

## Commercial Law in War and Peace

In the same sense in which the land law was the doctrinal embodiment of the Hudson Valley or Schoharie County, the commercial law was the expression of New York City. The seaport was commerce embodied—its shape, schedule, hierarchy, and justice were all adapted to mercantile existence. The city's government was primarily mercantile, and its law, in far more than the narrow accepted meaning of the phrase "commercial law," was formed by the forces acting on a community that lived and died by the conditions of maritime trade.

The goal of the commercial law is usually to achieve orderly predictability as the background to economic fluctuation, and in that sense, commercial law aspires to a settled nature, even as we expect it to conform to the "felt necessities" of changing economic life. The overriding need for certainty and invariability of outcomes in the area of commercial law presents perhaps the profoundest impulse towards legal settlement in colonial legal systems—without an early delineation of the fundamental rules of commerce, subsequent social development must necessarily be retarded.

Superficially and in retrospect, the process of settling commercial legal arrangements in British North America appears to have been comparatively simple. Much of the legal infrastructure for commercial relations within the area of European cultural dominance was internationalized centuries before the commencement of North American settlement. Admiralty, the law of negotiable instruments, the substantive law of agency and the adjective law of foreign attachment—all of these critical elements of the commercial system could be adopted in new venues of commercial activity with small need for adjustment. Colonial commerce, dependent on trading relationships with more economically powerful trading partners, had to bow to their terms. If wholesale adoption of metropolitan doctrines and institutions was the obvious route to commercial viability settlement would seem to be a single act of transplantation.

Furthermore, the problems of ethnic diversity that posed obstacles to the construction of a provincial legal order in other respects were of less significance in the development of the commercial legal system. Commercial relations transcended such differences the world over, and with respect to the population of New York itself, despite the sporadic hostilities of the mid-seventeenth century, there were few commercial relationships in Europe more enduring than that between England and the Netherlands. On all accounts, we might expect the history of commercial law in New York to represent the leading edge of legal settlement—a quick merger of Dutch and English practices into a

single system, closely calibrated to that of British metropolitan traders, gaining stability, despite the vagaries of colonial economies and imperial wars, from the less volatile pace of Atlantic commercial development.

Certainly this description captures some elements of the provincial experience, but on the whole the course of legal change was rather different. Uniformity across geographic and ethnic divisions was achieved in the early period, and by the early eighteenth century the materials for a settled commercial legal order were in place. But the colonial economy, in both its domestic and international components, inhibited stabilization of the legal regime. This tendency resulted from three primary causes—the prevalence of illegal trading in provincial New York, the perennial instability of the monetary system, and the procedural difficulties of imperial legal relations. Each played a significant role in hobbling movement toward a more stable and certain commercial law in the province at various times throughout the provincial period, and in the climactic period of colonial agitation at the latter end of the 1760s, all three together acted to destroy the stability of the system until the post-revolutionary reorganization.

The commercial law *strictu sensu*—the law of bundles, bills, and bottoms—was also closely related to other questions not capable of stable resolution. Regional and class tensions between debtors and creditors, exacerbated by the volatility of the money supply, put significant political strain on the legal order at crucial points in the provincial history—an analog of the social forces acting to destroy the stability of the land law in the Hudson River Valley in the 1760s. As well, the continuing constitutional controversy over the courts, often at the forefront of provincial political life, had sporadic unintended and severe effects on the provision of stable mercantile justice.

These centrifugal impulses, unlike most of the forces militating for diversity and uncertainty in law, were less apparent in the early period of provincial development than they were at the end. Geography provided a strong initial argument for centralization of commercial activity. The province Richard Nicolls was sent to conquer and govern in 1664 extended north from the mouth of the Delaware to the southern coast of Maine, taking in the offshore islands of New England. While many factors—not least the logistical difficulties of defending and administering this extended and discontinuous territory—underlay the comparatively rapid divestiture of portions of the Duke's chartered domains, the provincial boundaries at the end of the seventeenth century essentially enclosed that portion of the hinterland for which New York City served as the natural entrepot.

Trade patterns in the period of Dutch control set several of the parameters of commercial development that would continue under English rule. Fur trade was the Dutch West India Company's most important enterprise in New Netherland, as demonstrated by the colony's great seal, with its single beaver as the central image. The fur trade drew two lines of force through New Amsterdam—transshipment of furs brought south down the Hudson River in shallow-draft sloops, and the forwarding of supplies, including the essential trade goods as well as subsistence supplies, upriver. In addition, the trade

with the Caribbean that was to be a permanent part of the New York commercial environment were laid down by the Dutch: carrying flour and other foodstuffs as well as timber to the islands, returning with cargoes of molasses and “fractious” or “unworkable” slaves spared the quick and painful death of the sugar islands for physically less tortuous employment as laborers and domestic servants in New Amsterdam.

The legal and administrative mechanisms of this trade, unlike those of the later period under English rule, presupposed the Dutch West India Company trading monopoly, both in New Amsterdam and in the Dutch Caribbean. With few exceptions, if a merchant is defined as one engaged in foreign commerce, there was one merchant in New Amsterdam—the Company itself. At the highest level of organization commercial law in New Amsterdam consisted of the decisions of the Director-General, subject to the review of the Dutch West India Company and its Amsterdam Chamber.

Though consistent trade policy avoided some of the classes of litigation integral to the later shape of provincial commercial law, this by no means implies that the domestic economy of New Netherlands operated without recourse to the courts. The staples of commercial litigation in the Dutch period were the same as those prevailing under English rule in New York, or in any comparable mercantile community. First and foremost, there was debt litigation. Debt collection was always the preponderant work of the courts, whether under Dutch or English rule. Local conventions and payment systems determine the precise form that debt litigation takes—what documents or practices indicative of indebtedness are sufficient to prove the claim, for example. Conventions determine also the procedural context of collection—whether, as in agricultural communities short of specie like seventeenth-century Virginia,<sup>1</sup> debts are only collectible at a certain season of the year—but the business moves through the courts at all times, with tedious regularity.

Along with debt collection, the courts of New Netherlands confronted all the problems of contracts that break down before reaching the comparatively polished stage of simple non-payment. Claims for non-performance of contract obligations, delivery of unacceptable goods, and inadequate or harmful performance of service obligations are the common consequences of an interdependent economy, and the courts of New Amsterdam, the patroonships, and Beverwyck all expended substantial effort in the resolution of such disputes.

At the scale of magnification presented by court records—where individual commercial disputes are transformed into judgments mostly by processes unrecorded in detail—it is difficult to discern the substantive differences among legal systems. If the director of Rensselaerswyck sues for collection of an account, presenting his own books as evidence of the debt, and the defendant confesses his indebtedness but alleges set-offs, the resolution under Romano-Dutch law, as recorded in two lines of court minutes, will not exemplify any

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<sup>1</sup>Virginians in the 1640s used promissory notes stated in pounds of tobacco, payable “at the next crop” to satisfy both private and public obligations. Even fines imposed in the courts were collectible only in this fashion. See EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 177 (1975).

obvious differences in doctrine from the resolution of a similar dispute under the common law. But while the appearance of the substantive resolutions in such cases hardly seem to vary from year to year, regardless of the titular substitution of His Excellency the Duke of York for their High Mightinesses of the Dutch West India Company at the apex of the political order, the procedural context of commercial disputes in the courts changed after 1664, as the one quintessentially English institution made its appearance. Yet even the jury failed by its presence to make a sharp discrimination in the commercial legal order of the new province. Despite the adherence to juries, the English also continued to use the primary medium for specialized fact-finding in the Dutch courts—arbitration.

The use of arbitrators to investigate and dispose of cases with complex factual elements is perhaps the most striking feature of civil procedure in early New York. Dutch practice was certainly a predominant influence; such mechanisms also had the advantage of spreading the burden of adjudicating disputes over a larger segment of communities too thinly populated to maintain extensive permanent judicial establishments. Referring lawsuits from courts to arbitrators or referees<sup>2</sup> effectively increased the “carrying capacity” of courts which, in the circumstances of low population density and small economic surplus, were easily overburdened. When New Amsterdam acquired a court, in 1653, for example, it was one whose structure was based on that of Amsterdam’s own municipal court, composed of a schout, who acted in the roles of sheriff and prosecutor; two burgomasters, who served as administrative officers; and five schepens, the equivalent of aldermen.<sup>3</sup> This court met down to the time of the English occupation, and again during the Dutch reoccupation in 1673–74. The reference of claims to “good men” for reconciliation or settlement was a major element in the procedure of this court. Similar uses of reference to *goede mannen* prevailed outside the jurisdiction of New Amsterdam, in the patroonship of Rensselaerswyck.<sup>4</sup> Most often the referees were appointed by the court,<sup>5</sup> sometimes they were selected by the parties,<sup>6</sup> and occasionally one of the members of the court was delegated to attempt a settlement.<sup>7</sup> If an agree-

<sup>2</sup>A distinction should be drawn between the processes of “arbitration” in the strict sense, arising from an agreement between parties to carry future disputes to an informal forum of adjudication, and “reference,” in which a court refers a proceeding originally commenced before it to the disposition of others. The procedural distinction is sometimes important; where it is not, I have used the word “arbitration” to describe both processes.

<sup>3</sup>C.P. DALY, *HISTORY OF THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK* xix, xxiii (1855). In Holland the burgomasters and schepens served different functions; in New York they formed one governmental entity. The officials in Amsterdam were elected; in New York, however, they were appointed by Stuyvesant.

<sup>4</sup>*See, e.g.,* MINUTES OF THE COURT OF RENSSELAERSWYCK, 1648–1652, at 69, 99, 127 (A.J.F. van Laer ed. & trans. 1922). The Rensselaerswyck records also show the use of agreements to arbitrate future disputes. *See, e.g., id.* at 79.

<sup>5</sup>Schout v. Elzers, in 1 RECORDS OF NEW AMSTERDAM 54 (B. Fernow ed. 1897); Boot v. Goderis, *id.* at 77; Gompelmans v. Schellinger, *id.* at 202.

<sup>6</sup>Steyn v. Martyn, *id.* at 97; deKuyper v. Jansen, *id.* at 176.

<sup>7</sup>Verbeeck v. Pos, *id.* at 186. *See also,* Aiken, *New Netherlands Arbitration in the 17th Century*, 29 ARB.J. 145 (1974) (additional early cases of arbitration).

ment could not be reached between the parties, the judgment of the referees could be appealed to the court as a whole, which would then render a final decision. This form of challenge was apparently quite rare.<sup>8</sup>

Among the many problems of governance and control presented to the new English management after the Dutch surrender in 1664, the mechanisms of commercial justice did not rank among the more complex. New Amsterdam's Court of Schout, Burgomasters and Schepens could become New York City's Mayor's Court without violence to the fabric of English governance, and the same arrangement reestablished the civil justice of Albany. No move was made to interfere with the use of reference or arbitration, although juries were, with self-conscious Englishness, empanelled in those lawsuits that actually went to trial.

Nor was the continued use of arbitration solely a show of deference to Dutch sensibilities.<sup>9</sup> The Duke's Laws, which were only in force in the English areas of Long Island, Staten Island, and Westchester, provided that:

All actions of Debt or Trespasse under the value of five pounds between Neighbors shall be put to Arbitration of two indifferent persons of the Neighborhood to be nominated by the Constable of the place; and if either or both parties shall refuse (upon any pretense) their Arbitration: Then the next Justice of the peace . . . shall choose three other indifferent persons; who are to meet at the Dissenters charge from the first Arbitration and both plaintiffs and Defendant are to be concluded by the award of the persons so chosen by the Justice.<sup>10</sup>

The English settlements on Long Island, as we have seen, were primarily outgrowths of Connecticut communities across Long Island Sound. In those towns too there was a substantial tradition of arbitration,<sup>11</sup> and the Duke's Laws provision on arbitration, like most of the rest of the contents of that code, was drawn from other New England sources. Colonial systems at low population

<sup>8</sup>Only one such case appears in the period 1653–54, out of several dozen instances of reference. *Jensen v. Spysers*, 1 RNA 71.

<sup>9</sup>It should be noted that the English tradition itself was by no means void of precedent for the use of arbitration and reference. Arbitration played a significant role in the medieval common law, epitomized by the fifteenth-century comment that "Arbitration is used for the Common Weal, that is to say to appease disputes and wronge between the people." Y.B. 8 Edw.IV, Mich. pl. 9, 35 (1468, *per* Yelverton, J.), and the mercantile community in England took advantage of its possibilities from an early period. *See generally*, Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595 (1928) (commercial arbitration before the eighteenth century). The English procedure through the end of the seventeenth century was to enforce penal bonds requiring obedience to arbitration awards, *see id.* at 598–608, and when the use of penalties was statutorily forbidden after 1697, Parliament speedily provided an act to permit the direct judicial enforcement of arbitration results. *See* 9 Will.III, c. 15 (1698). Thus the English tradition of arbitration helped to make the Dutch predilection for reference comprehensible to the new authorities in New York.

<sup>10</sup>1 NY COL LAWS 7.

<sup>11</sup>The growth and decay of arbitral procedures in colonial Connecticut is discussed in B. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* 101–36 (1987).

densities tended, in short, to converge on arbitration as a mechanism for the settlement of smaller or more routine civil disputes. Traditional or religious reasons could be, and were, adduced in support of such measures, and these should by no means be ignored, but the evident utility of the institution—which lay in the use of contributed skilled labor to bolster the carrying capacity of the formal court systems—provides an independent explanation of the popularity of arbitration in early Anglo-America.<sup>12</sup>

While the advent of English government thus inspired comparatively few significant changes in the procedure of commercial dispute resolution in the years immediately following the conquest, it did have profound consequences for the organization of commercial life and the direction of commercial enterprise. These much larger changes in the economic life of the new province established, by the turn of the century, many of the prevailing themes of commercial legal development through the rest of the provincial period.

Primarily, of course, English control brought about such sweeping changes because at the level of imperial trade regulation it replaced one system of law by another. Here again, it is necessary to distinguish the various elements that are ordinarily blended in our label of “commercial law.” For international trade to be viable at all, certain of the basic mechanisms of exchange and dispute resolution had to be generally accepted—these elements of the classic *lex mercatoria* were effectively internationalized among Europeans and, as we have seen, were not strongly affected by the shift from Dutch to English rule. But the very national, imperial, objectives that commanded a largely uniform approach to commercial procedure also commanded a diversity at the highest level of commercial regulation—the rules about with whom one might trade, in whose ships, and for what commodities. However little flour merchants in Manhattan might change the way they collected their debts after 1664, to be embedded within the British Empire, subject to its law of trade regulation, altered the economic environment fundamentally. These changes, and the resulting mediation between commercial law at the low level—the local rules of commercial organization and dispute resolution—and commercial law at the high level—imperial legislative control over trade routes, shipping, customs, and currency—established the outlines of New York’s commercial law up to the Revolution.

Initially, and most visibly, absorption into the British Empire altered the existing pattern of trade relationships through the imposition of new legal controls. New Amsterdam lay at the junction of three major trade connections. First in importance was the fur trade with the aboriginal inhabitants of the continent. Woven cloth and iron implements were exchanged for furs in a trade so mutually profitable that it entirely reoriented the indigenous trade and warfare patterns everywhere north of the Ohio and east of Lake Winnipeg. The Dutch, in possession of the only transportation route to the continental interior competitive with the French-controlled St. Lawrence, anchored the south-

<sup>12</sup>Another view of the general history of arbitration in early America is provided in Mann, *Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U.L. REV., 443–81 (1984).

ern portion of that trade. Second in importance was the trade with the settlements of the Dutch Caribbean. Even using twentieth-century agricultural technology, as any contemporary visitor will note, the smaller islands of the Caribbean provide little encouragement to the cultivation of grain or the raising of livestock; intensive cultivation of sugar cane—the great cash crop of the islands—made the development of self-sufficiency in basic foodstuffs impossible. So the Hudson River Valley, from the beginning of Dutch rule, was marked out as the breadbasket of the Caribbean settlements. New Amsterdam bolted, baked, and packed in barrels, then went down to the sea in ships. Nor were sugar, molasses, and flour the only commodities to be exchanged. New Amsterdam's merchant ship-owners carried labor to the islands, and the slave trade swelled the African population of New Amsterdam itself to roughly 20%, almost entirely enslaved, by 1664. To these two profitable lines of export trade, there was added the dependence of the inhabitants of New Netherlands on imported manufactured articles—a dependence which they shared with the other European and indigenous inhabitants of North America. The hinterland of New Netherlands was undeveloped compared to that of New England, but New Amsterdam was its source for the goods that made life in the wilderness liveable.

Each of these basic trade relationships sustaining New Amsterdam's commercial community would be significantly affected by the imposition of British imperial control. The export market for furs and the source of manufactured goods for the province formally shifted from the Netherlands to Britain. Although it could hardly be extinguished overnight, and was never in fact effectively controlled before 1763, direct trade with Holland, along with the rest of the European continent, was formally prohibited from the moment of Stuyvesant's surrender. Some of the Dutch merchantile elite in New York would adjust to this new trading pattern, but after 1664—and particularly after the Dutch reoccupation and peaceful cession in 1673—the disruption of the long-standing commercial relations with Holland provided an opportunity for other, primarily British and French Huguenot, traders to establish themselves in the mercantile hierarchy of New York.

