The Law of Settlement: Land Law and the Manors

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

At the same time, the principles evolved through the application of those rules escaped the initial bounds of land law, and the land law became a seedbed for the development of other areas of the law.[2] This generative aspect of the land law was particularly pronounced in British North America, where the physical settlement of the country was the first order of business, and the rules which regulated the process of physical settlement became the template for the rest of the legal order. In New York, these developments took place in the context of a land-holding pattern unique in colonial America—that of the manors of the Hudson River Valley. The manor lords of New York built and maintained the system of rules which governed the disposition and employment of their own great fortunes; the effect on the settlement of the law was entirely out of proportion to the number of people who inhabited the manors themselves.

From the original Dutch settlement of New Netherland, the prospect of apportioning the land upriver from New Amsterdam into large manorial estates was present in the minds of colonial managers. The Dutch West India Company's creation of the patroonship system, which offered substantial land grants and administrative and judicial autonomy to any stockholder prepared to plant fifty immigrant families in the new colony, was a response to initial disappointment with the profits of the wholly-owned commercial settlement as originally envisioned.[3] The articles of capitulation in 1664, seeking to secure

[1] 2 **W. Blackstone, Commentaries** *2 (1766).

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

[3] *See* Chapter **??**, *supra*.

the support of the Dutch inhabitants of New York, assured Dutch landholders that their titles to property and their inheritance customs would be respected by the new government. As in other respects, the articles functioned as a source of substantive law in the colony, pluralizing the system of land tenure, like other elements of doctrine, in the interests of peaceful administration. At the same time, however, that Governor Nicolls was protecting titles and inheritance for Dutch owners throughout the colony, he was also moving to reduce the autonomy of the remaining patroonship; in 1664 and 1665 he took several steps in this direction, including that of depriving the patroon of Rensselaerswyck of his right to maintain a local court.[4]

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

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

[4] *See* 7 **Annals of Albany** 97–98 (J. Munsell, ed. 1859); **S. Nissenson, The Patroon's Domain** 272 (1937). This step seems to have been undertaken primarily for strategic reasons. Albany was, as noted in Chapter **??**, the most crucial military possession of the British in North America, and the only location of a permanent garrison in the seventeenth century. Institutions of local government under even partial Dutch control were difficult to tolerate, and divided control, including the patroon, was intolerable. The actual disposition made by Nicolls was to convert the patroon's right to hold court into the right to nominate three members of a new consolidated court for Albany, Rensselaerswyck, and Schenectady. Since the Governor nominated the rest of the six-member court, this significantly reduced the possibility of Dutch obstruction of English measures at the strategic pivot of the colony. The outcome of Nicolls' measures was a long struggle between successive governors and the Van Rensselaers, ending only in 1685. *See* p. 4 & note 17, *infra*.

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

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

The early success of this system prompted its continuance by Governor Francis Lovelace, who succeeded Nicolls in August of 1667. Among Lovelace's grants under the independent patent concept was one to John Archer, for the settlement of Fordham, in 1671.[8] In 1673, Lovelace went one step further, and ordered the establishment of a local court in Archer's manor.[9] This court, effectively equivalent to a court baron, was not an integral part of Archer's patent; it was, rather, an additional privilege granted at his special request. Nonetheless, this granting of judicial rights associated with the ownership of land marked the beginning of the English experimentation with quasi-feudal jurisdictional privileges in New York, an experiment which gave rise to the colony's four greatest manors, and which continued down to the opening of the eighteenth century.

Whatever the enthusiasm felt by Nicolls and Lovelace for the use of independent manors as the basis of the colony's political structure, they found little favor in the mind of Edmund Andros. His land policy, which involved the creation of no manor or independent patent between 1674 and 1680, resulted in part from a shift in the proprietor's emphasis. The instructions issued to Andros demonstrated that the Duke and his advisers understood the difficulty of increasing the colony's population, and regarded measures for the encouragement of planter immigration as the primary order of business. Andros was told to heed "the rules and propositions given to planters by those of New England and Maryland" so that prospective colonists might have "equall encouragement to plant" in New York.[10] The proprietor was prepared for hard-fought

[6]Thomas Pell's Patent of the Manor of Pelham (October 1666) (Deed Book A, 240–43, Westchester County Clerk's Office, White Plains, N.Y.). Pelham was, in the language of the patent, an "intire infranchised Townshipp Manor and place of itself," and was thus freed of any revenue or administrative burden imposed by other towns.

[7]The functions of these manorial courts can be seen in **F. Maitland, Select Pleas in Manorial and Other Seignorial Courts** (Selden Soc., No. 2, 1888).

[8]The original patent is reprinted in 1 **J. Scharf, History of Westchester County, New York, Including Morrisania, King's Bridge, and West Farms** 159–60 (1886).

[9]"Order about Fordham," April 20 1673, 13 **NY Col Docs** 471; 30 * *NY Col Mss** 125; 31 *id*. 42.

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

competition over inhabitants; attempting to induce settlers elsewhere in North America to remove to New York was also to be official policy, as shown by instructions to "receive and give all incouragement to any inhabitants that will come with their famelyes and goods, of whatsoever kind or country they be, from any of the other plantacions, to dwell with you at New Yorke" in the 1670s.[11] In response, Andros devised and prepared to implement a headright system of settlement and land distribution in the province. In August 1675 he secured approval from his Council for an offer to any free European immigrant of sixty acres homestead, plus fifty acres per head for family members and an equal provision for servants after the expiration of their indentures.[12] Although this promotional proposal was disseminated in England and Scotland, it failed to produce the flood of immigrants that the Duke and his Governor desired.[13]

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

While Andros's insubordinate approach to the Rensselaerswyck issue may have stemmed in part from the tension between his administration and the less Anglicized provincial Dutch leadership, along with the particular strategic and political problems necessarily accompanying the retrocession of Albany, it demonstrates as well the Governor's general distrust of the previous system for the hierarchical distribution of power through manorial grants. This distrust remained a fixed element of policy through the end of Andros's first Gov-

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

[12] *See* 13 **NY Col Docs** 485.

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

[14] 3 **NY Col Docs** 224–25.

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

[16] 3 **NY Col Docs** 269–70.

ernorship; the resumption of manorial growth required a change in personnel, and in the objectives at which future governors would aim.

It was under the administrations of Thomas Dongan and Benjamin Fletcher, from 1682 through 1698, interrupted by the turmoil of Leisler's Rebellion, that Nicolls' and Lovelace's early measures blossomed. In choosing to create a General Assembly in the colony in 1683, the Duke by no means abandoned the policy of repressing "democratical" sentiment, particularly from the Long Island towns. From the proprietor's point of view, the creation of the Assembly only shifted the venue of the dispute; after 1683 Dongan again sought a counterweight to localist agitation in the stability of the manorial system. In 1685 he confirmed the Van Rensselaer holdings, and while the new patent for Rensselaerswyck deprived the patroonship of its claim to Albany,[17] it did grant an even larger tract than the original Dutch provision, over one million acres in extent, along with a full set of feudal jurisdictional privileges, including the right to hold both court leet and court baron.[18] In 1686 Dongan created Livingston Manor, raising to the dignity of a New York princeling the colony's adroitly self-dealing former Secretary, Robert Livingston,[19] and in 1687 he completed the process begun earlier by Nicolls when he extended full manorial rights to Thomas Pell. In the same period, the governor gave independent patents of the older more limited sort to Frederick Philipse and Stephanus Van Cortlandt; under Fletcher's administration these patents would become the roots of Philipsburgh and Van Cortlandt Manors, the last two of the four great New York manorial estates.[20] Governor Dongan's grants were made on the most favorable terms. Along with the greatly expanded privileges of the new manor lords went only the most minuscule costs; the quitrents reserved in the patents, for instance, were but a fraction of those which the law required.[21] No doubt

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

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

[19]The story of Livingston's rise, a testament to the eternal utility of a bilingual education, is well told in **L.H. Leder, Robert Livingston, 1654–1728, and the Politics of Colonial New York** 3–53 (1961).

