so it had long been in the province; actually the substantial relative rise of the wealthiest merchants is the most important feature. In this boom, as in a more recent period, the general aura of prosperity temporarily concealed the fact that it was the rich who followed Nathaniel Bedford Forrest's advice, and got there fustest with the mostest. Awakening on such subjects can rarely be indefinitely postponed, and many of the war boom fortunes, against which envy and hostility concentrated in the hard times of the '60s, were redistributed by the social disruptions of 1776-83.

106. Watts to Francis Clarke, January 2 1762, NYHS Coll 1928, at 6.

or at least no more ill than usual in postwar periods, if only the British Empire had lost the war.

The great issue had been resolved; France was not to remain in North America. The effect of British victory in the war for global empire was the greatest reorientation of New York's trade since the English conquest a century before. Economic dislocation incident to the changes was extremely severe, and as always dislocation made claims on the flexibility of the system of commercial law to absorb some portion of the shock. But the new imperial government resulting from the war demanded a less flexible legal regime, as management sought to control commercial behavior in the colonies, on both the large and small scale, more closely than ever before. In the process, the commercial law of New York seemed to fracture and then break under the strain.¹⁰⁷

The effects of the peace on the trade system can be briefly outlined. The expulsion of the French from Canada spelled the eventual end of the fur trade in the Mohawk Valley. Albany's advantage rested in the availability of superior English goods at lower prices. With English control of Montreal, that advantage, always tenuous, evaporated. For the Iroquois, on the other hand, the prospect of provincial expansion into the continental interior was entirely unwelcome.

The trade to the French Caribbean, on the contrary, presented an even more favorable prospect after the peace than before. Without a hemispheric source of their own for temperate-zone goods, the French sugar islands were virtually a captive market for the colonial breadbaskets. The higher level of refining done before exportation rendered French sugar more attractive than Jamaican to New York merchants throughout the

107. The elements of the economic and political crisis of the 1760s are among the most fully and frequently described matters in the secondary literature concerning the colonial history of British North America. My goal in the account that follows is simply to explain how some of the period's complex, interconnected episodes impinged upon the administration of commercial justice in New York.

century, and the only barriers to massive expansion of the trade were imperial regulations, for which the traditional New York response was smuggling, an activity whose style varied between the defiantly overt and the mildly secretive. The superficially licit West Indies trade, however, had existed in the three decades before the peace simply by virtue of the non-enforcement of the Molasses Act of 1733. Only corruption and laxity of enforcement in Jamaica and New York prevented the levying of duties pursuant to the Act, and an additional *6d.* per gallon would suffice to extinguish the trade entirely. The entire Caribbean trade of the colony thus rested on props which the peace threatened to dislodge.

The trade to Holland, entirely illegal throughout the century, provided access to European and East Indian luxury goods at very favorable exchange, free of imperial duties. Like much of the remainder of New York's outport trade, it was now menaced by the prospect of enhanced British naval enforcement. But the naval situation presented an even more dire long-term prospect, for with the disappearance of French power in North America the cyclical privateering industry, in which New Yorkers had made such substantial investments and from which they had derived even more substantial returns, seemed headed for a permanent decline. Naval conflict in the North Atlantic had been the engine of New York's economic recovery in every crisis of the eighteenth century; British naval superiority bid fair to be its ruination.

The barometer measuring these intersecting economic pressures was the money supply. The imposition of new taxes and the enhanced collection of old ones meant further specie drain from the colony, while disruption of foreign trade and the long-term disappearance of privateering revenue reduced New York's access to extra-imperial hard currency. The war boom had brought too rapid an expansion of the money supply, leading to significant inflation throughout the seaport economies in the first years of the decade, but the comparatively narrow distribution of this new-gotten wealth threatened the artisans and workers of the

City with a particularly vicious squeeze as the economy contracted, for prices fell nowhere near as rapidly as incomes.¹⁰⁸

In almost every respect, imperial trade policy after 1763 was designed to achieve consequences which, if effectuated, would have the most damaging possible effect on New York's commerce. The Sugar Act's reduction of duties on molasses meant nothing, since the 1733 act had gone entirely unenforced—the effect, as the merchants of New York were to point out in a petition to Parliament in 1767, was simply to prevent New Yorkers from deriving the full value of their exports, thus preventing them from acquiring the capital necessary to meet imperial expectations.¹⁰⁹ The combination of excise and service taxes represented by the Stamp Act would have increased the specie drain on the provincial economy, while generally enhanced enforcement of the trade and navigation acts would rapidly have reduced New York's trade even in the absence of an acute currency crisis. But it was the Currency Act of 1764,¹¹⁰ prohibiting any colony from making its bills of credit legal tender, that presented the most acute short-term threat to the survival of the provincial economy. New York's last paper money was scheduled for cancellation in 1768, and Parliament's action in 1764, when New York was already suffering a severe credit famine, seemed a delayed sentence of death to the merchants of New York.¹¹¹

108. Price and wage levels for New York during the early '60s are harder to establish than those of Boston and Philadelphia. For a reasonably convincing reconstruction of the overall economic situation of the seaports at the time of the Treaty of Paris, see **G.B. Nash**, *supra* note 37, at 246-60.

109. For the petition of 240 New York merchants, see 31 *Journals of the House of Commons* 158-60. The political context of Parliamentary consideration, which was closely tied to the New York Assembly's refusal to accept the binding force of the Quartering Act, is discussed in **L.H. Gipson**, *The British Empire Before the American Revolution: The Rumbling of the Coming Storm, 1766-1770*, at 54-57 (1962).

110. 4 Geo. III, c. 34.

111. See, e.g., John Watts to Governor Mockton, April 14 1764, **NYHS Coll 1928**, at 242-43.

From 1760, local institutions for the legal control of the provincial commercial system tried to grapple with the dislocations created by successful imperial policy. As in previous periods, the postwar economic contraction began at the lowest levels of the system, as the pyramid of debt on which the trading economy stood began to tremble at its base. Debt litigation in the Mayor's Court reached unprecedented levels between 1760 and 1765,¹¹² and as local debts became impossible to collect, the financial stability of all but the wealthiest New York merchants became a matter of doubt. As John Watts ominously said early in 1764, "every thing is tumbling down, even the Traders themselves."¹¹³ Eighteen months later, misgivings had become actualities: "Business here is very languid, the weak must go to the Wall, frequent Bankruptcies & growing more frequent."¹¹⁴

With the city's prison space filling with debtors—a condition contemporary observers knew presaged an acceleration of economic collapse as the families of previously wage-earning debtors were deprived of the means of life—the Legislature took such measures as lay within its power. In May 1761 it passed a new act for the relief of insolvent debtors,¹¹⁵ which marked an important departure from prior doctrine. Under the new act,

112. William S. Sachs, in an unpublished doctoral dissertation, states that debt actions in the Mayor's Court numbered 46 in 1763 and 80 in 1766, never having exceeded 16 in one year before 1760. See W. Sachs, *The Business Outlook in the Northern Colonies, 1750-1775*, at 133 (Ph.D. diss., Columbia University, 1957). It appears that Sachs has undercounted through confusion over legal detail. The records from 1733-35 and 1750-54 would have shown more than 16 commercial debt actions per year. Absolute litigation levels should also at least be corrected for increases in population—a further reason for distrusting summary statistics based on absolute numbers from the court records. Sachs is correct about relative magnitudes of debt litigation in the early '60s. What is important is the growth of debt litigation from 1760-65, resulting from the cascading pattern of failures as the credit system shook itself apart.

113. Watts to Scott Pringle Cheap & Co., February 5 1764, *NYHS Colls* 1928, at 228.

114. Watts to Sir William Baker, August 11 1765, *id.* at 368. Between Watts and the Wall, of course, there remained sufficient distance to render his opinions compelling, but hardly desperate.

115. An Act for the relief of Insolvent Debtors and for Repealing the acts therein mentioned, May 19 1761, 4 *NY Col Laws* 526.

creditors holding three-quarters of any debtor's total liabilities, regardless of the total amount, could agree to accept an assignment of all non-exempt assets, and administer them for the benefit of all creditors, by petitioning in the Supreme Court or in any court in which process of arrest had issued against the debtor. Disputed claims against the debtor's estate were to be resolved by compulsory reference—the names of three referees to be chosen at random from among two nominees each of the assignees and the disputing creditor. Compliance with the provisions of the act resulted in a general discharge of all debt payable or contracted for at the time of assignment.

The 1761 act for the first time established a true bankruptcy system in the province, capable of meeting the demands of mercantile insolvency through joint administration by creditors, intended to afford the debtor the incentive of a fresh start in order to secure cooperation with and among creditors. The provision for compulsory arbitration of disputes in bankruptcy further carried out the theme of cooperative measures within the mercantile community, and reduced the impracticable burdens of debt litigation in the provincial courts, while it secured to the local merchants a subtle preference against distant creditors. The act was a substantial success, and was renewed and extended throughout the decade, finally expiring in 1770.¹¹⁶ In one of the few salutary notes struck in the imperial-provincial relations of the 1760s, the act was never nullified by the Crown, though milder experiments with bankruptcy statutes in other colonies were often disallowed through the eighteenth century as a result

116. See 4 NY Col Laws 747, 862. The act of renewal in 1765 established an important refinement of the system, by requiring all creditors holding mortgages or other securities for their lending to make effective relinquishment of their security interest before joining with the debtor in a discharge petition. See Act of December 23 1765, 4 NY Col Laws 862, 863-64. Although this did not permit unsecured creditors to "cram down" terms on unwilling secured creditors holding more than a quarter of the total debt, it did prevent secured creditors from colluding with the debtor to extinguish his unsecured debt, while leaving their mortgages and other securities unimpaired. The full significance of the bankruptcy statutes of the 1760s seems to have eluded prior historians.

of their prejudicial effects on metropolitan creditors.¹¹⁷ It was for this reason that the earlier insolvent relief acts in New York always contained a provision excluding debts owed to “absent or distant creditors,” dropped for the first time in 1761. Metropolitan acceptance of the New York bankruptcy system was not permanent. When, in 1770, the Legislature attempted to renew the provisions of 1761 on behalf of James DePeyster—whose large mercantile failure and substantial debt to the estate of Abraham DePeyster, who had died in office as Treasurer of the province, threatened to cause a major panic—the Privy Council disallowed the statute, on the advice of counsel who found it “so far to exceed the usual Bounds of insolvent acts, as to have been unfit to pass without more foundation laid for it than is stated in the Preamble.”¹¹⁸

The use of reference rather than litigation to resolve disputes in bankruptcy during the 1760s was part of a more general trend to contain the pressures on the provincial judicial system seen in several areas throughout the decade.¹¹⁹ In the arena of commercial justice, of course, the long provincial tradition of arbitration provided support. Confirmation of the continuing significance of arbitration proceedings in the wartime period is the appearance in the 1740s and '50s of newspaper advertisements by law stationers which include, along with the forms of wills and powers of attorney, arbitration bonds.¹²⁰ In eternal tandem with the law-stationers travel the scriveners, one

117. See E.B. Russell, *The Review of American Colonial Legislation by the King in Council* 125-34 (1915).

118. Report of the Judicial Committee of the Privy Council, May 25 1771, PRO PC 1/60/B9(1). For the statute, which differed in no substantial provision from the legislation of 1761, see Act of January 27 1770, 5 NY Col Laws 126.

119. A related tendency is the increase in negotiated dispositions of criminal cases, discussed in Chapter 4, *supra*.

120. See N.Y. Weekly Post-Boy, Oct. 31, 1743; Dec. 21, 1747; Jan. 11, 1748; N.Y. Gazette or Weekly Post-Boy, Jun. 30, Jul. 21, Aug. 25, Sep. 15, 1755. These bonds were the instruments by which extrajudicial arbitration was commenced and regulated. Both parties executed documents under seal which stated the facts of the case, and provided for the voiding of the bond obligation if the award of arbitrators was obeyed. The bonds were given to a third party, and the party getting the benefit of the award received them both.

of whom advertised, among his other works of copying, the preparation of accounts for arbitration.¹²¹ Where law stationers and scriveners are, it would be unwise to assume that lawyers have no place. Attorneys' registers shows the occasional fee for drawing arbitration bonds, among the work of drafting more familiar instruments.¹²² Merchants' letter books throughout the period convey a complex mix of attitudes about the law, and about the alternatives to standard process. Gerrard G. Beekman's surviving letters provide an example. In 1746, awaiting the arbitration of a prize case on behalf of his Rhode Island correspondents Vernon & White, Beekman wrote "the gentlemen appointed are ... I think all good men and Judges in such Casses."¹²³ In 1763, writing about an insurance matter to other Rhode Island correspondents, Southwick & Clark, Beekman took a very different tone:

... as to leaving of it to Reference the Gentlemen who are acquainted in these affairs have so often been Trouble with settling such accounts both Parties not alway Pleased that Scarce any One of them Chuses to do it again.¹²⁴

Beekman was not an immensely successful merchant, nor one much at home in the law (he apparently never served as a referee in any case). It seems clear that his own career, at least, did not make him more receptive to arbitrators than to lawyers, judges, and juries.

Another view of the counting-house, the bar, and the value of arbitration may be found in the letter book of John Watts, which covers the period from the opening of 1762 to the close of

121. N.Y. Weekly Post-Boy, May 6, 1745.

122. See, e.g., the statement of costs in *Fielding v. Magran*, *Register of John McKesson's Cases in the Mayor's Court 1761-68*, at f.11, NYHS.

123. Letter dated August 1746, 1 **Beekman Papers** 6. The referees were Christopher Bancker, William Walton, and Abraham Lynsen—all prominent merchants and frequent arbitrators.