The disruption of the island trade was an even more significant force acting to change the legal environment of New York's commerce. The Caribbean was an economic unit, and its division into permitted and prohibited zones of trade was a political artifice that traders, measuring potential profit against risks of unpleasant interference, never chose to acknowledge. The Dutch Caribbean, formally interdicted as a source of sugar after 1664, was a particularly promising area of commercial development, not only because of its social and linguistic connections to New York, but also, and primarily, because the loss of Dutch possessions on the mainland left no Dutch source for temperate-zone agricultural products. There were no trackless forests in Holland with which to meet the sugar industry's need for timber. From the very beginning, New Yorkers had special inducements to engage in trade that violated the provisions of imperial law. Though the particular inducements would vary from decade to decade, as would the governmental enthusiasm for suppression, the illegality

of a large portion of New York's trade remained a given throughout the provincial period, and no description of the legal elements of commercial relations can safely ignore the point. The demographics of the city itself provided an early demonstration of the social importance of the new legal regulation of trade. Supplying African slaves to the Dutch sugar islands was now more complex and less profitable, while the supply of Africans to the British Caribbean was secure in other hands. African slaves arrived in New York primarily as a by-product of New Yorkers' profitable trade between Africa and the Caribbean. The African population of New York began to fall as this trade was reduced—from 20% in 1664 to roughly 14% in 1674. This latter level remained roughly stable throughout the provincial period.

Along with the external reorientation of business relations there was a concomitant internal reorganization between the conquest and Leisler's Rebellion. The rigid public economic control exercised by the Directors-General of New Amsterdam gave way to one of the most striking idiosyncrasies of English public administration. Twentieth-century Americans, long since educated to the principle contained in the Sherman and Clayton Acts—and more frequently honored in the breach than in the observance—that government is a foe of monopoly economic power, find it hard to appreciate just how thoroughly inculcated the opposite principle was in the theory and practice of Anglo-American government from the Tudor period through the first third of the nineteenth century. The exchange of chartered monopoly rights in return for public investment—either through direct payment to the granting authority or through the gratis provision of goods and services the government would otherwise have to provide—was always a major part (sometimes the only apparent part) of the business of government. As a potential source of prerogative taxation, reducing the Crown's need to call or cooperate with Parliaments, the practice of granting monopolies in the domestic economy attracted severe and destructive attention as Tudor gave way to Stuart rule, inspiring, in the *Case of the Monopolies*, one of Edward Coke's most remarkable works of constitutional fantasy. But the complex of practices and beliefs long outlived Charles I.<sup>13</sup> The two decades following the English conquest saw the legal basis of commercial life reorganized on more monopolist lines, as government secured political support and public investment in exchange for exclusive economic privilege. This process, proceeding in parallel with the creation of the manorial system we have earlier discussed, turned the political strategy of the late seventeenth century into the infrastructure of eighteenth-century law.

Thus, along with the traditional monopoly of the fur trade exercised by the Albany *handlaers*, the period from 1664 to 1680 saw the creation or confirmation of a monopoly on flour bolting and packing on behalf of the city grain merchants, a monopoly on the Hudson River carrying trade in favor of city

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<sup>13</sup>For a perceptive description of the role played by this approach to governance in the granting of corporation property in New York City during the eighteenth century, see the chapter entitled "The Political Theory of a Waterlot Grant", in H. HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1830*, at 60-68 (1983).



merchants holding a special government license, and a regulation requiring all goods produced upriver to be sent to the city for reshipment. When, in 1678, the Albany *handlaers* objected to the shipping monopoly of the city merchants, alleging their traditional right to organize export of furs for themselves, Governor Andros tartly inquired whether they wanted a foreign trade or a monopoly of the fur business.<sup>14</sup> From this environment of monopoly privilege, artisans and laborers were excluded. Combinations of carters and coopers were actively suppressed by the City's Common Council and the Governor,<sup>15</sup> as the system of monopoly grants for the protection of commerce were allied to the power of the commercially-controlled city government to set prices and wages in the trades essential for the movement of goods. Here the doctrinal development followed the path of interest-group politics.

In all these alterations to the large-scale law of commerce we observe the legal foundations of the process of "Anglicization." Regulation of the channels of trade toward Britain, and the exchange of special economic privileges for support of the English government of the province, encouraged the growth of English and French traders in New York, unconnected to the previous business patterns, seeking to build or extend their fortunes in the new fields of the new empire. The new regulatory climate also provided the strongest possible incentives for the prominent Dutch mercantile families to come to terms with English rule. The strong Dutch mercantile flavor of the short-lived Leisler regime, at odds with the Anglicized segments of the city elite, provided a clear seismic indication of the subterranean fractures developed during the process.

Special commercial privileges in the city during the 1670s and '80s opened fault lines that would be important to later social and legal contests. Hostility on the part of Long Islanders, compelled to sell their grain to the city's agricultural processing monopoly and to ship their other goods through the city's port facilities, increased tension with the provincial government, always suspicious of these "ungovernable Puritans" in the first place. Leisler's regime was no more successful in this area than the Dominion government that preceded it, nearly coming to blows with Long Island militia unwilling to submit to expanded government by the merchants of the city.

While the substance of large-scale regulation of trade altered significantly between 1664 and 1691 as a result of imperial legislation and local managerial policy, the records of adjudication reveal no obvious discontinuities in the treatment of quotidian commercial disputes. The toleration of diverse substantive law in a uniform system of English jurisdictions, the hallmark of the administration of justice in the period,<sup>16</sup> is scarcely reflected in the dispatch of commercial business. New York commercial cases, in their substance if not their linguistic detail, would have appeared pretty much the before a court in London, Boston, or even Quaker Philadelphia. Thus, for example, the Court of Assizes in 1682 reversed the Mayor's Court judgment in favor of the holder of

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<sup>14</sup>For further discussion of these various regulations in their political context, see Chapter ??, *supra*, p. ??.

<sup>15</sup>*See id.*

<sup>16</sup>*See* Chapter ??, *supra*.

a note of hand for £30. Appellant claims breach of warranty on goods sold, and produces witnesses to the bargain, whose testimony apparently was more convincing to the Bench than it had been to the jury in the Mayor's Court. Only the fact that the goods sold consisted of "a negro," "warranted to be Sound and well Butt Proveing otherwise," provides a distinguishing mark of time and place.<sup>17</sup>

Along with the routine of debt collection, and the ancillary commonplaces of commercial claim and defense, the courts faced the litigation generated by the actions of government officers in the trade system. Claims against customs officials and sheriffs, founded on allegations of wrongful imposition of duties or improper actions in execution of judgment, appeared in the guise of actions for trover and conversion, alleging, for example, that the Deputy Collector wrongfully detained eighty-five gallons of rum, or the sheriff took and converted to his use £26.15s worth of hats.<sup>18</sup> Such suits against officers were a part of the pattern of commercial life, but they could easily shade over into acts of deliberate political defiance, as, for example, the indictment of the Mayor for treason because he had rendered judgment in the Mayor's Court refusing enforcement of a gambling debt.<sup>19</sup> The Court of Assizes had no difficulty dismissing the indictment, and issued a general order reciting that:

Severall persons have of Late Presumed Contrary to the Knowne Laws and practice of the Realme of England to Exhibite and Prefer Divers Causelesse and Vexatious Accusacons and Indictments into the Courts within this Government against Severall Magistrates and Others Concerned in the Publique affaires of the Government which Causeth Greate trouble and Disturbance

and requiring that all such accusations "be first heard and Examined before two Justices of the peace."<sup>20</sup>

The increasing jurisdictional sophistication of the provincial court system by no means implied the disuse of arbitrativ procedures in commercial and other disputes. Two cases in the Mayor's Court in 1675, for example, show the

<sup>17</sup>See *Smeedis v. Okson*, October 1682, *Proceedings of the General Court of Assizes*, in NYHS COLL 1912, at 32. The slave died in the custody of the seller, to whom he had been returned. Appellate review in the Court of Assizes amounted to trial de novo, as the taking of live testimony in this case demonstrates. This proposition, that the Governor in his highest court originally exercised the right to review findings of fact, would become a hotly-contested issue in the mid-eighteenth century. See *infra*, p. 39.

<sup>18</sup>See *Assize Proceedings*, October 1681, note 17, at 18–19. In the former case, brought by the prominent merchant Peter De Lanoy, the shipment of rum was held not dutiable, being en route to Virginia, and the Mayor's Court judgment against the Deputy Collector was affirmed. In the second, the sheriff produced the writ of execution and the judgment of the Mayor's Court under which he acted. The subsequent verdict and judgment of the Mayor's Court jury, holding the sheriff liable, was reversed.

<sup>19</sup>*Id.* at 22.

<sup>20</sup>*Id.* at 24. Historians intemperately eager to locate the single fateful moment at which "Reception" of the common law occurred in New York may be driven by the wording of this order to conclude that reception occurred sometime prior to 1681—an elegant demonstration that nonsensical questions tend to produce nonsensical answers.

court referring complex accounts.<sup>21</sup> The use of reference in this period was not confined to the Mayor's Court. The existing Court of Assizes records disclose two instances between 1680 and 1682 of arbitration involving large commercial transactions.<sup>22</sup>

The period following Leisler's Rebellion saw not only the completion of the process of institutional settlement, culminating in the Judiciary Act of 1691, but also a major expansion of the commercial life of the province. The opening of the worldwide struggle between French and British empires radically altered, and significantly improved, the position of the provincial traders. New York, though located at one of the strategic hinges of the North American confrontation between Britain and France, was largely spared depredation in King William's War, owing primarily to the anti-French activities of the Iroquois, who had allied to the British Empire the uniquely brutal combination of warfare and forced trade that underlay the attempt of the Five Nations to monopolize the southern Great Lakes fur trade.<sup>23</sup> New York contributed no substantial levies of men or resources to the campaigns against Canada between 1689 and the conclusion of temporary peace in 1697, thus sparing itself both the human and economic costs incurred in New England. British fleet operations in the Caribbean, however, afforded the New Yorkers a more profitable form of patriotism, supplemented by the smaller-scale but equally profitable overland trade supplying the enemy at Montreal. The maritime commerce of the province exploded—New York's shipping roster almost quadrupled, from about 35 ships in 1689 to 124 in 1700, while total trade—in the opinion of the

<sup>21</sup>In one case "to bring the same into as briefe a method for finding out the difference, as possible they can," and in the other "in order to the stating or bringing them to a narrow Compass, for the Courts more facile understanding the merritt of the cause." *Phillips v. Cousson*, *MCM*, June 24 1675, f. 72; *Stevenson v. DeHaert*, *MCM* Sept. 7 1675, f. 72. Both are reprinted in R.B. MORRIS, *SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY, 1674-1784*, at 257-58 (1935). In the former case, presumably because of the "great difficulty Therein," the court nominated four referees, while in the latter only two were needed. In both cases, it should be noted, the function of the referees was to advise the court, and not, by the language of the records, to make a judgment between the parties. In a similar case in 1683, after the examiners of the accounts reported to the court, further testimony as to the facts of the disputed sales transaction was taken; the court fashioned the judgment and apportioned the costs. *Wattson v. Saunders*, *MCM* July 3 1683 & August 7 1683, ff. 61, 64. Morris, it should be noted, collects his cases as examples of the old personal action of account, but the procedure followed in the cases makes clear that this classification is incorrect. The more advisory use of referees was clearly not the invariable practice of the period; *See* Moyné v. Sharpe, *MCM* August 3 1680 & September 10 1680, n.p.

<sup>22</sup>One case appealed a result in debt on account for £156, which the court referred (on motion of the original plaintiff and consent of defendant) to four referees, who reported a judgment for £139.5s.9d and costs. *Wilson v. Norman*, *Assize Proceedings*, October 1682, note 17, at 29. The suit involved an account between merchant and customer for goods sold and delivered between 1677 and 1681—a reminder of the long credit necessarily extended by New York merchants, a subject further discussed below. The losing defendant posted bond for a further appeal to the King and Council, but a search of the Privy Council records shows, rather unsurprisingly, that no appeal was docketed in London. The other case was an appeal from a successful action at law to enforce an award of £310. *Cardwell v. Golding*, October 1682, *id.* at 31. The original award was upheld. Again, security for further appeal was given, but apparently no appeal was prosecuted.

<sup>23</sup>Despite several recent additions to the monograph literature, the most insightful comprehensive analysis of the strategic situation in North America at the end of the seventeenth century remains B. DE VOTO, *THE COURSE OF EMPIRE 131-75* (1952).

Governor—doubled in the wartime decade.<sup>24</sup> The trade explosion brought specie into the province, while the absence of war debt held the emission of paper money, and resulting inflation, to a minimum.

Thus, when in 1691 the institutions of justice, including commercial justice, attained their more or less final form in the province, the state of the mercantile economy was far more positive than the immediate political circumstances. For the anti-Leislerian, Anglo-Dutch component of the mercantile elite, best represented by the councilors Frederick Philipse and Stephanus Van Cortlandt, political authority waxed with economic profit. But the expansion of trade and the political triumph of the anti-Leislerians acted against the stability of commercial law, as illegal trading became the centerpiece of the provincial economy.

Wartime disorganization of ocean commerce was always a time of opportunity. French privateering activity in northern waters afforded New Yorkers a boost in their legitimate carrying trade in competition with New England, but the opportunities to windward of the law were even more significant. The primary difficulty for the New York merchant, throughout the entire provincial period, was shortage of circulating currency.<sup>25</sup>

Imperial control over money supply, exercised according to mercantilist principles, provided a steady drain of specie from the provinces. Customs duties and quitrents were payable only in specie, thus ensuring, in perfect Imperial theory, that both real and movable property in the colony would sweat a steady stream of gold for Imperial repatriation. In practice, there were some impediments. Quitrent collections were nominal at best in most periods, and the use of warrants against customs revenue as currency of payment for Imperial expenses kept some substantial portion of the customs receipts in the province. But British merchants, while willing to extend short credit to their American correspondents, ultimately had to be paid in specie. The wartime supplies trade to the Caribbean fleet contributed to the rapid expansion of trade and the money supply, but this was an insufficient source of hard currency trade. There were those with more money to spend than the Royal Navy, however, and the anti-Leislerian elite of the province, including Governor Benjamin Fletcher, went into business supplying the pirates of the Atlantic.

Complicity between the colonial governments and the syndicates of maritime organized crime was hardly new;<sup>26</sup> indeed, the pirates were driven to New York in part by the reduced hospitality of the New England ports, wherein they had found a satisfactory reception among the Godly until the creation of the Dominion of New England. For shipwrights, outfitters, shop-keepers, tavern-keepers, and all those, who, like Pleasant Riderhood, saw seamen as their “natural prey,” a pirate ship laden with wealthy criminals in need of shore

<sup>24</sup>Bellomont to Lords of the Treasury, May 25 1698, 4 NY COL DOCS 317. See also Mason, *Aspects of the New York Revolt of 1689*, 30 NY HIST 174 (1949); H.A. JOHNSON, *THE LAW MERCHANT AND NEGOTIABLE INSTRUMENTS IN COLONIAL NEW YORK, 1664 TO 1730*, at 9-10 (1963).

<sup>25</sup>The most useful analysis of the monetary infrastructure of the colonial economies remains C.P. NETTELS, *THE MONEY SUPPLY OF THE AMERICAN COLONIES BEFORE 1720* (1934).

<sup>26</sup>See 1 H.L. OSGOOD, *AMERICAN COLONIES IN THE EIGHTEENTH CENTURY* ch. 16 (1924).

leave was as good as a feast. For Philipse, Van Cortlandt, William Nicolls, and William “Tangier” Smith (soon to be Chief Justice of the province), along with their political patron and business partner, the Governor,<sup>27</sup> supplying the pirates was a fortune in the making. It is impossible to establish how much money piracy poured into the New York economy before the end of King William’s War and the recall of Benjamin Fletcher, but Fletcher’s successor, Bellomont, estimated that it amounted to more than £100,000 a year.<sup>28</sup>

As in so many other matters, the appointment of the Earl of Bellomont as New York’s Governor signaled a reversal of fundamental policy on trade in the province. Fletcher’s pursuit of personal profit and anti-Leislerian political support had determined not only his extravagant land grants, but also his permissive attitudes toward illegal trade and the encouragement of piracy. Viewing with disgust the consequences of the commercial policy pursued by Fletcher, Bellomont told the Lords of Trade after six months in New York that piracy and illegal trade, carried on in violation of the Navigation Acts, were the “beloved twins” of the commercial elite of the province.<sup>29</sup> Bellomont’s alternative to the illegal trade currently sustaining the prosperity of the province was the bolstering of the fur trade to England, and the project, several times renewed in the early eighteenth century, to import Palatine German settlers to build a naval stores industry in the Hudson River Valley.