[20]Philipse and Van Cortlandt could in all probability have had full manorial grants for the asking; they were among Dongan's most important supporters. Sung Bok Kim, speculates that neither proprietor wanted a manorial patent at that early date—both were still in the process of filing claims for lands adjacent to the areas they already held. See **S.B. Kim, Landlord and Tenant in Colonial New York** 28–71 (1978).

[21]Quitrents were those rents permanently reserved on freehold land in lieu of other services to which the feudal law had typically given rise. In New York, the Duke's Laws established a fixed

Dongan expected that the newly-created manors would offer him strong support in political struggles with the General Assembly.

The Assembly's first session, in the autumn of 1683, produced a range of legislation marking the consensus developed during two decades of direct proprietorial governance. The broad constitutional provisions of the Charter of Libertyes and Priviledges, along with the creation of counties and the passage of the 1683 judiciary act, have already been discussed. The charter also contained provisions of substantive law—provisions taken seriously enough by the delegates to the first Assembly to have been entrenched in the New Yorkers' first attempt at an organic statute for the colony. Almost all of these provisions of substantive law raised to quasi-constitutional status in the charter concerned the law of real property. The legislature's intention in the exertion of control over the substantive content of the land law reveals much about the position of affairs in 1683.

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

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quitrent of 2*s*. 6*d*. per hundred acres annually, *see* 1 **NY Col Laws** 81, though these were rarely if ever collected. Livingston's 160,000 acres were charged 28*s*. per year; Rensselaerswyck's quitrent, previously fixed at 150 bushels of wheat (about 40*s*.), was reduced to one-third of its old value. It has been argued that the desire for quitrent revenues was one motivation for the creation of the manors. *See* Goebel, *Some Legal and Political Aspects of the Manors in New York* 16–17 (1928). This interpretation seems erroneous in light of the low nominal rates assessed and the absence of any prospects for complete enforcement. Rather, the low level of the quitrents confirms that the managerial expectations were of political rather than fiscal benefit.

[22] 1 **NY Col Laws** 114.

[23] *See* Chapter **??**, *supra*.

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

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

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

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

> grants Deeds Mortgages or other conveyances be entered & recorded in the Register of the County wherein such lands or Tenements do lye within six months after the dayes of their respective dates. Provided always ... Thatt none of the aforesaid grants ... shall be entered or recorded, untill the party or partys who did Seale and deliver the same shall make acknowledgment thereof before some

[24] 1 **NY Col Laws** 115.

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

> one of his matues Justices of the Peace, or thatt the same bee by Sufficient Witnesses proved . . . and Certificates thereof Entered on the backside of the said Deeds.[26]

Local records were to be transmitted annually to New York City for inclusion in the central land records of the province. In addition to providing a powerful source of fees for officialdom, the registration act aimed to make the ascertainment of title in the generality of cases a problem of search rather than litigation; the effect on the law was to reshape the conditions of use of traditional English legal technology for the trying of land title. The essence of registration, however, was an adaptation to conditions of settlement. The common law's historic disdain for land registration and preference for the magic of descent without record, depended upon the community's informal recording system—the stable population of inhabitants conscious of who owned what. Behind the dignity and ponderous tread of the medieval writ of right there stood the ultimately commonplace figures of those members of the grand assize whose knowledge of the history of the dispute was practically decisive. But colonial conditions are conditions of settlement—the population of an underpopulated landscape and the equivalent appearance of legal relations in a location with no usable legal past. Recording is the technology of the volatility of settlement, as information which in settled communities is dispersed throughout the population must be given a central location and a durable form.[27]

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

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

Intended as a system for the control of the delicate process of acquisition of Indian land (and one which again strengthened the patronage position of the

[26] Act of November 3 1683, 1 **NY Col Laws** 141–42.

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

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

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

The executive pattern of seeking conservative political structures through the creation of manorial rights continued in the new legislatively-created environment, in fact at a heightened pace, in the aftermath of the Glorious Revolution and Leisler's Rebellion. Under the governorship of Benjamin Fletcher, from 1692 to 1698, prominent anti-Leislerians, including Philipse and Van Cortlandt, had their earlier independent patents converted into full-scale manorial grants. Although Fletcher's policies were consistent with the practices of earlier administrations, the scale on which they were pursued and the character of the beneficiaries, most of whom were members of his Council or his collaborators in funding the colony's participation in King William's War, made accusations of corruption inevitable.[30] Strong as the position of the manor lords appeared in the last decade of the century, there were nonetheless formidable opponents of the system of property rights which had grown up in New York; in 1698 one of those opponents was to assume the governorship.

The advent of Richard Coote, Earl of Bellomont, in April 1698 marked a turning-point in the development of the land law in New York. For the first time, the colony's governor actively opposed the principles of land tenure which had come to play such an important role in provincial politics. Like his predecessors Bellomont was concerned with increasing the population and prosperity of New York; unlike them, however, the new governor came to see

[29] Approaching Indian, particularly Mohawk and other Iroquois, authorities with proposals for land purchase was a delicate and specialized matter, in which influence with the tribes was of the greatest value. These services were expensive in the largest sense. But fees alone would have precluded individual attempts to purchase in the Indian market. In the latter part of the eighteenth century, for which contemporary estimates of expenses are available, fees alone seem to have run at .ls15 to .ls25 sterling per thousand acres. *See* Goldsbrow Banyar to William Johnson, May 9 1754, 1 **William Johnson Papers** 401–02; Goldsbrow Banyar, "Fees on Grants of Land, January 27 1772, PRO CO 1103/5/211–12;"Information to Farmer and Mechanics intending to remove from Europe to America," William Smith Papers, Box 3, NYPL (apparently written sometime during the 1760s). These fees are of roughly the same magnitude as purchase prices in the same period.

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

the manors themselves as a major obstacle. Bellomont's original concern was, unsurprisingly, the overheated partisan atmosphere of provincial politics. The anti-Leislerian faction in New York had become closely identified with the Tory administration at home; the advent of Whig government not only brought Bellomont to the governorship, but also provided an appropriate context for combination between the Governor and Leislerians seeking once again to punish their opposition in the colony. The favoritism and corruption of Fletcher's approach to land policy provided the foothold for Leislerian attacks, and the best opportunity were his grants in Indian country. In December 1697, long after the news of Bellomont's appointment, Fletcher granted to a combination of Albany anti-Leislerians strips fifty miles long and two miles wide on either bank of the Mohawk River northwest of Albany.[31] To the Albany *handlaers*, necessarily concerned about any developments that might adversely affect their relations with the Iroquois, the Mohawk patent was an outrage. Even before Bellomont's arrival the burgers of Albany were in full cry against the grant, and Bellomont was readily enlisted in the struggle.