124. Letter dated February 2, 1763, 1 **Beekman Papers** 427.

1765, and involves us closely in his views on these subjects. His portrait of the legal profession ranges from the gently sarcastic:

If you should chance to see my friend Mr: White pray ask him if he received a Letter from me lately. These lawyers wont write unless they are paid by the Sheet.

to the more furiously defamatory

We have an odd kind of Mungrell Commerce here called the Mount Trade ... the Lawyers say it is legal & contrary to no Statute, the Men of Warr say it is illegal & both take & Condemn them at their own Shops while they are acquitted at others. No two Courts pursue the same measure ... yet the evil is suffer'd to go on without any determination, the Subject is tore to pieces by Robbers, Lawyers & all sorts of Vermin.¹²⁵

Speaking of the possible legal education of Peter DeLancey, his nephew by marriage, Watts wrote:

We have a high character of a Professor at Oxford who they say has brought that Mysterious Business to some System, besides the System of confounding other People & picking their Pockets, which most of the Profession understand pretty well.¹²⁶

When Watts' annoyance with lawyers descended from the epigrammatic to the pragmatic, his objections were predictable in nature—lawyers, he felt, profited by the techniques of causing delay and stirring up unnecessary litigation. In discussing a lately concluded action at law he wrote:

With regard to that Charge I can only say that I have been oblig'd to submit to it with great

125. To James Neilson, February 1, 1762, *NYHS Coll* 1928, at 20; To Isaac Barre, February 28, 1762, *id.* at 27.

126. To Sir William Baker, January 22, 1762, *Id.* at 13. One wonders whether Blackstone would on the whole have appreciated the compliment.

reluctance, & that your suffering is common with all others, who get under the Harrow of the Law in this part of the World.¹²⁷

Among the kinds of litigation Watts thought the world could do without was litigation over seamen's wages:

... such a Number of Pettifoggers are always ready to disturb the Minds of Seamen & puzzell the Laws, which are far from being explicit with respect to Commerce.¹²⁸

For Watts, arbitration was far from perfect, but nonetheless in practice it improved upon the ordinary regime of lawsuit:

... you left it to me to settle in the best manner I could without Law, which confin'd me to the determination of the referees, for I could not in decency appeal from their Judgment as it is contrary to all Practice ... And had we thrown ourselves into Expensive endless Law, we should have appeard with an ill Grace, haveing the Award of people in Commerce against us, to be offered to a Jury of the same profession, for which reason it is invariably lookd upon as a point of Justice & propriety to submit to the referees, or why leave it to them at all, the Looser is seldom content or satisfyd.¹²⁹

Watts' letters show once again that arbitration among merchants was prevalent enough to make the prospect of appealing to a struck jury from the award of referees distinctly unappetizing.¹³⁰

127. To John Young, April 18, 1764, *id.* at 246.

128. To John Erving, June 14, 1762, *id.* at 62.

129. To Joseph Maynard, August 14, 1764, *Id.* at 285. Watts had attempted to reach an alternative settlement with the referees in an insurance matter, "wrote them a long letter," without success. I cannot establish who the referees were.

130. Watts naturally assumed that a "struck," or special, jury would be available in any important mercantile lawsuit. The details of the procedure regarding special juries in the later eighteenth century can be found in Alexander Hamilton's *Practical Proceedings*, in 1 J. Goebel, *Law Practice of Alexander Hamilton* 61 (1969).

Watts' own views of the system of arbitration were formed from broad experience—as a party, as an attorney for his correspondents abroad, and as an extremely active referee.¹³¹ Certainly he had reason to know that “the Looser is seldom content or satisfyd,”¹³² but as against the delay and expense of common-law process, Watts distinctly preferred arbitration.

Support for extrajudicial dispute resolution in the 1760s was attributable in part to the pressing need to relieve congestion in the courts. Increased delay and expense of litigation formed the theme of one of Cadwallader Colden's typically ungracious and anti-lawyer speeches to the Assembly in November 1761,¹³³ though it was none of Colden's intention to acknowledge the underlying causes of the situation. In several statutes the Legislature acted to remove actions from the courts. Appeal to the Supreme Court by writ of certiorari or error after judgment before Justices of the Peace were sharply curtailed in 1765,¹³⁴ and in 1768 the Legislature took the unprecedented step of authorizing compulsory reference of commercial litigation brought in the Supreme Court.¹³⁵ The act did not cover the Mayor's Court, or any court of inferior jurisdiction in the colony.

The Mayor's Court had referred cases, as we have seen, without any statutory authority throughout the century, but only by consent of the parties. When the statute was amended in 1772,

131. Records exist of more than a dozen cases in the 1750s and '60s in which Watts served as a referee. This load was particularly heavy considering the demands on his time in his business and the Governor's Council. In view of his comments about seamen's wage litigation, it is interesting to observe that Watts served as a referee in at least one such case, *Waters v. Bowne*, July 21 1747, reprinted in *Records of the Mayor's Court*, *supra* note 21, at 562. The result of that reference is lost.

132. Letter to Joseph Maynard, August 14, 1764, *NYHS Coll* 1928, at 285.

133. See 2 **W. Smith, Jr.**, *supra* note 44, at 262.

134. Act of December 23 1765, 4 *NY Col Laws* 801. The act required filing of an affidavit disclosing the basis of the claim of error before the Supreme Court could issue the writ, and held unsuccessful petitioners responsible for costs and damages associated with frivolous appeals.

135. See An Act for the better Determination of personal Actions depending upon Accounts, December 31 1768, 4 *NY Col Laws* 1040.

the Mayor's Court and other inferior courts were brought within its coverage.¹³⁶ The statute provided for the allowance "to the Prevailing Party a reasonable sum for such Services and Expences as may accrue after the Reference of the Cause," thus contemplating the need for attorney's fees in preparation for reference. Witnesses were to be subpoenaed and examined under oath, and a magistrate, employed at the cost of the party moving the reference, swore the referees to provide fair and impartial arbitration. Each referee was to be allowed eight shillings a day, plus reasonable expenses, the whole to be included in the taxed costs. Execution of the award followed the traditional pattern—if for the plaintiff, by confession; if for the defendant, through *scire facias*. Decision of the referees could be had by majority vote, and any report had to be confirmed by the court before it became effective.

Even without the encouragement provided by the statute, reference was clearly a vigorous institution in the 1760s, at least in the Mayor's Court. An inspection of the manuscript minutes for the years 1758 to 1764 shows that one case in forty-one was sent to referees.¹³⁷ Roughly half the referees chosen, either by parties or by the court, can be identified as merchants.¹³⁸ Attorneys also appear in the guise of referees, for example, James Duane and Benjamin Kissam, the mentor of John Jay, who both served as arbitrators and appeared as advocates before other arbitrators during the period. No conflict was perceived in the choice of a referee who was engaged in other litigation before the court, as a party or attorney.¹³⁹ Expeditious process remained the most

136. See Act of February 26 1772, 5 Col. Laws 293.

137. There were 823 cases in the population, of which 20 were referred. *MCM* 1757-1765.

138. Fourteen of the thirty-one referees recorded can be so identified. One or more of them appears in thirteen of the twenty references between 1758 and 1762. Richard Sharpe, James Beekman, Jacob Walton, John Alsop Jr., and Gabriel Ludlow all joined the Chamber of Commerce soon after its formation in 1768. See the membership list in **Colonial Records of the New York Chamber of Commerce 1768-1784**, at 300-03 (J.A. Stevens, Jr., ed. 1867).

139. Malcolm Campbell, for example was a referee in *Craig v. McCowleigh*, *MCM* August 15, 1758. At the same time, Campbell was a party in two

important advantage of reference. For all cases between 1758 and 1764, the average time required for a judgment through reference was slightly over four weeks.¹⁴⁰ This made reference, from start to finish, more than twice as fast as jury trial.¹⁴¹ Though it offered speed, reference did not offer certainty. Fifteen percent of the reference awards between 1758 and 1764 were set aside,¹⁴² and a motion for leave to show cause why the report should be overturned may well have been a standard tactical device, John Watts' advice to the contrary notwithstanding.

Congestion induced by the debt crisis was no means the only reason for the trend away from judicial resolution of commercial disputes in the 1760s. Imperialist policy put political as well as economic strain on the judicial system, fatefully reducing confidence in the impartial administration of justice in the province. The problem began in 1760, with the deaths of James DeLancey and George II. The first event created a vacancy in the Chief Justiceship of the province, while the second required the recommissioning of the remainder of the Bench, whose appointments expired with the death of the Sovereign. George Clinton's fateful error in granting a commission during good behavior to DeLancey in 1744 now revealed its consequences. After the break with DeLancey, Clinton tried to regain influence over the Court by alliance with the Morrisite judiciary as well as appointment of his own placemen. Daniel Horsmanden and John Chambers were accordingly commissioned *quamdiu se bene gesserint* in the Clinton administration, as was David Jones in

actions before the court. This pattern can be found in five other instances between 1758 and 1762.

140. I exclude from this average one reference which fell apart because one referee refused to participate. The rule was not set aside for twelve months, and the suit was discontinued thereafter. *Davenport v. Van Zandt*, MCM March 3 1761 (referred), March 2 1762 (rule set aside). Obviously something unusual was afoot.
141. Measured by time from initiation to entry of judgment for all references and an equal number of jury trials, randomly selected. In this latter sample, the average case tried to a jury required just under ten weeks to complete.
142. See, e.g. *Kingsland v. Hicks*, MCM February 27, 1759 (Reference overturned on defendant's motion; plaintiff won at the subsequent trial). For an unavailing motion to set aside, see *Fix v. Jeffreys*, MCM July 22, 1760.

1758. Though these measures reduced DeLancey's dangerousness to administration, they did so at a high price, making any recession from the entirely unauthorized practice of appointing life-tenured judges seem an attempt at direct political control of the Supreme Court.

Colden was hardly the man to concede a Royalist position solely as a result of opposition from the united Bench and Bar of the province, as subsequent events were to show. His long service as the primary loyalist antagonist of James DeLancey had convinced him of the central role the Bench played in protecting the alliance of merchant and landlord fortunes against royal authority. The newly activist policy of the triumphant empire precisely suited Colden's views, and he now sought to celebrate a victory over his ancient enemy. Colden proposed to appoint William Smith, Sr., as Chief Justice *durante bene placito*, and to recommission the sitting justices on the same terms. Smith refused the new appointment, as did the incumbents. Their status hung fire while Colden commissioned Benjamin Pratt, of Massachusetts, to be the new Chief Justice, while at the same time refusing his assent to an act of the Assembly requiring appointment of judges to hold office during good behavior, which Colden quite rightly held to be in violation of royal instructions since the time of William III.¹⁴³ For more than two years the Assembly refused to vote funds to pay the salaries of judges serving with less than good behavior tenure, and when pressed to accept new commissions *durante bene placito* the incumbent Justices resigned. Pratt, who had no independent means of livelihood, resigned in 1763 and returned to Massachusetts, where he died shortly after. Horsmanden was browbeaten by Colden into accepting appointment to serve at pleasure, and the eventual issuance of renewed instructions specifically confirming that all judicial appointments were to be held at the pleasure of the Crown restored temporary peace to a

143. The best account of the judicial tenure controversy is to be found in the contemporaneous history of William Smith, Jr. See 2 **W. Smith, Jr.**, *supra* note 44, at 253-71.

judicial system that had hovered on the verge of complete dissolution.¹⁴⁴

Colden's war on the Supreme Court in the interests of royal government continued in 1764, taking contingent advantage of a vicious personal vendetta in the New York mercantile community. Waddell Cunningham, having a grudge against fellow-merchant Thomas Forsey, waylaid his enemy, beat him into immobility and stabbed him through the lungs. Cunningham skipped town; Forsey recovered and sued for damages. A Supreme Court jury, having heard Forsey's evidence and a weak plea in mitigation of damages from Cunningham's counsel, returned a verdict in the immense sum of £1,500. Cunningham had instructed his counsel to appeal from any judgment over the £300 minimum. But Cunningham's counsel had no procedural error to allege, and the jury had returned a general verdict. Without the foundation for a writ of error, Cunningham instructed counsel to appeal to the Governor and Council on the merits. This meant taking the legal position that the Governor and Council, a prerogative tribunal, had the power to review the factual findings of common-law juries. Cunningham's own counsel refused to prepare the papers asserting this novel and disturbing theory. For Colden, however, *Forsey v. Cunningham* presented the long-awaited opportunity to destroy the Supreme Court as a center of political opposition to the Crown. Gubernatorial review of jury verdicts would prevent the Supreme Court from protecting the manor lords' vast estates, as it would prevent smuggling merchants from hiding behind the blank refusal of New York juries to convict in revenue cases. Basing his action on what was at best an impossibly strained interpretation of the current royal instructions, Colden issued a *sui generis* "writ of inhibition," prohibiting the entry of final judgment in the Supreme Court, and over the unanimous opposition of the provincial Bench and Bar the locus of the dispute passed to the Privy Council, for resolution of the question

144. For the correspondence between the Board of Trade and Pratt and Colden over the Chief Justice's commission and the salary impasse, see PRO PC 1/50/47.

whether the Governor and Council had plenary appellate jurisdiction over general verdicts in the Supreme Court.¹⁴⁵

Response to Colden's actions in the *Forsey* appeal among the New York merchants was swift and angry. No event during the parlous years before the repeal of the Stamp Act rendered Councilor John Watts—at most times a pillar of the Episcopal establishment and ultimately a Loyalist stalwart—so voluble on the wrongs and rights of the provincials. To Watts, and no doubt to other like-minded members of the community, Colden's position threatened to deprive New Yorkers of the sacred right of jury trial:

The last Year you were agitating at Home several Points that affected the Libertys of America, our old Ruler has lately broach'd one here that will strike at the very Root of all our Libertys, if it is meant by the Crown, & intended to be forc'd upon upon the Colonys as he contends for, which we can't possibly conceive, 'tis so flatly contrary to the very Spirit of the English Government, & against all Law.¹⁴⁶

Though he fulminated all through the summer of 1765, until it was known that Colden's position had been rejected,¹⁴⁷ Watts never found a more satisfactory expression of his sentiments concerning this measure “absolutely stripping the whole Colony of the Birth right of every Englishman, a Tryal by his Peers in Matters of Fact,” than that most irate complaint of the English-

145. The involved maneuvering that preceded the Privy Council decision in *Forsey v. Cunningham* is fully described, and all the surviving sources cited, in J.H. Smith, *supra* note 90, at 390-412. Smith regrettably treats Colden's position as the outcome of personal stubbornness and anti-lawyer sentiment. While Colden certainly possessed more than a full measure of both, the enormous political stake for which he was wagering should not be overlooked. For the role played by *Forsey* in Colden's war on the manor lords of the Hudson River Valley, see Chapter 3, *supra*.

146. Watts to Isaac Barré, January 19 1765, NYHS Coll 1928, 323-24.

147. For the new royal instructions, limiting appeal to the Governor and Council to cases of error, see 7 NY Col Docs 764.

man at odds with government: “he is making French Men of us all.”¹⁴⁸

The rhetoric of English liberties, first heard in New York over the issues of good behavior tenure for judges and the *Forsey* appeal, would be sounded at much higher pitch in the dispute over the Quartering Act, the Stamp Act, and non-importation. But even as the dispute over appeals from jury verdicts sputtered out, other measures, both local and metropolitan, further reduced the merchants’ confidence in the provincial courts.

The closing of the courts incident to the Stamp Act resistance was perhaps the starkest lesson in disruption of essential commercial justice. Certainly the merchants of New York had no desire to see the courts operating on stamped paper. When the justices of the Supreme Court and members of the Council presented a memorial to the Governor, however, justifying the opening of the courts to do business without stamps, Moore tartly informed them that any judge doing so would lose his seat on the Bench as well as at the Council board.¹⁴⁹ In the circumstances then prevailing, well into the fifth year of credit famine and spiraling cycles of debt and insolvency, a moratorium on debt litigation was not necessarily an altogether harmful development. But the suspension of all civil justice for an indefinite period,¹⁵⁰ accompanied by the bullying of the judges (who were no more anxious than any other New Yorkers to confront the hard choices between what they saw as compliance with a noxious regulation and outright defiance of Parliamentary authority), destroyed any predictability in the commercial law—always the first and most basic concern of anyone compelled to trade his money for someone else’s promises. As events in the

148. Watts to Monckton, January 10 1765, *NYHS Coll* 1928, at 319; To James Napier, December 14 1764, *id.* at 318.

149. See Moore to Secretary Conway, February 20 1766, 7 *NY Col Docs* 806-12.

150. The Stamp Act was essentially a tax on services, including most importantly the services provided by private lawyers and public officers in the administration of justice. For this reason, criminal process made no use of stamped papers, and the closing of the courts for civil purposes did not entail a suspension of public order.