This was not the approach favored by those, including Frederick Philipse—the richest and most powerful merchant in the province—whose commercial fortunes were grounded on the existing illegal trade. Much piratical activity having shifted east of the Cape of Good Hope, to the western Indian Ocean and the Red Sea in the aftermath of peace in the Atlantic, the greatest of New York merchants began the practice of supplying pirates *in situ*, sending supply ships east of the Cape. Not only was trading with pirates plainly illegal, but any trade east of the Cape was barred by imperial trade legislation. Nonetheless, in a remarkable variation on the myth of the “triangle trade,” the New Yorkers managed at the turn of the century to create a quadrilateral trade pattern whose fourth corner lay at transient locations on the Red Sea lanes. Rum could there be sold to pirates at enormous advances; returning vessels touched at Madagascar and purchased slaves, these to be exchanged in the sugar islands for molasses to be distilled in New York.<sup>30</sup>

<sup>27</sup>For the best discussion of Benjamin Fletcher’s relations with pirates, see J.S. Leamon, *Governor Fletcher’s Recall*, 20 WMQ 3D SER. 527–42 (1963).

<sup>28</sup>Bellomont to Secretary Popple, July 7, 1698, cited in J.R. REICH, *LEISLER’S REBELLION: A STUDY OF DEMOCRACY IN NEW YORK, 1664–1720*, at 137 (1953). By way of comparison, Nettels calculates that roughly £44,000 was spent in New York for provisioning Her Majesty’s military during the entire period of Queen Anne’s War. Allowing for some exaggeration in Bellomont’s estimate of £100,000 per year, the overwhelming profitability of dealing with the pirates, and the critical importance of piracy to the New York economy, is clear.

<sup>29</sup>Bellomont to Lords of Trade, December 14 1698, 4 NY COL DOCS 438. For the other side of the file, reflecting the complaints from the provincial opposition, see *id.* 320, 416, 490, 604, 623.

<sup>30</sup>Documentation of this unusual variation of the so-called triangle trade, which is generally glimpsed more often in the writings of historians than in the shipping registers can be found in 4 NY COL DOCS 304, 412, 446, 475.

The prosperity of the 1690s, based as it was on a combination of war profiteering and encouragement of piracy, inculcated an instability in the regime of commercial law at the highest level even as it made more easy the administration of the law at its more basic level, in the resolution of individual disputes. The institutional mechanisms of commercial justice were nearly complete. The Judiciary Act of 1691 and the subsequent orders establishing the itineracy of the Supreme Court Justices consolidated the system of civil justice on English models, while the Mayors' Courts of New York and Albany acquired a consistent county court jurisdiction, supplementing their indispensable roles in the commercial litigation of the province. The Judiciary Act, by endowing the Supreme Court of Judicature with the jurisdiction and powers of Exchequer, thus sinking the separate Court of Exchequer created by Dongan in 1685,<sup>31</sup> brought the enforcement of administration's fiscal interests in the trade system into the the same courts, and before the same juries, that resolved the rest of the commercial docket. Although a patently desirable measure from the purely institutional point of view, the enforcement of the Crown's commercial policy by New York juries, whose prosperity depended in the largest measure on illegal trade, was not likely to be effective.

Prosperity, however achieved, meant expansion of the money supply, and liquidity was necessary to the success of commercial dispute resolution. One study finds that the Supreme Court of Judicature resolved its cases expeditiously in the period from 1694–1696, requiring less than three months on the average to bring cases before juries, and resolving less than 15% of its docket by default judgment.<sup>32</sup> Both the speed of resolution, and more significantly, the low number of default judgments, reflect the presence of money in the community; in other periods, as we shall see, contracted credit produced deadlock in the legal system. When there was simply no money with which to pay, debt litigation clogged the courts, and defendants had comparatively little reason to contest their creditors' actions.

In other respects, too, the incoherence of trade regulation left undisturbed the traditional dispute-resolving procedures and doctrines of the provincial courts. The minutes of the Supreme Court of Judicature for the period 1691–1704 show a familiar pattern of commercial arbitration, for example.<sup>33</sup> Simi-

<sup>31</sup>The history of the exchequer jurisdiction prior to 1691 is discussed in Chapter ??, *supra*.

<sup>32</sup>See Rosen, *The Supreme Court of Judicature of Colonial New York: Civil Practice in Transition, 1691–1760*, 5 *LAW & HIST. REV.* 213, 221, 229 (1987). Rosen attempts to compare these generalizations, drawn solely from analysis of the Supreme Court minutes, to equivalent figures from the 1750s. Rosen excludes from her calculations cases in ejectment, for unrelated technical reasons. With the ejectment cases removed, as inspection of the minutes demonstrates, the residue of the civil docket consisted very largely of actions sounding in debt and trespass (case), and *qui tam* actions under the acts of trade and navigation.

<sup>33</sup>In one suit an objection was made to jurors on the ground that they had earlier served as arbitrators in the same dispute. *Gysbert v. Miseroll*, August 6 1695, NYHS COLLECTIONS 1912, at 78. In another case a dispute between ship-master and merchant came on for trial, was referred, one of the parties raised objections to the award, which was overturned, and the case went off again to a jury. *vanSwieten v. Grevenraedt*, October 11 1701, April 12 1702, NYHS COLLECTIONS 1946 at 57, 100. Rosen, note 32, at 229, reports no cases in the Supreme Court resolved by arbitration between 1694 and 1696. So far as the minutes will disclose, this is correct, but the exclusive focus

larly, Herbert Johnson concluded in his study of the law of negotiable instruments that “[w]hile written evidences of indebtedness underwent considerable change during the years from 1664 to 1730, the amount of change in the laws applying to the bill of exchange is negligible. . . . and we may safely claim that the bill of exchange possessed all of its modern attributes by 1664, and continued to have these characteristics throughout the colonial history of New York.”<sup>34</sup>

What was true of the law pertaining to bills was largely true of the whole as one looks at the commercial system in May 1701, at the death of the Earl of Bellomont. Like the rest of British North America, New York was in one of the periodic respites in the century-long struggle between British and French Empires. Its maritime commerce, inflated by the licit and illicit economic opportunities of wartime, was strong. Trade to the West Indies, concentrated on the exportation of grain and meat in exchange for sugar and molasses, along with the trade to indigenous America through the Iroquois—seeking simultaneously to become the butchers of and retailers to the Far Tribes—were the commercial staples of the province. The wartime expansion of shipping produced employment for artisans and seamen, while the expansion of the money supply resulting from wartime provisioning contracts and the expenditures of pirates had increased credit without the production of ruinous inflation, largely because New York, unlike Massachusetts Bay, had not issued large quantities of paper money to finance direct participation in the war. The Mayor’s Court and Supreme Court provided commercial justice with comparative expedition, using both procedures and substantive rules that represented a smooth conjuncture of Dutch and English practices. Although juries decided the largest proportion of commercial litigations, the mercantile community and the courts continued to rely on the judgments of referees and arbitrators to resolve particularly complex questions, or to provide factual expertise in the intricacies of mercantile enterprise. Though operating, like the merchants of all other colonies, in constant need of a more capacious money supply, the merchants of New York had evolved a payment system built around formal obligations and bills of exchange that both facilitated local transactions and permitted New Yorkers access to the larger pool of credit in the Anglo-American world. The free assignability of debt obligations, not achieved in England itself until 1704, existed in New York as a contribution from Dutch law, though shortage of specie for discounting meant that most evidences of debt remained in the possession of the first payee until taken up by the maker.<sup>35</sup> Bellomont’s attempt to harness Leislerian political forces to his program of reversing Fletcher’s policies, in the encouragement of illegal trade as well as in the grants of large tracts

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of Rosen’s attention on the Supreme Court of Judicature somewhat hampers her conclusions. The Mayor’s Court minutes in the same two-year period show roughly a dozen instances of arbitration or reference.

<sup>34</sup>H.A. JOHNSON, note 24, at 40.

<sup>35</sup>See H.A. JOHNSON, note 24, at 34.

to the manor lords, had failed.<sup>36</sup> Unlike Boston, which had already begun to experience the bouts of inflation and high casualty rates that would be its portion in the wars of empire,<sup>37</sup> the social order of New York was not being eroded at its economic base, and the legal system reflected that happy truth.

But the New Yorkers' apparent success in constructing a syncretic commercial law, largely English but partly Dutch, to settle the commerce of this intensely mercantile province only imperfectly concealed the fundamental tensions on which the system was constructed. The large-scale law of New York's commerce, setting the ground rules of international trade and credit, and the legal power to control the all-important money supply, was beyond provincial control. The most profitable portions of New York's trade were either entirely illegal, depending on the evasion of the acts of trade and navigation and the encouragement of piracy, or were products of the vicissitudes of imperial war in the Caribbean and the North American interior. The consolidation of commercial justice at the lower levels set the stage for the completion of the process of settlement, through the development of legal mechanisms for large-scale trade regulation. But here the way was blocked by Empire. The commercial law regime, solid though it was to external inspection, rested on political and strategic premises that New Yorkers could not control. The history of the next seventy years, as the population and trade volume of the province increased, required the commercial law system to absorb the unavoidable shocks of participation in the British Empire. Ultimately, the shocks would grow too great, and the system that seemed all but settled in 1700 would dissolve under the strain.

During the period between the wars of King William and Queen Anne, and despite the continuing partisan strife stirred up in the Fletcher and Bellomont administrations, the merchant-dominated Assembly made some attempts further to consolidate the commercial system. Legislation to establish standard weights and measures—long needed to establish the credibility of New York goods in the export trade, as well as to facilitate the domestic industries, including construction—passed in 1703.<sup>38</sup> The usurious extension of credit to seamen—a practice again attributable to the attitudes of the waterside keepers of taverns and lodging-houses, to whom seamen were as wildebeest to the lion—called for the revival of the act prohibiting the enforcement of promissory notes against sailors,<sup>39</sup> while the practice of dilatory removal of actions in debt from the Mayor's Court to the Supreme Court, which increased the costs of collection in the period of post-war contraction, was blocked in the interest of

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<sup>36</sup>This second, but equally important element of Bellomont's policy is discussed in Chapter ??, *supra*.

<sup>37</sup>For a remarkable tripartite comparative history of the communities of Boston, New York, and Philadelphia in their responses to the war crises from 1685 to 1763, see G.B. NASH, *THE URBAN CRUCIBLE: SOCIAL CHANGE, POLITICAL CONSCIOUSNESS, AND THE ORIGINS OF THE AMERICAN REVOLUTION* (1979).

<sup>38</sup>See An Act to Ascertain the Assize of Casks, Weights, Measures and Bricks within this Colony, June 19 1703, 1 NY COL LAWS 554.

<sup>39</sup>See An Act for Reviving an Act for Encouraging of Seamen, October 11 1709, 1 NY COL LAWS 680.



the city's merchant creditors.<sup>40</sup> These comparatively narrow measures were accompanied by the first of many attempts to bring within the compass of the provincial legal order the critical problem of monetary stability. In the fall of 1709, with the renewal of hostilities in North America imminent, and the likelihood of war charges much increased, the Assembly forbade the exportation of specie from the province, with uncertain results.<sup>41</sup>

But specie drain was never a wartime problem in New York—what Empire took away it could also give. Once again, until the conclusion of the Peace of Utrecht in 1714, supplying Her Majesty's forces and waylaying French shipping in Atlantic and Caribbean waters brought money streaming back into New York. Again New Yorkers, despite the crucial strategic value of their territory at the gateway between Empires, sought to minimize direct participation in the terrestrial conflict, the better to concentrate on opportunities for profit at sea; again Massachusetts bled and New York fattened. The provincial Vice-Admiralty records only survive from the period after 1715, and so we lack prize-by-prize demonstration of the efficacy of the provincial maritime campaign (in which war was merely marketing, carried out by other means), but of its overall success there can be no doubt.<sup>42</sup>

Fortunately for New Yorkers, peace brought with it no diminution in prosperity and no increase in political disquiet. There was a minor trade recession in 1718-20; otherwise the Hunter and Burnet administrations proceeded in their course undisturbed by imperial destabilization of the economic order. Trade to the Caribbean expanded throughout the fifteen years following the peace, and while, in the West, the Iroquois had abandoned the shining dream of a monopoly of the Great Lakes trade that had driven them through three decades of massacre, torture, and the most remarkable feats of wilderness warfare, English versions of the trade goods demanded by indigenous people remained cheaper and better-manufactured than French. Thus, even without ultimate military success by its indigenous allies, Albany remained a formidable competitor for Montreal's dominance in the fur trade.

Indeed, the reign of George I in New York was the bright noonday of the provincial epoch. The favorable postwar economic situation was certainly one of the primary reasons, as was the persevering and graceful leadership of Governor Robert Hunter, who, after the formation of the Whig administration at home, adroitly converted strong metropolitan support into effectively unchallenged leadership in the province.<sup>43</sup> Among the key elements of Hunter's po-

<sup>40</sup>See An Act to prevent the Removal of Actions of Twenty pounds from the Mayors Court of New York and Other Courts, October 11 1709, 1 NY COL LAWS 681.

<sup>41</sup>An Act to prevent the Exportation of the Gold and Silver Coin out of this Colony, September 24 1709, 1 NY COL LAWS 678. The act exempted currency to the value of £5, carried by "any Traveller or Passenger by Land or by Water" to the neighboring colonies. It expired two years after enactment, forestalling disallowance at Whitehall. Enforcement rested with the Mayor or Recorder of New York. Neither the records of the Mayor's Court nor those of the Common Council in the period from 1710-12 reflect enforcement activity.

<sup>42</sup>Hunter reports, NYCD.

<sup>43</sup>For a perceptive account of the politics of Hunter's administration, see M.L. LUSTIG, ROBERT HUNTER, 1666-1734: NEW YORK'S AUGUSTAN STATESMAN 64-159 (1983).

litical success, in turn, was the alliance he formed with Lewis Morris, the leading force in the Assembly, whom Hunter elevated to the Chief Justiceship of the Supreme Court. William Smith, Jr., whose father was Morris's contemporary, said in his history of the province that "[t]ho' he was indolent in the management of his private affairs, yet, thro' the love of power, [Morris] was always busy in matters of a political nature, and no man in the colony equaled him in the knowledge of the law and the arts of intrigue."<sup>44</sup> Hunter and his successor, William Burnet, turned this most dangerous of potential opponents into a firm prop of the provincial government;<sup>45</sup> in doing so they avoided a danger latent in the political and legal order since 1691—the conversion of the court system into a locus of political opposition. Later administrations were to be less wise in this respect, to the manifest detriment of provincial government, and the stability of the law.

In the period from 1715–1720, the earliest covered by extant records, Morris also served as judge of the Vice-Admiralty Court of the province—a position less than strenuous in a period of peace and rather lax enforcement of the laws of trade and navigation.<sup>46</sup> The provincial money supply continued to be adequate, if not lavish, partially owing to a prudent issue of provincial bills of credit to cover the wartime public debt,<sup>47</sup> and the result was a comparatively low level of debt litigation, averaging less than a dozen cases a year in the Mayor's Court before the economic contraction of 1718–20.

Along with legislation aimed at expansion of credit, the Assembly also passed in 1714 a reform of the debt litigation system that was to have important effects in subsequent decades. In a commercial system short of specie, in which the primary payment mechanism was bonded debt, often in the increasingly important form of penal bonds containing effectual liquidated damages provisions for twice the actual value of the debt, a strong incentive existed for piecemeal litigation, as parties to a string of transactions had little choice but to sue on each bond individually.<sup>48</sup> Not only did this situation increase the volume of litigation, it also threatened unjust outcomes in situations of set-off or partial payment. To reduce the volume of litigation, lower costs of collec-

<sup>44</sup>W. SMITH, JR., *THE HISTORY OF THE PROVINCE OF NEW YORK* 140 (M. Kammen, ed. 1972).

<sup>45</sup>The best survey of the complex political career of Lewis Morris is E.R. SHERIDAN, *LEWIS MORRIS, 1671–1746: A STUDY IN EARLY AMERICAN POLITICS* (1981). Sheridan's precise focus on political biography is unfortunately less helpful in illuminating Morris's activities at law.

<sup>46</sup>The entire recorded output of Vice-Admiralty during the first two years of Morris's tenure can be found in *REPORTS OF CASES IN THE VICE-ADMIRALTY OF THE PROVINCE OF NEW YORK AND IN THE COURT OF ADMIRALTY OF THE STATE OF NEW YORK, 1715–1788*, at 1–5 (C.M. Hough, ed. 1925). The minutes for the remainder of Morris's tenure and the first three years of his regularly-commissioned successor, Francis Harison, have not survived. There is no reason to suppose the docket to have been any more extensive in 1718–20 than it was in 1715–17.

<sup>47</sup>See Acts of September 4 1714 & December 23 1717, 1 NY COL LAWS 815–27, 938–91.