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

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

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

[32] *See* **L. Leder**, note 19, at 129–47.

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

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

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

Measures of change in the land law system in the first decade of the century further encouraged the growth of large-scale land development, disfavoring the path toward individual freehold ownership. The first was the quitrent system. A quitrent of 2*s*. 6*d*. sterling per 100 acres was imposed under the first Andros administration, but lapsed after 1691, allowing the grants made by Fletcher to carry trivial quitrents, on a scale similar to Rensselaerswyck, where the patroon paid an annual quitrent of fifty bushels of wheat on his entire domain. When Robert Hunter was appointed governor in 1709, however, the quitrent was revived at its old rate, and remained in force thereafter.[37] The quitrent burden was substantial on any sizeable tract of undeveloped, unproductive land; only those possessing opportunities and resources for rapid development would find the investment in such land competitive over the medium term with investment in mercantile ventures.

The quitrent policy after 1709 met the need to raise revenue locally to fund governmental operation. At the same time, it was also intended to reduce the size of unproductive holdings. Encouragement of smaller holdings, or at least discouragement of the immense jobbery that marked the Dongan and Fletcher administrations, led to repeated instructions to governors throughout the first half of the eighteenth century limiting the size of land grants to 2,000 (subsequently 1,000) acres per patentee.[38] This policy objective was much harder to achieve. The administrative limitations were subverted by the use of large numbers of nominees, whose names were attached to papers solely as a fic-

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

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

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

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

tional contrivance to evade the rules. Even where no dummy patentees were included, numerous partners would be necessary to undertake the investments required for large-scale purchasing. The quitrent burden increased the attractiveness of partnerships, particularly in deals involving land that lay outside the domain of current settlement, where a substantial period of unproductive waiting must pass before development. Technical features of the land law, directed at reducing the number of small holdings, encouraged instead the formation of partnerships, which paralleled—often both in structure and membership—partnerships for commercial investment. The further technical result, since the patentees became joint tenants of the entire purchase, was vast domains that could only be developed under the rules applicable to English joint tenancies, including the need for cumbersome procedures to partition the estate in order to realize on the investment. For this technical problem a technical solution was necessary, and in 1708 the Assembly fundamentally altered the rules regarding partition of joint tenancies. A majority of the joint tenants resident in the colony could force a partition; after a notice period the property would be surveyed and divided into as many lots as there were joint tenants. These would then be parcelled out by a lottery witnessed by "three Indifferent persons."[39] By these and other means the system of large patent holdings continued to enjoy significant technical advantages over competing alternatives, and the system of lordship continued its territorial growth, reciprocally settling its relationship to technical legal doctrine.

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

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

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

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

rights they were publicly struggling with Bellomont to preserve. The answer lies in the way in which the manor system had come to operate during the last decades of the seventeenth century.

In the first place, the jurisdictional independence of the manors had come under considerable practical attack by the end of the 1680s. The statutes of 1691 established counties and provided for their government through a court of general sessions comprised of the justices of the peace for the individual towns, and these county governments could not afford to forego the tax revenue derivable from the manors lying within their jurisdiction. Rensselaerswyck and the northern part of Livingston Manor amounted to nearly two-thirds of Albany County in the 1690's, while Van Cortlandt and Philipsburgh together comprised roughly half of Westchester. The manors, however, refused to appoint the assessors and collectors required for the enforcement of county revenue measures, and in 1691 the legislature empowered the county justices of the peace to appoint such officials directly, a clause which was repeated in revenue acts year after year until 1711.[42] Kiliaen Van Rensselaer was particularly obstinate in denying county jurisdiction over Rensselaerswyck. In 1705 the legislature passed an act specifically detailing the provisions for administrative offices within the manor. It required the manor's freeholders to elect a supervisor, treasurer, assessor and collector, all of whom would be responsible for the same functions performed by township officials elsewhere in Albany County. A year later, excoriating "all shifts and tricks" used by Van Rensselaer to "evade the force of . . . any former Act," the legislature declared that Rensselaerswyck "can by no reasonable construction be intended to be Divided from the said County."[43]

Competition from other jurisdictions reduced the vigor of the purely judicial as well as the administrative side of the manorial right. The records of the business of the manorial courts are at all times extremely scant,[44] but the period after the legislature reorganized the county judiciary in 1691 is devoid of indications of the activities of any manor court.[45] Although the proprietors who did not dissolve their manorial jurisdictions at the opening of the eighteenth century continued to reserve the right to hold their local courts,[46] contempo-

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

[43]"An Act for defraying the Comon & necessary Charge in the Mannor of Renslaerwick in the County of Albany," August 4 1705, 1 **NY Col Laws** 584; "An Act for the better raising, Levying and defraying ye necessary Charge of the Mannor of Renslaerwick in the County of Albany," October 21 1706, 1 **NY Col Laws** 603–04.

[44]The absence of records of local jurisdiction is in part explained by the fact that the court baron was not a court of record. If courts baron were held in the early period, their traces would likely be of the indirect sort, primarily taking the form of appeals to superior jurisdictions. Julius Goebel reports one such appeal from the court of Fordham Manor in 1676. Goebel, *supra* note 21, at 19.

[45]*Id.*; **S. Kim**, *supra* note 20, at 104.

[46]See, for example, a printed lease for the sloopmaster Andrew Gardner, holding land in Livingston Manor in 1708, which states that the lessee "shall be subject and obedient to the Laws rules and jurisdiction which is or shall be hereafter made and Established in and by a court Leet and Court baron when the same shall be Erected . . . within the said Manor." Lease dated March 25 1708, Livingston-Redmond MSS, (microfilm ed., Franklin Delano Roosevelt Library, Hyde Park, N.Y.), Roll 3.

rary records show that as early as the mid–1680's tenurial issues of the sort which were the staple business of the court baron were being decided by the provincial judiciary at the proprietors' request.[47] Because the form of tenure known as copyhold never developed in New York,[48] the continuance of courts baron was not essential to the land titles of the manors' inhabitants; the provincial courts of general jurisdiction were soon adequate to those forms of action by which land title was tried and possession regulated.

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

To begin with, the manor lord hoping to attract leaseholders had one significant advantage over the patenting government or private vendor of a freehold estate: He could provide the sorts of material assistance to struggling newcomers that could make the difference between success and failure. Manor lords sometimes made direct payments to destitute potential tenants who seemed good risks,[49] while the provision of an initial rent-free period was common, if not standard, practice.[50] In addition, the landlord might offer first-year provisions, farming equipment, and livestock (hogs, sheep, cows or horses) to the prospective tenant, under terms which called for the tenant to pay the land-

[47]The earliest record known to me is of an ejectment action brought by Kiliaen Van Rensselaer against one of his tenants in the court of oyer and terminer in 1686. *See* Van Rensselaer v. Tewnison, May 16 1686, 34 **NY Col Mss** 5.