Hudson Valley were to show when the courts reopened in 1766, and violent rioting broke out in response to the resumption of evictions, the suspension of civil justice was an experiment provincial society was in no position to undertake.¹⁵¹

Not quite all civil justice for New Yorkers was suspended in the winter of 1765-66. The Vice-Admiralty Court at Halifax, Nova Scotia, was open for business, using stamped paper. But this was not a forum to which New York merchants could look with any sense of satisfaction. The creation in 1764 of a single Vice-Admiralty Court at Halifax, with jurisdiction over all the North American possessions, marked another unwelcome transformation of a provincial legal institution. The Vice-Admiralty Court in New York, as we have seen, was critical for the merchant privateers of New York from 1696 to 1763. In the legal ecology of the city, Vice-Admiralty was the specialized venue for regulation of the most important wartime industry. Its less favorable activities at other seasons were far outweighed by its advantages, particularly since the New York lawyers had spiked its guns by preventing Vice-Admiralty from deciding illegal trading cases arising from seizures in New York waters.¹⁵² But the traditional utility of Vice-Admiralty in New York did not outlast the imperial struggle with France, and the establishment of the Halifax jurisdiction in 1764 marked the conversion of all Vice-Admiralty to a new use: standardized pro-Government adjudication of cases arising under the trade and navigation acts, which meant, for New Yorkers, foreign non-jury courts for the suppression of New York's commercial economy.¹⁵³

151. No purpose would be served by an attempt to improve on the best existing account of resistance to the Stamp Act. To put the events in New York, particularly the closing of the courts, into the larger perspective of British North American resistance, see **E.S. Morgan & H.M. Morgan, *The Stamp Act Crisis*** 205-30 (1962).

152. This doctrine, emanating from the Privy Council in the case of the sloop *Mary & Margaret*, discussed *supra* note 90, effectively prevented Vice-Admiralty from acting as enforcement aid to local revenue officials, since a writ of prohibition could always issue out of the Supreme Court to bring trade enforcement seizures before sympathetic New York juries.

153. For the analysis of Imperial policy in connection with the establishment of the Halifax Vice-Admiralty Court in 1764, see **L.H. Gipson**, *supra* note 109,

Despite joy in the spring of 1766 over repeal of the Stamp Act, the essence of the provincial situation remained desperate. The Hudson Valley riots were a sign that could be read in London; the currency situation of New York, much less visible to metropolitan managers, was a profounder guarantee of future disorder. The expiration of New York's last paper money, in 1768, was now imminent,¹⁵⁴ and despite Governor Moore's strong representations to the Board of Trade, and the Board's reassuring words that something would be done for New York by way of exception to the Currency Act, and that before the expiration of 1768, the year 1767 came and went without action—the Ministry was threatening what amounted to further retaliatory destruction of the provincial economy in response to continued obstinacy over quartering.¹⁵⁵

It was therefore only partly in response to the increasing movement in Massachusetts for renewal of non-importation as a response to the Townshend duties that New York's merchants formed the Chamber of Commerce in April 1768.¹⁵⁶ The city's merchant elite did experience the pressure for renewed non-importation, could perceive the economic advantage such a period of monopoly on imported goods could give to them, and had learned as a result of the Stamp Act riots the importance of

at 120-27. For unsuccessful attempts to prosecute customs-related seizures at Halifax during the Stamp Act crisis, see **C. Ubbelohde, *The Vice-Admiralty Courts and the American Revolution*** 84-88 (1960).

154. Between 1766 and 1768 £274,259 of provincial bills of credit were retired, a contraction of the money supply more severe, in proportion to the overall size of the economy, than the contraction of the 1720s. See **V.D. Harrington, *supra*** note 64, at 335 n.64.

155. For the correspondence between Moore and the Board of Trade, see 7 **NY Col Docs** 820-27, 843-45.

156. For the formation of the Chamber, see **Chamber Records, *supra*** note 138, at 3-7. Conventional commentary on the Chamber's relation to the political and economic situation is all derived from **V.D. Harrington, *supra*** note 64, at 334-43, following the general line of interpretation established by **A.M. Schlesinger, *The Colonial Merchants and the American Revolution*** (1918). Unfortunately, Harrington did not perceive the quasi-legislative role the Chamber sought to adopt, with regard to the substance of local commercial law, or did not appreciate its significance. Later writers, understandably given to relying on Harrington's exceptional study, have been misled in turn.

keeping control of the tumult by staying in the lead. All of these elements motivated the formation of the Chamber, but when, on August 27, the city's merchants voted to cancel outstanding orders and cease importation from November 1 1768, the Chamber of Commerce was not the organ of that announcement—its membership was far too restricted for such purposes.

The Chamber of Commerce was the merchants' attempt to provide an alternate system of commercial law, replacing an external system at the verge of collapse. Promotional writing repeats often that this was the first incorporated Chamber of Commerce in the Western European world, but few have chosen to consider what this incorporation meant.¹⁵⁷ To slightly sodden celebrants at contemporary Chamber of Commerce lunches, incorporation at an early date is redolent of modernity, a sign of the go-ahead New York spirit. But an eighteenth-century corporation was something else entirely. A corporation meant a royal charter, and a charter was the grant of some portion of the Sovereign's authority into private hands. The Massachusetts Bay Company had a charter, as did the City of New York, in which a Chamber of Commerce now would have one as well.

The charter's recitation of the purpose of the corporation is revealing:

[T]he said Society (sensible that numberless inestimable Benefits have accrued to mankind from Commerce; that they are, in proportion to their greater or lesser Application to it, more or less Opulent and Potent in all Countries; and that the Enlargement of Trade will vastly increase the value of Real Estates, as well as the general Opulence of our said Colony) have associated together for some time past, in order to carry into Execution among themselves, and by their Example to promote in others, such Measures as were beneficial to these salutary Purposes; And that the said Society

157. The Chamber's charter of incorporation, which passed the seals after much preparation on March 13 1770, is reprinted—opposite a flattering portrait of the "Old Ruler," Lieutenant-Governor Cadwallader Colden, so beloved of the Chamber's members—in **Chamber Records**, *supra* note 138, at 89-97.

having, with great Pleasure and Satisfaction, Experienced the good Effects which the few Regulations already adopted, had produced, were very desirous of rendering them more extensively useful and permanent ... therefore the Petitioner ... most humbly prayed our said Lieutenant-Governor to Incorporate them a Body Politick, and to Invest them with such Powers and Authorities as might be thought most conducive to answer and promote the Commercial and consequently the Landed Interest of our said growing Colony.¹⁵⁸

In short, the New York Chamber of Commerce wanted to be a legislature.¹⁵⁹

From the beginning the adoption of “Regulations” was the Chamber’s *raison d’être*. By June 1768 the Chamber was considering the currency crisis, debating the establishment of fixed exchange rates for Pennsylvania and New Jersey paper currency, soon to be the only effective currency in circulation. Parliament would not permit the provincial legislature to make foreign money legal tender in New York, and would not permit any paper currency to be legal tender anywhere, but the New York merchants would try to legislate by consent of the elite. Extra-provincial paper currency was only a partial solution, and at the meeting of July 5 1768, “[i]t is proposed that there be some method fallen upon to establish a paper currency in this city.”¹⁶⁰ Economic necessity required evasion of the Currency Act, and the ingenuity of the merchants would have an institutional voice for its expedients.

Currency was far from the only subject in which the commercial law appeared to require invigorating reform at the

158. *Id.* at 89-90.

159. The reiterated proposition that prosperity of trade is prosperity for investors in real estate is a reminder of the peculiarly close relationship between the landed class and the merchants of the province. Expressions of identity of interests are not proof of identity of interest, to be sure, but the relevance of these professions to the charter of an incorporated trade association should have helped earlier historians grasp the significance of the association.

160. *Id.* at 12.

hands of this extra-constitutional legislature. The Chamber, even before the grant of its charter, sought to control the price of flour, the measure of damages for protested bills of exchange, the inspection of potash, the marking of barrels of butter and lard, the price of flour casks, the value of the standard ton, and the general level of commissions on inland and foreign sales.¹⁶¹ Without enforcement authority, of course, the Chamber's new commercial legislation depended on the political and economic force of agreement among the City's commercial elite. With respect to forces less powerful than the British Empire, this was ordinarily sufficient. In November 1768, for example, the bolters and bakers attempted to justify the rise in the price of bread from 25/6 to 28s. by pointing to the high price of flour, and prayed "that the Chamber would take into consideration ... the difficulty they have to make their principals give into the measures adopted by the Chamber,"¹⁶² in essence declaring the Chamber's inability to force compliance on them. The response was to have Lewis Pintard purchase, on the Chamber's own account, a cargo of flour at Philadelphia, which was disposed of by Anthony Van Dam (at the regulated 2.5% commission) in order to depress prices and discipline the market.¹⁶³ The men and their forbears had been ruling the city and the province for three generations; the exertion of authority was hardly new to them.

Commercial adjudication as well as legislation was required amidst the wreckage of the provincial commercial law, and the Chamber stood ready to provide that as well, through the tested mechanisms of arbitration. From the outset, the Chamber's members appointed a Monthly Committee for the resolution of any commercial disputes brought before it, whether by members or non-members. In April 1769, the Chamber decided to enter results of its arbitrations on its records; a year later the Chamber would assume the guise of a chartered "Body Politick," now, with understated ease, it was becoming an extra-constitutional court of

161. *See id.* at 23, 24, 39, 49, 40, 50.

162. *Id.* at 23.

163. *Id.* at 32.

record. Moreover, the Chamber became an informal clearing-house for other major arbitrations, as can be seen when members inform the body that they are engaged in resolution of a complex dispute, and wish to be excused from membership on the Monthly Committee until completion.¹⁶⁴ In February 1770, the Whig merchant Isaac Low proposed that Chamber arbitration be the compulsory means of dispute resolution between members. Had it been adopted, the effect would have been the secession of the mercantile elite from the provincial system of mercantile justice. But this was a step too far, and the tide of events was flowing in the opposite direction. In May news arrived of the repeal of all the Townshend duties except the tea tax, and in June New Yorkers learned that Parliament would permit the issue of £120,000 in provincial bills which, while not formally legal tender, would be received at the Loan Offices and Treasury. By mid-July, the city had lifted non-importation. Low's motion, lying on the table since March, was never revived.¹⁶⁵

Changes of Imperial policy in 1770 restored a modicum of prosperity and stability to the province, and particularly the city's merchants. The experiment with autonomous extra-constitutional commercial law, a unique combination of boldness and subtlety, largely sputtered out—the Chamber would resolve less than a dozen disputes by arbitration before the opening of the war, and only the charter was left to remind anyone who cared to look just how unsettled the provincial commercial law had become. No one foresaw, and few of the New York merchants would have been pleased to know, that dispute over the one remaining duty on tea would three years later precipitate the destruction of constitutional rule in New York. But however much the appearance of equilibrium had been restored, the

164. *Id.* at 36, 39-40.

165. *Id.* at 73, 79. When war did come, and British military occupation finally closed the courts altogether, the Chamber provided commercial justice for the city through its Arbitration Committee. For a description of the practice and doctrine of the Chamber in the war, see Moglen, *Commercial Arbitration in the Eighteenth Century: Looking for the Transformation of American Law*, 93 *Yale L.J.* 135, 144-47. (1983). Regrettably, this author also completely fails to grasp the significance of the Chamber's charter, which he claims to have read.

commercial law of the Empire still remained at variance with the realities of New Yorkers' existence. Sooner or later, the disjunction would result in legal dissolution.

Like the land law and the law of crimes, the substantive law of commerce underwent a period of settlement between 1664 and the close of the seventeenth century. Settlement meant both imposition and negotiation, as English government of the province adopted both local and international rules of commercial interaction, at the same time imposing the large-scale structure of trade regulation dictated by Imperial considerations. The technical problems of conciliating diversity were less severe in the commercial realm than in other areas, because commerce among European societies was largely internationalized long before the settlement of New York. Dutch practices and institutions could be assimilated with comparative ease, as the cooptation of the Mayor's Courts of New York City and Albany and the continued vitality of commercial arbitration show.

But the characteristics of New York's commercial life imposed stresses on the system of commercial regulation that resisted solution within the available legal terms. Imperial trade regulation imposed norms that made illegal large portions of New York's peacetime trade. Imperial currency policy adversely affected the legal regulation of credit. Shortage of hard currency was alleviated largely by preying on Atlantic commerce—indirectly through dealings with Atlantic pirates in the 1690s, directly by privateering during the wars of the eighteenth century. The effect was a boom and bust cycle that followed the pattern of military engagement between the British Empire and its Atlantic rivals.

The commercial law system developed within this context. Admiralty in New York took on a distinctive shape as a result of the cyclical expansion of the prize business. Debt collection measures and other legal ancillaries of the credit system were repeatedly changed to respond to the problem of recurrent rapid contractions. But Imperial regulation hampered the legal system's responses. Debt relief measures were narrow in scope in

part because the intellectual environment of English law limited the legal imagination, but they were also narrow because the interests of metropolitan creditors were dearer to the hearts of London administrators than those of the New York mercantile elite. Parliament's use of the Currency Act of 1764 to coerce New York into funding Imperial military policy, by paying for the quartering of the New York garrison after peace with France, demonstrated that the stability of New York's commercial system was not important to British legislators. New York's lawyers could not establish, within the Empire's structure, a local order of commercial law to overcome these obstacles. Nor could they deal with the most basic of New York's commercial law problems: the unrealistic illegalization of New York's trade with parts of the Caribbean Basin and Northern Europe that left the local debt collection and commercial litigation systems to resolve the disputes of a trade that could not officially exist.

The problems of prosperity were soluble, and the New York commercial law played its appropriate institutional role in assisting the economic growth of the province, particularly in the 1740s and from 1756 to 1763. The problems of contraction and disorder in the credit system, on the other hand, were only soluble under conditions the Imperial structure would not permit. Against this background, the attempt by New York's merchants in 1768 to form a private-law legislature and arbitration system under the corporate charter of the Chamber of Commerce takes on very great significance. The Chamber's action was the beginning of an attempt to create an alternate commercial system insulated from Imperial interference. The possibilities of such an organization were no doubt limited by practical considerations. In effect, the Chamber's activities were directed at retaining control of an economic and political situation that threatened the political dominance of the provincial commercial and legal elites. A tenuous balance was regained after 1770, and the nascent institutions withered. But the efforts to retain control had shown that stability in New York was inconsistent with cherished Imperial policies. Unless Imperial policy changed radically, or New Yorkers were given more power to govern themselves (as

the Chamber of Commerce had sought to do), further disorder seemed unavoidable. After 1776, many of the merchants and most of the lawyers prominent in the attempts to stabilize the system in the late 1760s found themselves on the Loyalist side of a provincial civil war. Whether they said so or not, the Empire to which they were loyal had betrayed them.

