

# LEGAL TURMOIL IN A FACTIOUS COLONY: NEW YORK, 1664-1776

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## I. INTRODUCTION

When Colonel Richard Nicolls, the first English governor of New York, arrived in the fall of 1664, two quite different legal systems confronted him. On Manhattan Island and along the Hudson River, sophisticated courts modeled on those of the Netherlands were resolving disputes learnedly in accordance with Dutch customary law. On Long Island, Staten Island, and in Westchester, on the other hand, English courts were administering a rude, untechnical variant of the common law carried across the Long Island Sound from Puritan New England and practiced without the intercession of lawyers.

The task for Nicolls was to control these Dutch and Puritan legal systems. The main argument of this Article<sup>†</sup> is that he did not perform that task well. On the contrary, he set in motion constitutional dynamics that his successors over the next 110 years either could not or would not change. In the end, those dynamics left the British crown impotent in its New York colony. Great Britain's military failures in the American Revolution merely confirmed that longstanding impotence.

This is not to claim that Nicolls was an incompetent administrator. The task he confronted was an extraordinarily difficult one, and the tools he had to address it were few and feeble. We need to understand the two legal systems that were on the ground in 1664 to appreciate the difficulty of Nicolls's task, and Part I of the Article will turn to them. Part II will then consider how Nicolls and his immediate successors used their limited tools to deal with the difficulties they faced. Finally, Part III will examine how the dynamics Nicolls set in play persisted over the next eleven decades.

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† All documents cited in this Article are available on request from the Barbara and Maurice A. Deane Law Library at the Hofstra University School of Law.

## II. DUTCH AND ENGLISH LAW IN 1664

Dutch and English Puritan law as they existed in New York in 1664 were thoroughly different—a difference that dated back to the founding of the two colonial cultures.

When Southampton was settled on the east end of Long Island in 1638, its founders did not imagine that they were establishing an insignificant town or even a summer spa for wealthy residents of New Amsterdam. On the contrary, they thought they were establishing a sovereign polity, comparable to the Plymouth Colony, the New Haven Colony, or even, perhaps, the Massachusetts Bay Colony.<sup>1</sup> Like those other New England colonies, Southampton was to be governed by a General Court, with plenary power “[t]o make and repeal[] [l]aw[]s” and “[t]o hear[] and determine all causes . . . civil[] or criminal.”<sup>2</sup>

The settlers of New Amsterdam, in comparison, had no great illusions. They never dreamed that they were founding what would become the largest city in the world during the mid-twentieth century and what still may be the wealthiest. Theirs was merely a trading outpost of the Dutch West India Company under the company’s total control.<sup>3</sup> For its first twenty years, New Netherland’s legal system boasted a single, highly centralized court, consisting of the Director-General and a council of between one and five men.<sup>4</sup> To make sure that New Netherland functioned under Dutch law rather than as an independent sovereign entity, rulers in the Netherlands quickly sent trained professionals, among them at least two men who held the degree of doctor of laws from Dutch universities, to assist in governing the colony.<sup>5</sup>

Over time, the settlers of New Netherland demanded the establishment of local courts modeled after those at home, and Peter Stuyvesant, then the Director-General, yielded and set up such courts during the 1650s.<sup>6</sup> They were expected to act and did act “according to

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1. See William S. Pelletreau, *Introduction to THE FIRST BOOK OF RECORDS OF THE TOWN OF SOUTHAMPTON WITH OTHER ANCIENT DOCUMENTS OF HISTORIC VALUE*, at III-V (Henry P. Hedges et al. eds., Sag Harbor, N.Y., John H. Hunt 1874) [hereinafter 1 RECORDS OF SOUTHAMPTON].

2. Act of Jan. 2, 1641, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 25-26.

3. RUSSELL SHORTO, *THE ISLAND AT THE CENTER OF THE WORLD: THE EPIC STORY OF DUTCH MANHATTAN AND THE FORGOTTEN COLONY THAT SHAPED AMERICA* 105 (2004).

4. For a discussion of New Netherland law on which Part I of this Article is based, see William E. Nelson, *Dutch Law in New Netherland*, in *LAW AND JURISPRUDENCE IN DUTCH NEW YORK* (Albert M. Rosenblatt & Julia C. Rosenblatt eds. forthcoming 2010) (manuscript at 4, on file with author). Further footnote references will be omitted, except to quoted material.

5. *Id.* at 8.

6. *Id.* at 5-6.

the law and customs of the fatherland,”<sup>7</sup> as mediated by the legal professionals who had settled in the colony. New Netherlanders were willing to accept discretionary judgments by those professionals, as well as continued central control of the judicial system by the company’s appointees, which Director-General Stuyvesant carefully preserved by hearing frequent appeals and, on occasion, even presiding in person over the local courts.<sup>8</sup>

Like their New England compatriots, the people of Southampton, in contrast, insisted that their magistrates exercise neither discretion nor central control, but that they govern “according to the [laws] now established, and to be established by General[] Courts hereafter.”<sup>9</sup> Initially, the law to be followed was set down in quasi-statutory form in “An Abstract of the Lawes of Judgement as given Moses . . . that is of perpetual[] and uni[v]ersal[] Equity.”<sup>10</sup>

After a brief section on trespasses, the Abstract offered a long list of capital offenses, including blasphemy, idolatry, witchcraft, heresy, “scornful[] neglect or contempt” of the Sabbath, treason, rebellion against the established government, murder, adultery, incest, and defiling an espoused woman.<sup>11</sup> Rebellious children also were to be executed.<sup>12</sup> Banishment was the punishment for those who reviled the established church, committed perjury, or behaved irreverently toward magistrates.<sup>13</sup> Fines and corporal punishment were appropriate for wounding a freeman, profanity, drunkenness, rape, and fornication, although punishment of the last offense would be suspended if the couple married.<sup>14</sup>

This religiously driven code was never seriously enforced. Under pressure from more populous Indian tribes and Dutch claims of sovereignty, the tiny settlement of Southampton voted in 1644 to “enter into [c]ombination” with Connecticut,<sup>15</sup> and after the merger,

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7. *Herpertsz v. de Hulter* (Ct. Fort Orange & Beverwyck Feb. 10, 1654), in 1 MINUTES OF THE COURT OF FORT ORANGE AND BEVERWYCK 1652-1656, at 110 (A.J.F. van Laer ed. & trans., 1920) [hereinafter 1 MINUTES OF FORT ORANGE]; see also *In re Gemackelyck* (Ct. Fort Orange & Beverwyck Feb. 25, 1655), in 1 MINUTES OF FORT ORANGE, *supra*, at 202-03 (denying a brewer’s petition to have confiscated beer barrels returned to him “according to the custom of the fatherland”); Nelson, *supra* note 4, at 6-8 (stating that the municipal courts of New Amsterdam “routinely applied local Dutch law and custom . . . ‘according to custom of the fatherland’”).