[48]Copyhold was so called because the tenant held his estate by copy of court roll—that is, as a result of the entry of the grant transaction or adjudication on the records of the lord's court. Although technically an unfree tenure, copyhold received substantial special protections from English courts in the seventeenth and eighteenth centuries. *See* 2 **W. Blackstone, Commentaries** *95–98 (1766).

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

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

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

In responding to this desire, the proprietors of Rensselaerswyck pioneered, beginning in the mid–1680's, the "durable" or "perpetual" lease. This lease conveyed a permanent, inheritable interest in the land, reserving only the right to a perpetual rent. Although drawn to follow Dutch forms,[54] the Rensselaerswyck lease conveyed an estate close to that known as "fee farm" under the common law,[55] and was so treated by the courts. The standard Rensselaerswyck lease before 1680 had been for a term of six years,[56] and it seems likely that difficulties experienced by the patroon in competing for tenants precipitated the move to the perpetual lease.ˆ[Sung Bok Kim adduces, in addition to this reason for the longer lease terms at the end of the seventeenth century, the reason that proprietors, newly granted representation in the legislature, wanted to create estates sufficient to enfranchise their tenants. **S. Kim**, *supra*

[51]With respect to livestock, landlords frequently used the so-called half-increase system, by which the tenant and the landlord split the increase in the stock. *See* **S. Nissenson**, *supra* note 4, at 70–71; 3 **Early Records of the City and County of Albany and Colony of Rensselaerswyck** 472–73, 488–90, 507–08, 558–59 (J. Pearson, ed. 1916). This system was apparently extremely popular with tenants. *See New York Weekly Journal*, July 15 1734 (advertisement for tenants).

[52]Philip Livingston, for example, considered "a saw mill ... the first thing without which we can't Pretend to setle." Livingston to Jacob Wendell, October 19 1739, Livingston Papers, *supra* note 50.

[53]In the 1780's Alexander Hamilton served as counsel in a dispute between Robert Livingston, Jr., third lord of the manor, and Chancellor Robert R. Livingston, of Clermont, arising from the Chancellor's construction of a grist mill for his tenants' benefit on Roeloff Jansens Kill, to which the third lord believed himself entitled under his grandfather's will. *See* **3 J. Goebel & J. Smith, The Law Practice of Alexander Hamilton** 8–50 (1980).

[54]See **S. Nissenson**, *supra* note 4, at 58–61.

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

[56]*Id*. at 44.

note 20, at 176; *id*. at 117 (applied to other manors lords as well as the Van Rensselaers). The difficulty is that there was no requirement to create any specific number of voters; the grants of representation were not dependent upon population. The manor lords could have held the seats as pocket boroughs had they wanted to.

Indeed, it appears that Kim mistakes the cause for the effect, insofar as it was only after leases for two concurrent lives had begun to appear that the legislature made it clear that "whereas Doubts have Arisen whether a person haveing an Estate of ffreehold in possession for his Life, or for the Life of his Wife, should be allowed to vote," such estates were of sufficient dignity to confer the franchise. Act of October 18 1701, 1 **NY Col Laws** 452, 453. The proprietors bargained for terms with tenants, and the legislature then made a *post hoc* decision about suffrage.] In this instance a combination of Dutch with English technology, available for adoption primarily as a consequence of the hybrid ethnicity and experience of the lords of Rensselaerswyck, effectuated the necessary variations in rules to meet the demographic conditions of settlement. Elsewhere in the colony, the proprietors were less sanguine in their sentiments about durable leasing arrangements. In Livingston Manor, for example, it would appear that the durable lease was tried at first in combination with tenancies-at-will. By 1718, Robert Livingston appears to have settled on a lease for two concurrent lives (those of the lessee and his wife) as the best arrangement; of the leases granted in the manor between 1718 and the revolution, roughly three-quarters were of this type.[57] Van Cortlandt Manor displayed another, less consistent, variety of terms. Since under the will of Stephanus Van Cortlandt the estate was destined for division on the death of his widow,[58] the pattern which Gertrude Van Cortlandt followed until her own demise in 1724 was to avoid making leases which would bind the heirs. Occasionally she offered lands on short terms if she found a tenant willing to take an abbreviated lease.[59] After the partition of the manor, which took place between 1732 and 1734, great portions of the property were sold off, and the varying needs of those descendants who retained property dictated a profusion of terms.[60] Also in contrast to the practices of the northern manors, Frederick Philipse and the later proprietors of Philipsburgh eschewed the durable or extended lease. Instead, Philipse set the pattern of offering parole leases, which amounted to tenancies-at-will.[61] Despite the apparently poor terms, Philips-

[57]See **S. Kim**, *supra* note 20, at 177.

[58]*See* p. 12, *supra*.

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

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

[61]Considerable testimony as to Philipsburgh leasing practices, by among others Frederick Philipse III, James De Lancey, and John Tabor Kempe, appears in Evidence on Memorial of Fred Philips, PRO AO 12/19, 385–405. The use of oral leases recognized by the landlord and other tenants was functionally equivalent to copyhold in the period before its recognition in the common

burgh Manor was settled more rapidly than the other great manors, at least in part because the proprietors allowed extensive customary protection to grow up around the tenancy-at-will, so that Philipsburgh tenants may well have had the sort of rights traditionally associated with copyhold tenure.[62] In addition to the central question of security of tenure, two other elements of the law of landlord and tenant played a major role in the bargaining between parties: the tenant's right to sell the improvements made to the property, and the nature of the landlord's remedies for arrears of rent. The two issues were related, and their interplay represented another way in which private ordering eclipsed the public aspects of eighteenth-century land law.

Perhaps the most important amelioration of the disadvantages of leaseholding, once security of tenure was achieved, was the tenant's right to acquire the value of such improvements as he made to the property. Improving the land by cultivating it and building on it created equity; through the sale of his lease the tenant wanted to be able to realize that equity. The landlord too was interested in the improvement of the property, and not infrequently required the tenant to undertake certain improvements. Leases generally mandated that the tenant construct a house; Robert Livingston, Jr., third lord of the manor, required that new tenants construct a barn within ten years.[63] Additional conditions might be placed on the use of the land; Livingston contracted with one tenant to sow twenty-four bushels of winter wheat each year.[64] Whether the improvements were mandated by the landlord or independently undertaken by the tenant, New York law gave the landlord a right to a "quarter-sale," or a proportion of the proceeds from the sale of the lease.[65] The quarter-sale provision was sometimes replaced by a requirement that a tenant wishing to sell his lease give the landlord a right of first refusal, at "the lowest price."[66] The landlord's right of first refusal served several purposes: it gave him some control over the reliability of the entering tenant, but beyond that it gave the landlord a last chance to recoup any outstanding arrears of rent, and even, perhaps, to ensure that the incoming tenant was not part of a collusive assault on the landlord's le-

law courts. Both copyhold of that era and the parole tenancy-at-will lay outside the possessory protections of the common law: the tenant had no legal recourse against the landlord if he recovered possession in a peaceable fashion.

[62] **S. Kim**, *supra* note 20, at 235 (comparative rate of growth of manors); Evidence on Memorial of Fred Philips, *supra* note 61, at 393–94, 397–98, 401–05 (comparisons of Philipsburgh practices to "the nature of copyhold").

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

[64] *Id*.