Conclusion

In June 1770 the Attorney-General of His Majesty's Province of New York, John Tabor Kempe, as part of his private practice, prepared for litigation concerning a bill of exchange executed in "the Illinois country."¹ John Tabor Kempe was a loyal subject of George III, an officer of his courts and a defender of his law. Rather than break faith with his King, Kempe would soon abandon the career and fortune he had built for himself and end his life, like so many others, an unhappy exile in the nation of his birth. In 1763, George III had by proclamation forbidden New Yorkers, or anyone else from British North America, to settle in this "Illinois country," and in 1774 he would assent to a statute declaring it to be, for such purposes as these, outside the boundaries of the common law. But neither the King's Proclamation nor Parliament's Quebec Act would determine the destiny of the Illinois country. Indeed, two years after the passage of the Quebec Act, King and Parliament would no longer be recognized as constitutional authorities in most of British North America. In New York the legal elite, including William Smith, Jr., and John Tabor Kempe, continued to accept the Imperial legal order. But by 1777 Kempe was an emigré, Smith was a prisoner under genteel house arrest, and Imperial government in New York City rested on military occupation. Courts acting under Imperial commissions no longer functioned anywhere in the province. The provincial legal system had died.

1. John Tabor Kempe Lawsuits, *Blouin v. Witmen* (NYHS).

Among its other guises, the British Empire was a legal construct, containing and defining the subsidiary legal orders of the Empire's constituent parts. Independence meant in one sense the collapse of the old Imperial legal order in North America. But this collapse was not complete, because the legal order of the first British Empire was a federalist one.

This was not, to be sure, the official constitutional theory of the British Empire. The official theory was a peculiar combination of two themes: claims to Royal prerogative on one hand, and assertions of Parliamentary sovereignty on the other. The sphere of Royal prerogative within the British Realm had contracted sharply after 1688, but the King was still inclined to assert a sovereign power to govern elsewhere in the Empire. He issued Proclamations, that of 1763 for example, which claimed to have the force of law, though no Parliament or local assembly had participated in their promulgation. The British Parliament, on the other hand, made increasing claims to sovereignty within the Realm in the course of the eighteenth century. Parliamentary sovereignty could not long be maintained against a Crown eager to resume traditional powers unless the Crown were absolutely dependent on Parliament for its financial and military resources. And a Crown sovereign elsewhere in the Empire was not under absolute Parliamentary control. Parliament too, therefore, wanted to make law for the colonies.

The official constitutional theory of the Empire thus presented two conflicting views, which nonetheless had in common a belief that some body in London exercised sovereign control over North American law. In North America, the official theory neither reflected legal reality nor commanded the public assent. The King's Proclamations were less resisted than they were ignored. Parliamentary experiments with imposing excise taxes (such as the Townshend duties) achieved increasingly unpleasant results on each occasion of controversy after 1763. The imposition by Parliament of a sales tax on services—called the Stamp Act and, like most such taxes, particularly burdensome to businessmen and lawyers—called forth such a storm of public

opposition that it was withdrawn almost as rapidly as news of the response could travel. This outcome was particularly striking since British populations had been quietly paying stamp duties for some time, and continued peaceably to do so down to the present.

Most British North Americans, in fact, tended to behave as though they doubted that sovereignty was exclusively located somewhere in Great Britain. Whatever else they thought, they believed that their legislatures formed an essential part of the constitutional consensus necessary before they could be compelled to do certain things, like paying taxes. The New York Assembly had said so in its very first sessions. The federal aspect of the Empire was a working assumption of provincial lawyers and legislators. Divergence between formal theory and practical working assumptions is hardly unknown in the common law tradition.

The first British Empire at its heyday in 1763, seen from the provincial perspective, had a federal legal system. Among its constituent parts, the provincial legal system of New York was particularly well-developed. I have tried to show in the preceding chapters how that legal system developed, within the Imperial context, through the eighteenth century. I have also tried to show how the settlement achieved before 1763 was in several respects eroded by the effect of Imperial structure or policy under the changed conditions that prevailed after the long war with France was won. Taken together, the themes of both stories—of settlement and unsettlement—do much to explain the evolution of the legal systems of New York and its confederates after independence. With those themes in mind, John Tabor Kempe and his bill drawn “in the Illinois country” may stand as our emblem for the process by which the British Imperial legal system passed away, and the legal empire of the United States began to appear.

* * * * *

The legal institutions of New York started with the problem of dealing with diversity. The province at the time of conquest contained many different ethnic, economic, and geographic units, including many that were actively or potentially hostile to the new government. The superior force that might have welded such units together was not available; what transpired instead was an attempt, certainly not wholly conscious in any man's mind at any time, to lay down tracks on which the legal and political arrangements of the various working parts of the province might converge. Institutional heterogeneity was to give way, slowly, to homogeneity, as management provided a context for the reconciliation, the settlement as it were, of the conflicting strains of earlier development.

The key to this process was the creation of institutions of justice flexible enough to give the appearance of legal uniformity while tolerating substantial heterogeneity in practice. Even if this goal had appeared clearly to administration, however, the basic economic, geographic, and political constraints would have affected its implementation. At the local level, a dearth of trained counsel, the political wisdom of limited home rule, the size of the area to be administered, and the traditional institutions of English local government converged to establish the lay justice of the peace as the basic unit of legal administration. The justices, equipped with the discretion circumstances dictated, provided a workable, if not ideal, channel for the mediation between heterogeneous principles for the resolution of disputes and the need for apparent conformity to administration policy. The justices mediated both the pace of settlement and its content, even expressing— as did the Dutch JP who valued English law “no more than a turd”—resistance to the consolidation of the legal order.

But the most exigent necessity of settlement once these basic arrangements had been put in place was the elaboration of those institutions on a provincial scale that had never existed before. There followed the decades of experimentation with the superior courts that ended in the Judiciary Act of 1691. Finding a level of

centralization that conformed both to political theory and the realities on the ground was not an instantaneous process—the General Court of Assizes met the political needs of the proprietor, but failed to meet the logistical needs of administration and smacked too thoroughly of government at a distance, conforming to the model of conquest rather than settlement. Itinerant justice comfortably resonated with shared traditions among Anglophones, but if the itinerant judge was the last decision-maker west of Greenwich, the political authority of provincial administration was reduced rather than increased. The ultimate solution—lay justices hierarchically associated with itinerant judges, subject to appellate review before the entire colonial Bench—partly recapitulated English patterns and to that extent was similar to arrangements in other colonial communities, but the similarity was *post hoc*; the process of experimentation determined the outcome. From the combined genetic endowment of the various English systems the environment of New York brought forth organisms; like Darwin's orchids they were both familiar and outlandish, with commonplace parts adapted to uncommon uses.

And the process of experimentation was itself tentative. Heterogeneity seemed to the proprietor and his managers, themselves previously conditioned to distrust democratic mechanisms, the strongest of arguments against a legislature, or other methods for popular definition and control of the legal system. Before 1689 the elaboration of institutions was constrained by the political judgment of provincial management: Andros might push the New York City Mayor's Court only so far toward conformity with the behavior of JPs elsewhere; if the King's writ ran in Esopus at all, its rather eccentric gait had to be prudently ignored. Despite the brief experiment with legislation as a process for populating the legal space, only the transatlantic upheavals of 1688-91 opened an opportunity for a more pluralistic definition of the legal order.

The Supreme Court was the outcome of this interval, and with its appearance a number of previously discordant elements

in the legal environment fell into more harmonious relationship. Working homogeneity of institutions begat increased homogeneity of doctrine. The legislation of 1691 itself, which for the first time spoke of powers drawn from Common Pleas, King's Bench, and Exchequer, marked the explicit acknowledgment of a doctrinal vocabulary; the words drew meanings along with them, and expectations, and objections that might be made, and so the rules came to resemble the words. "Anglicization" means many things, but to the legal historian observing the arrival in New York of that mixture of Henry of Bratton's Latin, Littleton's French, and Coke's inscrutabilities that passed for English among lawyers, the concept is less problematical than for others. In the beginning there were the words.

In one crucial respect, however, the events of 1691 marked a dead end. The brief interval of constitutive legislation terminated there, and imperial constitutional theory thereafter insisted that the creation of courts was a prerogative matter. Thus the pattern of settlement itself, the locus of authority to create new objects in the legal space, became a source of controversy. Recurrently in the province's legal life the basic legitimacy of the other courts would be called in question, and whether the precipitating cause was Governor Cosby's controversy with Rip Van Dam or Cadwallader Colden's attempt to confine the power of the manor lords, political questions in the courts recurrently threatened to unravel the consensus that made the system work. Controversies over tenure in judicial office and the scope of admiralty jurisdiction were hardly unique to New York in the eighteenth century, but the tenor of those disputes within the province had always a particularly vicious tone, as the contingent history of settlement rendered them particularly parlous.

Initial measures of institutional settlement after 1688 had other portentous consequences. The insufficiency of the provincial legal profession ensured the presence of lay judges on the highest provincial courts. This absence of a strongly professionalized élite made the courts an attractive venue for the testing of partisan political authority, while the deep political

rancor afflicting the community in the aftermath of the Leislerian interregnum afforded strong incentives to partisan capture of the courts. The Governor's own ambiguous institutional status, as judge in some courts of (allegedly) uncertain legitimacy and litigant in others, additionally encouraged the employment of the Supreme Court as a bulwark of partisan opposition. Thus the careers of Lewis Morris and James DeLancey, along with so much else of the provincial legal life, took a portion of their shape from the institutional settlement of the 1690s.

The theme of progressive, aggregative population of the legal environment is perhaps most simply and clearly sounded in the development of the legal profession itself. Professional settlement had both demographic and institutional elements. The changing composition of the profession represented the outcome of a comparatively smooth transition by stages from a Bar comprised entirely of transplanted lawyers, to one dominated by foreign-trained natives or permanent immigrants, to one composed of domestically-educated New Yorkers. Accompanying this transition was the growth of an active guild mentality, involving both attempts to limit access to the profession in the interest of present profits, and ultimately an attempt to provide for inter-generational transfer of standing at the Bar. This somewhat increased stability of personnel assisted in the intellectual development of the profession; educational achievement became both a requirement assisting guild control over membership and a privilege attainable by men who knew that they intended careers at the Bar and who could count on powerful familial assistance in reaching their objective. The increasing level of education at the Bar in turn stimulated both the creation of an intellectual culture that defined provincial legal experience in its own terms (through works such as the *Laws* and Smith's *History*), and also a set of institutions—such as the law offices of Smith, Livingston, Scott, Kissam and their ilk; the Debating Society; and the Moot—through which other members and prospective members of the Bar could participate in that legal culture.

The professionalization of the Bench and the maturation of the guild fraternity brought the profession to an admirable state of coherence by the close of the provincial period. This was achieved despite the tendency of partisan conflict to disorganize the Bar. The institutional weaknesses arising from the post-Leislerian arrangements aggravated the consequences of New York's contentious political climate and tended, as in the 1730s, to the creation of antagonistic moities of the Bar. The same tendencies were observable in the early 1760s, but professionalization meant solidarity. Professional solidarity altered the response to attempts by authority to exert political discipline over the courts. Attacks on the judges were received by the political society as attacks on the law, and attacks on the law were experienced as attacks on the property and liberty of New Yorkers entitled to the benefits of the "real" English constitution. The Bar knew itself and its law, and knew that law to be the embodiment of liberties Parliament could not take away.

The population of the legal environment—the elaboration of the institutions, rules, and customs of the law—proceeded, of course, in rhythm with the population of the physical landscape; the institutions and practices traveled with the geographic and demographic expansion of the province. At the intersection of those two processes of settlement stood the law of real property. Here the process of legal settlement ceases to be the abstract conception of the retrospective observer, and becomes a tangible process, as legal entities are called into existence to explain, regulate, and condemn events on the ground.

From a managerial point of view, rational physical settlement of the country required elaboration of property rules. Rule space and acreage were congruent, and as the map of the Hudson River Valley became more precise, so did the rules which made it possible to draw the lines of which the map was made. Here too the early movements of settlement were composed as variations on the theme of bringing uniformity out of heterogeneity. The basic impulse was political—the creation of the manors both provided a counterweight to dissenting voices,

and organized large areas of future economic development in what promised to be a uniform and stable fashion.

Legal technology to serve these ends seemed ready to hand, as the very use of the word "manor" implied. Once again, the legal space was not quite as empty as it suited management to pretend, and the heterogeneous combination of patroonship and manor had to be brought to at least fictitious uniformity, but with very little difficulty the entire property system could be made to look English. By the turn of the eighteenth century the legal space seemed to be filled with the concepts necessary to support a terrain map of New York divided, at least as to the Hudson River Valley and points north northwest, into large quasi-independent blocs; words of 1290 conditioning the geographic reality of 1700.

Still, the pattern of physical settlement inflected the contents of the legal space. Economic development of the manors required tenants, and competition for tenants directed the superior importance of the lease over the grant. As legal entities, rather than economic units and sources of political authority, the manors, initially backward-looking invocations of arcane legal concepts directed at the attainment of political stability and patronage, became arenas for present-minded negotiation of rights in the marketplace. This process, altogether apparent in the sources, remains obscure so long as "colonial legal history" is seen as a balance of "indigenous contributions" as against "English transplantations," or as the rude, untutored prelude to a "formative era," however benign or oppressive the historian chooses to proclaim this latter period was. Only when legal development is seen as an analogue of physical development, a process of construction in "empty" space, does the history of provincial land law actually make sense.

But the limitations on settlement of the land and its law were primarily geographic and strategic, rather than intellectual. At the edge of the settled area resided the uncomfortable reminders that emptiness was never more than relative, and that the neat fictions of the older land law, in which all titles

descended from the Crown, could not be realized in New York. On Indian relations in the period before 1763 rested the fate of the Empire on the North American continent, and the Mohawk Valley and the Lake Champlain corridor were keys to the strategic situation. The legal space contained no analog for these realities, so that constant extra-legal intervention by administration, necessary to preserve the strategic balance and personally profitable to officials, only aggravated political controversy.

Then, too, there was a confrontation between legal and geographic boundaries at the eastern edges of the province, where parallel processes of colonial settlement moved inhabitants and grantees of Connecticut and Massachusetts into collision with those of New York. These problems too had no legal solution. However much Fairclaim and Shamtitle might have settled in their centuries of unremitting warfare over Blackacre, no suit in ejectment, however framed, could make the eastern Hudson Valley peaceful. New York law could opine, but it could not enforce. The law stopped short of the border in these cases, and the challenges posed required another conceptual expansion of the legal space, to include both Indian proprietary interests and a mechanism for the practical legalization of colonial boundaries. But neither advance into unknown legal territory was possible given the Imperial constraints. New York's government might ultimately prevail in the forum of metropolitan politics; Philip Schwarz has shown that by and large this was the result of the provincial boundary disputes. But this could not remedy all the consequences of weakening the land law's effectiveness in disturbed areas. The legal settlement of the first decades of the eighteenth century was overtaken after mid-century by unsettlement—the slow deterioration of public order and legal certainty on the land.

