

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 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

Of course no legal system is ever designed by a freehand sketch. Constraints on the imagination of those entrusted with or self-appointed to the responsibilities of government are a profound barrier to true invention in law, and these limits to creativity—particularly the intellectual inertia that leads

¹Magistrates of Gravesend to the Amsterdam Chamber of the Dutch West Indies Company, 1651, 2 NY COL DOCS 155–56.

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."

even the boldest of reformers to cleave in part to real or imagined traditions—are a critical part of any interpretation of the history of law. The early legal history of New York, however, shows these limitations more clearly than the received wisdom about the early legal development of other parts of British North America. The image of the “builders of the Bay Colony” arranging in 1636 and 1648 a new architectural beginning for law in America is a poor model for discussion of legal development in New York.³

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.

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.⁴

³The phrase is, of course, Samuel Eliot Morison’s. For the classic and most perceptive account of the early legal development of Massachusetts, see G.L. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* (1960), which is significantly subtitled “A Study in Tradition and Design.”

⁴For 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*

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 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,⁵ 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 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

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).

⁵The 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).

arrange for the settling of fifty families within their new dominions.⁶ 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;⁷ 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.⁸ 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 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.⁹

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.¹⁰ 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.

⁶See VAN RENSSELAER-BOWIER MANUSCRIPTS 157 (A. van Laer, trans. and ed. 1908).

⁷The 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).

⁸Such, 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).

⁹M. KAMMEN, COLONIAL NEW YORK: A HISTORY 37, 38, 58 (1975).

¹⁰The 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.

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 Director-General, Wilhelm Kieft, told him that there were eighteen languages spoken on Manhattan.¹¹

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.¹²

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 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

¹¹I. 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.

¹²M. KAMMEN, note 9, 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).

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.¹³ 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.¹⁴

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 were, as we shall see, to become part of the English practice in New York.¹⁵

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

¹³A. 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.

¹⁴The 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).

¹⁵The process of arbitration under the Dutch and its effect on the commercial law of colonial New York is more extensively discussed in Chapter 4.

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 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.¹⁶ 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.¹⁷ 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.¹⁸ But however much the terms of capitulation savored 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

¹⁶Nicolls' 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).

¹⁷"Articles of Capitulation," 2 NY COL DOCS 250–53.

¹⁸The 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.

sent representatives, but only 9 of the 34 delegates were Dutch,¹⁹ 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,²⁰ 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.²¹

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 Laws²² 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. 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 Hempsteed 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.²³

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 .ls20 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.²⁴

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

¹⁹For the names of the delegates, see 14 NY COL DOCS 565.

²⁰First Patent to the Duke of York, March 12 1664, 1 N.Y.COL LAWS 1, 2–3.

²¹The 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).

²²Duke of York’s Laws, March 1 1664/5, 1 NY COL LAWS 6–71.

²³Letter dated March 13 1664/5, Long Island Collection, East Hampton Library. It is reprinted in Pennypacker, note 21, at 22.

²⁴Duke’s Laws, 1 NY COL LAWS 7–8, 16–17.

that illuminate the difficulties under which Nicolls labored in settling law for New York. While the Duke's Laws continued to provide 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 .1s200 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."²⁵ 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 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

²⁵Letter from Nicolls to Lord Clarendon, July 30 1665, NYHS COLL 1869, at 77.

that such attendance was not infrequent; judicial officers attended from as far away as Nantucket and Delaware.²⁶

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 .1s20, 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.²⁷

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 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.²⁸ 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.²⁹ 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.³⁰ 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.³¹ It also established the close connection between the colony's highest court and

²⁶Proceedings 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.

²⁷See 1 NY COL LAWS 42, 91.

²⁸Michael 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).

²⁹1 NY COL LAWS 44, 80.

³⁰1 NY COL LAWS 93.

³¹Amendments 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.

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.³² 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.³³ 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 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.³⁴ 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

³²See "Relation of the March of the Governor of Canada," 3 NY COL DOCS 118–19.

³³3 NY COL DOCS 135; see 1 DOC HIST NY 60–70.

³⁴No 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).

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, permitting direct trade with the Netherlands, this privilege was paradoxically terminated with the conclusion of peace in 1668.³⁵ 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.³⁶ 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 up-river 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.³⁷ 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.³⁸

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 Hampton and Southampton were petitioning the Crown to be removed from the jurisdiction of the Duke's proprietary and returned to the

³⁵For 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.