8. See Nelson, *supra* note 4, at 4, 8-10.

9. Act of Jan. 2, 1641, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 25.

10. 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 18.

11. *Id.* at 18-21.

12. *Id.* at 20.

13. *Id.* at 19-20.

14. *Id.* at 21-22.

15. Act of Mar. 7, 1644, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 31.

Connecticut law rather than the Abstract of Universal Equity may have governed Southampton. We cannot know for sure, for our only evidence lies in the town records, and they never say. But they do make it clear that the Abstract was never in force.

With the exception of one prosecution for “carnal fl[ilthiness” between two servants, both of whom received corporal punishment,<sup>16</sup> all of the criminal cases of the 1640s involved “unre[v]erent speeches”<sup>17</sup> toward magistrates or other “passionate expressions.”<sup>18</sup> Indeed, the town meeting was obsessed with controlling speech. It ordered that no person except a magistrate “shall speak[] in an[y] business . . . [u]nless he be[] [u]nco[v]ered, dur[ing] the t[i]me of his speech” and then only when the matter he was addressing was “in hand” and prior business had been completed.<sup>19</sup> The meeting also criminalized “pri[v]ate agitations by any particular persons”—that is, lobbying.<sup>20</sup> In the interest of “set[t]ling . . . peace and [u]nity amongst the [i]nhabitants of this towne[,]” subsequent legislation imposed a fine on anyone who “[u]p[ra]ndingl[y] reproach[ed] another . . . or contentiously discourse[d] [about] former differences and griev[anc]es tending to the disquiet of the towne,”<sup>21</sup> while another law required every resident to act as an “assistant [u]nto the [m]arshall & constable.”<sup>22</sup> Maintaining peace and order amidst fragility appears to have been the main concern of early criminal law on Long Island.<sup>23</sup>

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16. Town of Southampton v. Wood (Gen. Ct. Southampton Mar. 4, 1644), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 35.

17. Town of Southampton v. Halsey (Gen. Ct. Southampton Mar. 15, 1643), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 27.

18. Town of Southampton v. Cooper (Gen. Ct. Southampton Nov. 18, 1644), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 34.

19. Act of July 7, 1645, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 37. The term “uncovered” means “[n]ot wearing a hat.” 18 THE OXFORD ENGLISH DICTIONARY 932-33 (2d ed. 1989).

20. Act of July 7, 1645, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 37.

21. Act of June 24, 1647, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 45.

22. Act of Mar. 5, 1646, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 39.

23. There were occasional prosecutions for other offenses, such as breaking and entering a dwelling at night, theft, drunkenness, and missing church on Sunday. *See, e.g.*, Town of Southampton v. Shaw (Gen. Ct. Southampton Sept. 1, 1663), in THE SECOND BOOK OF RECORDS OF THE TOWN OF SOUTHAMPTON LONG ISLAND, N.Y., WITH OTHER ANCIENT DOCUMENTS OF HISTORIC VALUE 31 (Henry P. Hedges et al. eds., Sag Harbor, N.Y., John H. Hunt 1877) [hereinafter 2 RECORDS OF SOUTHAMPTON] (drunkenness; fine of twenty shillings); Town of Southampton v. King (Sept. 1, 1663), in 2 RECORDS OF SOUTHAMPTON, *supra*, at 31 (missing church on Sunday; fine of five shillings per offense); Cooper v. Bennit (Gen. Ct. Southampton June 9, 1663), in 2 RECORDS OF SOUTHAMPTON, *supra*, at 30 (theft; payment of treble damages to victim); Town of Southampton v. Wood (Gen. Ct. Southampton Mar. 17, 1656), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 115 (breaking and entering; fine of five shillings).

Dutch magistrates had much broader criminal and regulatory concerns. In addition to hearing the usual sorts of cases, such as assault, theft, and contempt of authority, they were deeply involved in regulating trade with Native Americans and controlling “sin, vice, corruption and misfortunes,”<sup>24</sup> proceeding rather harshly against Jews, Baptists, Quakers, and Lutherans. Indeed, the Dutch magistrates took an oath “to maintain here the [r]eformed [r]eligion according to . . . the Synod of Dordrecht and not to tolerate publicly any sect.”<sup>25</sup> Of course, there were also prosecutions of unmarried couples who engaged in “carnal conversation,” where magistrates had plenary discretion to impose criminal punishments or require a couple to marry.<sup>26</sup> In one case, in which a man admitted to intercourse but denied being the father of the woman’s child, the court achieved a practical result, albeit one unwarranted by law, by requiring him to pay the woman a substantial amount of money “on account of a former acknowledgment . . . that he did not reward” her “for sleeping with” him.<sup>27</sup>

The frequently discretionary procedures used in criminal cases intruded deeply into subjects’ lives. Dutch magistrates practiced torture “by customary methods that are lawful and based on law”<sup>28</sup> in order to discover a defendant’s “accomplices” as well as “the truth.”<sup>29</sup> They granted prosecutorial officials broad powers of search—“as often and repeatedly as it . . . suit[ed] [the officer’s] convenience or [as] circumstances . . . require[d]”<sup>30</sup> and permitted them to “put” those

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24. Act of Feb. 25, 1654, in 5 NEW YORK HISTORICAL MANUSCRIPTS: DUTCH: COUNCIL MINUTES, 1652-1654, at 119 (Charles T. Gehring ed. & trans., 1983) [hereinafter COUNCIL MINUTES, 1652-1654].

25. Oath of Fidelity (Ct. Fort Orange & Beverwyck Apr. 30, 1654), in 1 MINUTES OF FORT ORANGE, *supra* note 7, at 139 (case was mistakenly dated as May 30, 1654 in original records).