However vital and self-confident the culture of Bench and Bar in the third quarter of the century, the forces acting to unsettle the law gained the upper hand. Unresolved and largely unresolvable problems in the Hudson River Valley began eroding

public order even before the removal of the strategic threat that held centrifugal impulses in check. The unrest of 1766 threatened the decay of legal control. The criminal law—never the most flexible component of the provincial law because of the slight importance of doctrine in the general history of the common law of crimes, the effective absence of adversary counsel from the courts, and, most importantly, the public unwillingness to commit resources to the maintenance of the criminal justice system—began to lose its basic effectiveness, crushed between the demands of urban policing in the city and the restoration of basic public order in the Hudson Valley. This stress removed the realistic possibility of adjudicating the province's other criminal business, pushing the system in the direction of negotiating dispositions for most minor criminal charges, increasing the reliance on summary punishment for those whose social status would permit the imposition of such measures, and concentrating resources on the increasingly violent and intractable problems of rural rioting. The endpoint of this progression is hidden from us beneath the larger turmoil of the war, but we may confidently relate it to the more or less contemporaneous failures of legal settlement elsewhere that produced Shays' Rebellion, the Regulation movement, and other violent responses to legal failure in the hinterland of late colonial and early national America.

The intimate economic connection of that hinterland to New York City was echoed throughout the provincial period by the close social and political connection between the greatest merchants and landowners of the province. To a very large extent, it was the profits of local commercial enterprise that were speculatively invested in the land, rather than the imported capital of new aristocratic settlers. The twin engines of this commercial economy were the fur trade of Albany and the grain export and carrying trades of New York City. Both antedated the arrival of the English, and both had, to a certain extent, populated the legal space before the Duke's Laws were even thought of. The political and social arrangements of provincial life, however, connected landed and mercantile interests, through patterns of marriage and investment, so thoroughly as to make it one of the

conditions of provincial legal development that the landed and commercial sectors cooperated rather than resisting one another's legal interests. Barriers to the refinement of commercial law, impediments to increases in efficiency—these allegedly predictable consequences of antagonism and trials of political strength between these "classes" were absent from the legal development of the province. The fundamental problem of commercial litigation was debt collection, just as the fundamental problem of the land law was mediation of possessory and ownership interests. Conditions of development gave land owners no interest in hobbling mechanisms of effective collection, since owners increasingly acted as contractual creditors for rent rather than possessors of proprietary privilege. Absence of internal political confrontation over these fundamental issues meant that, contrary to arguments advanced by some historians of "transformation," the commercial law of the province was in general favorable to mercantile interests, and grew both more favorable and more efficient over the course of the provincial period.

If the institutions and doctrines of commercial law required only to be established to be settled, we might speak of the effective completion of the commercial law system in New York as early as 1720. Merger of Dutch and English practice was comparatively simple, and both the internationalization of basic commercial practices and the tradition of extrajudicial resolution of commercial disputes provided ample flexibility to deal with the changes incident to economic growth. But the essence of the commercial legal system is its attempt to afford stability of result under conditions of economic change, and both political and economic circumstances prevented full achievement of that goal in provincial New York.

For New York's economy was captive to a cycle of wartime boom and peacetime depression determined by the dynamics of imperial competition between Great Britain and France. That cycle placed repeated strain on the capacity of the legal system to clear the flow of commerce by collecting debts, distributing

business risk, and making prompt and predictable resolution of quotidian factual disputes. The New York commercial system was unable to respond optimally to these stresses because the large-scale legal organization of commerce, including the rules determining who might trade, in what goods, using which modes of transportation, and with what capital—what we might call the macroeconomic features of the commercial law—were out of provincial control, being conceived as matters of imperial policy. Imperial limitations on trade could not prevent illegal trade—the enforcement machinery was much too weak—but they could force important segments of commercial life out of the ken of the legal system. This process introduced distortions and inflexibilities familiar to anyone who has studied or experienced the effects of such “black market” or “underground” economies in other contexts. Imperial limitations on local monetary policy decisively affected the payment system. Perennial shortage of currency determined the rules in good times; credit famines and cascading bouts of destructive debt litigation afflicted the system in bad ones.

Imperial macroeconomics had positive as well as negative effects on the legal system. Commerce raiding was the most important speculative activity of the city before 1763, as land speculation was always the accelerator of growth in the hinterland. The replacement of trade and conspiracy with pirates in the late seventeenth century by investment in privateering in the eighteenth was an entirely positive development. It is too cynical to see privateering as merely piracy under a flag of convenience; the distinction is precisely the extension of adjudication to a forum previously governed entirely by violence. The wartime floods of Vice-Admiralty litigation in New York stood precisely for that proposition.

The paradox inhibiting settlement of New York’s commercial law was that the profitable elements of the peacetime trade were never as legal as privateering. Thus in one sense, at the macroeconomic level, the legal system did not in the slightest conform to the reality of the city’s trade. But debts contracted in

the illegal trade with Holland had to be collected in New York, and sight drafts paid whatever the transaction in Curaçao that lay behind them; thus at another level, where the state intervened to see that people kept their promises, the system of commercial law had to respond to the full range of commercial activity. Thus the macroeconomic and microeconomic sides of the commercial law were made in two different legislatures, responsive to two different economic constituencies, and were administered in largely separate fora. Settlement was never fully consummated, and instability, even dissolution, were constant possibilities.

Fundamentally, the legal system of Empire was the problem. The legal structure within which provincial New Yorkers acted was ill-designed to meet the realities of their economic and political existence. The Imperial federation established a continental Vice-Admiralty Court in Halifax, in the hope that this would provide efficient, if ham-fisted, enforcement of the trade and navigation acts. But the acts were inimical to American economic welfare, and the Empire provided no equivalently specialized tribunal helpful in resolving inter-colonial commercial disputes between individuals. No legal authority existed capable of or interested in regulating the money supply in response to the actual conditions of trade in North America. Imperial policy, founded on the interests of metropolitan creditors, inhibited the development of legal mechanisms to cope effectively with insolvency in the commercial credit system. Later, in forming another federation, lawyers from New York and other parts of North America acquainted with these and other legal inadequacies of the Empire would try to rectify them.

Because New Yorkers saw themselves as part of a federal legal order, with their own system of provincial law, separation of that system from the Empire did not require the creation of an entirely new legal order. Political revolution might be happening around them, but New York's independent legislatures initially behaved as though the primary land law change necessary was to make quitrents payable to "New York State" rather than "the Crown." Experience had shown, however, that the domestic legal

system was dependent on the enclosing Imperial context. New Yorkers had never seen their legal system as existing outside the structure of a federal Empire. Nor did they start to do so after 1776. After a beaten Empire evacuated New York City in 1783—significantly the final act of the entire continental uprising—the problem became the terms of a new imperial federation.

That new federation had a different geographic orientation. Its center of gravity lay to the West, through the Mohawk Valley, down to the lakes, to the Ohio, the Illinois, and ultimately to the great river that flowed through the arch of the continent. There lay the richest temperate agricultural land on the globe, whose products would travel south to New Orleans, sold to pay for European goods landed at New York and other Atlantic ports and floated west on the rivers that came down from the mountains. Settlement of the new land would soon begin, and with settlement of land comes settlement of law. A new country meant, at the last, a new empire, a Union, and a new federal law. The law would be new, because the conditions would be new, and it would be old, because the settlers wanted to live as they remembered—or hoped, or wished—that they had lived before. They remembered how to make a promissory note, how to prosecute a thief, how to leave the farm to your son. They knew that there was no right without a remedy, and that no man should be forced to his trial but before a jury of his neighbors. Someday they might remember that theirs was too pure an air for slaves to breathe in.

But all this was yet to be, in 1770, in His Majesty's Province of New York. Ten years of hard times had frayed the fabric of provincial life. The law seemed not just unsettled, but actively endangered. In city and country both, the basic needs for justice—to know where one's land lies, to do business with confidence, to be secure against lawless violence, to have trust in the courts to protect against public tyranny and private domination—were less and less adequately met. Government itself was threatened; there had been treason prosecutions. The Attorney-General, John Tabor Kempe, had brought them. Now

he was thinking about a bill of exchange, executed in the Illinois country. The settlement of the law began again.

Appendix A

Notes on Sources and Methods

The footnotes in the preceding chapters identify the location of every document quoted or relied upon, and the secondary literature of greatest utility in dealing with points immediately at issue. A more general survey of the primary and secondary literature that contributed to the formation of the ideas and interpretations presented has been postponed to this point, in the interest of leaving the historical narrative as uncluttered as the circumstances would permit. Below I describe the major collections of primary sources, printed and unprinted, around which my study has been conducted, along with some of the essential secondary literature for scholars in the area. I have also included some description of methodological decisions affecting the contours of the project.

I. Primary Sources

A. Printed Sources

Although the historian's task in dealing with the history of colonial New York is complicated in many respects by the byzantine ramifications of provincial political life, it is immeasurably simplified by the careful editing of the basic documentary record of institutional and political development that occurred broadly between 1850 and 1900, largely under the direction of Edward B. O'Callaghan and Berthold Fernow. Without their patient and scrupulous compilation of documents located in both North America and Western Europe, studies such as the present one would be quite literally impossible.

Of all their combined output, the most important single compilation of sources is *Documents Relative to the Colonial History of the State of New York*, cited in the text as **NY Col Docs**, edited by O'Callaghan with contributions by Fernow in 15 volumes, published 1853-87. For the legal historian, Fernow's edition of *The Colonial Laws of New York from the Year 1664 to the Revolution*, 5 vols., Albany, 1894, cited in the text as **NY Col Laws**, is perhaps equally important. Despite a mere handful of omissions, Fernow's is probably the finest compilation of colonial statutes for any of the British North American systems. For the period before 1664, and the brief Dutch reoccupation in 1673-74, O'Callaghan's 1868 edition of the *Laws and Ordinances of New Netherland* and Fernow's 1897 edition of the *Records of New Amsterdam, 1653-1674*, in 7 volumes, are indispensable. O'Callaghan's *Documentary History of the State of New York*, 4 vols., published 1849-51, contains additional useful matter.

In addition to the formal legislative output of the colonial Assembly, captured in **NY Col Laws**, the *Journal of the Votes and Proceedings of the General Assembly of the Colony of New York*, vols. 1-2, and the *Journal of the Legislative Council of the Colony of New York, 1691-1775*, 2 vols., 1861, are of great importance. Victor Paltsits' edition of the *Minutes of the Executive Council of the Province of New York, 1668-1673*, 2 vols., 1910, reprints one extant series of these records, but more useful is Berthold Fernow's *Calendar of Council Minutes, 1668-1783*, 58 **NY State Lib. Bull.**, 1902, reprinted 1987.

The equivalent central sources for the legislative and administrative activity of New York City's colonial government are contained in *Minutes of the Common Council of the City of New York, 1675-1776*, 8 vols., 1905. The Albany Common Council records are almost completely collected in Joel Munsell's *Annals of Albany*, 10 vols., 1850-59. Printed records of local governance outside these confines are predictably less consistent, both as to coverage and editorial quality. Long Island localities have in general received closer and more successful attention, particularly in the *Oyster Bay Town Records, 1653-1704*, 2 vols., 1916-24, and the *Records of the Towns of North and South Hempstead, Long Island, N.Y.*, 5 vols., 1896-1901, covering the years 1654-1777. Mention should also be made of the *Records of the Town of Brookhaven...*, vol. 1 [1655-1798], 1880; *Huntington Town Records*, 3 vols., 1887; and *Records of the Town of Easthampton...*, 5 vols., 1883-1905, though I have found them less helpful.

In addition to sources printed in full, I have of course relied heavily on the calendars of English historical documents used by all historians of colonial America, particularly the *Calendar of State Papers, Colonial Series, America and West Indies*, and *Acts of the Privy Council, Colonial Series*. The *Calendar of Historical Manuscripts in the Office of the Secretary of State, Albany, New York, Part II: English Manuscripts, 1664-1776*, published under O'Callaghan's direction in 1866, and the *Calendar of New York Colonial Commissions, 1680-1770*, published by the New-York Historical Society in 1929, are also invaluable.

For the legal historian, the printed court records also offer significant assistance, though with substantial reservations. The *Proceedings of the General Court of Assizes, 1680-82*, **New-York Historical Society Collections 1912**, along with the *Minutes of the Supreme Court of Judicature, April 4, 1693 to April 1, 1701*, in the same volume, and Paul Hamlin's and Charles Baker's superbly-edited minutes for the period 1691-92 and 1701-04, in **NYHS Colls 1946** (reprinted 1959, with Introduction volume, and Biographies and Index) are the only printed series of minutes for the highest common-law court of the province. For the Mayor's Court of New York City, Richard Morris's *Selected Cases of the Mayor's Court of New York City, 1674-1783*, 1935, contains much useful material, but Morris' principles of selection do not result in a representative depiction. Kenneth Scott's *Minutes of the Mayor's Court of New York, 1674-1675*, 1983, provides a faithful edition of one volume of minutes. For both the provincial Supreme Court and the Mayor's Court, only the manuscript minutes themselves, described below, proved sufficient for this study's purposes. The reports of New York's Vice-Admiralty are satisfactorily edited and introduced by Judge Charles Hough, in *Reports of Cases in the Vice Admiralty of the Province of New York and in the Court of Admiralty of the State of New York, 1715-1788*, 1925.

Some additional printed records of local courts deserve mention. *The Minutes of the Court of Sessions (1657-1696) Westchester County, New York*, edited by Dixon Ryan Fox, 1924, in fact contains the records of town courts 1657-1678/79, the Court of Sessions 1687-88, and the minutes of General Sessions of the Peace 1691-96. These materials are useful, as covering an important period, though the editing is inferior, as to both textual questions and annotation. *The Minutes of the Court of Albany, Rensselaerswyck and Schenectady, 1668-85*, 3 vols., 1926-32, edited by A.J.F. van Laer, along with his edition of the *Minutes of the Court of Rensselaerswyck, 1648-1652*, 1922, provide essentially all the relevant available material for the region in the period before 1691.

Printed primary sources from non-institutional contexts have also contributed profoundly to this research. Contemporary pamphlets on legal and political subjects, reprinted in a variety of contexts, including the Early American Imprints, have been consulted. Complete references to all such sources can be found in the bibliography. Special mention should be made of Stanley Katz's edition of James Alexander's 1735/36 pamphlet *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal*, 1963, and Michael Kammen's absolutely indispensable edition of William Smith, Jr.'s *The History of the Province of New-York*, 2 vols., 1972. The edition of *The Papers of Sir William Johnson*, 14 vols., 1921-65, by James Sullivan *et al.*, is the only contemporary source from which one can gain an educated understanding of Indian relations and the strategic situation in relation to New York land policy. The Johnson Papers occasionally raised questions for which two other editions of papers related to Indian relations were helpful: Lawrence H. Leder, *The Livingston Indian Records, 1666-1723*, 1956; Charles H. McIlwain, *An Abridgment of the Indian Affairs ... from the Year 1678 to the Year 1751 by Peter Wraxall*, 1915. The **New-York Historical Society Collections**, the annual publications series of the Society, has for the past century reprinted material of the greatest interest, including letter books (particularly those of Cadwallader Colden, and, less in volume but equally interesting in content, John Watts), abstracts of wills, tax lists, and other essential sources. Individual citations to documents in the Collections can be found in the text.