<sup>48</sup>The same problem existed with respect to the primary alternative payment system, the less formal promissory note, which came increasingly into use in New York after the passage of the Promissory Note Act, 3 & 4 Anne c. 8 (1704). The Act was not formally in force in the colonies, but Mayor's Court pleadings mention the Act, and make the recitations common to its use, at least as early as 1710, *see, e.g., Churchill v. Hood*, MCM June 27 1710, an elegant demonstration of the force of English commercial practice in securing uniformity of colonial commercial law.

tion, and decrease the advantage to the first plaintiff to reach the courthouse, the act of 1714 provided that any defendant sued for debt “upon Bonds Bills, Bargains, Promises, Accounts or the like” might allege in his answer any off-setting instruments of debt, upon which judgment might be entered (by jury verdict or otherwise) for either side in the amount of the net balance. The act specifically provided that if defendant’s set-off exceeded plaintiff’s claim the resulting judgment would be a debt of record, on which execution might be had by *scire facias*.<sup>49</sup> The effect of the statute, in practice, was to encourage parties to regularize their accounts by reducing their reciprocal portfolios of debt instruments to a single judgment in any of the provincial courts, frequently by confession of judgment of the net amount of multiple debt instruments. The minute books of the courts are accordingly a poor vantage from which to appreciate the operation of the system. Observation reveals an increase in the default judgment rate in debt cases, along with a fall in the total volume of apparent debt litigation, but not the underlying mechanism. Practice papers, however, can restore the remaining detail. For examples of the use of the 1714 act as a debt consolidation device, the papers of James Alexander, who used it heavily for the regulation of his own portfolio of others’ bonded debt, are particularly helpful.<sup>50</sup>

In addition to the reform of debt procedure in 1714, the Assembly chose in 1717 to make its first foray into the legal control of interest rates, instituting a six percent limit on legal interest for five years.<sup>51</sup> The contraction of the economy, incipient in 1717, had significantly raised the cost of money by mid-1718, and the limit was raised to eight percent.<sup>52</sup> The act expired by its terms in 1722, and was not renewed. A second response to the slowing economy, which brought with it the eternal threat of a collapse of credit incident to the contraction of the money supply, prompted the Assembly to make “Lyon dollars” (actually Dutch coins) legal tender in the province—the only designation of foreign currency as legal tender in the provincial period.<sup>53</sup>

Along with changes in the basic operation of the system of private debt, the era of political good feelings in New York allowed a more deliberate ex-

<sup>49</sup>An Act for preventing the Multiplicity of Law Suits, September 4 1714, 1 NY COL LAWS 827.

<sup>50</sup>See, e.g., Alexander v. Howell, October 1736, Box 44, file 3, James Alexander Papers, NYHS; Alexander v. Crees, July 1742, 44/2; Alexander v. Ferris, October 1742, 44/1. Deborah Rosen, comparing minutes of the New York Supreme Court of the 1690s and 1750s, claims a fundamental “transition” in civil practice in New York, based on the substantial replacement of jury verdicts by default judgments between her two short periods of observation. Rosen understands that default in debt cases may result from the use of judicial process as a recording device, see Rosen, note 32, at 233–34, but her narrowly exclusive focus on the Supreme Court minutes for two benchmark periods prevents her from estimating its significance or illuminating its procedural basis. She does not refer to the 1714 statute.

<sup>51</sup>An Act for the Restraining the taking of Extravagant and Excessive Usury, May 27 1717, 1 NY COL LAWS 909. It should be noted that this and subsequent usury statutes in New York provided for treble damages recoveries by victims of usurious lending.

<sup>52</sup>See 1 NY COL LAWS 1004.

<sup>53</sup>See Act of November 19 1720, 2 NY COL LAWS 5. The best capsule summary of the coinage used in provincial New York is Fernow, *Coins and Currency of New York*, in 4 J.G. WILSON, MEMORIAL HISTORY OF THE CITY OF NEW YORK 309 (1892).

plotation of the postwar commercial possibilities through changes in the large-scale legal organization of trade. Consolidation of the commercial advantage in the Indian trade offered by the superior quality and lower price of English-made trade goods required measures to close off the trade between Albany and Montreal, whereby New York's traders found themselves in competition with their own goods at one remove. Governor Burnet, of whom William Smith, Jr. said that "[o]f all our governours none had such extensive and just views of our Indian affairs,"<sup>54</sup> secured among the first legislative measures of his administration a statute prohibiting the export of Indian trade goods to the French, enforced by seizure and forfeit of such goods and a penalty for illegal trading in the enormous sum of £100.<sup>55</sup> Though Burnet's measure was prudent in the long term, securing to the New Yorkers the full strategic advantage of British industrial superiority in the period before the eruption of the final imperial war with France, it met with strong opposition from the Albany traders, bent on pursuing their traditional trade with the enemy at Montreal, and enforcement—dependent as it was upon officers and juries in the Albany country—was lax at best.<sup>56</sup>

Along with his attempt at negative regulation of imperially disfavored trade, Burnet also undertook positive measures to secure commercial advantage in the western trade by establishing a provincial trading post at Oswego.<sup>57</sup> Burnet later convinced the Assembly to support the Oswego post by application of excise revenue, though this application of customs receipts, and the controversial prohibition of trade in Indian goods with the French, triggered wholesale rejection of Burnet's far-sighted western policy by management at Whitehall.<sup>58</sup> The fate of Burnet's attempt at the legislative reorganization of the Indian trade illustrates the forces operating to limit the effectiveness of local commercial law in the context of imperial control over the large-scale regulation of trade.

The general continuation of prosperity through the 1720s once again made transactional dispute resolution relatively easy. A new generation of native-born lawyers began to take over commercial litigation in the Mayor's Court; the generally profitable business they did there formed the basis for the first real steps in the direction of an organized Bar for the province.<sup>59</sup>

Merchants and lawyers continued, too, to make use of reference and arbitration to resolve the factual complexities of commercial disputes outside the courtroom. Prominent among the advantages of reference was its speed. The rule referring a case might require "the report of the Parties . . . on or before Tuesday next."<sup>60</sup> When a commercial account was adjusted by reference in

<sup>54</sup>1 W. SMITH, JR., note 44, at 166.

<sup>55</sup>An Act for the Encouragement of the Indian Trade and rendring of it more beneficiall to the Inhabitants of this Province and for Prohibiting the Selling of Indian Goods to the French, November 19 1720, 2 NY COL LAWS 8.

<sup>56</sup>See 1 W. SMITH, JR., note 44, at 167–68.

<sup>57</sup>See Johnson G. Cooper, *Oswego in the French-English Struggle in North America, 1720–1760* (unpublished PhD. dissertation, Syracuse University, 1961).

<sup>58</sup>See Act of November 26 1727, 2 NY COL LAWS 372.

<sup>59</sup>The evolution of the Bar during the 1720s is considered in more detail in Chapter ??, *supra*.

<sup>60</sup>*Mathews v. Morris*, reprinted in R. MORRIS, note 21, at 553.

October 1730, the rule requested “all Convenient Speed” of the referees; the rule was entered on October 6, the report was available one week later, and the defendant was ordered to pay the judgment and costs within four days, under penalty of attachment for contempt.<sup>61</sup> Further refinement of procedure can be observed in the cases of the 1740s, by which time it had become the practice for the defendant to confess judgment in the amount of plaintiff’s claim, the confession explicitly limited to security for his obedience to the referees’ award.<sup>62</sup> If the plaintiff was found liable to the defendant, the referees’ report became a debt of record, on which the defendant could recover by the process of *scire facias* under the 1714 statute.<sup>63</sup> Another indication of the importance of arbitration in this period can be found in the area of marine insurance. The New York practice was for merchants themselves to serve as underwriters, several subscribing the capital on each policy.<sup>64</sup> Merchants frequently arranged for the insurance in New York on cargoes belonging to their correspondents elsewhere.<sup>65</sup> Arbitration clauses were a standard feature of marine insurance policies in eighteenth century New York; the practice was originally English, though one which apparently decreased in England during this period.<sup>66</sup> The clauses evidently were effective in keeping marine insurance matters in the hands of arbitrators, and they undoubtedly accounted for much of the arbitration *per se* during the period.<sup>67</sup>

Other evidence from outside the court records indicates the degree to which there remained considerable social pressure within the mercantile community

<sup>61</sup>Connor v. Kippin, *id.* Arbitration was of course not inconsistent with the involvement of lawyers. The plaintiff in this case was represented throughout by John Chambers, whose fee, amounting to 15% of the amount of the debt recovered, was included among the costs of suit taxed to the defendant.

<sup>62</sup>Waters v. Bowne, July 21, 1747, *reprinted in id.* at 562. Since confession of judgment is sometimes recorded in the minute books without indication of the reference on which it is based, the default judgment statistics in debt cases include an uncertain number of contested cases decided extrajudicially. Only the lawyers’ records provide an indication of the real state of affairs. *See, e.g.,* Alexander v. Shoddy, March 1732, Docket Book B, James Alexander Papers, NYHS. Alexander, indefatigable as always in the collection of his own debts, here left final determination of the amount owing to the sole arbitration of James DeLancey. Default in New York Supreme Court served as security for payment of the award. Cases such as these provide reason for caution in the use of apparently reliable quantifications of data contained in the minute books.

<sup>63</sup>*See* Duryee v. Horsfield, July 15 1755, *reprinted in* R. MORRIS, note 21 at 563.

<sup>64</sup>The pooling of underwriting occurred informally in the first half of the century, though by 1760 there were competing “assurance offices” in Manhattan, serving a clearing-house function for merchants seeking to underwrite or insure, though probably not directly involved in underwriting risk. *See* V.D. HARRINGTON, *THE NEW YORK MERCHANT ON THE EVE OF THE REVOLUTION* 153–55 (1933).

<sup>65</sup>Letter, Gerrard G. Beekman to Joseph Jackson, Oct. 19, 1761 in 1 BEEKMAN MERCANTILE PAPERS 1746–1779 at 392 (White ed. 1956) (hereinafter cited as BEEKMAN PAPERS); Same to Southwick & Clark, April 6, 1762, 1 *Id.* at 406; John Watts to Thomas Astin, Jan. 30, 1762, NYHS COLLECTIONS 1928 at 285.

<sup>66</sup>J. WESKETT, *A COMPLETE DIGEST OF THE THEORY, LAWS, AND PRACTICES OF INSURANCE* xxii (Dublin, 1783), cited in J. GOEBEL, *2 LAW PRACTICE OF ALEXANDER HAMILTON* 397 n. 24 (1969).

<sup>67</sup>For example, of the references or arbitrations mentioned in Gerrard G. Beekman’s letter book for the period 1746–1770, all but one concerned insurance matters; the exception was a prize case. *See* 1 BEEKMAN PAPERS 6.

to arbitrate disputes. In March 1731, for instance, William Channing twice bought advertisements in the *New York Gazette* denying the claim of William Vesey that he refused to submit their disagreements to arbitration. He was, the advertisement proclaimed, prepared to leave “all Things in Dispute to the final Determination of any Merchant or Merchants in this City.” Somewhat later, in 1756, Waddell Cunningham was engaged in a prolonged negotiation between Aspinwale & Doughty, merchants in New York, and McQuoid & Haliday, his own correspondents in Liverpool. In the midst of the preliminary maneuvering, he wrote to Liverpool:

I have the pleasure of a letter from Mr. Wm. Haliday . . . with the sundry proofs, of your affairs in dispute with Messrs. Aspinwale & Doughty. I have had them examined on the subject, but tho I have sent for an answer, they think proper to defer it, my reason for writing them was, least they sho'd deny in Court I offer'd Arbitration, which I am sure will have A great weight both with the Court, & Jury, if it shou'd come to Tryal.<sup>68</sup>

To get to trial without an offer to arbitrate, or to bear the burden of refusing such an offer, was a liability for the merchant litigant. Cunningham no doubt anticipated that an involved commercial dispute would be tried to a struck jury, likely to have some experience in such matters; such a jury would evidently, in his opinion, consider refusal to arbitrate evidence of unfair play.

The prosperity of the 1720s came to an abrupt end in 1729, to be succeeded by more than eight years of serious economic difficulties. One contribution to the decline was enhanced competition in the food export trade to the Caribbean mounted by the merchants of Philadelphia. Rapid development of the Pennsylvania hinterland provided enhanced production, and Philadelphia emerged from the economic doldrums as New York descended into them.<sup>69</sup> One aspect of New York's competitive disadvantage resulted from a weakness in the order of commercial regulation—since the Bolting Act of 1694 had abolished the city monopoly on flour production for export the flour trade had been essentially unregulated.<sup>70</sup> Unmerchantable and fraudulent goods repeatedly damaged the reputation of the New York product.

In addition to enhanced commercial competition from the other breadbasket settlement—a force acting to depress New York's economy in the long term—the recession of 1729 was precipitated in the short term by a collapse of the credit system, largely attributable to the shortage of money. Throughout the provincial period, with money scarce at the best of times, the economies of the seaports were houses of paper, debt piled on debt. New York merchants dealing with English correspondents were generally allowed twelve

<sup>68</sup>Cunningham to McQuoid & Haliday, June 28, 1756, in *Letter Book of the Firm of Gregg and Cunningham* 61 (unpublished ms. in the New York Historical Society).

<sup>69</sup>A comparative review of the economic situation of the port cities during this period is provided in G.B. NASH, note 37, at 102–28.

<sup>70</sup>See An Act against unlawful by laws and Unreasonable forfeitures, March 24 1694, 1 NY COL LAWS 326.

months' credit; in the wholly illegal but critically important direct trade with Dutch merchants, terms were nominally less advantageous, generally only three months' credit, though reliable customers were rarely cut off for taking more time to pay. On the local side of his business, the merchant had to extend credit to his own customers, no matter how great the encouragements to cash trade. Some articles—sugar and its derivatives, flour, tea—were generally sold for cash, but almost all other goods were sold on six to twelve months' credit.<sup>71</sup> In ordinary practice a merchant had not even time to dispose completely of one shipment's inventory before the next arrived and the first needed to be paid for; any circumstances increasing the difficulty of collecting his debts threatened disaster. John Watts' comment that "of people in Commerce . . . the greater part live by Credit" reminds us of the precariousness with which the credit system supported even the highest standards of living in the province.<sup>72</sup>

This context made the continuance of an adequate money supply a matter of economic life and death for the provincial mercantile class. A reduction of the usually sparse quantity of money in circulation meant that consumers could not find cash to pay their retail debts, catching both the retail tradesman and the importing merchant between the millstones. Again in distinction from Pennsylvania, New York emitted negligible quantities of paper money during the 1720s; roughly £24,000 in outstanding bills of credit were canceled upon expiration during the decade, and only £16,000 were issued.<sup>73</sup> The result appears to have been a classic credit famine and cascading collapse of the commercial system in 1729. The jails began to fill with debtors who could not or would not pay, and by the fall of 1730 the situation had grown desperate.

For the first time, the Assembly met the credit crisis with a temporary act for the relief of insolvent debtors in the familiar eighteenth-century mold. Those arrested for debts totaling less than £100 might regain their liberty by making an assignment of all assets—save household goods and tools of trade to the value of £10—for the benefit of creditors and executing a pauper's oath; in keeping with the prevailing theory, release from confinement was not a discharge from the preexisting debts, which remained enforceable against after-acquired assets.<sup>74</sup> Additional provision was made for the release on similar terms of those imprisoned for debts under 40s., since such small debtors could be confined on summary process before a single Justice of the Peace. The act

<sup>71</sup>The essential guide to the conduct of business in colonial New York remains Virginia Harrington's study on the period from 1750–1775. It is, after sixty years, still unrivaled for thoroughness and accuracy; its only drawback is its comparatively narrow chronological focus. Because equivalents of the letter books and other counting-house sources on which Harrington drew are largely unavailable for the decades before 1730, it may be doubted whether her work can be significantly improved upon. For the credit policies of New York merchants in the late provincial period, see V.D. HARRINGTON, note 64, at 101–04.

<sup>72</sup>Watts to James Napier, June 1 1765, NYHS COLL 1928, at 355.

<sup>73</sup>See V.D. HARRINGTON, note 64, at 352.

<sup>74</sup>An Act for the relief of Insolvent Debtors within the Colony of New York with respect to the imprisonment of their persons, October 29 1730, 2 NY COL LAWS 669. For a rather general survey of statutes for the relief of insolvent debtors in colonial America, see P.J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900* (1974).

expired by its terms after one year;<sup>75</sup> in New York, as everywhere else in the common-law world in the eighteenth century, insolvency was treated by the law as an exceptional condition, ordinarily indicative of speculation and unworthy of lenient treatment, except under even more exceptional conditions calling for temporary intervention. Insolvency was not seen as an ordinary risk incident to commerce, and this perspective inhibited the legal management of the consequences of insolvency through collective organization of creditors.

Along with the act to deliver the jails, the Assembly undertook one other measure of pro-debtor reform in the legal system as a result of the 1729 collapse. As a companion to the relief statute, the legislature prohibited the collection of penalties on bonded debt. Collection on any penal bond was to be limited to principal, lawful interest, and taxable costs. Attorneys bringing actions for collection and sheriffs' officers acting to levy execution were made independently answerable for failure to attach to all papers addressed to defendants a schedule itemizing the legitimate components of the claim or judgment.<sup>76</sup> Since the penal bond was the primary form of obligation in use, in part precisely because it allowed the creditor to finesse the issue of the interest rate, the Assembly's action represented an extremely disruptive attempt to control the price of money at a time of acute shortage. Rather unsurprisingly, the act was disallowed by the Crown at the end of 1731.<sup>77</sup>

Coeval with the onset of the economic crisis, though neither could be regarded as a complete response, were two other important changes in the law applicable to commercial relations. For the first time in 1729, the Assembly required the itinerant traders of the province to acquire a license, and pay a yearly fee of £5, with an additional £5 for "each Horse or other Beast bearing or drawing burthen."<sup>78</sup> The act exempted those selling goods of their own produce or manufacture, as well as "any Tinker Glazier Cooper Plumbers, Tayler

<sup>75</sup>Despite the explicit expiration clause, some evidence suggests that the act continued to function beyond 1731. At least three cases in the Mayor's Court minutes as late as 1734 show administrations of the pauper's oath and release from imprisonment for debt specifically founded on "the Act of 1730." See, e.g., *Huggins et ano. v. Stimson*, MCM April 2 1734, at 399.