³⁶The 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).

³⁷See 1 MINUTES OF THE EXECUTIVE COUNCIL: ADMINISTRATION OF FRANCIS LOVELACE, 1668–1673, at 56–58 (V. Paltsis, ed. 1910); 2 *id.* at 522–23.

³⁸The export restrictions were highly controversial and difficult to enforce. The sequence of events is described in R. RITCHIE, note 36, at 61–63.

control of Connecticut.³⁹ 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.⁴⁰ Andros would have none of this. With the firmness 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.⁴¹

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.⁴² The final extinction of Dutch claims to the colony produced a harder line on loyalty questions. For the first time the records reveal prosecu-

³⁹The 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.

⁴⁰Petition of Jamaica, December 1 1674, 24 NY COL MSS 25.

⁴¹For the official records of these events, see 14 NY COL DOCS 681-85.

⁴²See, 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.

tions for sedition against those who spread rumors of a Dutch return,⁴³ 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 privileges granted to them by Governour Nicolls."⁴⁴ These privileges they declared to be religious liberty, freedom from impressment, the continuance of Dutch inheritance rules, and 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.⁴⁵ 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."⁴⁶ 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.⁴⁷ 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."⁴⁸ 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.⁴⁹

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 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.

⁴³See, e.g., *Sheriff v. Cornelis the Fisher & Ogden*, 2/19/74-5, *id.* at 22.

⁴⁴*Id.* at 29.

⁴⁵See R. RITCHIE, note 36, at 69-70.

⁴⁶MAYOR'S COURT MINUTES, note 42, at 29.

⁴⁷Papers connected with the trial and sentence are in 24 NY COL MSS 172, 176K, 186a-k.

⁴⁸Werden to Andros, September 15 1675, 3 NY COL DOCS 232-34.

⁴⁹See 25 NY COL MSS 14-15.

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%.⁵⁰

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.⁵¹ The fiscal assistance of these and other 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,⁵² 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 li-

⁵⁰The 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, note 36, 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.

⁵¹The creation of the van Cortlandt and Philipsburgh manors is discussed in Chapter 3.

⁵²In 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, note 36, 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.

cense from the Governor, an order supplemented by a regulation requiring the river towns to bring their goods to the city for reshipment.⁵³ 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 shall see fit, which no doubt will tend to the preservation and benefit of the place."⁵⁴

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;⁵⁵ 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.⁵⁶ 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.⁵⁷

While Andros' response to the economic threat against the merchant lite 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 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.⁵⁸

The departure of Andros marked a transition in the constitutional development of the colony. The perennial fiscal difficulties worsened as the econ-

⁵³For 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).

⁵⁴The 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.

⁵⁵The 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).

⁵⁶The 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.

⁵⁷See 29 NY COL MSS 29; 2 ALBANY MINUTES, note 54, at 480–83.

⁵⁸For the events surrounding the recall of Andros, see R. RITCHIE, note 36, at 117–26.

omy 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 Penn,⁵⁹ 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

⁵⁹The 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 Animosity, 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.

responses to the Duke for his scrutiny.⁶⁰ Dongan was appointed to the governorship in August, selected to carry out the Duke's new policy. His instructions, sealed on January 27 1683, contained specific directions for the holding of elections;⁶¹ in August Dongan arrived in New York, and on September 13 writs of election issued.⁶²

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 Poynings'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.⁶³ The Attorney General's Jamaica opinion significantly 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.⁶⁴ The legal events of the summer

⁶⁰Letter 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.

⁶¹3 NY COL DOCS 311–35.

⁶²14 NY COL DOCS 770–71.

⁶³See 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] CSPC nos. 1322–23, 1346–47, 1405–06.

⁶⁴The 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

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.⁶⁵ The result of this first brief session was a collection of fifteen significant statutes, including the famous “Charter of Libertyes and Priviledges” and the first judiciary act for the colony.

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.⁶⁶ 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 General 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 Limitacons.”⁶⁷ 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

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, note 54, at 153–57 (session of August 29 1681).

⁶⁵Mathias 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 Agression: The English Conquest, the Charter of Liberties of 1683 and Leisler’s Rebellion in New York,” read at the American Historical Association meeting, 1973.

⁶⁶See 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).