26. See, e.g., Schaets *ex rel* Consistory v. Ripsz (Ct. Fort Orange & Beverwyck Dec. 2, 1654), in 1 MINUTES OF FORT ORANGE, *supra* note 7, at 188; see also Wyngaart v. Verplanck (Ct. Burgomasters & Schepens May 10, 1661), in 3 THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674 ANNO DOMINI: MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS SEPT. 3, 1658, TO DEC. 30, 1661, INCLUSIVE, at 297 (Berthold Fernow ed., New York, N.Y., Knickerbocker Press 1897) (punishing seduction “with fair words and promises” resulting in plaintiff’s pregnancy).

27. See Jacobsen v. Westercamp (Kingston Ordinary Ct. Feb. 6, 1663), *microformed on Reel 47*, slide 73 (on file with Queens County Library, Jamaica, N.Y.).

28. *In re van Tienhoven* (Ct. New Amsterdam Apr. 28 1655), in COUNCIL MINUTES 1655-1656, at 39 (Charles T. Gehring ed. & trans., 1995) (requesting the use of torture to extract a confession from Hans Breyer, a suspected thief). Breyer ultimately was convicted and sentenced to death. See Schout v. Breyer (Ct. New Amsterdam May 14, 1655), in COUNCIL MINUTES 1655-1656, *supra*, at 44-49.

29. *In re* Examination of Willemsz (Ct. New Amsterdam Aug. 24, 1654), in COUNCIL MINUTES, 1652-1654, *supra* note 24, at 170; *cf. In re* Interrogation of Bordingh (Ct. New Amsterdam Dec. 9, 1653), in COUNCIL MINUTES, 1652-1654, *supra* note 24, at 90 (imprisoning defendant until he states from whom he obtained contraband goods).

30. Act of Nov. 25, 1653, in 1 MINUTES OF FORT ORANGE, *supra* note 7, at 80-81.

accused of petty offenses “in irons.”<sup>31</sup> And, they passed judgment on various defenses offered to avoid criminal liability and, in the process, unavoidably exercised discretion when deciding whether to believe witnesses.

The legal system of New Netherland interfered even more in the day-to-day lives of its residents through intensive economic regulation. Magistrates regulated the price and quality of nearly every commodity, even fixing at 120% the markup that importers could charge over the price at which they had purchased goods in Europe.<sup>32</sup> Along with regulation of prices came regulation of wages and occupational performance and the licensing of individuals seeking to practice, often as monopolists, in many key occupations.<sup>33</sup> Finally, magistrates regulated laborers and the conditions of labor, often unfavorably to the working classes.<sup>34</sup>

Regulation of trade was but one part of magistrates’ regulatory activity. Another, equally important part was regulation of land use. Some subjects of concern, like fire prevention, were obvious. But land use regulation extended far beyond concerns of safety. New Netherland was eager to develop its cities and towns and did not want “large and spacious lots [held] for profit or pleasure” solely.<sup>35</sup> Hence it required that “all . . . lots . . . be as soon as possible built on” and imposed a special tax on those kept vacant.<sup>36</sup> At the same time, those planning to build were not free to do whatever they pleased, but were required to act for “the public good, ornament, and welfare of th[e] city.”<sup>37</sup> Thus, anyone seeking to build a new structure or an extension to an existing one first had to notify the surveyors of the city and obtain approval of his or her plans.

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31. *Jansz v. Laecken* (Ct. New Amsterdam Sept. 14, 1654), in COUNCIL MINUTES, 1652-1654, *supra* note 24, at 183 (gambling on Sunday).

32. Order Regulating Imported Goods (Ct. New Amsterdam Nov. 19, 1653), in COUNCIL MINUTES, 1652-1654, *supra* note 24, at 78-79; *see also* Nelson, *supra* note 4, at 46 n.212.

33. Nelson, *supra* note 4, at 47.

34. *Id.* at 48-50.

35. Act of Jan. 17, 1658, in 2 THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674 ANNO DOMINI: MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS 1656 TO AUG. 27, 1658, INCLUSIVE, at 302 (Berthold Fernow ed., New York, N.Y., Knickerbocker Press 1897).

36. *Id.*

37. *In re Stevensen* (Ct. Burgomasters & Schepens Mar. 15, 1655), in 1 THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674 ANNO DOMINI: MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS 1653-1655, at 300 (Berthold Fernow ed., New York, N.Y., Knickerbocker Press 1897) [hereinafter 1 THE RECORDS OF NEW AMSTERDAM]; *cf.* New Amsterdam, N.Y., Ordinance Prohibiting Goats from Running Free in New Amsterdam (Oct. 26, 1655), in COUNCIL MINUTES 1655-1656, *supra* note 28, at 127-28 (regulating where goats may be herded and pastured in order to prevent destruction of land).

In addition to regulating trade and land use, Dutch magistrates tightly controlled family life, especially marriage. The records contain cases, for example, in which a husband sued his wife “demand[ing] to know . . . why she [would] not live with him.”<sup>38</sup> The marriage cases are particularly important because they display the mindset that gave the magistrates of New Netherland extraordinary power. They did not arise, as common-law cases do, because a plaintiff sought some specified form of relief, such as money damages, for which established legal standards had to be met. Instead, they arose because someone had a problem, such as a runaway spouse, for which he or she sought the magistrates’ help.<sup>39</sup> Listening to very human stories and uncabined by inflexible rules of procedure or evidence, the magistrates tried to fashion practical, human solutions, not to administer fixed remedies in favor of those who met preexisting, fixed standards. To the extent they succeeded in imposing their solutions, Dutch magistrates exercised a level of power and flexibility that English Puritan judges totally lacked.

Indeed, the English judges prior to 1664 seem to have possessed virtually no regulatory jurisdiction whatsoever. Like every other court, that of Southampton administered estates<sup>40</sup> and appointed guardians for minors.<sup>41</sup> Of course, magistrates prohibited the sale of guns to Native Americans<sup>42</sup> and controlled the settlement of newcomers in the town.<sup>43</sup> Later, they regulated the price of bread, corn, and cloth sold to Indians,<sup>44</sup> but left merchants free to sell to any Englishman at “such price [as] he[] can afford.”<sup>45</sup> The only other noteworthy regulations in Southampton occurred when the General Court set the fees of the town miller,<sup>46</sup> required parents to whip children who stole fruit,<sup>47</sup> and gave a particular individual a monopoly over the sale of liquor, in an effort to keep it out of the hands of Indians and to preserve “the boun[d]s of moderation & sobriety” within the town.<sup>48</sup>

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38. Claessen v. Dirricksz (Ct. New Amsterdam Sept. 9, 1652), in COUNCIL MINUTES, 1652-1654, *supra* note 24, at 35.