[65] The quarter-sale reservation was known to the English law, but it would, in the context of a perpetual lease such as that offered by the Van Rensselaers, have been a restraint on alienation in violation of the medieval statute *Quia Emptores*, 18 Edw.I (1290). Whether *Quia Emptores* was applicable in New York remained a highly technical and vexing question through the early national period. *See* Van Rensselaer v. Hayes, 19 N.Y. 68 (1859) (holding statute did apply in colonial New York).

[66] This was certainly true in the Claverack portion of Rensselaerswyck. *See* 5 Deed Book Series 104, 424; 6 *id*. 423–25; 8 *id*. 334, Albany Co. Clerk's Office. For evidence that the first refusal right was also in use in Livingston Manor, see **S. Kim**, *supra* note 20, at 222 n.206.

gal claim to his boundaries, always a matter of concern in an era of constant challenges to land titles.[67]

Where quarter-sale reservations were employed, the proportion of the sale price taken by the landlord varied considerably. The Livingston practice, followed by several other proprietors, was to require payment of one third of the first sale of improvements on any particular plot; other landlords took one quarter of the sale price.[68] On subsequent sales of leases for the same property, landlords generally, though not always, took a reduced proportion of the sale price.[69] Along with his quarter-sale interest in the equity created by improvements, the landlord had a security interest as well. Landlords quickly came to view tenants' improvements as security for payment of rent, and where tenants failed to meet rent obligations the landlord, long before any question of quarter-sale arose, had available the power of distraint—he could enter the land and seize improvements to the value of the rent due.[70] Despite the presence of this remedy, most of the proprietors had great difficulty collecting their rents,[71] and were nevertheless reluctant to invoke their legal remedies.[72] A landlord who had a reputation for harsh collection policies might well find himself unable to get tenants.[73] Thus, the development of the land law in the first half of the eighteenth century followed a pattern in which concern for private ordering, for individual agreements between tenants and landlords, displaced the earlier concern for public ordering, for the constitutional, jurisdictional and political consequences of land tenure, which had been dominant in the seventeenth century.

The primary importance of private ordering in the development of rules for the use and occupation of real property in New York after 1700 by no means excluded land disputes from the legal system. In New York, as in everywhere else in British North America in the eighteenth century, only basic actions for the collection of debt were more common than lawsuits over land title. Of

[67]Cadwallader Colden, for example, hoped through the use of his right of consent to lease sales to prevent collusion between tenants and title challengers. Colden to James Alexander, dated on receipt Oct. 20, 1740, James Alexander Papers, Box 47, NYHS.

[68]See **S. Kim**, *supra* note 20, at 226–27.

[69]Robert R. Livingston of Clermont and Frederick Philipse III, for example, took one fifth and one sixth of such sales, respectively. *Id*. at 227. Not all landlords reserved quarter-sale rights; the Beekmans in Cortlandt began only in 1775 to require a one-tenth share. *See* Lease between Henry & Gertrude Beekman and Abiel Fuller, Mar. 16, 1775, Van Cortlandt Papers, V2208, Sleepy Hollow Restorations Library.

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

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

[72]*Id*. at 217–18.

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

the 42 cases in which James Duane was retained between 1760 and 1772, for example, for which both Duane's files and the court record are available, 15 were cases in ejectment; all but half a dozen of the remainder were actions for debt on a bond or assumpsit.[74] The records of other practitioners tell a similar story.[75]

As in England, most of the actions brought for the purpose of resolving a controversy over land ownership were actions in ejectment. Ejectment, which permitted the litigation of freehold title, developed by a series of ruses out of the cause of action *ejectio firmae*, fashioned in the fourteenth and fifteenth centuries for the protection of termors, who were unable to make productive use of the older real actions. *Ejectio firmae* gave the lessee a version of trespass to be used to recover the remaining portion of his term when he had been forced out by someone other than his lessor. The speed and simplicity desirable when the lessee—whose term might easily expire during the lengthy process of the real actions—sought to recover possession represented an irresistible attraction to owners, and by the opening of the seventeenth century *ejectio firmae* had become ejectment, a fictitious lawsuit in which the demandant claimed to have made a lease to one Doe, who then entered on the claimed property pursuant to the lease and was there ejected by one Roe, said to be an agent of the tenant. The result, once the current occupant had been notified of the proceedings, was a simple and relatively expedient way of reaching the issue whether plaintiff had been empowered to make a valid lease, that is, whether he rather than the defendant was entitled to possession of the property at issue.[76] The encrusted layers of make-believe which clothed every use of ejectment to establish land ownership are rightly described as "an illustration of what Maitland called the 'Englishry of English law'," [77] but they were just as acceptable in the increasingly Anglicized legal community of New York, where the Does, the Jacksons, and the Fairclaims entered at the demise of the real party in interest and were evicted with the same bloodless vigor that Roe, Styles, and Shamtitle showed at home.

The difference was that, in the context of a working system of land registration, litigation by ejectment was neither necessary nor productive for the resolution of disputes that could be solved by reference to the chain of past conveyances. In New York ejectment did the work of framing boundary disputes,

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

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

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

[77]**S.F.C. Milsom**, note 2, at 162.

reconciling conflicting grants whose patents all too often referred ambiguously to landmarks rather than courses and distances, or which showed the consequences of less than painstaking survey work. Patentees had always an interest, at the time of issuance, in the least definite possible description, for land that had to be paid for was more expensive than land that could be snuck into one's possession under cover of an indefinite grant. But at the point of contact between two such grants, a heavy precipitation of lengthy litigation could be expected. It was in such circumstances, for example, that James Duane represented patentees of land in Albany and Ulster counties whose resistance to claims from neighboring patentees, brought in a single ejectment action, took fourteen years to resolve. Defendants' costs for the last four years alone, from April 1765 to November 1768, came to more than .ls180.[78] Where competing claims arose from grants under both New York and neighboring colony patents, ejectment became the vehicle for the judicial attempt to accomplish what intercolonial diplomacy could not. At the boundary between Westchester County and Connecticut (and, after mid-century, at the Taconic-Berkshire border between New York and Massachusetts) Doe and Roe conducted their puppet war for speculators who claimed under titles from two different colony governments.[79] Increasing appearance of such cases in the files of practitioners in the 1750s and '60s provides an ominous indication of new stresses on the land law system of New York.

When, in 1700, Stephanus Van Cortlandt and Frederick Philipse voluntarily extinguished the legal incidents of their lordships, they were responding to forces which were only to grow stronger during the eighteenth century. The most important expression of those forces was the constant competition for tenants, which led the great proprietors to keep themselves constantly informed of the terms and conditions being offered by their neighboring competitors. Robert R. Livingston of Clermont was voicing the common practice when he wrote to his son in 1762 that "I have lett out" several properties "on the same terms the Patroons … lett his as also Lydius."[80] By mid-century the practice, though not the theory, of the land law was based on the contractual premises embodied in such documents as leases, and not on the status premises embodied in patents or quasi-feudal grants. Land had become commoditized; landlord and tenant bargained for rules set in a competitive market.@facstuff(In New York plentiful land and scarce labor created a new legal regime, very different from the one established under English conditions. Yet, by and large, the rules were not significantly altered. In one sense, the conciliation of realities and rules was successful. But the doctrinal settlement also created po-

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

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

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

tential zones of instability, where rules sharply diverged from the actualities. Events in the third quarter of the eighteenth century put enormous pressure on the surrounding circumstances of the land law system, intensifying border conflicts and altering the strategic and economic context of life in the Hudson River Valley. Those pressures forced rule changes, not all of which the legal system was able to accommodate.)