B. Manuscript Sources

Vast as the achievements of past compilers and editors are, no study of this kind can be carried on solely from the printed sources. The available body of manuscript material is extensive, and no value would inhere in a list of manuscripts consulted without consequence for my inquiry. Like all other toilers in the vineyard, I have profited from the exhaustive labors leading to Everts Greene and Richard Morris, *A Guide to the Principal Sources*

for Early American History (1600-1800) in the City of New York, 2d ed., 1953. I have drawn upon additional collections located at the Library of Congress, Yale University, the Sleepy Hollow Restorations Library, and the Franklin Delano Roosevelt Library, in addition to the governmental repositories in Nassau, Suffolk, Westchester, Dutchess, and Columbia counties, the New York State Library, and the Public Records Office in London. The primary collections are discussed below; citations to the other sources quoted from or relied upon are found in the footnotes.

There are two major categories of manuscript sources upon which I have primarily relied: court records and lawyer practice files. As I have already indicated, some valuable editing of colonial court records for publication has occurred. But the publication has necessarily been exemplary rather than comprehensive. The state of the manuscript minutes, at least for major fora of provincial justice, are quite good. For the Supreme Court, after the last published series, ending in 1704, we have either rough or engrossed minutes for the remainder of the colonial period, excepting only the years 1715-22 and 1740-49. I have used both the original manuscripts and the microfilm located at Queens College. The complete minutes of the New York City Mayor's Court, largely in engrossed form including transcription of pleadings, have been read at the New York County Hall of Records. I have also consulted, much less comprehensively, the Minutes of the Court of Assizes, 1665-72 (NYSL), and the surviving minutes of the General Sessions of the Peace for New York, Queens, and Richmond counties, located in the respective clerks' offices. For a general discussion of the methods found most promising in the treatment of these sources, see the Note on Court Records, below. In addition to these records, I have also read the records of the appellate litigation from New York before the Privy Council. These quasi-judicial records are located in the Chancery Lane Public Records Office, in series PC 1, registered in PC 2.

The reader familiar only with the printed sources is likely to misjudge the importance of practice records. We have one

splendid exemplar in Julius Goebel and Joseph Smith's, *Law Practice of Alexander Hamilton*, 4 vols., 1969-72, which makes clear what these sources at their best can teach us. But it is the breadth of these materials, as well as the pinnacles seen in the Hamilton collection, that makes such sources particularly useful. I have extensively consulted the practice papers of James Alexander (NYHS), John Chambers (NYSL), James Duane (NYHS), Daniel Horsmanden (NYHS), Samuel Jones (NYPL), John Tabor Kempe (NYHS), William Livingston (NYPL & NYSL), John McKesson (NYHS), Joseph Murray (Columbia University), and William Smith, Jr. (NYPL). Those wishing to consult these papers at their most useful should review William Smith, Jr.'s Supreme Court Register, and John Tabor Kempe's lawsuit files. In both, the organization of an eighteenth-century lawyer's mind can be glimpsed in the methodical record of his professional habits. The systematic uses of practice papers are discussed in the Note on Court Records, below.

In addition to these two major categories of manuscript sources, other collections should be briefly noted. Following suggestions made in the work of Sung Bok Kim, I have consulted the Livingston Manor Papers, NYHS; the Rensselaerswyck Manuscripts, NYSL; the Cortlandt Manor Papers, NYHS; and the Philipsburgh Manor Papers, Sleepy Hollow Restorations Library, to learn about leasing practices in the manors. The Wendell Family Papers, NYPL, containing an invaluable series of family business correspondence from 1682 to the end of the provincial period, educated me in commercial conventions. Documents concerning Robert Livingston's claim against the State of Massachusetts, in the Stirling Papers, NYHS, and the Boundary Papers, NYHS, provided views of the evolution of the New York-Massachusetts boundary controversies in the 1750s and again in the 1770s.

II. Secondary Sources

The published secondary literature on colonial New York is, of course, immense, and even the specialist's knowledge decreases, with disconcerting predictability, as the square of one's distance from one's own specialization. My goal in this work has been to explain the impingement of forces and phenomena external to the legal system on its development, and I have used this immense secondary literature to clarify what the sources within the legal system seemed to be telling me. Though there is necessarily a reciprocal relationship between the conceptions acquired from secondary sources and the primary materials of one's own investigation, I have tried to steer clear of controversies between writers where engagement would have served no purpose in clarifying my own narrative, or would have cluttered my account with distracting controversy I was in no position authoritatively to resolve. Where secondary accounts disagreed on issues of concern to me, I have read the primary sources on which the contending parties based their views, to the extent practicable (most often only a small fraction of the work done by the writers themselves), and have drawn my own provisional conclusions. A special case arises in the treatment of the secondary literature on the law of crime and criminal procedure in colonial New York, which is fully discussed in the footnotes to Chapter 4. Below I discuss only those works whose influence over my own account is not fully reflected in the footnotes identifying precise contributions.

In Michael Kammen's *Colonial New York*, 1975, we have a basic general history of the province, adequate to the needs of the student and efficient in the delineation of the basic patterns of life

and social change. But Kammen is reluctant to essay much commentary on legal phenomena. Where he does so, his source is likely to be the history of William Smith, Jr., which Kammen himself brilliantly edited for republication, as noted above. To Smith we both owe a fundamental debt, for without his trenchant eye for political detail, attached to the brain of one of the canniest lawyers in the province's history, we would miss altogether some of the most revealing clues to the nature of legal development in New York. A valuable physical history of New York City, along with much else of a richness incommunicable in summary, is found in I.N. Phelps Stokes, *The Iconography of Manhattan Island, 1498-1909*, 6 vols., 1915-28. Arthur Peterson & George Edwards, *New York as an Eighteenth Century Municipality*, 1917, provides a workable basic delineation of the City's institutions of political and social life. Such works teach us what we soon feel we always knew, and no amount of praise adequately captures their value.

A similarly profound debt to the great institutional histories of the first British Empire should also be acknowledged here. Herbert L. Osgood, *The American Colonies in the Seventeenth Century*, 3 vols., 1904, and, to a lesser extent, Herbert L. Osgood, *The American Colonies in the Eighteenth Century*, 4 vols., 1924, remain essential to any historian of British North America. This is all the more true of Charles M. Andrews, *The Colonial Period of American History*, 4 vols., 1934, and the great masterpiece of the so-called "Imperial School," Lawrence H. Gipson, *The British Empire before the American Revolution*, 15 vols., 1936-70. It is an indication of contemporary academic fashion that it is still considered necessary to list these works in bibliographies, but a reading of the current secondary literature often leads me to question whether these monuments of historical enterprise are read quite as often as they are cited. One of the primary themes of my own study, as I see it, is the impossibility of comprehending the development of a "colonial" legal system, as that term is used to describe British North America before 1776, without mastering the history written by these great men.

The political history of provincial New York is both ferocious and ferociously complex. The single most valuable guide is Patricia U. Bonomi, *A Factious People: Politics and Society in Colonial New York*, 1971. Mention should also be made of the remarkable doctoral dissertation of Beverly McAnear, "Politics in Provincial New York, 1689-1761," unpub. Ph.D. diss., Stanford University, 1935. For the period between the Conquest and the end of the post-Leislerian factional conflict, we have several comprehensive and valuable studies, including Robert Ritchie, *The Duke's Province: A Study of New York Politics and Society, 1664-1691*, 1977; Thomas J. Archdeacon, *New York City, 1664-1710: Conquest and Change*, 1976; and Jerome Reich, *Leisler's Rebellion: A Study of Democracy in New York, 1664-1720*, 1953.

The later political history of the province seems to present that pattern of fluid factionalism without substantial ideological content beloved of the historians who have followed the promptings of Sir Lewis Namier. In Stanley N. Katz, *Newcastle's New York: Anglo-American Politics, 1732-1753*, 1968, we have a compellingly successful attempt to apply both Namier's methods and his materials to the illumination of the provincial political scene; I have derived some additional profit from the associated conceptions presented more generally in Alison G. Olson, *Anglo-American Politics 1660-1775: The Relationship between Politics in England and Colonial America*, 1973. Perhaps it is as a consequence of this underlying condition of New York's political history that so much of the best description is to be found in the biographical mode, in which the conceptual problems can be subordinated (perhaps one might say, evaded) in deference to the ordinary conventions of biographical narration. Among the works providing indispensable interpretations of periods in New York politics within a biographical framework are: Lawrence H. Leder, *Robert Livingston, 1654-1728, and the Politics of Colonial New York*, 1961; Mary Lou Lustig, *Robert Hunter, 1666-1734: New York's Augustan Statesman*, 1983; Alice M. Keys, *Cadwallader Colden, 1906*; Eugene R. Sheridan, *Lewis Morris, 1671-1746: A Study in Early American Politics*, 1981.

The particular role of Royal prerogative in New York politics has attracted useful, though conceptually divergent attention in two influential articles: Carole Shammas, *Cadwallader Colden and the Role of the King's Prerogative*, **N.-Y. Hist. Soc. Q.** 53:103-26, 1969; and Rex M. Naylor, *The Royal Prerogative in New York, 1691-1775*, **NY Hist.** 5:221-55, 1924, along with Eugene Sheridan's biography of Lewis Morris.

I have profited from the recurrent interest in the machinery of politics in provincial New York, though such concerns are rather distant from my own. Carl L. Becker's *The History of Political Parties in the Province of New York, 1760-1776*, 1909, repr. 1968, remains a useful account, though primarily focused on events I do not consider. I have found particularly useful Nicholas Varga, *Election Procedures and Practices in Colonial New York*, **New York Hist.** 41:249-77, 1960, and Bruce M. Wilkenfeld, *The New York City Common Council, 1689-1800*, **New York Hist.** 52:249-74, 1971. Mention should also be made of two classic articles by Milton M. Klein, *Democracy and Politics in Colonial New York*, **New York Hist.** 40:249-77, 1959, and *Politics and Personalities in Colonial New York*, **New York Hist.** 47:3-16, 1966.

This phase of my study of New York legal history largely terminates before the final crisis of the first British Empire. The large literature on the coming of the Revolution tends, therefore, to an emphasis at cross-purposes with my own. An exception should be made, however, for Edward Countryman, *A People in Revolution: the American Revolution and Political Society in New York, 1760-1790*, 1981, which has substantially informed my view of the political climate between 1766 and 1770.

The Imperial strategic context of events in New York, on the other hand, is a matter of constant importance throughout my account; one of my primary purposes has been to restore this component to visibility, despite the presumably benign neglect from which it has suffered at the hands of most recent writers. No one working in the area can afford to ignore what is probably the greatest historical achievement by an American writer—

Francis Parkman's *France and England in North America*, 16 vols., 1851-92—notwithstanding which, it is more than sometimes done. *Montcalm and Wolfe*, 2 vols., 1884, repr. 1 vol. 1962, remains unsurpassed in its account of the climactic confrontation between the two Empires. Volumes III, V, VI, and VII of Gipson are of equivalent importance for establishing the context of the colonial wars in New York. Francis Jennings, *Empire of Fortune: Crowns, Colonies, and Tribes in the Seven Years War in America*, 1988, brilliantly culminates a series of recent studies of the social and military history of the great mid-century confrontation. Robert E. Ziebarth, "The Role of New York in King George's War, 1739-1748," unpub. PhD. diss., New York University, 1972, is the most valuable study of this particular phase of the Imperial struggle, while Johnson G. Cooper, "Oswego in the French-English Struggle in North America, 1720-1760," unpub. DSS. diss., Syracuse University, 1961, focuses attention usefully on one of the geographical pivots of Imperial strategy. An authoritative biography of Sir William Johnson is still the most important missing component of our literature; in its absence, I have supplemented my reading of the Johnson papers with James T. Flexner, *Mohawk Baronet: Sir William Johnson of New York*, 1959; and David S. McKeith, *The Inadequacy of Men and Measures in English Imperial History: Sir William Johnson and the New York Politicians, A Case Study*, unpub. PhD. diss., Syracuse University, 1971. It is appropriate here to insist once again on the importance of a book generally ignored by professional historians, Bernard De Voto, *The Course of Empire*, 1952. Headstrong and idiosyncratic though it is, De Voto's book establishes some primary themes in the history of exploration and grand strategy in North America more usefully than any other work, as well as providing a remarkable instance of historical writing as a literary genre.

As all are aware, the past three decades have been an era of progress in social history, in many of its various forms. Studies in the colonial society of New York have been legion, and only the most important to my own study can be noted here. Ira Rosenwaike, *Population History of New York City*, 1972, usefully supplements the classic work of Evarts B. Greene and Virginia D.

Harrington, *American Population before the Federal Census of 1790*, 1932, as does Robert V. Wells, *The Population of the British Colonies in America before 1776*, 1975. The physical disposition of the City's population has been well described in Carl Abbott, *The Neighborhoods of New York, 1760-1775*, **New York Hist.** 55:33-54, 1974, and, more recently and comprehensively, in Nan A. Rothschild, *New York City Neighborhoods: The 18th Century*, 1990.

The politics and law of ethnic diversity in New York are a constant theme of this study, but we have lacked any comprehensive historical sociology of ethnic tension in the provincial society. Joyce D. Goodfriend, *Before the Melting Pot: Society and Culture in Colonial New York City, 1664-1730*, 1992, a truly remarkable and ground-breaking study, does much to fill the need, but it reached me too late for a full assimilation of the many remarkable ideas and suggestions it contains.

The problem of inter-ethnic relations in New York necessitates a clarification concerning my use of the term "Anglicization" in reference to changes in social organization, and particularly the legal system of the province, between 1664 and 1700. The term has been adopted into the vocabulary of Early Americanists largely through the immensely influential unpublished doctoral dissertation of John M. Murrin, "Anglicizing an American Colony: the Transformation of Provincial Massachusetts," Yale University, 1966. Murrin's attention to the general movement to increase conformity with English cultural norms in Massachusetts during and after the late seventeenth century resonates powerfully, as recourse to his work has shown, with other contemporary social developments elsewhere in British North America. But the Anglicization of Massachusetts described by Murrin is a process, simply put, of Anglicizing the descendants of Englishmen. That was not the situation in New York. Murrin has explored the utility of his concept of Anglicization in New York in two characteristically provocative, and unpublished, papers: "The Perils of Premature Anglicization: The Dutch, the English, and Leisler's Rebellion in New York," 1968; and "English Rights as Ethnic Aggression: The English

Conquest, the Charter of Liberties of 1683 and Leisler's Rebellion in New York," 1973. The brilliance of these papers establishes, rather than resolves, the important conceptual difference between Anglicization in New York and in Massachusetts, a difference demonstrated by the analysis of Joyce D. Goodfriend, "'Too Great a Mixture of Nations': The Development of New York City Society in the Seventeenth Century," unpub. PhD. diss., University of California, Los Angeles, 1975. Pending the conceptual unification of "Anglicization" as a sociological concept meaningful throughout British North America, I believe it is preferable to allow the term a meaning locally defined. Another important instance of this approach is John D. Runcie, *The Problem of Anglo-American Politics in Bellomont's New York*, **WMQ 3d ser.** 25:191-217, 1969.