39. *Id.*

40. See, e.g., *In re* Appointment of Marvins (Gen. Ct. Southampton July 23, 1650), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 64 (granting letters of administration).

41. See, e.g., *In re* Steevens (Gen. Ct. Southampton Mar. 14, 1663), in 2 RECORDS OF SOUTHAMPTON, *supra* note 23, at 40 (assigning a guardian for a sixteen-year-old orphan).

42. See Act of Apr. 6, 1641, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 22.

43. See Act of Jan. 25, 1655, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 111-12.

44. See Act of Mar. 3, 1651, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 77-78.

45. See Act of Apr. 25, 1653, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 90.

46. See Act of Mar. 8, 1649, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 59.

47. See Act of Aug. 13, 1651, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 74.

48. See Act of Jan. 25, 1655, in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 111.

Records of three other English courts prior to 1664—Huntington, Newtown, and Westchester—show that they, like their counterpart in Southampton, exercised limited criminal jurisdiction.<sup>49</sup> Their main concerns were maintenance of authority, punishment of theft, and preservation of sexual morality. Thus, there were prosecutions for contempt of authority,<sup>50</sup> theft,<sup>51</sup> and receiving stolen goods,<sup>52</sup> while a woman was fined for carrying herself lasciviously with a man despite a court order to avoid his company,<sup>53</sup> and a different man and his wife were fined and banished because he had exposed himself, revealed his wife's infirmities, and offered money for sex to other men's wives.<sup>54</sup> No significant economic regulatory activity whatsoever occurred in the three towns.

Prior to 1664, however, whether in New Netherland or in the English towns, the bulk of litigation was not criminal, but civil. Perhaps to distinguish themselves from the Dutch, the people of the English towns turned to the common law to resolve civil disputes. But they applied the common law in a "rude, untechnical" fashion,<sup>55</sup> as one would expect in towns that had no lawyers and in which, the town records suggest, most residents were at best only semi-literate.

Accordingly, the records of Southampton are replete with actions of case,<sup>56</sup> actions of debt,<sup>57</sup> actions of "slander and defamation,"<sup>58</sup> actions

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49. JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)*, at 64, 69 (1944).

50. *See* Town of Newtown v. Robards (Town Ct. Newtown Dec. 5, 1659), *in* TRANSCRIPTIONS OF EARLY TOWN RECORDS OF NEW YORK: MINUTES OF THE TOWN COURTS OF NEWTOWN 1656-1690, at 8 (N.Y. City Historical Records Survey Project ed., 1940) [hereinafter MINUTES OF THE TOWN COURTS OF NEWTOWN]; Town of Easttowne v. Benfeld (Westchester Ct. Sess. Feb. 1, 1657), *in* 1 THE MINUTES OF THE COURT OF SESSIONS (1657-1696) WESTCHESTER COUNTY NEW YORK 1 (Dixon Ryan Fox ed., 1924) [hereinafter MINUTES OF THE WESTCHESTER COURT OF SESSIONS].

51. *See* Town of Newtown v. Forman (Town Ct. Newtown Apr. 5, 1660), *in* MINUTES OF THE TOWN COURTS OF NEWTOWN, *supra* note 50, at 16.

52. *See* Town of Huntington v. Suttin (Town Ct. Huntington Apr. 13, 1660), *in* 1 HUNTINGTON TOWN RECORDS, INCLUDING BABYLON, LONG ISLAND, N.Y. 1653-1688, at 24 (Charles R. Street ed., Huntington, N.Y., Babylon, N.Y. 1887) [hereinafter HUNTINGTON TOWN RECORDS].

53. *See* Town of Easttowne v. Timer (Westchester Ct. Sess. Jan. 23, 1658), *in* MINUTES OF THE WESTCHESTER COURT OF SESSIONS, *supra* note 50, at 8.

54. *See* Town of Easttowne v. Wright (Westchester Ct. Sess. May 6, 1657), *in* MINUTES OF THE WESTCHESTER COURT OF SESSIONS, *supra* note 50, at 6.

55. Paul Samuel Reinsch, *English Common Law in the Early American Colonies*, 2 *ECON., POL. SCI., & HIST. SERIES* 393, 400 (1898), *reprinted in* BULLETIN OF THE UNIVERSITY OF WISCONSIN NO. 31, at 8 (Madison, Univ. of Wisconsin 1899). I found Reinsch's characterization inapt for the early Chesapeake and New England colonies, but it is accurate for the early settlements in Long Island, Staten Island, and Westchester.

56. *See, e.g.,* Rainer v. Phillips (Gen. Ct. Southampton Dec. 1, 1663), *in* 2 RECORDS OF SOUTHAMPTON, *supra* note 23, at 32.



of trespass,<sup>59</sup> and actions of “bloodshed & battery.”<sup>60</sup> There was also “an action for equity.”<sup>61</sup> Sometimes the writs were used properly, as in an action of the case for “slanderous words,”<sup>62</sup> an action of the case on a book account,<sup>63</sup> and an action of trespass against a town official for seizing goods in an effort to collect an allegedly unlawful tax.<sup>64</sup> But often they were used incorrectly, as in an action of case “for the tres[]pass in taking [u]p the horse illegally”<sup>65</sup> and an action of case for “se[i]zing” and cutting up a beached whale.<sup>66</sup> In another civil suit, which intermixed criminal law, a jury found a defendant guilty of “fel[]oniously taking away” the plaintiff’s goods and of breach of the Sabbath and breaking up the plaintiff’s house.<sup>67</sup>

In the other English towns as well, there were actions of case,<sup>68</sup> actions of debt,<sup>69</sup> actions of trespass,<sup>70</sup> actions of defamation<sup>71</sup> and

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57. See, e.g., *Barnes v. Osburne* (Gen. Ct. Southampton Nov. 8, 1650), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 63.

58. See, e.g., *Meggs v. Smith* (Gen. Ct. Southampton Dec. 17, 1651), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 52.