In the period between 1750 and the beginning of the revolution the basic competition for tenants intensified, though altered in fundamental character by two new elements in the situation of the large proprietors—agitation at the eastern boundaries of New York, particularly with Massachusetts, and renewed executive opposition to the manorial land system within the province, primarily attributable to the boundless energy and limitless hostility of Cadwallader Colden. The manor lords' attempts to retain the loyalty of their tenants under these new and more dangerous circumstances substantially affected land practices on the ground; at the same time, the pressures placed upon the provincial land system overflowed into the courts—precipitating changes in the system of land litigation—and beyond, resulting in the outbreaks of violence in the Hudson River Valley between 1751 and 1757, and again in the "Great Rebellion" of 1766.[81] The doctrinal consequences of this extraordinary tumult were comparatively slight, and it is this relative inflexibility of the legal system itself, behaving with comparative autonomy in a period of enormous social stress, which may be taken to indicate the completion of the process of legal settlement, at least as regards the land law itself.

After 1750, boundary disputes between the manor proprietors and Massachusetts land developers eager for tenants to open up the Berkshires caused violent disruptions in the pattern of life in the northern manors. The difficulties arose, as so often, from the original ambiguities in the royal patents establish-

[81]Some historians have seen in the pattern of unrest in the 1750s and 1760s a revolt by oppressed tenants who were attempting to overthrow a regime of property law which legitimated class robbery. *See, e.g.*, **I. Mark, Agrarian Conflicts in Colonial New York 1711–1775**, at 50–84, 115–63 (1940). This interpretation has been subjected to searching, and largely successful, criticism by Sung Bok Kim, who views the disturbances as resulting from the assaults by Massachusetts on the land titles of New York proprietors, which eroded the loyalty of some tenants and threatened the stability of other tenants' holdings. *See* **S. Kim**, *supra* note 20, at 281–415. Kim, whose studies of the economics of tenancy lead him also to the conclusion that the tenure system was "capitalistic" rather than "feudal" in the eighteenth century, concludes that the results of the system were "benign." *Id*. at 280. Although Kim's account of the roots of agrarian violence in mid-century New York is ultimately convincing, his insistence on the benignity of the land law seems misguided. The documents associated with the disturbances in the Hudson River Valley show the inescapable evidences of anti-landlord feeling on the manors during this period. *See, e.g.*, Mark & Handlin, ₋Land Cases in Colonial New York 1765–1767: ₋The King v. William Prendergast, 19 **N.Y.U.L. Quarterly R.** 165, 169–94 (1942) (records of treason trial succeeding "Great Rebellion" of 1766). To say that a status, or public-law, conception of property came to be replaced by a private, contractual conception of property in the course of the eighteenth century is not to suggest that the resulting regime was without significant inequities. Correctly ascertaining the relative importance of class antagonism and competition between rival land claimants as causes of agrarian unrest in colonial New York is a delicate task for which our knowledge is still too incomplete; it should be clear that conclusions as to the development of the land law do not in any sense prejudge the outcome of that analysis.

ing both colonies. The Massachusetts Bay charters, both of 1629 and 1691, left the western boundary of the domain unsettled; the intervening grant of New York, whose eastern boundary was confirmed in 1674 and 1676 as lying at the Connecticut River, had no effect on the pretensions of the Bay Colony government, which continued to act as though its charter granted it dominion to the Pacific Ocean.[82] The Connecticut River settlements—Springfield, Northampton, Deerfield, and Northfield—represented the practical westward boundary of the Bay Colony until the conclusion of Queen Anne's war, but after 1715 the Berkshire hills began to seem attractive territory, and the area lying between the Housatonic and the Hudson became an inevitable focal point of intercolonial controversy. In 1705, Governor Cornbury awarded Peter Schuyler and eight other patentees the "Westen Hook," a tract reaching from the Housatonic to the eastern boundary of Claverack (the lower manor of Rensselaerswyck), establishing the eastern boundary of New York settlement.[83] In 1722, responding to petitions for land grants in the area from Springfield, Westfield, Hadley, and Hatfield, the Massachusetts General Court established the townships of Upper Housatonic (Stockbridge) and Lower Housatonic (Sheffield), ordering a settling committee to plant 120 families in each.[84] From this point on, jurisdictional conflict in the area was inevitable.

Settlement in these and other new Massachusetts towns was impeded by war from 1744 to 1748, but by December 1749 the Massachusetts council was urging the rapid settlement of the lands between Stockbridge and Pontoosuck (Pittsfield), along with the area between Sheffield and the Taconic hills, further delay being "prejudicial to the Interest of the Province."[85] Philip Livingston, who had been attempting throughout the 1740s to make interest with land speculators in western Massachusetts, in the hope that by purchasing land within the Bay Colony jurisdiction he could protect the flank of his own holdings in the disputed area,[86] died in 1749, leaving to his son Robert, Jr. what was soon to be the most hotly contested real estate in New York (or perhaps it was in Massachusetts). Refusals to pay rent and violent actions on both sides characterized Livingston Manor from 1751 to 1754, as tenants, supported by speculators with the official blessing of the Bay Colony government, preferred to be Massachusetts freeholders than tenants of Robert Livingston, Jr. In April 1753 the General Court officially annexed portions of Livingston Manor to Hamp-

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

[83]*See* "Names of the Patentees of the Westen Hook," March 5 1705, Albany County Misc. Mss., Box 3, NYHS; Indian deed, dated May 2 1703, Schuyler Papers, Box 2, NYHS.

[84]3 **Journals of the House of Representatives of Massachusetts** 194 (1919–64); 4 *id*. 31, 56–57. *See* 1 **J.G. Holland, History of Western Massachusetts: The Counties of Hampden Hampshire, Franklin, and Berkshire** 163 (1855).

[85]26 **Journals Mass. House Rep.** 128.

[86]*See* **S. Kim**, note 20, at 287–90.

shire County.[87] There were crop burnings, death threats, and forcible evictions.[88] By July 1754 there were riots within the domain of the manor proper, including the destruction of some 1,200 trees near Livingston Manor's Ancram ironworks. Raids by Livingston and his opponents on one another's towns resulted in at least two kidnappings and several beatings. At the end of the month, Governor Clinton issued a proclamation officially pitting the force of the New York government against the Massachusetts claimants, ordering all law enforcement officers in Albany and Dutchess counties to arrest those who had kidnapped Livingston's tenants, and to prevent "like Riotous proceedings for the future."[89] A copy of the proclamation was sent to Massachusetts Bay's Lieutenant Governor, Spencer Phips; Clinton demanded the extradition of all persons concerned in the riots, including those Massachusetts magistrates who had abetted the activity, and warned that New York would no longer accept Massachusetts attempts to acquire New York lands by subversion of New York tenants.[90]

By February 1755 violence had spread to Claverack, Massachusetts militia commissions had been issued to New York tenants, and the sheriff of Albany County had been seized by these forces and carried off to appear in court in Springfield.[91] James De Lancey, the Lieutenant Governor, wrote to Massachusetts Governor William Shirley, warning that the situation might soon result in "a civil war between the two governments."[92] There were more kidnappings and killings through the spring, followed by a general disengagement of the two provincial governments during the summer, after which the slow processes of restoration began.[93] In August 1757 the Board of Trade rendered a decision fixing the boundary twenty miles due east of the Hudson River.[94] This placed New York's eastern boundary at the eastern limit of Livingston Manor, and brought an end to agitation within this domain. For John Van Rensselaer, who claimed an extent for Claverack twenty-four miles east of the Hudson, the solution was not as satisfactory. Claverack was not to be quietly possessed by its lord at any time thereafter.