<sup>76</sup>An Act to prevent the Taking or Levying on Specialties more than the Principal Interest and Cost of Suit and other purposes therein Mentioned, October 29 1730, 2 NY COL LAWS 676. The "other purposes," primarily comprised a confirmation of the power of clerks of court to issue writs of replevin without judicial intervention, presumably as a gesture in the direction of creditors' interests. See *id.* at 678. An interesting question arises as to the ascertainment of the maximum lawful interest under the statute. The English Usury Act of 1660 was obviously not in force in New York, and the Mayor's Court never gave countenance at any time to the occasional pleading that set up the English act against recovery on a penal bond. The last provincial statute setting the usury limit, that of 1718, expired in 1722. See *supra*, p. 19. It seems most likely that the 8% limit set in 1718 was still regarded as the maximum legal rate, though it no longer had any statutory basis. I have found no litigation during the short lifetime of the 1730 act that clarifies the contemporary understanding of the situation. For an indication that lending in New York during the 1720s had been an attractive investment at the implied 8% limit, see Governor Clarke to Lords of Trade, June 2 1738, 6 NY COL DOCS 116.

<sup>77</sup>The report of counsel to the Board of Trade recommending disallowance of the statute is apparently lost, a search in the Privy Council records at the Public Record Office having proved fruitless.

<sup>78</sup>An Act for Licensing Hawkers and Pedlers within this Colony, July 12 1729, 2 NY COL LAWS 571.



or other Person usually Trading in mending and making of Cloths Kettells, Tubs or House hold goods," and reserved to New York City and Albany the right to exclude such licensed peddlers from those communities. The intention, in short, was to rationalize the country trade in imported articles—a result ultimately favorable to the merchant importers of the City.<sup>79</sup>

The year 1730 also saw the grant of a new charter to the City of New York. The Montgomery Charter provided a clear foundation for the exercise of governance and proprietary control by the Mayor and Common Council of the City, removing various uncertainties resulting from the prior charter, issued under the Dongan administration in 1686.<sup>80</sup> As concerned the system of commercial adjudication, the Charter's most important consequence was the limitation of the right of audience in the Mayor's Court to eight named attorneys, who were, in effect, to enjoy exclusive access to the profits of justice accruing from the collection of debts and other business in the most important commercial court in the province.<sup>81</sup> Hard times expanded the volume of debt litigation in the courts through the decade of the 1730s, and not until another wartime boom brought prosperity back to the city was the stranglehold on the profits of debt litigation broken.

The credit collapse of 1729–30 ushered in a period of stagnant trade. The maritime commerce engine of the city's economy shut down; shipbuilding ground to a virtually complete halt, idling craftsmen and seamen. As one newspaper correspondent put the case in 1737:

Our shipping are sunk. And our Ship-building almost entirely lost. Our Navigation is in a Manner gone; and Foreigners are become our Carriers, who have been continually draining us of that Money, which formerly was paid to our seamen.<sup>82</sup>

Even if the situation was not quite this desperate, the Caribbean trade had certainly failed. Slave cargoes reached a low for the period following Queen Anne's War, and the overall level of per capita imports during the period from 1728–36 seems to have declined by roughly 10% from the level in the preceding decade.<sup>83</sup>

<sup>79</sup>The act expired after one year, but was repeatedly revived and remained in force throughout the remainder of the provincial period. See, e.g., 2 NY COL LAWS 758, 988; 3 NY COL LAWS 60, 417, 873.

<sup>80</sup>The Montgomery Charter is reprinted in 2 NY COL LAWS 575–639. Consideration of the Charter's manifold consequences is beyond the scope of the present study. The best account of the Charter's content and effect is found in H. HARTOG, note 13, at 13–43.

<sup>81</sup>The Mayor's Court Bar monopoly, and its relevance to the rise of an organized legal profession in the province, is discussed in Chapter ??, *supra*.

<sup>82</sup>New-York Weekly Journal, March 28, 1737.

<sup>83</sup>See Governor Clarke to Lords of Trade, February 17 1738, 6 NY COL DOCS 112. For the calculation of per capita import levels, see G. B. NASH, note 37, at 124. The computation is complicated by transcription errors in the census of 1737; extrapolation is difficult because the provincial white population seems to have been falling in the mid-'30s, probably as a consequence of out-migration to other colonies caused by unemployment. See Nash, *The New York Census of 1737: A Critical Note on the Integration of Statistical and Literary Sources*, 36 WMQ (3D SER.) 212 (1979). As an alternative gauge of the depths of the maritime depression, Beverly McAnear, on the basis of ship clearance

The sources of the revival of commerce, beginning in 1738–39, were the traditional pair: illegal trading and war. Free trade zones in the Dutch and Danish Caribbean—at St. Thomas, Curaçao, St. Eustatius, and Surinam—provided access to French sugar, both higher in quality and lower in price than the Jamaica product, as well as a market for flour and lumber.<sup>84</sup> The emission in 1737 of £48,350 in provincial bills of credit (the largest single increase in the money supply before the French and Indian War) provided liquidity for the trade expansion,<sup>85</sup> and the Anglo-Spanish war that began in 1739—the only war in human history named after a severed ear—again opened before New York eyes the vistas of commerce raiding and trading with the enemy.

The renewal of war in the Atlantic had an immediate and striking effect on the legal system of New York. Even as the merchants had their wartime specialty, so had the lawyers. The Vice-Admiralty Court of the province decided one case in 1730, and rendered not a single decision for the next eight years. In May 1739, Lewis Morris, Jr., replaced Daniel Horsmanden as Judge, and thereafter the Court entertained a truly astonishing torrent of business.<sup>86</sup> From 1739 through the opening of war with France in 1744, Morris adjudged the condemnation of 32 prizes, bringing at auction more than £150,000.<sup>87</sup> It was pardonable exaggeration on the Governor's part when he informed the Board of Trade at the end of 1741 that New York "was never in so flourishing a condition as it is now."<sup>88</sup>

Unfortunately for the New York merchants, the sword sometimes cut both ways. Vessels engaged in illegal trade with the Spanish possessions were legitimate prizes under the order of general reprisal, and merchants trying to make a profit at both ends of the war were liable to find themselves defendants rather than claimants in the prize court. For the lawyers, however, this was good fortune. When, within a few months of the opening of the war, Captain

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records, estimates that trade with New England fell 50% and trade with the West Indies more than 20% during the 1730s. B. McAnear, *Politics in Provincial New York, 1689–1761*, at 359–60 (unpublished Ph.D. dissertation, Stanford University, 1935).

<sup>84</sup>The Danish port at St. Thomas only opened to British-American vessels in 1735. By 1737, illegal trade to the Caribbean neutrals was visibly producing a renewal of activity in New York, however unwelcome to the Crown's customs officials. See Archibald Kennedy to Board of Trade, January 10 1737/8, PRO CO 5/1059/GG19.

<sup>85</sup>This issue supplemented another £12,000 in bills issued in 1734. See V.D. HARRINGTON, note 64, at 352.

<sup>86</sup>See *REPORTS OF CASES IN THE VICE-ADMIRALTY*, note 46, at 13. It is a testament to the sagacity and power of the Morris family that this appointment, the first judicial appointment for the Morrisites after Governor Cosby removed Lewis Morris, Sr., from the Chief Justiceship of the Supreme Court in 1732, in the midst of the Zenger episode (discussed in Chapter ??, *supra*) would constitute the richest single piece of judicial patronage available in the province. The Morris family, as always, knew to get in on the ground floor.

<sup>87</sup>See *1 Mins. Vice-Adm. Ct. NY, 1715–46*, United States District Court, SDNY.

<sup>88</sup>Clarke to Board of Trade, December 15, 1741, 6 NY COL DOCS 207–09. Clarke's jaunty tone concerning the state of the province has a somewhat more sinister ring when one recalls that his letter followed by less than five months the executions of thirty black men and four white men and women in the hysteria following the alleged "New York Conspiracy," discussed in Chapter ??, *supra*. The edgy, nearly desperate tone of the city after the disastrously harsh winter of 1740 leading to the "negro plot" hysteria is remarkably captured in Thomas Davis' elegant narrative reconstruction of the events of '41. See T.J. DAVIS, *A RUMOR OF REVOLT* 12–34 (1985).

Vincent Pearse in *H.M.S. Flamborough* seized two ships in New York harbor for illegal trading, the owners' counsel argued that Vice-Admiralty had no jurisdiction since the vessels were seized in New York water, rather than on the high seas. When Morris denied the motion, counsel secured writs of prohibition from the Supreme Court. Although the jurisdiction of Vice-Admiralty was ultimately vindicated, it required appeals to the Privy Council—otherwise extremely infrequent in New York. A good bout of expensive litigation all round, contributing to the wartime prosperity, at the very least, of the New York Bar.<sup>89</sup> Even among those few surviving practice records from the period, the papers of three counsel reflect their involvement in the *Flamborough* cases.<sup>90</sup> The eighteenth-century equivalent of the Predators' Ball continued, without abatement and at a higher pitch, after the opening of war with France in 1744. Before the peace of Aix-la-Chapelle temporarily suspended worldwide hostilities between England and France in 1748, ship registrations had risen from 53 to 157, sixty more privateers had been commissioned, and another 213 prizes, worth roughly £450,000, were condemned in Vice-Admiralty and auctioned off in New York.

The profitability of the war at sea only reinforced the traditional sentiments of the City's mercantile elite that territorial warfare with the French in Canada was a job for someone else—let Massachusetts borrow and bleed. This was not the view of Governor George Clinton, however, and the disagreement over war policy precipitated the break between Clinton and his closest political ally, the most powerful native of the province and spokesman for the merchant aristocracy, Chief Justice James DeLancey.<sup>91</sup> DeLancey exercised enormous influence in the Council and General Assembly, where as many of as half the members in some sessions were his relatives or stood on his interest; in 1747, through the metropolitan influence of his brother-in-law Peter Warren, DeLancey was

<sup>89</sup>For Privy Council disposition of the cases of *Pearse v. Cummins* and *Pearse v. Kay & Hubbard*, see 3 ACTS OF THE PRIVY COUNCIL, COLONIAL nos. 527–28, PRO PC 2/97/13–14, 305–10, 344–45. For the original Vice-Admiralty proceedings, see 1 *Mins. Vice-Adm. Ct. NY, 1715–46*, at 110–16.

<sup>90</sup>See James Alexander Papers, Box 45 & Register of Cases, NY Sup Ct 1741–42, at 42, NYHS; William Livingston Book of Precedents, 1329/276–87, NYSL; John Chambers MSS, 9885/436, NYSL. For technical details of the litigation, see J.H. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 518–20 (1950). For the infrequency of Privy Council appeals from New York, see the statistics collected by Smith, *id.* at 667–71. It should be noted that there was simultaneous litigation in 1739–41 over the jurisdiction of Vice-Admiralty to adjudicate seizures in New York water for violation of the Navigation Acts. Here the New York Supreme Court's writ of prohibition was eventually upheld by the Privy Council, on the ground that Vice-Admiralty was not a court of record within the meaning of the acts. See *Kennedy qui tam etc. v. Sloop Mary & Margaret*, REPORTS OF CASES IN THE VICE-ADMIRALTY, note 46, at 16; 3 ACTS OF THE PRIVY COUNCIL, COLONIAL no. 538; J.H. SMITH, *supra*, at 515–17.

<sup>91</sup>The most complete and perceptive account of provincial politics in the period from 1743–53 remains S. KATZ, *NEWCASTLE'S NEW YORK: ANGLO-AMERICAN POLITICS, 1733–1753*, at 164–244 (1968). Although I here put more stress on disagreement over war policy than Katz's own account, which emphasizes DeLancey's long campaign to acquire complete political control in New York, in which the break with Clinton was a carefully-prepared tactical measure, *id.* at 166–76, this is entirely a matter of emphasis. From the point of view of the mercantile community, DeLancey's reignition of factional politics in the province had a legitimate policy goal—the furtherance of their own economic interests—while renewed political opposition centered in the Supreme Court had effects on the legal system of the province quite independent of DeLancey's personal ambitions.

commissioned as Lieutenant-Governor of the province. But the fulcrum of DeLancey's power was his commission as Chief Justice. Originally raised to that eminence by Cosby, in order to regain control of the Supreme Court from the Morrisites in the midst of the Zenger controversy, DeLancey consolidated the office as a haven for political opposition when he secured an unwise commission from Clinton in September 1744 granting him tenure in office during good behavior.<sup>92</sup> The commission sowed the seed of future political disaster in two respects: not only did it permit DeLancey to use the organs of justice to subvert imperial policy for local or political purposes, it also created a precedent for good behavior commissions of judges, ensuring the eventual eruption of controversy over the traditional appointments to serve at pleasure, which were all the Governors' instructions ever authorized them to make.<sup>93</sup> Both crops were to be harvested shortly, to the detriment of legal stability.

In keeping with the general eighteenth-century pattern, the temporary outbreak of peace in 1748 brought about a contraction of credit in the wake of the withdrawal of privateering and victualling opportunities for New York merchants. Levels of debt litigation again increased sharply,<sup>94</sup> and the jails began to fill. By the fall of 1750 the situation was serious enough to warrant the passage of another act for relief on insolvent debtors, and the Assembly substantially reenacted the act of 1730, again to be in force for one year only.<sup>95</sup> This one-year jail delivery once again proved insufficient to cope with the effects of a continuing shortage of credit, and in the fall of 1751 the act was extended until January 1 1753, but significantly the availability of relief was limited to debtors imprisoned in the City.<sup>96</sup> Only the emission of £45,000 in provincial bills of credit in 1755 and the renewal of New York's naval war in 1756 would restore sufficient liquidity to the credit system to relieve the congestion of the courts and futile destructiveness of cascading debt litigation.<sup>97</sup> In the meantime, and with an

<sup>92</sup>See *Cal Couns Mins* 345 (September 13, 1744).

<sup>93</sup>Instructions since the time of William III had contained a provision prohibiting governors from arbitrary or capricious removals of sitting judges. It was clear, if not explicit, constitutional law in the province, as elsewhere in British North America, that this did not authorize commissions *quamdiu se bene gesserint*. For the joint opinion of the law officers of the province to this effect in the aftermath of Clinton's administration, see 6 NY COL DOCS 792.

<sup>94</sup>A sample of 250 cases from the Mayor's Court minutes evenly divided between the period 1745–48 and 1750–53 shows litigation of debt on specialties (bonds, excluding bail bonds; promissory notes; and bills of exchange) rising from 5% to slightly more than 15% of the Mayor's Court docket. Some of this litigation certainly involved protested bills of exchange drawn on merchants outside the province, and thus no reliance on the precise figures is warranted, but the overall pattern relating litigation levels to the local supply of credit is significant.

<sup>95</sup>An Act for the Relief of Insolvent Debtors with Respect to the Imprisonment of their Persons, November 24, 1750, 3 NY COL LAWS 822. The act differed from the 1730 act in few significant respects. The upper limit of eligibility for relief was lowered from £100 to £50 in total indebtedness, while the exclusion for household goods and tools of trade was lowered from £10 to £5. The price level in the province had by no means fallen so drastically since 1730. The provisions of the 1730 act regarding small claims debtors were not reenacted.

<sup>96</sup>See 3 NY COL LAWS 866.

<sup>97</sup>For these reasons, the comparison of summary statistics concerning default rates in civil litigation from 1694–96 (a period of wartime prosperity) and 1754–56 (a period of peacetime recession and credit famine) in demonstration of a long-term "transition" in the procedures of adjudication,

eye to the mitigation of the catastrophic effect of imprisonment for small debts on workers thereby deprived of their opportunity to support their families, the Assembly raised the upper limit on debt litigations cognizable by single Justices of the Peace from 40s. to £5, and provided that defendants having families should no longer be arrested; process was instead limited to summons.<sup>98</sup>

Other legislative measures were taken to encourage the revival of trade. The most important was the regulation of the production of flour, in order to combat the competitive disadvantage at which unreliable quality had put New York's exports for at least a quarter century. The legislature's apparent surprise at finding New York's flour suffered from a bad reputation is perhaps disingenuous, but its recitation of the justification for intervention deserves quotation:

WHEREAS in all well Regulated States the greatest care is taken to have their Staple Commodities put under proper Regulations, and as the Flower of this Colony (its Greatest Staple) has in a Great measure lost its Reputation abroad, Therefore in order to retrieve & preserve the Same,<sup>99</sup>

each bolter or baker was to have a mark, registered with the local authorities, to be applied to each barrel of flour or bread for export, and each such cask was to be inspected by officers locally appointed for the purpose, who were specifically instructed to bore into the cask to ascertain fairness of packing and quality of goods.