59. See, e.g., *Dayton v. Stanborough* (Gen. Ct. Southampton Apr. 11, 1650), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 61.

60. See, e.g., *Till v. Herrick* (Gen. Ct. Southampton Sept. 28, 1653), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 93.

61. *Gosmer v. Cooper* (Gen. Ct. Southampton Dec. 2, 1656), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 113.

62. *Meggs v. Miller* (Gen. Ct. Southampton Oct. 5, 1653), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 108.

63. See, e.g., *Mills v. Thorpe* (Gen. Ct. Southampton Mar. 3, 1651), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 76.

64. See, e.g., *Halsey v. Cooper* (Gen. Ct. Southampton Mar. 17, 1656), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 113.

65. *Fordham v. Halsey* (Gen. Ct. Southampton Dec. 22, 1654), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 106-07.

66. *Topping v. Cooper* (Gen. Ct. Southampton June 2, 1663), in 2 RECORDS OF SOUTHAMPTON, *supra* note 23, at 30.

67. *Stanborough v. Stanborough* (Gen. Ct. Southampton Mar. 2, 1662), in 2 RECORDS OF SOUTHAMPTON, *supra* note 23, at 29.

68. See, e.g., *Fferris v. Parant* (Westchester Ct. Sess. Sept. 30, 1662), in MINUTES OF THE WESTCHESTER COURT OF SESSIONS, *supra* note 50, at 34; *Jesupe v. Larison* (Town Ct. Newtown Aug. 22, 1659), in MINUTES OF THE TOWN COURTS OF NEWTOWN, *supra* note 50, at 3.

69. See, e.g., *Cockrin v. Fayrchild* (Town Ct. Newtown Aug. 21, 1659), in MINUTES OF THE TOWN COURTS OF NEWTOWN, *supra* note 50, at 1; *Knap v. Finch* (Westchester Ct. Sess. Apr. 5, 1657), in MINUTES OF THE WESTCHESTER COURT OF SESSIONS, *supra* note 50, at 2.

70. See, e.g., *Whitehead v. Blatesfeeld* (Town Ct. Newtown Feb. 9, 1664), in MINUTES OF THE TOWN COURTS OF NEWTOWN, *supra* note 50, at 27; *Doughty v. Furman* (Town Ct. Newtown Oct. 27, 1659), in MINUTES OF THE TOWN COURTS OF NEWTOWN, *supra* note 50, at 5.

71. See, e.g., *Petit v. Lawrance* (Town Ct. Newtown Dec. 26, 1659), in MINUTES OF THE TOWN COURTS OF NEWTOWN, *supra* note 50, at 10; *Gill v. Roose* (Westchester Ct. Sess. Sept. 5, 1658), in MINUTES OF THE WESTCHESTER COURT OF SESSIONS, *supra* note 50, at 9.

slander,<sup>72</sup> and an action of battery.<sup>73</sup> Often writs were misused: one, for example, was an action of case “for breach of covenant,”<sup>74</sup> a second, an action of debt on a book account,<sup>75</sup> and a third mixed civil and criminal jurisdiction in “an action [u]pon suspi[ci]on of fel[ony].”<sup>76</sup> But sometimes plaintiffs got it right, as when one brought case for breach of a contract to provide labor in return for the use of land.<sup>77</sup>

While some cases were resolved when both parties agreed to submit to arbitration,<sup>78</sup> the favored mode of adjudication was trial by jury,<sup>79</sup> which lay at the core of the common law.<sup>80</sup> Thus, legislation in Southampton directed the marshal to return “the best able[] and most impartial” men for all trials, although it specified that only six jurors were needed unless the amount in controversy exceeded twenty pounds,<sup>81</sup> then a quite large sum. Informal special verdicts were allowed: one involving a false accusation of perjury, for instance, imposed five shillings in damages if the defendant apologized and ten pounds of sterling in damages if he did not,<sup>82</sup> while another left determination of a case to the magistrates, “there be[ing] no[] law of [the] [c]ol[ony]

72. See, e.g., *Higgins v. Turner* (Westchester Ct. Sess. Sept. 13, 1662), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 30; *Larison v. Wall* (Town Ct. Newtown Apr. 7, 1660), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 18.

73. See, e.g., *Travis v. Sartell* (Town Ct. Newtown July 11, 1660), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 20.

74. *Ludlam v. Whitney* (Town Ct. Huntington Oct. 25, 1660), in *HUNTINGTON TOWN RECORDS*, *supra* note 52, at 31.

75. *Mathews v. Wood* (Town Ct. Huntington July 29, 1662), in *HUNTINGTON TOWN RECORDS*, *supra* note 52, at 41-42.

76. *Doughty v. Bullocke* (Town Ct. Newtown Sept. 5, 1660), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 22.

77. *Forman v. Larance* (Town Ct. Newtown Mar. 3, 1660), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 13.

78. See, e.g., *Archare v. Rose* (Westchester Ct. Sess. Apr. 20, 1659), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 20-21; *Kelly v. Raynor* (Gen. Ct. Southampton Jan. 11, 1650), in 1 *RECORDS OF SOUTHAMPTON*, *supra* note 1, at 61.

79. See, e.g., *Frost v. Smith* (Town Ct. Newtown Feb. 9, 1664), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 27. On one occasion, however, a court told litigants, perhaps after they had waived a jury but perhaps not, that their “contenti[ions] [were] []needles[s]” and that “ne[i]ther . . . [should] tr[o]uble the co[u]rt an[ny] more.” *Laurance v. Larison* (Town Ct. Newtown Mar. 3, 1659), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 12. One other matter should be noted, in which the Newtown court enforced a judgment of the town court of neighboring Flushing. See *In re Doughty* (Town Ct. Newtown Feb. 9, 1664), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 27.

80. Thus, early legislation carefully preserved an accused’s right to indictment by a grand jury. See Act of Dec. 22, 1641, in 1 *RECORDS OF SOUTHAMPTON*, *supra* note 1, at 24.