African slavery in New York is of course a critical component of the provincial social history. The indispensable sources are Edgar J. McManus, *A History of Negro Slavery in New York*, 1960; James G. Lydon, *New York and the Slave Trade, 1700-1744*, **WMQ 3d ser.** 35:375-94, 1978; and Thomas J. Davis, "Slavery in Colonial New York City," unpub. PhD. diss., Columbia University, 1974. Some suggestions towards a legal history of slavery in New York can be found in Edwin Olson, *The Slave Code in Colonial New York*, **Jour. Negro Hist.** 29:147-65, 1944. The secondary literature on the slave revolt crises of 1712 and 1741 is cited and discussed in the footnotes to Chapter 4.

My study of the provincial land law depends critically upon my interpretation of New York's land policy, both in its Imperial strategic and local social context. Although the footnotes to Chapter 3 fully indicate my debt in this regard, no opportunity should be lost to indicate the overwhelming importance of Sung Bok Kim, *Landlord and Tenant in Colonial New York: Manorial Society, 1664-1775*, 1978, which is probably the most important single work on the history of colonial New York to appear in the past quarter century. Kim's ultimate conclusion, that the tenants of the Hudson River Valley were "simply petty landed bourgeois" is not one I myself endorse, but his prodigious

research in the manorial records, his reconstruction of the effects of inter-colonial boundary conflicts on the destruction of stability on the ground after 1750, and his effective demonstration of the replacement of quasi-feudal by contractarian relations within the manorial structure are achievements of the very greatest significance, on which, without question, the validity of my own interpretations depend. In addition to Kim, I have profited from the analyses of expansionist land speculation and its effect on provincial politics of Ruth L. Higgins, *Expansion in New York, with Especial Reference to the Eighteenth Century*, 1931; Edith M. Fox, *Land Speculation in the Mohawk Country*, 1949; Charles W. Spencer, *Sectional Aspects of New York Provincial Politics*, *Pol. Sci. Q.* 30:397-424, 1915; and Oscar Handlin, *The Eastern Frontier of New York*, *NY Hist.* 18:50-75, 1937. Dixon Ryan Fox, *Yankees and Yorkers*, 1940, is a beguiling work, but unfortunately a weak reed upon which to rely. On the political history of boundary disputes in New York, Philip J. Schwarz, *The Jarring Interests: New York's Boundary Makers, 1664-1776*, 1979, is invaluable. I have found two works critically important in shaping my understanding of the property régime in New York City during the eighteenth century: Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, 1983; and Elizabeth Blackmar, *Manhattan for Rent: 1785-1850*, 1989, whose chronological limits lie outside my period, but which is more insightful than any other scholarship in its account of the residential land use system in the City during the eighteenth century.

My account of the land law also draws upon Kim's approach to the roots of the agrarian uprisings in the Hudson River Valley in the second half of the century, particularly the rebellion of 1766. I have read with much profit, and disagreement, Irving Mark, *Agrarian Conflicts in Colonial New York, 1711-1775*, 1940, whose rather heavily *marxisé* non-technical interpretations of legal phenomena significantly reduce the utility of the work. No one writing about civil disturbances in the eighteenth century can ignore the extraordinarily important conceptual movement initiated by Edward P. Thompson, *The*

Moral Economy of the English Crowd in the Eighteenth Century, 50:76-136, 1971, itself building on George Rudé, *The Crowd in History, 1730-1848*, 1964. Perhaps the most successful sustained consideration of the analogs in British North America is Dirk Hoerder, *Crowd Action in Revolutionary Massachusetts, 1765-1780*, 1977. A general conceptual approach to the connection between traditional forms of mass dissent and the the creation of a revolutionary situation is provided by Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1775-1776*, 1972; and another by Rowland Berthoff and John M. Murrin, *Feudalism, Communalism and the Yeoman Freeholder: The American Revolution Considered as a Social Accident*, in Stephen G. Kurtz and James H. Hutson, **Essays on the American Revolution**, 1973. One approach to interpreting the legal response to the 1766 rebellion is found in Irving Mark and Oscar Handlin, *Land Cases in Colonial New York 1765-1767: The King v. William Prendergast*, **N.Y.U. L.Q.R.** 19:165-94, 1942; different, previously unedited, sources and a different conceptual orientation yield a different interpretation in my article, "Treason and Riot in the 'Rebellion' of 1766: The Trial of Elisha Cole," forthcoming. Finally, on technical issues alone, I have profited from Samuel G. Nissenson, *The Development of a Land Registration System in New York*, **NY Hist.** 20:1-38, 1939; and Robert L. Fowler, *History of the Law of Real Property in New York*, 1895, which is serviceable but hardly satisfactory.

The mercantile community of the province, and particularly of New York City, plays a large role in the commercial law developments described in Chapter 5. Along with the absolutely invaluable work of Virginia D. Harrington, *New York Merchants on the Eve of the Revolution*, 1935, I have profited extensively from Philip L. White, *The Beekmans of New York in Politics and Commerce, 1647-1877*, 1956, which in addition to its excellencies as family history is extremely helpful on mercantile details. The Livingston clan has of course attracted more than its share of attention, as it always did in life, and much of that attention has usefully been directed at the family's mercantile activities. E.B. Livingston's *The Livingstons of Livingston Manor*, 1910, is still useful, but it is now

superseded in the most important respects by Cynthia A. Kierner, *Traders and Gentlefolk: the Livingstons of New York, 1675-1790*, 1992. Thomas Elliot Norton, *The Fur Trade in Colonial New York, 1686-1776*, 1974, provided my education in the inland economy, splendidly supplemented by David A. Armour, "The Merchants of Albany, New York: 1686-1760," unpub. PhD. diss., Northwestern University, 1965, which makes excellent use of the business records of the Albany fur trade. Similarly, Richard Pares, *Yankees and Creoles: The Trade Between North America and the West Indies Before the American Revolution*, 1956, has guided my understanding of the continental context of New York's Caribbean trade. Samuel D. McKee, Jr., *Labor in Colonial New York, 1664-1776*, 1935, is still useful. But my thinking about the socio-economic development of New York City, including relations between merchants, artisans, and consumers, has been decisively affected by Gary B. Nash, *The Urban Crucible: Social Change, Political Consciousness, and the Origins of the American Revolution*, 1979. Although Nash's ideological prepossessions are not my own, his brilliant comparative study of the dynamics of economic development, war, and welfare policy in Boston, New York, and Philadelphia during the eighteenth century cannot be ignored by anyone seeking to understand even the tangentially related questions with which I have been concerned.

In writing about the forces acting to unsettle the commercial law of the province during the eighteenth century, I have necessarily also depended upon the literature describing the monetary history of the American colonies. In placing the local monetary history in the context of imperial trade conditions, I have relied upon James F. Shepherd and Gary M. Walton, *Shipping, Maritime Trade, and the Economic Development of Colonial North America*, 1972. The essential data for an understanding of colonial monetary history was first explored by Curtis P. Nettels, *The Money Supply of the American Colonies before 1720*, 1934. The fundamental data for New York are partially recovered in John H. Hickcox, *A History of the Bills of Credit or Paper Money Issued by New York, from 1709 to 1789*, 1866. E. James Ferguson, *Currency Finance: An Interpretation of Colonial Monetary Practices*, **WMQ** 3d

ser. 10:153-80, 1953, first described the mechanisms underlying the instabilities in the colonial money supplies. The most sophisticated account of the colonial capital markets, and their behavior under the impact of imperial policy, is Leslie V. Brock, *The Currency of the American Colonies, 1700-1764: A Study in Colonial Finance and Imperial Relations*, 1975. My interpretations of the mechanisms playing upon the commercial law in New York are confirmed in some respects by observations in Richard A. Lester, *Currency Issues to Overcome Depressions in Delaware, New Jersey, New York, and Maryland, 1715-1737*, *Jour. Pol. Econ.* 47:182-217, 1939. Similar explorations of themes in other colonies' political histories can be found in Joseph A. Ernst, *Money and Politics in America, 1755-1775: A Study in the Currency Act of 1764 and the Political Economy of Revolution*, 1973.

Rendering an intelligible account of monetary policy in the British Empire, even for oneself in aid of other investigations, requires viewing the policies pursued in light of the economic wisdom of the time, rather than that of the historian's time. Granting the basic premise of economic analysis, that people consciously pursue their own rational interests, it is of course a truism that they pursue not their actual interests, but the interests they perceive to be their own. The monetary theorists of the late eighteenth century were not engaged in discussion with the theorists of the historian's age, and the common reasoning of the time was therefore not our own either. I have been informed by Joyce Appleby, *Locke, Liberalism and the Natural Law of Money*, *Past and Present* 71:43-69, 1976, and William Letwin, *The Origins of Scientific Economics: English Economic Thought, 1660-1776*, 1963. The reconstruction of common economic attitudes is the very provocative achievement of J.E. Crowley, *This Sheba, Self: The Conceptualization of Economic Life in Eighteenth-Century America*, 1974. An interesting attempt to explore related problems in New York itself is Cathy Diane Matson, "Fair Trade, Free Trade: Economic Ideas and Opportunities in Eighteenth-Century New York City Commerce," unpub. PhD. diss., Columbia University, 1985.

Although the work has not been done for Massachusetts—a rare case in American legal history—some of the principal features of my account of the development of New York commercial law might be observable in the former colony as well. Aside from an inspection of the court records and practice materials, the sources necessary for such a study are probably available, and would include W.T. Baxter, *The House of Hancock: Business in Boston, 1724-1775*, 1945; Roger W. Weiss, *The Colonial Monetary Standard of Massachusetts*, **Econ. Hist. Rev.** 27:577-92, 1974; Herman J. Belz, *Paper Money in Colonial Massachusetts*, **Essex Inst. Hist. Coll.** 101:149-63, 1965; Andrew M. Davis, *Currency and Banking in the Province of Massachusetts-Bay*, 2 vols., 1901.

Though this is the first comprehensive study of the legal development of colonial New York, I of course could not have proceeded in this enterprise without the body of legal history literature already in existence. In this area, the footnotes to the preceding chapters delineate my indebtedness as precisely as possible. But some works rarely cited in the text deserve further mention. Herbert A. Johnson's *The Advent of Common Law in Colonial New York*, in George A. Billias, ed., **Law and Authority in Colonial America**, 1965, contains much useful material, despite an interpretive bias in the direction of "reception," which seems to me unjustified by the sources. Johnson's *The Prerogative Court of New York, 1686-1776*, **Am. J. Leg. Hist.** 17:95-144, 1973, is an indispensable first step in the direction of a legal history of probate in colonial New York, a topic with which I have chosen not to deal in the present work. *Authority and Resistance in Early New York*, 1988, collects the papers given at the New-York Historical Society conference of the same title in 1985, from which I and the other conference participants learned much. Linda Briggs Biemer's "The Transition from Dutch to English Law: Its Impact on Women in New York," unpub. PhD. diss., Syracuse University, 1979, is an interesting beginning in a direction very little traveled by the existing literature, and which I have not substantially advanced in the current work, though I hope to accomplish more in future research. Her narrative of the Anglicization of New York law differs very substantially from my

own, in that she does not perceive Englishness as an inherently planned response, mediated by managerial considerations, preferring a simpler, and to my mind, less satisfactory model. But there can be no doubt of the importance of the phenomena she investigates, and her work has forced me to reconsider some of the conceptions with which I initially approached the subjects covered in Chapter 1.

The biographical orientation of much of the New York scholarship, on which I have commented above, has among its drawbacks the difficulty that lay biographers have in confronting the details of the legal lives of their subjects. Such works as Sheridan's *Lewis Morris*, cited above, while in other respects superb, rarely capture the most significant aspects of the legal activity they describe. Two biographical or prosopographical works should be mentioned for the successful attention they devote to legal matters. Edward P. Alexander, *A Revolutionary Conservative: James Duane of New York*, 1938, though almost entirely a political biography and brief into the bargain, shows a sensitivity to the aspects of Duane's law practice that bore on his interests in disputed Vermont lands, and helped me to resolve questions raised by my reading of the Duane papers in the NYHS. Dorothy Rita Dillon, *The New York Triumvirate: A study of the Legal and Political Careers of William Livingston, John Morin Scott, and William Smith, Jr.*, 1949, is a unique work, successfully anatomizing the connections between legal and political activity for these members of the "third generation" at the Bar. Though Dillon's primary focus is on the description of their role in the political turmoil of the 1760s, her insights were invaluable in helping me to build an interpretation of the intellectual and social development of the legal profession in the province.

In writing about the development of the legal profession in New York, Paul Hamlin's *Legal Education in Colonial New York*, 1939, provided me with a wealth of detail. Hamlin's compilation of educational profiles, library lists, and anecdotes of practice has been of the greatest assistance, and will continue to be a standard reference source. I have relied occasionally on three other

secondary works. Albert P. Blaustein, *New York Bar Associations Prior to 1870*, *Am. J. Leg. Hist.* 12:50-57, 1968, adds no detail, though his conceptions are of more than passing interest. John R. Aiken, "Utopianism and the Emergence of the Colonial Legal Profession: New York, 1664-1710, a Test Case," unpub. PhD. diss., University of Rochester, 1967, is an interesting and provocative work, though its interpretation of the political theory motivating anti-lawyer sentiment in early New York seems to me more sophisticated than the sources will bear. Alden Chester and E. Melvin Williams, *Courts and Lawyers of New York: A History, 1609-1925*, 3 vols., 1925, provides little not to be found in Hamlin's later work.

Although they are cited and discussed at appropriate places in the text, further acknowledgment of two brief monographs is necessary in this place. Julius Goebel, *Legal and Political Aspects of the Manors in New York*, 1938, and Herbert A. Johnson, *The Law Merchant and Negotiable Instruments in Colonial New York, 1664-1730*, 1963, each opened up an area of provincial legal history treated in a more comprehensive setting in my own study. Both represent a tradition of meticulous technical scholarship presented with accuracy and brevity. Each is *sine qua non* to the further developments in its field.

III. Notes on Method

Academic lawyers, accustomed to the conventions of case reporting developed in the United States during the course of the nineteenth century (now giving way to new forms of information distribution made possible by digital information-processing technology) would find the documentation of seventeenth- and eighteenth-century provincial legal systems extremely frustrating.

When all the preservation losses are additionally considered, the situation may well be regarded as intractable. Though it is not intractable in fact, workers in these fields must be acutely conscious that the sources for the legal history of royal justice in, e.g., fourteenth-century England, far surpass, both in quantity and quality, the evidentiary aggregation for the all of the British North American colonies throughout the pre-Revolutionary period.

Methodologies of historical investigation are but idealizations of scholarly procedure, and like all formalisms they acquire and retain their validity only in their contact with realities. Actual methods, in short, arise from a synthesis of formal criteria and the documents the historian consults. The methods I have chosen to employ in using the primary sources of the provincial legal system evolved from contact with the sources themselves. They represent neither the only nor the final paths of approach to the materials. The ultimate justification of any method of historical inquiry, from my point of view, is the utility and plausibility of the resulting narrative reconstruction, as it appears to those engaged in furthering the same search for knowledge of the past. But for those curious about why I made the particular methodological decisions I did, or for whom the basic infrastructural problems of Early American legal history are of particular interest, some words of explanation on a few critical points may be helpful.