However much hope the Legislature may have placed in the power of an honest bread barrel, in gunpowder rather than flour lay the real basis of recovery. "War is declared in England—Universal joy among the merchants," William Smith, Jr., observed. It was July 1756, and from that moment the recession was over. For a few at the political and social pinnacle of the commercial system—such as John Watts, able to bring to bear the influence of the DeLancey-Warren interest—the enormous influx of British troops and seamen would create opportunities for vast profits in supplying His Majesty. But war

*see* Rosen, note 32, should be viewed with the utmost skepticism.

<sup>98</sup>An Act to empower Justices of the Peace to Try Causes from forty Shillings to Five Pounds, December 7 1754, 3 NY COL LAWS 1011. The act expired in 1758, but the small claims jurisdiction it created was very popular, and the act was renewed and the jurisdiction expanded throughout the remainder of the provincial period. *See* 4 NY COL LAWS 296, 372, 736; 5 NY COL LAWS 304.

<sup>99</sup>An Act to prevent the Exportation of Unmerchantable Flower & the false Tareing of Bread and Flower Casks, November 24, 1750, 3 NY COL LAWS 788. The act expired in 1752, was renewed for six additional years, *id.* at 883. In 1769 the Legislature found that notwithstanding the prior acts "such great abuses have been committed in the Manufacturing of Flour, that this great Staple of the Colony has in a very considerable Degree lost its reputation in all places to which it has usually been exported," and ordered additional inspection of the method of manufacture, as well as providing for a standard export barrel. *See* Act of May 20 1769, 4 NY COL LAWS 1096. The reputation of New York flour seems to have shared with the status of the middle class in the minds of certain historians the property of constant unrelenting fall (or rise) without prospect of limitation.

was a game any New York merchant could play, as the next sentence in Smith's diary pointed out: "Privateering engrosses the Coffee House."<sup>100</sup>

New York, the strategic pivot of the continental war, saw an influx of thousands of soldiers and seamen, as Britain threw resources in unprecedented quantities into the ordeal that would resolve what Parkman called "[t]he most momentous and far-reaching question ever brought to issue on this continent . . . Shall France remain here, or shall she not?"<sup>101</sup> More than 23,000 troops arrived in New York and Boston during 1757–58 alone, along with 14,000 seamen attached to the fleet headquartered in those ports after 1758.<sup>102</sup> But vast as were the sums to be made in victualling such forces, it was as always the private war at sea that carried real prosperity down through all levels of the maritime economy. By January 1757 there were thirty privateers at sea with ten ships under construction in the yards for speculative employment; in March 1758, DeLancey wrote to Pitt of "a madness to go privateering" in New York.<sup>103</sup> Ultimately more than 220 privateers were granted letters of marque and reprisal in New York; Vice-Admiralty condemned 401 prizes with the usual beneficial effect on the welfare of the Bar, and, according to one historian, more than £2,000,000 flowed into the pockets of privateering investors and crews.<sup>104</sup> Wages for merchant seamen rose, as manpower diverted itself into privateering; shipwrights and other construction workers were unable to meet the demand for their services, and thus the laborers and artisans of the city, and the tradesmen with whom they spent their wages, had their crumbs from the feast of the merchant princes.<sup>105</sup>

New Yorkers might have anticipated that the height of wartime growth would bear the usual relation to the depth of postwar depression. By 1761, when the focus of the war shifted southward, and New York saw the last of the fleet, the contraction was under way. New wealth cushioned the merchants, however, and at first the complaints of commercial slowdown were gentle, spoken as it were with the mouth still half full. "Our Consumption at this Season is very slender," wrote John Watts at the beginning of 1762, "& the Tipling Sol-

<sup>100</sup>2 *William Smith Papers* 412, NYPL.

<sup>101</sup>F. PARKMAN, *MONTCALM AND WOLFE* 26 (1962).

<sup>102</sup>G.B. NASH, note 37, at 235. After more than eighty years, Parkman's account of the strategic situation of the British Empire in the latter stages of the war has been superseded, save on literary grounds, by L.H. GIPSON, *THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION: THE VICTORIOUS YEARS, 1758–1760* (1965).

<sup>103</sup>7 NY COL DOCS 343.

<sup>104</sup>See J.G. LYDON, *PIRATES, PRIVATEERS, AND PROFITS* 157–59 (1970).

<sup>105</sup>The opulence in which the profits of war enabled the New York mercantile elite of the '60s to live is well-described by Virginia Harrington, note 64, at 11–46. It is one of the few unintentionally misleading features of Harrington's account that she does not indicate how recent was the foundation of this prosperity, and how disproportionately the mercantile elite had profited from the war boom. One might infer from Harrington's description that so it had long been in the province; actually the substantial relative rise of the wealthiest merchants is the most important feature. In this boom, as in a more recent period, the general aura of prosperity temporarily concealed the fact that it was the rich who followed Nathaniel Bedford Forrest's advice, and got there fustest with the mostest. Awakening on such subjects can rarely be indefinitely postponed, and many of the war boom fortunes, against which envy and hostility concentrated in the hard times of the '60s, were redistributed by the social disruptions of 1776–83.

diery that used to help us out at a dead lift are gone to drink [their rum] in a warmer Region, the place of it's production."<sup>106</sup> All might have been well, or at least no more ill than usual in postwar periods, if only the British Empire had lost the war.

The great issue had been resolved; France was not to remain in North America. The effect of British victory in the war for global empire was the greatest reorientation of New York's trade since the English conquest a century before. Economic dislocation incident to the changes was extremely severe, and as always dislocation made claims on the flexibility of the system of commercial law to absorb some portion of the shock. But the new imperial government resulting from the war demanded a less flexible legal regime, as management sought to control commercial behavior in the colonies, on both the large and small scale, more closely than ever before. In the process, the commercial law of New York seemed to fracture and then break under the strain.<sup>107</sup>

The effects of the peace on the trade system can be briefly outlined. The expulsion of the French from Canada spelled the eventual end of the fur trade in the Mohawk Valley. Albany's advantage rested in the availability of superior English goods at lower prices. With English control of Montreal, that advantage, always tenuous, evaporated. For the Iroquois, on the other hand, the prospect of provincial expansion into the continental interior was entirely unwelcome.

The trade to the French Caribbean, on the contrary, presented an even more favorable prospect after the peace than before. Without a hemispheric source of their own for temperate-zone goods, the French sugar islands were virtually a captive market for the colonial breadbaskets. The higher level of refining done before exportation rendered French sugar more attractive than Jamaican to New York merchants throughout the century, and the only barriers to massive expansion of the trade were imperial regulations, for which the traditional New York response was smuggling, an activity whose style varied between the defiantly overt and the mildly secretive. The superficially licit West Indies trade, however, had existed in the three decades before the peace simply by virtue of the non-enforcement of the Molasses Act of 1733. Only corruption and laxity of enforcement in Jamaica and New York prevented the levying of duties pursuant to the Act, and an additional *6d.* per gallon would suffice to extinguish the trade entirely. The entire Caribbean trade of the colony thus rested on props which the peace threatened to dislodge.

The trade to Holland, entirely illegal throughout the century, provided access to European and East Indian luxury goods at very favorable exchange, free of imperial duties. Like much of the remainder of New York's outport trade, it was now menaced by the prospect of enhanced British naval enforcement. But

<sup>106</sup>Watts to Francis Clarke, January 2 1762, NYHS COLL 1928, at 6.

<sup>107</sup>The elements of the economic and political crisis of the 1760s are among the most fully and frequently described matters in the secondary literature concerning the colonial history of British North America. My goal in the account that follows is simply to explain how some of the period's complex, interconnected episodes impinged upon the administration of commercial justice in New York.

the naval situation presented an even more dire long-term prospect, for with the disappearance of French power in North America the cyclical privateering industry, in which New Yorkers had made such substantial investments and from which they had derived even more substantial returns, seemed headed for a permanent decline. Naval conflict in the North Atlantic had been the engine of New York's economic recovery in every crisis of the eighteenth century; British naval superiority bid fair to be its ruination.

The barometer measuring these intersecting economic pressures was the money supply. The imposition of new taxes and the enhanced collection of old ones meant further specie drain from the colony, while disruption of foreign trade and the long-term disappearance of privateering revenue reduced New York's access to extra-imperial hard currency. The war boom had brought too rapid an expansion of the money supply, leading to significant inflation throughout the seaport economies in the first years of the decade, but the comparatively narrow distribution of this new-gotten wealth threatened the artisans and workers of the City with a particularly vicious squeeze as the economy contracted, for prices fell nowhere near as rapidly as incomes.<sup>108</sup>

In almost every respect, imperial trade policy after 1763 was designed to achieve consequences which, if effectuated, would have the most damaging possible effect on New York's commerce. The Sugar Act's reduction of duties on molasses meant nothing, since the 1733 act had gone entirely unenforced—the effect, as the merchants of New York were to point out in a petition to Parliament in 1767, was simply to prevent New Yorkers from deriving the full value of their exports, thus preventing them from acquiring the capital necessary to meet imperial expectations.<sup>109</sup> The combination of excise and service taxes represented by the Stamp Act would have increased the specie drain on the provincial economy, while generally enhanced enforcement of the trade and navigation acts would rapidly have reduced New York's trade even in the absence of an acute currency crisis. But it was the Currency Act of 1764,<sup>110</sup> prohibiting any colony from making its bills of credit legal tender, that presented the most acute short-term threat to the survival of the provincial economy. New York's last paper money was scheduled for cancellation in 1768, and Parliament's action in 1764, when New York was already suffering a severe credit famine, seemed a delayed sentence of death to the merchants of New York.<sup>111</sup>

From 1760, local institutions for the legal control of the provincial commercial system tried to grapple with the dislocations created by successful imperial

<sup>108</sup>Price and wage levels for New York during the early '60s are harder to establish than those of Boston and Philadelphia. For a reasonably convincing reconstruction of the overall economic situation of the seaports at the time of the Treaty of Paris, see G.B. NASH, note 37, at 246–60.

<sup>109</sup>For the petition of 240 New York merchants, see 31 *Journals of the House of Commons* 158–60. The political context of Parliamentary consideration, which was closely tied to the New York Assembly's refusal to accept the binding force of the Quartering Act, is discussed in L.H. GIPSON, *THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION: THE RUMBLING OF THE COMING STORM, 1766–1770*, at 54–57 (1962).

<sup>110</sup>4 Geo. III, c. 34.

<sup>111</sup>See, e.g., John Watts to Governor Mockton, April 14 1764, NYHS COLL 1928, at 242–43.



policy. As in previous periods, the postwar economic contraction began at the lowest levels of the system, as the pyramid of debt on which the trading economy stood began to tremble at its base. Debt litigation in the Mayor's Court reached unprecedented levels between 1760 and 1765,<sup>112</sup> and as local debts became impossible to collect, the financial stability of all but the wealthiest New York merchants became a matter of doubt. As John Watts ominously said early in 1764, "every thing is tumbling down, even the Traders themselves."<sup>113</sup> Eighteen months later, misgivings had become actualities: "Business here is very languid, the weak must go to the Wall, frequent Bankruptcies & growing more frequent."<sup>114</sup>

With the city's prison space filling with debtors—a condition contemporary observers knew presaged an acceleration of economic collapse as the families of previously wage-earning debtors were deprived of the means of life—the Legislature took such measures as lay within its power. In May 1761 it passed a new act for the relief of insolvent debtors,<sup>115</sup> which marked an important departure from prior doctrine. Under the new act, creditors holding three-quarters of any debtor's total liabilities, regardless of the total amount, could agree to accept an assignment of all non-exempt assets, and administer them for the benefit of all creditors, by petitioning in the Supreme Court or in any court in which process of arrest had issued against the debtor. Disputed claims against the debtor's estate were to be resolved by compulsory reference—the names of three referees to be chosen at random from among two nominees each of the assignees and the disputing creditor. Compliance with the provisions of the act resulted in a general discharge of all debt payable or contracted for at the time of assignment.

The 1761 act for the first time established a true bankruptcy system in the province, capable of meeting the demands of mercantile insolvency through joint administration by creditors, intended to afford the debtor the incentive of a fresh start in order to secure cooperation with and among creditors. The provision for compulsory arbitration of disputes in bankruptcy further carried out the theme of cooperative measures within the mercantile community, and reduced the impracticable burdens of debt litigation in the provincial courts, while it secured to the local merchants a subtle preference against

<sup>112</sup>William S. Sachs, in an unpublished doctoral dissertation, states that debt actions in the Mayor's Court numbered 46 in 1763 and 80 in 1766, never having exceeded 16 in one year before 1760. See W. Sachs, *The Business Outlook in the Northern Colonies, 1750–1775*, at 133 (Ph.D. diss., Columbia University, 1957). It appears that Sachs has undercounted through confusion over legal detail. The records from 1733–35 and 1750–54 would have shown more than 16 commercial debt actions per year. Absolute litigation levels should also at least be corrected for increases in population—a further reason for distrusting summary statistics based on absolute numbers from the court records. Sachs is correct about relative magnitudes of debt litigation in the early '60s. What is important is the growth of debt litigation from 1760–65, resulting from the cascading pattern of failures as the credit system shook itself apart.

<sup>113</sup>Watts to Scott Pringle Cheap & Co., February 5 1764, NYHS COLLS 1928, at 228.

<sup>114</sup>Watts to Sir William Baker, August 11 1765, *id.* at 368. Between Watts and the Wall, of course, there remained sufficient distance to render his opinions compelling, but hardly desperate.

<sup>115</sup>An Act for the relief of Insolvent Debtors and for Repealing the acts therein mentioned, May 19 1761, 4 NY COL LAWS 526.

distant creditors. The act was a substantial success, and was renewed and extended throughout the decade, finally expiring in 1770.<sup>116</sup> In one of the few salutary notes struck in the imperial-provincial relations of the 1760s, the act was never nullified by the Crown, though milder experiments with bankruptcy statutes in other colonies were often disallowed through the eighteenth century as a result of their prejudicial effects on metropolitan creditors.<sup>117</sup> It was for this reason that the earlier insolvent relief acts in New York always contained a provision excluding debts owed to “absent or distant creditors,” dropped for the first time in 1761. Metropolitan acceptance of the New York bankruptcy system was not permanent. When, in 1770, the Legislature attempted to renew the provisions of 1761 on behalf of James DePeyster—whose large mercantile failure and substantial debt to the estate of Abraham DePeyster, who had died in office as Treasurer of the province, threatened to cause a major panic—the Privy Council disallowed the statute, on the advice of counsel who found it “so far to exceed the usual Bounds of insolvent acts, as to have been unfit to pass without more foundation laid for it than is stated in the Preamble.”<sup>118</sup>

The use of reference rather than litigation to resolve disputes in bankruptcy during the 1760s was part of a more general trend to contain the pressures on the provincial judicial system seen in several areas throughout the decade.<sup>119</sup> In the arena of commercial justice, of course, the long provincial tradition of arbitration provided support. Confirmation of the continuing significance of arbitration proceedings in the wartime period is the appearance in the 1740s and ‘50s of newspaper advertisements by law stationers which include, along with the forms of wills and powers of attorney, arbitration bonds.<sup>120</sup> In eternal tandem with the law-stationers travel the scriveners, one of whom advertised, among his other works of copying, the preparation of accounts for arbitration.<sup>121</sup> Where law stationers and scriveners are, it would be unwise to as-

<sup>116</sup>See 4 NY COL LAWS 747, 862. The act of renewal in 1765 established an important refinement of the system, by requiring all creditors holding mortgages or other securities for their lending to make effective relinquishment of their security interest before joining with the debtor in a discharge petition. See Act of December 23 1765, 4 NY COL LAWS 862, 863–64. Although this did not permit unsecured creditors to “cram down” terms on unwilling secured creditors holding more than a quarter of the total debt, it did prevent secured creditors from colluding with the debtor to extinguish his unsecured debt, while leaving their mortgages and other securities unimpaired. The full significance of the bankruptcy statutes of the 1760s seems to have eluded prior historians.

<sup>117</sup>See E.B. RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* 125–34 (1915).

<sup>118</sup>Report of the Judicial Committee of the Privy Council, May 25 1771, PRO PC 1/60/B9(1). For the statute, which differed in no substantial provision from the legislation of 1761, see Act of January 27 1770, 5 NY COL LAWS 126.

<sup>119</sup>A related tendency is the increase in negotiated dispositions of criminal cases, discussed in Chapter ??, *supra*.

<sup>120</sup>See N.Y. Weekly Post-Boy, Oct. 31, 1743; Dec. 21, 1747; Jan. 11, 1748; N.Y. Gazette or Weekly Post-Boy, Jun. 30, Jul. 21, Aug. 25, Sep. 15, 1755. These bonds were the instruments by which extrajudicial arbitration was commenced and regulated. Both parties executed documents under seal which stated the facts of the case, and provided for the voiding of the bond obligation if the award of arbitrators was obeyed. The bonds were given to a third party, and the party getting the benefit of the award received them both.