81. Act of June 27, 1646, in 1 *RECORDS OF SOUTHAMPTON*, *supra* note 1, at 66.

82. See *Cooper v. Wood* (Gen. Ct. Southampton Jan. 3, 1654), in 1 *RECORDS OF SOUTHAMPTON*, *supra* note 1, at 106.

precisely to guide” the jurors.<sup>83</sup> In a highly unusual case, a jury requested three months time to bring in their verdict—apparently so they could investigate the matter, and the court granted their request.<sup>84</sup> Finally, Southampton did not require unanimity, as it allowed one seven-man jury to split—four on one side and three on the other.<sup>85</sup>

But, despite these oddities, the key point—the antipathy of New England Puritans to magisterial discretion—remains. Although a certain amount of discretion is inevitable in any legal system, the English settlements surrounding New Amsterdam vested little of it in judges. In civil cases, the judicial hand was tied by the writ system, which enabled a court to determine only whether litigants could establish they had been wronged in some specified manner entitling them to a specified form of relief.<sup>86</sup> Of course, there remained the discretion entailed in weighing evidence, but that discretion was vested in the jury, not the judge.<sup>87</sup>

In civil litigation in New Netherland, in contrast, the magistrates exercised vast discretion. Like courts elsewhere on the Atlantic shore of North America, Dutch courts heard cases ranging from title and boundary disputes to assaults and slanders.<sup>88</sup> But contract and commercial law were the most important heads of jurisdiction. Here, too, courts resolved disputes with great flexibility. One reason was that litigants often came before magistrates seeking human solutions to human problems, rather than established forms of legal relief. One defendant, for example, acknowledged making “an agreement, but

83. Pope v. Ludlam (Gen. Ct. Southampton Mar. 5, 1660), in 2 RECORDS OF SOUTHAMPTON, *supra* note 23, at 6.

84. See Cooper v. Wood (Gen. Ct. Southampton Sept. 5, 1654), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 104.

85. See Lupton v. Dayton (Gen. Ct. Southampton Dec. 9, 1662), in 2 RECORDS OF SOUTHAMPTON, *supra* note 23, at 21. A party who lost a suit could bring a new suit to revise the judgment, apparently before a seven-man rather than a six-man jury. See Cooper v. Wood (Gen. Ct. Southampton Nov. 5, 1654), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 106. He or she also could appeal to a plenary session of the General Court, which had discretion, however, to refuse to hear the appeal. See Wood v. Rainer (Gen. Ct. Southampton Mar. 4, 1655), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 112. If the popularly controlled General Court heard the case, it resolved it by majority vote. See Cooper v. Wood (Gen. Ct. Southampton Jan. 31-Feb. 1, 1654), in 1 RECORDS OF SOUTHAMPTON, *supra* note 1, at 107. After all proceedings had been concluded in Southampton, appeal theoretically lay to the Particular Court in Hartford, although the distance of that court made appeals extremely rare. *Id.*

86. See F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 2 (A.H. Chaytor & W.J. Whittaker eds., Cambridge Univ. Press 1941) (1909) (“Let it be granted that one man has been wronged by another; the first thing that he or his advisers have to consider is what form of action he shall bring.”).

87. See Reinsch, *supra* note 55, at 33 (“Immediately upon the occupation by the English, the jury came into use in New York. Jury trials [were], however, at first, very informal, more after the manner of a simple arbitration, and verdicts [were] often given in the alternative.”).

88. Nelson, *supra* note 4, at 33-35.

declare[d] that there [were] some obscure points in it which he should be glad to have explained.”<sup>89</sup> A second reason for the lack of clear law was that magistrates often sought to achieve justice through practical compromises: thus, in a case involving a lease of a farm that had produced only “a small yield of grain,” the lessee was allowed to remain in possession “because it [was] not right, in the first year of the lease, to take a farm from the lessee because he is not able, owing to poor crops, to pay the rent.”<sup>90</sup>

The rules of Dutch civil procedure only confirmed the vast, unbounded discretion of the magistrates. Because they functioned without juries, Dutch courts could not rely on the wisdom and experience of the local community to evaluate the credibility of witnesses and thereby determine the truth. They had to turn to other devices, of which the oath was most important. In administering oaths, however, courts often had to make discretionary judgments about which party should take an oath and thereby assume the burden of proof.<sup>91</sup> Alternatively, judges might require litigants to proceed to arbitration, but the goal of arbitration was not as it is today to save the litigants from expense; it was “to conciliate the parties if possible”<sup>92</sup> or, at the very least, in “doubtful cases,” where “both parties appear[ed] to have a claim,” to let “arbitrators who underst[oo]d the matter” take the burden of discretion and decision off the court.<sup>93</sup>

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89. Gerritsen v. Vosburch (Ct. Fort Orange & Beverwyck June 8, 1658), in 2 MINUTES OF THE COURT OF FORT ORANGE AND BEVERWYCK 1657-1660, at 116 (A.J.F. van Laer ed. & trans., 1923).

90. Ebbingh v. Sleght (Kingston Ordinary Ct. Mar. 28, 1662), *microformed on* Reel 47, slides 33-34 (on file with Queens County Library, Jamaica, N.Y.), *published in* N.Y. STATE HISTORICAL ASS'N, 11 PROCEEDINGS OF THE NEW YORK STATE HISTORICAL ASSOCIATION: THE THIRTEENTH ANNUAL MEETING, WITH CONSTITUTION, BY-LAWS AND LIST OF MEMBERS 26 (1912).

91. Nelson, *supra* note 4, at 13-14.

92. Bastiaensz v. Sandertsen (Ct. Fort Orange & Beverwyck July 16, 1652), in 1 MINUTES OF FORT ORANGE, *supra* note 7, at 27; *see also* Commissary v. Vosburgh (Ct. Fort Orange & Beverwyck July 31, 1654), in 1 MINUTES OF FORT ORANGE, *supra* note 7, at 173 (allowing a matter pending before the court to be settled by arbitration).

93. Huys v. Rudolphus (Ct. New Amsterdam Dec. 1, 1655), in COUNCIL MINUTES 1655-1656, *supra* note 28, at 165; *see also* Verveelen v. Moesman (Ct. Burgomasters & Schepens Oct. 16, 1663), in 4 THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674 ANNO DOMINI: MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS JAN. 3, 1662 TO DEC. 18, 1663, INCLUSIVE, at 317 (Berthold Fernow ed., New York, N.Y., Knickerbocker Press 1897) (referring a dispute over a dog bite to arbitration where the court determined there was insufficient proof presented by the parties); de Kuyper v. Jansen (Ct. Burgomasters & Schepens Mar. 2, 1654), in 1 THE RECORDS OF NEW AMSTERDAM, *supra* note 37, at 171 (referring a case to arbitration where there was insufficient proof of ownership of a sow). Another strategy for a local court in a difficult case was to seek outside advice—in an instance of a pregnancy of a woman whom the alleged father met while “she ran along the road with a can of wine one evening”—from the Director General and the clergy. Warners v. de Sille (Ct. Burgomasters & Schepens Sept. 7, 1654), in 1 THE RECORDS OF NEW AMSTERDAM, *supra* note 37, at 238-39.