Agrarian unrest subsided in New York in 1757, with the end of the Livingston Manor riots, only to resume again in 1766. Even the first outbreak was sufficient, however, to unsettle the social situation of the manor proprietors and to reveal a fatal and fundamental weakness in the land law system. Not only had the proprietors been given an object lesson in the dangerous possibilities that lay in turning their own tenants into agents for the subversion of their grants, they had also seen the helplessness of the land law system in the face of conflicting intercolonial claims. The first problem could only be met by

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[87] *See* 29 **Journals Mass. House Rep.** 137–140, 164; 3 **Acts and Resolves of Massachusetts Bay** 656.

[88] *See* **S. Kim**, note 20, at 290–310.

[89] *See* 3 **Doc Hist NY** 749–757.

[90] 77 **NY Col Mss** 144; 30 **Journals Mass. House Rep.** 64.

[91] *See* **S. Kim**, note 20, at 310–325.

[92] De Lancey to Shirley, February 17 1755, 3 **Doc Hist NY** 779.

[93] *See* * *S. Kim**, note 20, at 325–43.

[94] 7 **NY Col Docs** 223–224, 273–74.

a continuing renegotiation of the terms of tenancy; the second would remain an irremediable feature of the imperial legal order.[95] Only Article III, .ss2 of the Federal Constitution of 1787 could resettle the jurisdictional issue; the legal position of the manor lords would never again be fully satisfactory. The situation was bad enough, but it was made worse by the mounting of an adroit, patient, and uncompromising attempt to destroy the manor system from within, using the legal environment which had hitherto been its most solid protection.

Cadwallader Colden's long career in the politics of New York was marked by an implacable hostility to the system of land distribution in which, as surveyor general, he was so deeply involved.[96] Stubborn and vain, impressed with the talents of no one save Sir William Johnson, whose virtues he understood better than anyone else, Colden brought impeccably royalist principles to bear on his analysis of political life in New York, and saw the manor lords, in curious though forceful terms, as "the principal Demagogues in oppressing the Administration."[97] The destruction of the manors, in Colden's view, would liberate land for the rapid population of New York and provide a permanent revenue through quit-rents, rendering the governor and administration independent of the factional politics of the Assembly. After 1746 the only local support for Governor George Clinton in his struggle with James De Lancey,[98] and himself head of the government in 1760–61, Colden saw the opportunities presented by the situation in the Hudson River Valley for the destruction of the system he so loathed. Like another, less fortunate, amateur litigant, he knew as much law as any gentleman in England, and with the assistance of the Attorney General, John Tabor Kempe, with whom he was joined in financial as well as political interest, Colden began his assault on the manors just as the boundary riots were coming to a close.

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

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

[96] Born in 1688, Colden emigrated to Philadelphia from Scotland, where he had been trained as a physician, in 1710. Robert Hunter brought him to New York, appointing him in 1720 to his life-long post as surveyor general. Burnet appointed him to the Council in 1721, where he also remained until his death in 1776. On five occasions after 1760, Colden served as Lieutenant-Governor in control of the province—a total of more than six years in office. Mathematician, botanist, physician, and philosopher, he was also a confirmed hater of lawyers, though he trained to sons to the Bar. For a fine general biography, see **A.M. Keys, Cadwallader Colden** (1906). The only disadvantage of Keys' work is its insensitivity to the detail of legal questions; it is in this respect perhaps not unlike Colden himself.

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

[98] *See* **S. Katz, Newcastle's New York** 176–84 (1968). Katz's work remains the only lucid description of the politics of the Clinton administration, which ought perhaps to be called instead the Age of DeLancey.

erack had never been accurately determined, and the manor's legitimate extent could be as small as 23,800 acres or as large as 281,600. The slight difference of a quarter-million acres provided room for at least the thin edge of a wedge to be inserted, and a series of petitions for authority to purchase from the Indians provided the opportunity. In one, Colden's daughter and son, along with the Attorney General himself and Goldsbrow Banyar, the province's deputy secretary, asked in May 1761 for a grant of 13,000 acres east of Kinderhook, within what Van Rensselaer claimed as Claverack. A long series of legal actions finally came to rest before the Governor and Council in October 1762,[99] ending inconclusively, with an opinion dismissing the various petitions on the ground that the petitioners' evidence, much of it gathered in deposition of the Massachusetts developers who had inspired the resistance in Livingston and Claverack before 1757, had not demonstrated that the lands claimed were actually vacant.

Recognizing that the colony's Supreme Court, under the control of De Lancey and the landed interest, would never undertake the legal reduction of the manors, Colden saw the Governor and Council in their role as a potential court of appeals as the institutional key to his campaign. The technical requirement was to provide for the reexamination of factual issues resolved by Supreme Court juries in appeals to the Governor and Council, and in 1764, as Lieutenant-Governor, Colden encouraged the attempt to lodge an appeal on the merits from a jury verdict in the famous case of *Forsey* v. *Cunningham*.[100] Success in such an endeavor, the proprietors realized, would afford Colden, or any future governor so minded, the legal mechanism necessary to the extinction or reduction of their grants.

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

As we have seen, the proprietors of Philipsburgh Manor were distinguished throughout the eighteenth century by their adherence to the parole lease, or tenancy-at-will, as the only available tenure. In 1760, in a sharp break with that tradition, Frederick Philipse III offered all his tenants the opportunity to convert their parole leases into leases for three lives.[101] There seems to have been little response from Philipse's tenants; perhaps the offer functioned more to de-

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

[100]The proceedings in *Forsey*, the Privy Council appeal, and the controversy that surrounded it, which John Watts (himself a proprietor in Van Cortlandt Manor, speaking in his usual understated tones) said would end in "the worst System on Earth", **NYHS Coll 1928**, at 391, are discussed in Chapter 4, *infra*.

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

fine the rights which had grown up around the parole tenure in Philipsburgh than to replace them.[102]

At the same time that Frederick Philipse III was offering improved security of tenure to his tenants, the proprietors of Claverack and Rensselaerswyck proper were wrestling with remnants of the manorial past. Under the will of Kiliaen Van Rensselaer, made in 1718, the heirs to Rensselaerswyck were permitted only to make such leases as would be determined "upon the death of the grantor upon forfeiture of the manor ... to the next heir in taile."[103] Similar restrictions were placed, under the will of his brother, Henry of Claverack, upon the heirs to that estate. In 1762, John Van Rensselaer, Henry's heir, was advised by his lawyers that perpetual leases which had been issued to Claverack tenants were invalid under the terms of his father's will. As the tenant in tail, John was without authority to make a lease for longer than his own life. Within a year after receiving this advice, Van Rensselaer barred the entail on his estate, recovered the property in fee simple, and confirmed his tenants' leases; at roughly the same time Stephen Van Rensselaer, proprietor of Rensselaerswyck, did the same.[104] When we recall that 1762 saw the climax of the Colden-Kempe assault on Claverack, events within and without the manor may seem to form a close correlation.