<sup>121</sup>N.Y. Weekly Post-Boy, May 6, 1745.

sume that lawyers have no place. Attorneys' registers shows the occasional fee for drawing arbitration bonds, among the work of drafting more familiar instruments.<sup>122</sup> Merchants' letter books throughout the period convey a complex mix of attitudes about the law, and about the alternatives to standard process. Gerrard G. Beekman's surviving letters provide an example. In 1746, awaiting the arbitration of a prize case on behalf of his Rhode Island correspondents Vernon & White, Beekman wrote "the gentlemen appointed are . . . I think all good men and Judges in such Casses."<sup>123</sup> In 1763, writing about an insurance matter to other Rhode Island correspondents, Southwick & Clark, Beekman took a very different tone:

. . . as to leaving of it to Reference the Gentlemen who are acquainted in these affairs have so often been Trouble with settling such accounts both Parties not alway Pleased that Scarce any One of them Chuses to do it again.<sup>124</sup>

Beekman was not an immensely successful merchant, nor one much at home in the law (he apparently never served as a referee in any case). It seems clear that his own career, at least, did not make him more receptive to arbitrators than to lawyers, judges, and juries.

Another view of the counting-house, the bar, and the value of arbitration may be found in the letter book of John Watts, which covers the period from the opening of 1762 to the close of 1765, and involves us closely in his views on these subjects. His portrait of the legal profession ranges from the gently sarcastic:

If you should chance to see my friend Mr: White pray ask him if he received a Letter from me lately. These lawyers wont write unless they are paid by the Sheet.

to the more furiously defamatory

We have an odd kind of Mungrell Commerce here called the Mount Trade . . . the Lawyers say it is legal & contrary to no Statute, the Men of Warr say it is illegal & both take & Condemn them at their own Shops while they are acquitted at others. No two Courts pursue the same measure . . . yet the evil is suffer'd to go on without any determination, the Subject is tore to pieces by Robbers, Lawyers & all sorts of Vermin.<sup>125</sup>

Speaking of the possible legal education of Peter DeLancey, his nephew by marriage, Watts wrote:

<sup>122</sup>See, e.g., the statement of costs in *Fielding v. Magran*, *Register of John McKesson's Cases in the Mayor's Court 1761-68*, at f.11, NYHS.

<sup>123</sup>Letter dated August 1746, 1 BEEKMAN PAPERS 6. The referees were Christopher Bancker, William Walton, and Abraham Lynsen—all prominent merchants and frequent arbitrators.

<sup>124</sup>Letter dated February 2, 1763, 1 BEEKMAN PAPERS 427.

<sup>125</sup>To James Neilson, February 1, 1762, NYHS COLL 1928, at 20; To Isaac Barre, February 28, 1762, *id.* at 27.

We have a high character of a Professor at Oxford who they say has brought that Mysterious Business to some System, besides the System of confounding other People & picking their Pockets, which most of the Profession understand pretty well.<sup>126</sup>

When Watts' annoyance with lawyers descended from the epigrammatic to the pragmatic, his objections were predictable in nature—lawyers, he felt, profited by the techniques of causing delay and stirring up unnecessary litigation. In discussing a lately concluded action at law he wrote:

With regard to that Charge I can only say that I have been oblig'd to submit to it with great reluctance, & that your suffering is common with all others, who get under the Harrow of the Law in this part of the World.<sup>127</sup>

Among the kinds of litigation Watts thought the world could do without was litigation over seamen's wages:

... such a Number of Pettifoggers are allways ready to disturb the Minds of Seamen & puzzell the Laws, which are far from being explicit with respect to Commerce.<sup>128</sup>

For Watts, arbitration was far from perfect, but nonetheless in practice it improved upon the ordinary regime of lawsuit:

... you left it to me to settle in the best manner I could without Law, which confin'd me to the determination of the referees, for I could not in decency appeal from their Judgment as it is contrary to all Practice ... And had we thrown ourselves into Expensive endless Law, we should have appear'd with an ill Grace, haveing the Award of people in Commerce against us, to be offered to a Jury of the same profession, for which reason it is invariably lookd upon as a point of Justice & propriety to submit to the referees, or why leave it to them at all, the Looser is seldom content or satisfyd.<sup>129</sup>

Watts' letters show once again that arbitration among merchants was prevalent enough to make the prospect of appealing to a struck jury from the award of referees distinctly unappetizing.<sup>130</sup> Watts' own views of the system of arbitration were formed from broad experience—as a party, as an attorney for

<sup>126</sup>To Sir William Baker, January 22, 1762, *id.* at 13. One wonders whether Blackstone would on the whole have appreciated the compliment.

<sup>127</sup>To John Young, April 18, 1764, *id.* at 246.

<sup>128</sup>To John Erving, June 14, 1762, *id.* at 62.

<sup>129</sup>To Joseph Maynard, August 14, 1764, *id.* at 285. Watts had attempted to reach an alternative settlement with the referees in an insurance matter, "wrote them a long letter," without success. I cannot establish who the referees were.

<sup>130</sup>Watts naturally assumed that a "struck," or special, jury would be available in any important mercantile lawsuit. The details of the procedure regarding special juries in the later eighteenth century can be found in Alexander Hamilton's *Practical Proceedings*, in 1 J. GOEBEL, LAW PRACTICE OF ALEXANDER HAMILTON 61 (1969).

his correspondents abroad, and as an extremely active referee.<sup>131</sup> Certainly he had reason to know that “the Looser is seldom content or satisfyd,”<sup>132</sup> but as against the delay and expense of common-law process, Watts distinctly preferred arbitration.

Support for extrajudicial dispute resolution in the 1760s was attributable in part to the pressing need to relieve congestion in the courts. Increased delay and expense of litigation formed the theme of one of Cadwallader Colden’s typically ungracious and anti-lawyer speeches to the Assembly in November 1761,<sup>133</sup> though it was none of Colden’s intention to acknowledge the underlying causes of the situation. In several statutes the Legislature acted to remove actions from the courts. Appeal to the Supreme Court by writ of certiorari or error after judgment before Justices of the Peace were sharply curtailed in 1765,<sup>134</sup> and in 1768 the Legislature took the unprecedented step of authorizing compulsory reference of commercial litigation brought in the Supreme Court.<sup>135</sup> The act did not cover the Mayor’s Court, or any court of inferior jurisdiction in the colony.

The Mayor’s Court had referred cases, as we have seen, without any statutory authority throughout the century, but only by consent of the parties. When the statute was amended in 1772, the Mayor’s Court and other inferior courts were brought within its coverage.<sup>136</sup> The statute provided for the allowance “to the Prevailing Party a reasonable sum for such Services and Expences as may accrue after the Reference of the Cause,” thus contemplating the need for attorney’s fees in preparation for reference. Witnesses were to be subpoenaed and examined under oath, and a magistrate, employed at the cost of the party moving the reference, swore the referees to provide fair and impartial arbitration. Each referee was to be allowed eight shillings a day, plus reasonable expenses, the whole to be included in the taxed costs. Execution of the award followed the traditional pattern—if for the plaintiff, by confession; if for the defendant, through *scire facias*. Decision of the referees could be had by majority vote, and any report had to be confirmed by the court before it became effective.

Even without the encouragement provided by the statute, reference was clearly a vigorous institution in the 1760s, at least in the Mayor’s Court. An inspection of the manuscript minutes for the years 1758 to 1764 shows that one case in forty-one was sent to referees.<sup>137</sup> Roughly half the referees chosen, ei-

<sup>131</sup>Records exist of more than a dozen cases in the 1750s and ’60s in which Watts served as a referee. This load was particularly heavy considering the demands on his time in his business and the Governor’s Council. In view of his comments about seamen’s wage litigation, it is interesting to observe that Watts served as a referee in at least one such case, *Waters v. Bowne*, July 21 1747, reprinted in *RECORDS OF THE MAYOR’S COURT*, note 21, at 562. The result of that reference is lost.

<sup>132</sup>Letter to Joseph Maynard, August 14, 1764, NYHS COLL 1928, at 285.

<sup>133</sup>See 2 W. SMITH, JR., note 44, at 262.

<sup>134</sup>Act of December 23 1765, 4 NY COL LAWS 801. The act required filing of an affidavit disclosing the basis of the claim of error before the Supreme Court could issue the writ, and held unsuccessful petitioners responsible for costs and damages associated with frivolous appeals.

<sup>135</sup>See An Act for the better Determination of personal Actions depending upon Accounts, December 31 1768, 4 NY COL LAWS 1040.

<sup>136</sup>See Act of February 26 1772, 5 COL. LAWS 293.

<sup>137</sup>There were 823 cases in the population, of which 20 were referred. *MCM 1757–1765*.

ther by parties or by the court, can be identified as merchants.<sup>138</sup> Attorneys also appear in the guise of referees, for example, James Duane and Benjamin Kissam, the mentor of John Jay, who both served as arbitrators and appeared as advocates before other arbitrators during the period. No conflict was perceived in the choice of a referee who was engaged in other litigation before the court, as a party or attorney.<sup>139</sup> Expeditious process remained the most important advantage of reference. For all cases between 1758 and 1764, the average time required for a judgment through reference was slightly over four weeks.<sup>140</sup> This made reference, from start to finish, more than twice as fast as jury trial.<sup>141</sup> Though it offered speed, reference did not offer certainty. Fifteen percent of the reference awards between 1758 and 1764 were set aside,<sup>142</sup> and a motion for leave to show cause why the report should be overturned may well have been a standard tactical device, John Watts' advice to the contrary notwithstanding.

Congestion induced by the debt crisis was no means the only reason for the trend away from judicial resolution of commercial disputes in the 1760s. Imperialist policy put political as well as economic strain on the judicial system, fatefully reducing confidence in the impartial administration of justice in the province. The problem began in 1760, with the deaths of James DeLancey and George II. The first event created a vacancy in the Chief Justiceship of the province, while the second required the recommissioning of the remainder of the Bench, whose appointments expired with the death of the Sovereign. George Clinton's fateful error in granting a commission during good behavior to DeLancey in 1744 now revealed its consequences. After the break with DeLancey, Clinton tried to regain influence over the Court by alliance with the Morrisite judiciary as well as appointment of his own placemen. Daniel Horsmanden and John Chambers were accordingly commissioned *quamdiu se bene gesserint* in the Clinton administration, as was David Jones in 1758. Though these measures reduced DeLancey's dangerousness to administration, they did so at a high price, making any recession from the entirely unauthorized prac-

<sup>138</sup>Fourteen of the thirty-one referees recorded can be so identified. One or more of them appears in thirteen of the twenty references between 1758 and 1762. Richard Sharpe, James Beekman, Jacob Walton, John Alsop Jr., and Gabriel Ludlow all joined the Chamber of Commerce soon after its formation in 1768. See the membership list in COLONIAL RECORDS OF THE NEW YORK CHAMBER OF COMMERCE 1768–1784, at 300–03 (J.A. Stevens, Jr., ed. 1867).

<sup>139</sup>Malcolm Campbell, for example was a referee in *Craig v. McCowleigh*, MCM August 15, 1758. At the same time, Campbell was a party in two actions before the court. This pattern can be found in five other instances between 1758 and 1762.

<sup>140</sup>I exclude from this average one reference which fell apart because one referee refused to participate. The rule was not set aside for twelve months, and the suit was discontinued thereafter. *Davenport v. Van Zandt*, MCM March 3 1761 (referred), March 2 1762 (rule set aside). Obviously something unusual was afoot.

<sup>141</sup>Measured by time from initiation to entry of judgment for all references and an equal number of jury trials, randomly selected. In this latter sample, the average case tried to a jury required just under ten weeks to complete.

<sup>142</sup>See, e.g. *Kingsland v. Hicks*, MCM February 27, 1759 (Reference overturned on defendant's motion; plaintiff won at the subsequent trial). For an unavailing motion to set aside, see *Fix v. Jeffreys*, MCM July 22, 1760.

tice of appointing life-tenured judges seem an attempt at direct political control of the Supreme Court.

Colden was hardly the man to concede a Royalist position solely as a result of opposition from the united Bench and Bar of the province, as subsequent events were to show. His long service as the primary loyalist antagonist of James DeLancey had convinced him of the central role the Bench played in protecting the alliance of merchant and landlord fortunes against royal authority. The newly activist policy of the triumphant empire precisely suited Colden's views, and he now sought to celebrate a victory over his ancient enemy. Colden proposed to appoint William Smith, Sr., as Chief Justice *durante bene placito*, and to recommission the sitting justices on the same terms. Smith refused the new appointment, as did the incumbents. Their status hung fire while Colden commissioned Benjamin Pratt, of Massachusetts, to be the new Chief Justice, while at the same time refusing his assent to an act of the Assembly requiring appointment of judges to hold office during good behavior, which Colden quite rightly held to be in violation of royal instructions since the time of William III.<sup>143</sup> For more than two years the Assembly refused to vote funds to pay the salaries of judges serving with less than good behavior tenure, and when pressed to accept new commissions *durante bene placito* the incumbent Justices resigned. Pratt, who had no independent means of livelihood, resigned in 1763 and returned to Massachusetts, where he died shortly after. Horsmanden was browbeaten by Colden into accepting appointment to serve at pleasure, and the eventual issuance of renewed instructions specifically confirming that all judicial appointments were to be held at the pleasure of the Crown restored temporary peace to a judicial system that had hovered on the verge of complete dissolution.<sup>144</sup>

Colden's war on the Supreme Court in the interests of royal government continued in 1764, taking contingent advantage of a vicious vendetta in the New York mercantile community. Waddell Cunningham, having a grudge against fellow-merchant Thomas Forsey, waylaid his enemy, beat him into immobility and stabbed him through the lungs. Cunningham skipped town; Forsey recovered and sued for damages. A Supreme Court jury, having heard Forsey's evidence and a weak plea in mitigation of damages from Cunningham's counsel, returned a verdict in the immense sum of £1,500. Cunningham had instructed his counsel to appeal from any judgment over the £300 minimum. But Cunningham's counsel had no procedural error to allege, and the jury had returned a general verdict. Without the foundation for a writ of error, Cunningham instructed counsel to appeal to the Governor and Council on the merits. This meant taking the legal position that the Governor and Council, a prerogative tribunal, had the power to review the factual findings of common-law juries. Cunningham's own counsel refused to prepare the papers asserting this novel and disturbing theory. For Colden, however, *Forsey v. Cunningham* pre-

<sup>143</sup>The best account of the judicial tenure controversy is to be found in the contemporaneous history of William Smith, Jr. See 2 W. SMITH, JR., note 44, at 253–71.

<sup>144</sup>For the correspondence between the Board of Trade and Pratt and Colden over the Chief Justice's commission and the salary impasse, see PRO PC 1/50/47.

sented the long-awaited opportunity to destroy the Supreme Court as a center of political opposition to the Crown. Gubernatorial review of jury verdicts would prevent the Supreme Court from protecting the manor lords' vast estates, as it would prevent smuggling merchants from hiding behind the blank refusal of New York juries to convict in revenue cases. Basing his action on what was at best an impossibly strained interpretation of the current royal instructions, Colden issued a *sui generis* "writ of inhibition," prohibiting the entry of final judgment in the Supreme Court, and over the unanimous opposition of the provincial Bench and Bar the locus of the dispute passed to the Privy Council, for resolution of the question whether the Governor and Council had plenary appellate jurisdiction over general verdicts in the Supreme Court.<sup>145</sup>

Response to Colden's actions in the *Forsey* appeal among the New York merchants was swift and angry. No event during the parlous years before the repeal of the Stamp Act rendered Councilor John Watts—at most times a pillar of the Episcopal establishment and ultimately a Loyalist stalwart—so voluble on the wrongs and rights of the provincials. To Watts, and no doubt to other like-minded members of the community, Colden's position threatened to deprive New Yorkers of the sacred right of jury trial:

The last Year you were agitating at Home several Points that affected the Libertys of America, our old Ruler has lately broach'd one here that will strike at the very Root of all our Libertys, if it is meant by the Crown, & intended to be forc'd upon upon the Colonys as he contends for, which we can't possibly conceive, 'tis so flatly contrary to the very Spirit of the English Government, & against all Law.<sup>146</sup>

Though he fulminated all through the summer of 1765, until it was known that Colden's position had been rejected,<sup>147</sup> Watts never found a more satisfactory expression of his sentiments concerning this measure "absolutely stripping the whole Colony of the Birth right of every Englishman, a Tryal by his Peers in Matters of Fact," than that most irate complaint of the Englishman at odds with government: "he is making French Men of us all."<sup>148</sup>

The rhetoric of English liberties, first heard in New York over the issues of good behavior tenure for judges and the *Forsey* appeal, would be sounded at much higher pitch in the dispute over the Quartering Act, the Stamp Act, and non-importation. But even as the dispute over appeals from jury verdicts

<sup>145</sup>The involved maneuvering that preceded the Privy Council decision in *Forsey v. Cunningham* is fully described, and all the surviving sources cited, in J.H. SMITH, note 90, at 390–412. Smith regrettably treats Colden's position as the outcome of personal stubbornness and anti-lawyer sentiment. While Colden certainly possessed more than a full measure of both, the enormous political stake for which he was wagering should not be overlooked. For the role played by *Forsey* in Colden's war on the manor lords of the Hudson River Valley, see Chapter ??, *supra*.