In short, both New Netherland and the English settlements surrounding New Amsterdam had developed functioning legal systems that served their needs by the mid-1660s. The English settlers had put in operation a rude, untechnical, common-law legal system resting on the power of the communities it served and reflecting New England concerns, values, and ideals. The Dutch, in contrast, had established a centralized system under the tight appellate control of the Director-General and Council that was committed to the professionalized application of Dutch law with the assistance of men trained in the fatherland, sometimes at its leading universities, and thus trusted to use their discretion to reach just and efficient disposition of the human conflicts that litigants presented to them.

### III. FIRST THE SOLDIERS, AND THEN THE LAWYERS CAME

How was Governor Richard Nicolls, upon his arrival in New York in the fall of 1664, to control the two quite different legal systems that confronted him? Controlling the Dutch legal system, which Nicolls in the Articles of Surrender had promised to preserve, required that he appoint to the bench men learned in Dutch law;<sup>94</sup> the only such men available were existing Dutch residents of New York, and Nicolls had to induce them to serve his and their new masters with loyalty, on the best terms he could obtain, and thereby negotiate the gap between Dutch custom and English policy. Controlling the English Puritan towns required the governor to exercise dominion over locally elected judges, local juries, and town meetings that had assumed plenary power “[t]o make and repeal[] [l]aw[]s,”<sup>95</sup> and Nicolls did not even know what those jurisdictions had enacted and decided. He needed, that is, first to learn what Puritan law was and then to enforce it.

Nicolls had to achieve these stupendously difficult ends without the help of a bureaucracy and with only a small army. It may be that he could have assembled representatives of the Dutch and English towns together in a legislative body, coaxed them to hammer out a compromise

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94. See Articles of Surrender Consented to by Colonel Nicolls, His Delegates, and Director General Stuyvesant's Delegates (Aug. 27, 1664), in *NEW YORK HISTORICAL MANUSCRIPTS: ENGLISH: BOOKS OF GENERAL ENTRIES OF THE COLONY OF NEW YORK, 1664-1673: ORDERS, WARRANTS, LETTERS, COMMISSIONS, PASSES AND LICENSES ISSUED BY GOVERNORS RICHARD NICOLLS AND FRANCIS LOVELACE* 35-37 (Peter R. Christoph & Florence A. Christoph eds., 1982); see also Articles of Agreement Made with Deputies from Albany After the Reduction of the Province (Oct. 10, 1664), in *3 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK* 559 (B. Fernow ed. & trans., Albany, N.Y., Weed, Parsons & Co. 1883); *In re* Report of Beekman (Kingston Ordinary Ct. Nov. 14, 1664), *microformed on* Reel 47, slides 196-98 (on file with the Queens Library, Jamaica, N.Y.).

95. Act of Jan. 2, 1641, in *1 RECORDS OF SOUTHAMPTON*, *supra* note 1, at 25.

system, and employed them to go back home and enforce it, but that option was unavailable. His master, the autocratic and Catholic James, Duke of York, would have nothing to do with Reformed Protestant legislatures, and thus the governors of New York ruled without legislative help until 1683.<sup>96</sup> Nicolls had no choice but to try to treat his domain as two separate colonies—the one Dutch and the other New England.

This policy produced only mixed success, and then, only in the short run; ultimately the policy had anarchical consequences.<sup>97</sup> Nicolls did succeed in using existing Dutch elites to govern Albany and Kingston, and he appeared to gain some minimal control over the English towns of Long Island, Staten Island, and Westchester.<sup>98</sup> But Nicolls had to work through local leaders, who, unable to participate in colonial government, focused their attention on their own communities.<sup>99</sup> As a result, localism took root and persisted as a determinative force in New York law and politics throughout the colonial period.<sup>100</sup>

Manhattan, as we will see, proved to be unique. There the immediate presence of the colonial administration, together with lawyers on the ground who had close ties to it, enabled Nicolls and his successors to reconstitute the law in an exceptionalist fashion anticipating an American future that none of them, of course, could fully foresee.

#### *A. The Endurance of Dutch Law Along the Upper Hudson*

In Albany and Kingston, local courts continued to function into the 1680s largely as they had under Dutch rule.<sup>101</sup> As late as 1676, the magistrates were being directed “to act in the administration of [j]ustice according to . . . former [p]ractice, not [r]epugnant to the [l]aws of[] the

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96. See MICHAEL KAMMEN, *COLONIAL NEW YORK: A HISTORY* 103 (1975).

97. See *id.* at 80-82, 98-99.

98. See PATRICIA U. BONOMI, *A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK* 36-37 (1971).

99. *Id.* at 39.

100. *Id.* at 28-29, 39, 54-55.

101. But Donna Merwick argues that English legal ways displaced Dutch ones with some rapidity. DONNA MERWICK, *DEATH OF A NOTARY: CONQUEST AND CHANGE IN COLONIAL NEW YORK* 152, 185-86 (1999). Nonetheless, the fact remains, as this Article shows, that displacement occurred more slowly in the Albany region than in New York City—slowly enough that the subject of Merwick’s book—Adriaen Janse van Ilpendam—was able to carry on his Dutch notarial practice for more than two decades after the English conquest, albeit at a diminishing rate. *Id.* at 187, 238-39.