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

Events from 1751 to 1766 marked the completion of the settlement of the land law in New York. The principles on which the manors had originally been created—both the technical association of jurisdiction with ownership and the political correlation between concentration of ownership and support for executive government—had been thoroughly eroded by the process of physical settlement, dominated as it was by competition to get and retain tenants. The lords had become landlords, whose stability at the pinnacle of the provincial

[102]There is no record, either in the surviving Philipsburgh lease books or in Frederick Philipse III's testimony in support of his request for compensation from the Crown, *see supra* note 61, of any leases for three lives issued as a result of this offer.

[103]Will of Kiliaen Van Rensselaer, June 18 1718, Townsend Coll, Box 1.

[104]See **S. Kim**, *supra* note 20, at 175–76.

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

In this environment, the closure of the courts in late 1765 as a consequence of the Stamp Act Crisis was radically destabilizing. Tenant resistance broke out in the form of rent strikes and forcible dispossessions, particularly in the lower Hudson Valley, in Van Cortlandt and Philipse domains. Though some of the rioting in Van Cortlandt Manor seems to have been occasioned by tenant grievances over leasing practices, the most serious threats to order emanated from the Philipse Highland Patent, an area of conflicting land claims long under dispute. The failure of the land law system to resolve such disputes, previously experienced in the areas of Livingston and Van Rensselaer country involved in boundary conflict with Massachusetts, had produced another harvest of disorder. Livingston Manor and the Van Rensselaer possessions were mostly quiet through the spring of 1766, but rioting in the lower areas was perceived to threaten even the homes of landlords in New York City, already convulsed with the urban resistance to the Stamp Act. When the courts reopened in the spring of 1766, local governments proclaimed themselves unable to deal with the armed rioters, variously numbered between 300 and 2000 by contemporary and historical estimates.[105] By mid-June, Governor Moore had called upon the military to reinforce the civilian government, and a regiment en route from Albany to New York City marched down the Valley with the purpose of dispersing rioters and restoring order. Confronted at one point by skirmishers who seriously wounded three soldiers, troops hotly pursued the rioters, who either surrendered or fled the colony. By the end of June resistance had collapsed, and the government began preparing treason prosecutions against the leaders.

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

The rioting of 1766 was the most significant such outbreak during the provincial period. Both the riots and the period of relative quiet that followed are reflections of the land law settlement in its strengths and weaknesses. The technical and political limitations of the land law's powers of conciliation were repeatedly revealed in the history of boundary conflict and resulting civil disorder. Factional conflicts within the New York political system as well as conflicts on an Imperial level—between British and local claimants, as in the long-running Oblong controversy, or between claimants holding grants from different colonial governments—imposed strains for which doctrinal development could offer no remedy. The problem was incomplete sovereignty, in the sense that no institution within the provincial system was able to make its adjudications final and back them with sufficient force. New York's provincial government could prevail more often than not before the Crown, perhaps in part for the reason given by Timothy Dwight, at the end of the eighteenth century: "being a royal Government [New York] was ever favoured by the court of Great Britain in its various claims of territory & was almost certain of success in the final adjustment let the object claimed be what it might."[106] But the province's long-term success in boundary negotiations could not prevent the destabilizing consequences of disputes, as rival claims encouraged tenants to resist landlords.

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

None of these purposes, to be sure, was achieved completely, or without offsetting disadvantages. The essence of the land law settlement was the flexibility inherent in the institutions and doctrines established in the late seventeenth century, which permitted a continuous mediation between managerial goals and the purposes of the nongovernmental participants, including the

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

large landlords and, to a lesser extent, their tenants. The key to this flexibility was the process whereby the apparently traditional, largely inflexible, structure of manorial organization—adopted in the late seventeenth century to solve political problems of the early provincial managers and to gratify the ideological prepossessions of the proprietor—was replaced by a contractualized system of private ordering, centering on the lease. Competition for tenants organized the land law of the manors themselves, while the public-law elements of the system concentrated on the control of the large-scale pattern of settlement. This compromise worked, but in a pattern familiar from other episodes in the common law's history, it worked in part by disguising its innovations. Formal doctrinal change was far less evident than actual alteration of relations in practice. By the close of the provincial period, the divergence between formal doctrine and common practice was in certain respects profound.)

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

The initial steps taken by the legislature of New York State to alter the land law were extremely tentative.[107] Not until 1786 was any substantial legislation enacted. At this time, the legislature passed an act declaring that all estates in fee tail existing in the state, or created by conveyances taking effect in future, would be converted into estates in fee simple.[108] The same act did away with the common law rule of primogeniture, proclaiming instead a rule of partible inheritance in cases of intestate succession.

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

With the revision of the law undertaken by Samuel Jones and Richard Varick,[109] completed in 1789, the substantive development of the land law took another small stride, through the enactment of the major English statutes bearing on the land law, as adapted by Jones and Varick to the needs of the new state. The revision included "An Act concerning Tenures,"[110] which contained

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

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

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

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

the substance of the ancient statute *Quia Emptores* and the statute of Charles II, never made applicable to the colonies, which abolished in England the feudal tenures derived from military service.[111] In drafting the act, however, the New York revisors made sure that the rights of New York landlords which descended from original manorial grants, rights which could not be granted or exercised under the English statutes, would nonetheless be saved.[112]

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

The balance of successes and failures in the settling of the land law illustrates the central theme in the larger story of legal settlement in New York. Doctrinal structures and institutional arrangements evolved under the pressure to compromise local political outcomes with Imperial policy. Within the limited domain of provincial sovereignty, the compromises were largely successful; adjustments between landlord and tenant, commercial city and agrarian countryside, Dutchmen and Englishmen, found their way into a legal system showing on its face less flexibility for such conciliations. At the geographic boundaries, however, the forces of destabilization could not be effectively conciliated by legal settlement, because the geographic boundaries were also boundaries of the legal system. In the borderlands Imperial policy and Imperial politics displaced the settling function of the law. Even when, as most often, New York as a political unit prevailed in the ultimate disposition of Imperial favor, displacement of the mediating function of the law weakened the legal settlement throughout the society. Ultimately, the settling function of the law was undercut by the Empire that had begun the process of legal settlement in the first place. Though the basic practices and institutions of the land law were robust enough to survive even the disorganizing consequences of a military rebellion and political revolution between 1776 and 1783, the land law failed to keep the peace on the ground in the strategic and economic center of the province during the 1760s. This failure contributed significantly to the collapse of public

[111] For the statute *Quia Emptores*, 18 Edw.I, *see* note 65, *supra*; the statute abolishing the incidents of feudal military tenures was 12 Car.II c. 24 (1660).

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

order and the unsettling of another aspect of the provincial legal system, the mechanisms of criminal justice, in the ten years preceding independence.