A. Note on Court Records

To the extent that Holmes is correct in defining law as “the prediction of what the judges will do in fact,” legal history is the description of what in fact the judges did. This is not the full extent of law or legal history, to be sure, but it is always a central part. For the common-law legal academic of the late twentieth century, “what the judges do” is largely determined by what the judges say. The judicial opinion has long been the central genre of the legal literature. But not for long enough to provide the

epistemological basis of Early American legal history. In this world, to our ear, the judges are strangely silent.

Much more silent than were the judges of the early common law. The Year Books provide descriptions of what the judges said and did more vibrant than our own, and this is only one of the less important respects in which the legal historian of fourteenth-century England may be said to enjoy advantages the Early Americanist envies. The mannered fictionality and crowded technical landscape of law reporting as reimagined by Edward Coke antedated the conquest of New York, but it too was without trans-Atlantic equivalents. The behavior of the British North American judge of the colonial period is formally depicted only through the minutes of the courts.

Taken by themselves, these minutes are oracular at best. The Clerks' interests are the practical ones of the day: fiscal, evidentiary, logistical. Docket management, collection of fees, facilitation of execution—these are the prevailing considerations, and they do not operate to shape documents whose design would be selected by the historian of doctrine, or even the social historian of law. Two other difficulties must be recognized. These are records of a legal society that depends upon handwriting for all primary recordation, and must for various reasons stringently contain its costs. Certain predictable classes of errors are, therefore, not worth the cost to avoid or correct, and similarly with almost all classes of factual obscurity. Second, these documents are not necessarily physically integrated in the course of their composition, and they are not extensively duplicated as part of the routine operating procedure. Their conservation is therefore particularly contingent, and the preservation of an entire population is cause for celebration.

The factual and technical obscurities of judgment rolls pose comparatively little difficulty in the rich environment of the Public Records Office. The plea rolls, which record pleadings that at least expand the record of the dispute to include all the formalities and all the (potentially fictive) facts required by the

Chancery, are the foundation of the legal history of the English royal courts and their British Imperial descendants. Where Early American minutes are engrossed, with interpolated pleadings and even occasional arguments of counsel, the equivalent material is available. Otherwise, the legal historian of colonial British North America must work in what, to other common-law historians, is an impoverished environment.

I have pointed out above that the two most important courts in New York, the Supreme Court of Judicature and the New York City Mayor's Court, have long series of surviving minutes. But those of the Supreme Court are merely rough minutes posing all the usual problems, except for 13 years beginning after 1750. The Mayor's Court Minutes, on the other hand, represent an extraordinary run of engrossed minutes, absolutely continuous and substantially serving the purpose of a plea roll interlineated with a judgment roll. Richard Morris called attention to the important nature of the Mayor's Court Minutes in his 1935 *Selected Cases* in the American Legal Records series, but the necessary response, an exhaustive technical monograph on the doctrinal content of the Mayor's Court Minutes, did not follow.

But the Mayor's Court, though it had a vestigial criminal jurisdiction and a proprietary docket of an idiosyncratic kind, was primarily the civil court of a mercantile seaport—founding a comprehensive view of the colonial legal order on its activities would be extremely distorting. This is a particular reflection of a general methodological truth, that studies of a legal system cannot exceed in breadth of interpretation their breadth of coverage of the courts. Both quantitative and qualitative judgments based on the work of less than all relevant courts should eschew propositions about the system as a whole, since no matter what the accuracy of their judgments about the courts they know, historians are merely assuming the behavior of the courts they do not study. When the explicit subject of investigation is the system as a whole, the harm done by too great concentration on any one forum, however informative its records, is particularly acute.

So while I have relied heavily on the Mayor's Court Minutes in those areas in which the court was a dominant participant, I have of necessity attempted to solve the Early American legal historian's characteristic problem—how to deal with the traditionally-malformed minutes of the other courts. It should be understood at the outset that there is no unique solution to this problem. There is no general best approach even to all the jurisdictions coexisting within a single legal "system," at whatever level of generality one defines aggregations of jurisdictions to constitute "systems." Since other secondary literature employs a diversity of approaches to the same records, one has both the advantage of precepts and examples in making a selection of one's own method, and the outcome of other peoples' investigations to rely upon.

One evident and popular approach to the individually uninformative nature of entries in rough minutes is to gain informational content by aggregating them. Quantitative approaches to court records do realize on the promise of increasing the information content of the records, and I have both made quantitative arguments of my own and accepted those of others, but they raise some special versions of the fundamental problem, thus meriting separate consideration, provided below in the Note on Quantification.

What one wants most to supplement the minutes, from the traditional point of view, is the plea rolls. These, along with the sayings of the judges in one or another literary form, we shall never really have in most courts. File papers may exist, and where they do they can be enlisted with success, as William E. Nelson, *The Americanization of the Common Law*, 1975, occasionally shows, though for Nelson such tactics are almost supererogatory, owing to the relative completeness with which pleadings are included in Massachusetts court records, partially explaining what Lawrence Friedman has called the "Massachusocentric" tendency in American legal history. But file papers are not often systematically preserved, and they are rarely organized by the time they reach the historian's hands. Even in the comparative

order of the English legal records, the state of the early Chancery file papers is a story and a by-word through the world.

Rough minutes can be made to yield much material directly, though not often of a doctrinal character, by patient indexing of persons and events to external sources of contemporary information. Paul Hamlin and Charles Baker succeeded brilliantly in this approach, with their edition of the surviving Supreme Court Minutes through 1704. But the work is exceedingly laborious given current technology, extraordinarily weighty when responsibly produced, and sheds almost no light on issues of substantive law—thus recalling Sheridan’s joke about Gibbon, less luminous than voluminous.

I have elected quite a different route to the supplementation of the court records. Practice papers of counsel survive in several extensive collections. Not all important practitioners have left behind any practice papers, and there are some periods for which our coverage is scant or wanting. In addition, there are some papers (including, e.g., those of John Chambers) for cases in which the minutes themselves are lost. This is not always a severe disadvantage. The state of organization of practice papers varies, both with the type of record and its integrity at the time of creation, and with the habits of the possessor and his descendants in interest, including librarians and researchers. Some collections, like the lawsuit files of John Tabor Kempe at NYHS, are perfectly ordered, sorted by the name of the client, reflecting both a meticulous man and a some good breaks.

One rarely meets with this combination of virtues. Still, the utility of practice papers is great. If a case is represented at all, the initial pleading will likely be present. When a file is reasonably complete—as it often is with John T. Kempe, James Duane, or James Alexander, to mention a prominent few—notes of trial evidence and briefs of counsel are frequently present, along with the procedural scruff of service and dilatory practice. Cost books give some sense of the expense of litigation, and account books shed some light on the basic economies of practice.

The minute books can show roughly how often similar legal phenomena occur, how long they take to happen, and who tends to win. Practice files can show for a comparatively few cases how pleading works, what legal arguments are made, and which sources cited. Occasionally we gain some insight into how much it costs and how the practice is managed.

One might try the technical equivalent of an interlineation of the surviving practice records with the surviving minutes, by aggregate indexing of all the contents. I considered such an approach, consisting of a name and date index to the SCJ and NYMC minutes, and a fuller index to the practice papers, computationally linked. Topical indexes to several of the most important practice collections were built, and tested with several proposed forms of index to the minutes. The data is extremely hard to link, owing to noise from two sources: the enormous variation in spelling of surnames in New York, arising from the early-modern freedom of orthography along with the tendency to use several ethnic equivalent surnames for the same individual; and the occurrence of casual errors in dates. The computer was little better than I at making the links, and the labor of creating the whole index to each of two large series of records seemed unlikely to pay significant dividends. It was simpler to seek out minute entries individually, for cases identified as interesting by the practice files.

Sometimes old ways are best. My first approach to the minutes was to read them. I read the Mayor's Court Minutes for the first time in 1982 and 1983, the Supreme Court minutes on microfilm in 1984. Most of the detail was immediately forgotten, but I learned what kinds of things could happen, and roughly how often, and collected a set of questions about why. Engrossed minutes in the Supreme Court and Mayor's Court were later supplemented with combined rough minutes and practice files, though the number of such cases was always disappointingly small, and practice records frequently provided some useful supplementation of the Mayor's Court minutes. Whether cases were followed out of counsel's files depended on their apparent

interest for points under active investigation, as determined by my indexes to the practice files, in generating which I was assisted by those whose help is gratefully acknowledged elsewhere.

The bulk of litigation, as almost all theorists of our adjudication system acknowledge, consists of “easy” cases, in which clarification of doctrine need not occur in order to resolve the dispute. The mass of cases is all the less likely to further our understanding significantly where the sayings of the judges are absent. So while doctrinal history can be made from these New York sources, the sifting is slow, technically difficult, and to uneven effect.

But, as in the development of a photographic print, the large contours emerge before the fine doctrinal detail. The basic properties and outlines of the legal system as lawyers knew and used it can be discerned, and their behavior, with its resulting legal effects, can be correlated with other information about the external non-legal environment. The result is a narrative description of legal development invoking a series of relationships among external forces and the behavior of the legal system at a comparatively high level of doctrinal abstraction. Corroboration of the plausibility of the hypothesized relationships is provided by representative illustrations from the records, often as supplemented by the practice papers. I have made no attempt to turn the footnotes to these chapters into a partial topical index to the minutes and the practice records—that should await an account at the level of technical detail that requires such indexing. Instead I have proceeded much in the common law style, by using instances to delineate the qualitative contents of the law. I differ, however, in having no intention to turn my instances into authority; my narrative contains illustrations rather than precedents, and its effect is the creation of interpretive hypotheses, not final judgments.

B. *Note on Quantification*

My explicitly qualitative approach to the legal sources raises the question of the value of quantitative analysis in this area. No historian who recognizes the malleability of method in the face of sources could be so dogmatic as to exclude all numerical expressions of information about the past. My study, like almost all others, raises questions in its wanderings about how often, how much, and for how long.

But it is in the nature of sources to control the use we make of them, even when we only think to count them. I am very dubious about the too-detailed use of quantitative arguments based on court records such as those of colonial New York, for several reasons.

Numbers are just the simplest kind of aggregation. Counting implies a categorization scheme, and every number comes to us containing a set of individual decisions about category boundaries equal in magnitude to the number itself. Most of those decisions are right, but not all. Under most circumstances, this state of affairs is carried on the books as "measurement error," and it is standardized and mathematically corrected. But where the categories counted into are categories of law, or where they depend on other qualitative boundaries, our numbers merely reify our qualitative judgments, however controversial or incorrect. When counting the incidence of a rule, for example, our measurement error is equal to the defect in our understanding of the law surrounding the rule, which is not subject to standardization, much less effective mathematical correction.

This is of declining importance as the informational richness of the sources increases; if the documents are fully explanatory, and we understand them consistently, the problem is not very severe. But that is not the condition of our sources. Where the pleadings are not available, minute book entries may not make entirely clear even what the cause of action is. Both technical

knowledge and prior experience in the records are necessary to perceive the difficulties, let alone to resolve them reliably. Inadvertent error is not the only source of difficulty. Some causes of action (the sheriff suing for recovery on a bail bond, for example) may be sensible to count as “debt” cases for some purposes, but not others. Once distilled to absolute numbers, our consciously-debated boundary decisions become unchangeable, locked inside numbers that cannot be pried apart.

This is only an explanatory restatement of the fact that the absolute numbers produced by counting are accompanied implicitly by a confidence interval, or are normally distributed around the “true” measurement they represent. Seen in that familiar light, there is no need for alarm. Even where preservation problems have already “sampled” the original population before we began scientific selection, and where our populations or samples are small, we can use quantitative methods to aggregate our data meaningfully, and convey it in a form that reminds the reader of the inherent qualifications.

But this is not how readers tend to understand quantitative arguments, however scrupulously put. Quantitations can be extremely vivid, but for precisely that reason I have chosen to use the most exact sort, which are derived from absolute numerations of qualitative judgments, as one uses the most vivid forms of prose description—where they can instantly clarify a point sufficiently certain that the implicit exaggerations can mislead no one and will do no harm.

This principle has two effects on the quantitative arguments I make in this study. Most classes of error in absolute numbers fall out of calculations of proportion or general magnitude. Accordingly I have occasionally accepted the significance of a conclusion in other writers’ work about magnitudes of quantitative phenomena, while expressing less than perfect confidence in the absolute numbers which they report. My own enumerations are of course subject to similar corrections; redoing others’ work is generally impracticable.

Similarly, I have sometimes made use of absolute numbers compiled by another writer, while expressing doubt about the utility of that study's time-series comparisons. Such comparisons are particularly troublesome, because measurements in the legal system from two points in time need to be compared net of the influence of irrelevant independent variables. This does not imply a need for multiple regression of every variable with a numeric value. On the other hand, absolute numbers of lawsuits given without correction for population growth are acutely deceptive. The shorter the interval of comparison, of course, the less serious the problem; the critical test is, I think, whether the result conforms to acculturated common sense.

C. Note on Equity

The legal development discussed in this book is primarily development in the law courts, leaving activity in equitable jurisdictions largely undescribed. This is the outcome of a deliberate decision, for the history of equity in colonial New York has a contour distinctively its own, better suited to separate reconstruction.

The early, inactive history of New York's Chancery Court, its significant growth under the active direction of Governor William Burnet from 1720-27, and the political crisis of 1727 which largely ended its utility as an adjudicative institution, are effectively described in Joseph H. Smith, *Adolph Philipse and the Chancery Resolves of 1727*, in Leo Hershkowitz and Milton M. Klein, eds., **Courts and Law in Early New York**, 1978. We possess the order books and much subsidiary material from the Court of Chancery from 1720 to 1732, and the editing for publication of this material is the central task for an understanding of equity in New York. The late Professor Smith, along with others, intended an edition of the records, more of the groundwork for which is invaluable reported in Joseph H. Smith and Leo Hershkowitz, *Courts of Equity in the Province of New-York: The Cosby Controversy, 1732-1736*, **Am. J. Leg. Hist.** 16:1-50, 1972. I propose to complete

the work, but the dimension of the problem should be clearly understood. As William Smith, Jr., noted in his history, Burnet was not a lawyer, and his understanding of equity conformed to the traditional notion captured in Selden's quip about the Chancellor's foot. Thus an educated editorial understanding of the orders requires a clear grasp of the degree of Burnet's divergence from contemporary English practice, and the English equity practice of the eighteenth century awaits the equivalent of James Oldham's monumental edition of *The Trial Notebooks of Mansfield*, 1992.

The history of equity in New York is highly contingent, but it was also, as Stanley Katz brilliantly pointed out in *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, **Perspectives in Am. Hist.** 5:257-84, 1971, part of a larger phenomenon in the North American portions of the British Empire. Tracing that history will contribute importantly to the history of Early American law, but the method and prerequisites combined to place that task outside the bounds of the current study.

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