<sup>146</sup>Watts to Isaac Barr, January 19 1765, NYHS COLL 1928, 323–24.

<sup>147</sup>For the new royal instructions, limiting appeal to the Governor and Council to cases of error, see 7 NY COL DOCS 764.

<sup>148</sup>Watts to Monckton, January 10 1765, NYHS COLL 1928, at 319; To James Napier, December 14 1764, *id.* at 318.



sputtered out, other measures, both local and metropolitan, further reduced the merchants' confidence in the provincial courts.

The closing of the courts incident to the Stamp Act resistance was perhaps the starkest lesson in disruption of essential commercial justice. Certainly the merchants of New York had no desire to see the courts operating on stamped paper. When the justices of the Supreme Court and members of the Council presented a memorial to the Governor, however, justifying the opening of the courts to do business without stamps, Moore tartly informed them that any judge doing so would lose his seat on the Bench as well as at the Council board.<sup>149</sup> In the circumstances then prevailing, well into the fifth year of credit famine and spiraling cycles of debt and insolvency, a moratorium on debt litigation was not necessarily an altogether harmful development. But the suspension of all civil justice for an indefinite period,<sup>150</sup> accompanied by the bullying of the judges (who were no more anxious than any other New Yorkers to confront the hard choices between what they saw as compliance with a noxious regulation and outright defiance of Parliamentary authority), destroyed any predictability in the commercial law—always the first and most basic concern of anyone compelled to trade his money for someone else's promises. As events in the Hudson Valley were to show when the courts reopened in 1766, and violent rioting broke out in response to the resumption of evictions, the suspension of civil justice was an experiment provincial society was in no position to undertake.<sup>151</sup>

Not quite all civil justice for New Yorkers was suspended in the winter of 1765–66. The Vice-Admiralty Court at Halifax, Nova Scotia, was open for business, using stamped paper. But this was not a forum to which New York merchants could look with any sense of satisfaction. The creation in 1764 of a single Vice-Admiralty Court at Halifax, with jurisdiction over all the North American possessions, marked another unwelcome transformation of a provincial legal institution. The Vice-Admiralty Court in New York, as we have seen, was critical for the merchant privateers of New York from 1696 to 1763. In the legal ecology of the city, Vice-Admiralty was the specialized venue for regulation of the most important wartime industry. Its less favorable activities at other seasons were far outweighed by its advantages, particularly since the New York lawyers had spiked its guns by preventing Vice-Admiralty from deciding illegal trading cases arising from seizures in New York waters.<sup>152</sup> But the

<sup>149</sup>See Moore to Secretary Conway, February 20 1766, 7 NY COL DOCS 806–12.

<sup>150</sup>The Stamp Act was essentially a tax on services, including most importantly the services provided by private lawyers and public officers in the administration of justice. For this reason, criminal process made no use of stamped papers, and the closing of the courts for civil purposes did not entail a suspension of public order.

<sup>151</sup>No purpose would be served by an attempt to improve on the best existing account of resistance to the Stamp Act. To put the events in New York, particularly the closing of the courts, into the larger perspective of British North American resistance, see E.S. MORGAN & H.M. MORGAN, *THE STAMP ACT CRISIS* 205–30 (1962).

<sup>152</sup>This doctrine, emanating from the Privy Council in the case of the sloop *Mary & Margaret*, discussed note 90, effectively prevented Vice-Admiralty from acting as enforcement aid to local revenue officials, since a writ of prohibition could always issue out of the Supreme Court to bring

traditional utility of Vice-Admiralty in New York did not outlast the imperial struggle with France, and the establishment of the Halifax jurisdiction in 1764 marked the conversion of all Vice-Admiralty to a new use: standardized pro-Government adjudication of cases arising under the trade and navigation acts, which meant, for New Yorkers, foreign non-jury courts for the suppression of New York's commercial economy.<sup>153</sup>

Despite joy in the spring of 1766 over repeal of the Stamp Act, the essence of the provincial situation remained desperate. The Hudson Valley riots were a sign that could be read in London; the currency situation of New York, much less visible to metropolitan managers, was a profounder guarantee of future disorder. The expiration of New York's last paper money, in 1768, was now imminent,<sup>154</sup> and despite Governor Moore's strong representations to the Board of Trade, and the Board's reassuring words that something would be done for New York by way of exception to the Currency Act, and that before the expiration of 1768, the year 1767 came and went without action—the Ministry was threatening what amounted to further retaliatory destruction of the provincial economy in response to continued obstinacy over quartering.<sup>155</sup>

It was therefore only partly in response to the increasing movement in Massachusetts for renewal of non-importation as a response to the Townshend duties that New York's merchants formed the Chamber of Commerce in April 1768.<sup>156</sup> The city's merchant elite did experience the pressure for renewed non-importation, could perceive the economic advantage such a period of monopoly on imported goods could give to them, and had learned as a result of the Stamp Act riots the importance of keeping control of the tumult by staying in the lead. All of these elements motivated the formation of the Chamber, but when, on August 27, the city's merchants voted to cancel outstanding orders and cease importation from November 1 1768, the Chamber of Commerce was not the organ of that announcement—its membership was far too restricted for such purposes.

The Chamber of Commerce was the merchants' attempt to provide an alternate system of commercial law, replacing an external system at the verge

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trade enforcement seizures before sympathetic New York juries.

<sup>153</sup>For the analysis of Imperial policy in connection with the establishment of the Halifax Vice-Admiralty Court in 1764, see L.H. GIPSON, note 109, at 120–27. For unsuccessful attempts to prosecute customs-related seizures at Halifax during the Stamp Act crisis, see C. UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 84–88 (1960).

<sup>154</sup>Between 1766 and 1768 £274,259 of provincial bills of credit were retired, a contraction of the money supply more severe, in proportion to the overall size of the economy, than the contraction of the 1720s. See V.D. HARRINGTON, note ??, at 335 n.64.

<sup>155</sup>For the correspondence between Moore and the Board of Trade, see 7 NY COL DOCS 820–27, 843–45.

<sup>156</sup>For the formation of the Chamber, see\* *Chamber Records*, NOTE 138, AT 3–7. CONVENTIONAL COMMENTARY ON THE CHAMBER'S RELATION TO THE POLITICAL AND ECONOMIC SITUATION IS ALL DERIVED FROM V.D. Harrington, NOTE 64, AT 334–43, FOLLOWING THE GENERAL LINE OF INTERPRETATION ESTABLISHED BY A.M. Schlesinger, *The Colonial Merchants and the American Revolution*\* (1918). Unfortunately, Harrington did not perceive the quasi-legislative role the Chamber sought to adopt, with regard to the substance of local commercial law, or did not appreciate its significance. Later writers, understandably given to relying on Harrington's exceptional study, have been misled in turn.

of collapse. Promotional writing repeats often that this was the first incorporated Chamber of Commerce in the Western European world, but few have chosen to consider what this incorporation meant.<sup>157</sup> To slightly sodden celebrants at contemporary Chamber of Commerce lunches, incorporation at an early date is redolent of modernity, a sign of the go-ahead New York spirit. But an eighteenth-century corporation was something else entirely. A corporation meant a royal charter, and a charter was the grant of some portion of the Sovereign's authority into private hands. The Massachusetts Bay Company had a charter, as did the City of New York, in which a Chamber of Commerce now would have one as well.

The charter's recitation of the purpose of the corporation is revealing:

[T]he said Society (sensible that numberless inestimable Benefits have accrued to mankind from Commerce; that they are, in proportion to their greater or lesser Application to it, more or less Opulent and Potent in all Countries; and that the Enlargement of Trade will vastly increase the value of Real Estates, as well as the general Opulence of our said Colony) have associated together for some time past, in order to carry into Execution among themselves, and by their Example to promote in others, such Measures as were beneficial to these salutary Purposes; And that the said Society having, with great Pleasure and Satisfaction, Experienced the good Effects which the few Regulations already adopted, had produced, were very desirous of rendering them more extensively useful and permanent ... therefore the Petitioner ... most humbly prayed our said Lieutenant-Governor to Incorporate them a Body Politick, and to Invest them with such Powers and Authorities as might be thought most conducive to answer and promote the Commercial and consequently the Landed Interest of our said growing Colony.<sup>158</sup>

In short, the New York Chamber of Commerce wanted to be a legislature.<sup>159</sup>

From the beginning the adoption of "Regulations" was the Chamber's *raison d'être*. By June 1768 the Chamber was considering the currency crisis, debating the establishment of fixed exchange rates for Pennsylvania and New Jersey paper currency, soon to be the only effective currency in circulation. Parliament would not permit the provincial legislature to make foreign money legal tender in New York, and would not permit any paper currency to be legal tender anywhere, but the New York merchants would try to legislate by consent

<sup>157</sup>The Chamber's charter of incorporation, which passed the seals after much preparation on March 13 1770, is reprinted—opposite a flattering portrait of the "Old Ruler," Lieutenant-Governor Cadwallader Colden, so beloved of the Chamber's members—in CHAMBER RECORDS, note 138, at 89–97.

<sup>158</sup>*Id.* at 89–90.

<sup>159</sup>The reiterated proposition that prosperity of trade is prosperity for investors in real estate is a reminder of the peculiarly close relationship between the landed class and the merchants of the province. Expressions of identity of interests are not proof of identity of interest, to be sure, but the relevance of these professions to the charter of an incorporated trade association should have helped earlier historians grasp the significance of the association.

of the elite. Extra-provincial paper currency was only a partial solution, and at the meeting of July 5 1768, “[i]t is proposed that there be some method fallen upon to establish a paper currency in this city.”<sup>160</sup> Economic necessity required evasion of the Currency Act, and the ingenuity of the merchants would have an institutional voice for its expedients.

Currency was far from the only subject in which the commercial law appeared to require invigorating reform at the hands of this extra-constitutional legislature. The Chamber, even before the grant of its charter, sought to control the price of flour, the measure of damages for protested bills of exchange, the inspection of potash, the marking of barrels of butter and lard, the price of flour casks, the value of the standard ton, and the general level of commissions on inland and foreign sales.<sup>161</sup> Without enforcement authority, of course, the Chamber’s new commercial legislation depended on the political and economic force of agreement among the City’s commercial elite. With respect to forces less powerful than the British Empire, this was ordinarily sufficient. In November 1768, for example, the bolters and bakers attempted to justify the rise in the price of bread from 25/6 to 28s. by pointing to the high price of flour, and prayed “that the Chamber would take into consideration . . . the difficulty they have to make their principals give into the measures adopted by the Chamber,”<sup>162</sup> in essence declaring the Chamber’s inability to force compliance on them. The response was to have Lewis Pintard purchase, on the Chamber’s own account, a cargo of flour at Philadelphia, which was disposed of by Anthony Van Dam (at the regulated 2.5% commission) in order to depress prices and discipline the market.<sup>163</sup> The men and their forbears had been ruling the city and the province for three generations; the exertion of authority was hardly new to them.

Commercial adjudication as well as legislation was required amidst the wreckage of the provincial commercial law, and the Chamber stood ready to provide that as well, through the tested mechanisms of arbitration. From the outset, the Chamber’s members appointed a Monthly Committee for the resolution of any commercial disputes brought before it, whether by members or non-members. In April 1769, the Chamber decided to enter results of its arbitrations on its records; a year later the Chamber would assume the guise of a chartered “Body Politick,” now, with understated ease, it was becoming an extra-constitutional court of record. Moreover, the Chamber became an informal clearing-house for other major arbitrations, as can be seen when members inform the body that they are engaged in resolution of a complex dispute, and wish to be excused from membership on the Monthly Committee until completion.<sup>164</sup> In February 1770, the Whig merchant Isaac Low proposed that Chamber arbitration be the compulsory means of dispute resolution between members. Had it been adopted, the effect would have been the secession of

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<sup>160</sup>*Id.* at 12.

<sup>161</sup>*See id.* at 23, 24, 39, 49, 40, 50.

<sup>162</sup>*Id.* at 23.

<sup>163</sup>*Id.* at 32.

<sup>164</sup>*Id.* at 36, 39–40.

the mercantile elite from the provincial system of mercantile justice. But this was a step too far, and the tide of events was flowing in the opposite direction. In May news arrived of the repeal of all the Townshend duties except the tea tax, and in June New Yorkers learned that Parliament would permit the issue of £120,000 in provincial bills which, while not formally legal tender, would be received at the Loan Offices and Treasury. By mid-July, the city had lifted non-importation. Low's motion, lying on the table since March, was never revived.<sup>165</sup>

Changes of Imperial policy in 1770 restored a modicum of prosperity and stability to the province, and particularly the city's merchants. The experiment with autonomous extra-constitutional commercial law, a unique combination of boldness and subtlety, largely sputtered out—the Chamber would resolve less than a dozen disputes by arbitration before the opening of the war, and only the charter was left to remind anyone who cared to look just how unsettled the provincial commercial law had become. No one foresaw, and few of the New York merchants would have been pleased to know, that dispute over the one remaining duty on tea would three years later precipitate the destruction of constitutional rule in New York. But however much the appearance of equilibrium had been restored, the commercial law of the Empire still remained at variance with the realities of New Yorkers' existence. Sooner or later, the disjunction would result in legal dissolution.

Like the land law and the law of crimes, the substantive law of commerce underwent a period of settlement between 1664 and the close of the seventeenth century. Settlement meant both imposition and negotiation, as English government of the province adopted both local and international rules of commercial interaction, at the same time imposing the large-scale structure of trade regulation dictated by Imperial considerations. The technical problems of conciliating diversity were less severe in the commercial realm than in other areas, because commerce among European societies was largely internationalized long before the settlement of New York. Dutch practices and institutions could be assimilated with comparative ease, as the cooptation of the Mayor's Courts of New York City and Albany and the continued vitality of commercial arbitration show.

But the characteristics of New York's commercial life imposed stresses on the system of commercial regulation that resisted solution within the available legal terms. Imperial trade regulation imposed norms that made illegal large portions of New York's peacetime trade. Imperial currency policy adversely affected the legal regulation of credit. Shortage of hard currency was alleviated largely by preying on Atlantic commerce—indirectly through dealings with Atlantic pirates in the 1690s, directly by privateering during the wars of the

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<sup>165</sup>*Id.* at 73, 79. When war did come, and British military occupation finally closed the courts altogether, the Chamber provided commercial justice for the city through its Arbitration Committee. For a description of the practice and doctrine of the Chamber in the war, see Moglen, *Commercial Arbitration in the Eighteenth Century: Looking for the Transformation of American Law*, 93 *YALE L.J.* 135, 144–47. (1983). Regrettably, this author also completely fails to grasp the significance of the Chamber's charter, which he claims to have read.

eighteenth century. The effect was a boom and bust cycle that followed the pattern of military engagement between the British Empire and its Atlantic rivals.

The commercial law system developed within this context. Admiralty in New York took on a distinctive shape as a result of the cyclical expansion of the prize business. Debt collection measures and other legal ancillaries of the credit system were repeatedly changed to respond to the problem of recurrent rapid contractions. But Imperial regulation hampered the legal system's responses. Debt relief measures were narrow in scope in part because the intellectual environment of English law limited the legal imagination, but they were also narrow because the interests of metropolitan creditors were dearer to the hearts of London administrators than those of the New York mercantile elite. Parliament's use of the Currency Act of 1764 to coerce New York into funding Imperial military policy, by paying for the quartering of the New York garrison after peace with France, demonstrated that the stability of New York's commercial system was not important to British legislators. New York's lawyers could not establish, within the Empire's structure, a local order of commercial law to overcome these obstacles. Nor could they deal with the most basic of New York's commercial law problems: the unrealistic illegalization of New York's trade with parts of the Caribbean Basin and Northern Europe that left the local debt collection and commercial litigation systems to resolve the disputes of a trade that could not officially exist.

The problems of prosperity were soluble, and the New York commercial law played its appropriate institutional role in assisting the economic growth of the province, particularly in the 1740s and from 1756 to 1763. The problems of contraction and disorder in the credit system, on the other hand, were only soluble under conditions the Imperial structure would not permit. Against this background, the attempt by New York's merchants in 1768 to form a private-law legislature and arbitration system under the corporate charter of the Chamber of Commerce takes on very great significance. The Chamber's action was the beginning of an attempt to create an alternate commercial system insulated from Imperial interference. The possibilities of such an organization were no doubt limited by practical considerations. In effect, the Chamber's activities were directed at retaining control of an economic and political situation that threatened the political dominance of the provincial commercial and legal elites. A tenuous balance was regained after 1770, and the nascent institutions withered. But the efforts to retain control had shown that stability in New York was inconsistent with cherished Imperial policies. Unless Imperial policy changed radically, or New Yorkers were given more power to govern themselves (as the Chamber of Commerce had sought to do), further disorder seemed unavoidable. After 1776, many of the merchants and most of the lawyers prominent in the attempts to stabilize the system in the late 1760s found themselves on the Loyalist side of a provincial civil war. Whether they said so or not, the Empire to which they were loyal had betrayed them.