⁶⁷1 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).

were repealed outright, to be replaced by an essentially equivalent system.⁶⁸ 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 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.⁶⁹ 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 dower rights of widows, and prohibition of "all Herriotts Ward Shippes Liveryes primer Seizins yeare day and Wast Escheats and forfeitures upon the death of parents and ancestors naturall unaturall casuall or Judicially, and that forever."⁷⁰

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,⁷¹ marked the first attempts by New York's inhabitants, convened in a legislature, to struc-

⁶⁸"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.

⁶⁹The 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.

⁷⁰1 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.

⁷¹"An Act to settle Courts of Justice," November 1 1683, 1 NY COL LAWS 125–128.

ture a system of law enforcement for the entire colony.⁷² 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 proper 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.⁷³ In addition to the county 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 .ls5 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 .ls100. 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.”⁷⁴

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

⁷²Dongan’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.

⁷³The 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 (1924). The editing, by Dixon Ryan Fox, regrettably leaves much to be desired.

⁷⁴1 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.

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 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 1684,⁷⁵ 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.⁷⁶ 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.”⁷⁷

The accession of James II and the creation of the Dominion of New England altered the environment in which the New Yorkers worked.⁷⁸ 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

⁷⁵According to at least one memorandum, the Duke had signed and sealed the charter by October. See [1680–84] CSPC no. 1885.

⁷⁶See D. LOVEJOY, note 16, at 1–20, 122–159.

⁷⁷3 NY COL DOCS 357.

⁷⁸The most satisfactory account of the creation of the Dominion remains V. BARNES, *THE DOMINION OF NEW ENGLAND* 5–70 (1923).

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.⁷⁹ 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, 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.⁸⁰ The events of Leisler's Rebel-

⁷⁹For 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.

⁸⁰It 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

lion 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;⁸¹ During his period of control Leisler confirmed the 1683 structure while replacing the judges appointed by Governor Dongan.⁸² 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 1691,⁸³ 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 months, until Leisler's execution on May 16.⁸⁴ 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

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*, at 55–126 (1953); R. RITCHIE, note 36, 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, note 16, at 251–364.

⁸¹An 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).

⁸²See 2 DOC HIST NY 30–36.

⁸³"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.

⁸⁴See D. LOVEJOY, note 16, at 336–40, 354–58.

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.⁸⁵ The pressing 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's 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.⁸⁶ Again, instructions prepared for one even-

85

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

86

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

tuality would be fatal in another; Slougher 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.

Slougher proceeded with admirable caution and address. In his opening speech to the newly-convened Assembly, on April 5 1691, Slougher 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."⁸⁷ 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, Slougher 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, entitled, *An Act for the Settlement of Courts of Justice* as a Form found very agreeable to the Constitution of this Government.⁸⁸

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 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.⁸⁹ 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*

Commission, dated January 4 1689/90, 3 NY COL DOCS 624-25.

⁸⁷1 J GEN ASSEM 3; 1 J LEGIS COUN 2.

⁸⁸1 J GEN ASSEM 4; 1 J LEGIS COUN 3.

⁸⁹See 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, note 81, 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.

*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.*⁹⁰

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 General's performance as a draftsman,⁹¹ 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 4.⁹² 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.⁹³ 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.⁹⁴ For these leaders of the anti-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 ma-

⁹⁰1 J GEN ASSEM 5.

⁹¹See 1 J GEN ASSEM 8.

⁹²The 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.

⁹³The 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, note 89, at 56-57.

⁹⁴See D. LOVEJOY, note 16, at 356-57.

chinery 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.⁹⁵

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 .ls20 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.⁹⁶ 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 Intentts & purposes whatsoever, as the Courts of King’s Bench, Comon Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have,”⁹⁷ for judgments in excess of .ls20. From the Supreme Court, appeal by error lay to the Governor and Council for judgments over .ls100, and from there to the King in Council for judgments over .ls300.⁹⁸ 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,”⁹⁹ 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

⁹⁵1 NY COL LAWS 227.

⁹⁶*Id.* at 228.

⁹⁷*Id.* at 229.

⁹⁸*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.

⁹⁹1 NY COL LAWS 229.

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,¹⁰⁰ which is 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.¹⁰¹ 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 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

¹⁰⁰There 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 Charter of Liberties and Privileges, in connection with the declaration of property law principles, which are discussed in Chapter 3, *infra*.

¹⁰¹This conclusion is well expressed and sensibly argued by Robert Ritchie. *See* R. RITCHIE, note 36, at 238.

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.