[g]overnment.”<sup>102</sup> Despite the availability of appeals to the English Governor and Council,<sup>103</sup> which had power to reverse and annul proceedings it found “unusual[] (if not . . . [a]rbitrary)”<sup>104</sup> or merely erroneous—and after 1683, to newly established sessions courts<sup>105</sup>—old practices such as reliance on oaths,<sup>106</sup> recourse to arbitrators,<sup>107</sup> and the requirement of timely notice to defendants<sup>108</sup> remained in place.<sup>109</sup> An

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102. Instructions for the Commissaries Authorized for the Jurisdiction of Albany, Colony of Rensselaerswyck and Dependencies (July 4, 1676), in 2 MINUTES OF THE COURT OF ALBANY, RENSSELAERSWYCK AND SCHENECTADY 1675-1680, at 130 (A.J.F. van Laer ed. & trans., 1928) [hereinafter 2 MINUTES OF THE COURT OF ALBANY]. When an inferior court for small cases was established in Schenectady, its magistrates received the same instructions. See Instruction for the Commissaries of Skenechtady, in 2 MINUTES OF THE COURT OF ALBANY, *supra*, at 23.

103. See, e.g., *Teunise v. van Marken* (Ordinary Ct. Albany May 2, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 100, 104. The Governor and Council reversed the judgment in the court below. See *Teunise v. van Marken* (N.Y. Governor & Council Aug. 29, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 152.

104. *In re Loveridge* (N.Y. Governor & Council May 22, 1678), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 326.

105. See *Gardenier v. Dorite* (Ordinary Ct. Albany July 1, 1684), in 3 MINUTES OF THE COURT OF ALBANY, RENSSELAERSWYCK AND SCHENECTADY 1680-1685, at 466-67 (A.J.F. van Laer ed. & trans., 1932) [hereinafter 3 MINUTES OF THE COURT OF ALBANY].

106. See, e.g., *Jansz v. Piter, the Frenchman* (Ordinary Ct. Albany May 26, 1670), in 1 MINUTES OF THE COURT OF ALBANY, RENSSELAERSWYCK AND SCHENECTADY 1668-1673, at 146 (A.J.F. van Laer ed. & trans., 1926) [hereinafter 1 MINUTES OF THE COURT OF ALBANY]; *Hussy v. Swartwout* (Kingston Ordinary Ct. Mar. 3/13, 1667/68), *microformed on* Reel 47, slide 511 (on file with Queens County Library, Jamaica, N.Y.); cf. *Siston v. Lespinard* (Ct. Schenectady June 20, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 122 (dismissing claim since accuser “can not adduce any proof”). But see *Backer v. Gerritse* (Ordinary Ct. Albany Oct. 3, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 169 (accepting that claim had been paid through the showing of written evidence, which trumped the oath).

107. See, e.g., *Nottingham v. Penniman* (Ordinary Ct. Albany Sept. 6, 1675), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 19; see also *van Marcken v. Volckerts* (Ordinary Ct. Albany June 9, 1670), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 154 (condemning defendant to fine “because he ha[d] neglected to settle with the plaintiff”); *Du Booy v. Swartwout* (Kingston Ordinary Ct. Mar. 22, 1670), *microformed on* Reel 47, slide 566 (on file with Queens County Library, Jamaica, N.Y.) (imposing Solomonic compromise on parties in a dispute about the rental of a barn). For an instance of judicial enforcement of an arbitration, see *Bleecker v. Witthart* (Ordinary Ct. Albany Oct. 6, 1669), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 107-08.

108. See, e.g., *Cloet v. Viele* (Ordinary Ct. Albany May 2, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 242 (nonsuited plaintiff because defendant received only one day’s notice).

109. The courts also continued the old practice, followed throughout American colonies, of allowing witnesses to be sworn and examined before magistrates and their depositions subsequently to be admitted in court. See, e.g., *Bratt v. Gysbertse* (Ordinary Ct. Albany June 5, 1683), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 349; Governor’s Order Regulating Affidavits and Depositions (Apr. 17, 1677), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 223-24. Like all courts, they remained attentive to the scope and limits of their jurisdiction. See, e.g., *van Eps v. Martin* (Ordinary Ct. Albany Mar. 3, 1684/85), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 520; *van Marken v. Yonckheer* (Ordinary Ct. Albany Feb. 8, 1675/76), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 66; *In re Swartwoudt* (Kingston

old procedure of having magistrates vote on cases, with the presiding magistrate having an extra vote in case of a tie, also continued.<sup>110</sup>

The one significant innovation the English introduced was trial by jury. The procedure first appeared in Albany in February 1672/73 in a trial of two Native Americans for the murder of one Jan Stuart, in which the usual magistrates, reinforced by an equal number of English military personnel, sat as a special court of oyer and terminer.<sup>111</sup> After one of the Indians confessed to the killing and the other to directing him to commit it, the jury found both guilty, and the court sentenced them to death.<sup>112</sup>

But the use of juries was rare. Thus, in one prosecution for an assault and for failure to clean chimneys, the court did “not find” the case “of sufficient consequence to be submitted to a jury,” found the defendant guilty, and sentenced him to a fine.<sup>113</sup> Moreover, the procedure proved irregular and problematic in many of the cases in which it was used.<sup>114</sup> In *Teunis v. van Marken*,<sup>115</sup> for example, the jury put all the facts underlying its verdict into the record, and the court “fully approve[d] the opinion of the jury,”<sup>116</sup> but the Governor and Council reversed. Similarly, in *Sanders v. van Slichtenhorst*,<sup>117</sup> the jury put into the record the facts underlying its 9-3 compromise verdict “that all abusive words should be weighed and balanced against each other,” but “that the plaintiff [was] guilty of having made unfounded charges by reason of his failure to produce proof,” and the court agreed.<sup>118</sup> In *Pretty v. Sanders*, where the jury again reported the underlying facts, the court had to send it out three times before receiving a legally acceptable verdict on which to base a conviction,<sup>119</sup> while in *Stevens v. Pretty*,<sup>120</sup> the

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Ordinary Ct. Jan. 5, 1671/72), *microformed on* Reel 47, slide 612 (on file with Queens County Library, Jamaica, N.Y.).

110. See Governor’s Order Nominating New Magistrates (Aug. 11, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 143.

111. See *King v. Kaelkompte* (Albany County Ct. Oyer & Terminer Feb. 15, 1672/73), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 327-28.

112. *Id.*

113. *Siston v. Loveridge* (Ordinary Ct. Albany Dec. 7, 1675), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 51.

114. *But see Hieronimus v. Becker* (Ordinary Ct. Albany Oct. 3, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 288-89 (jury resolved in defendant’s favor whether he was liable when his gun accidentally wounded the plaintiff).

115. *Teunise v. van Marken* (Ordinary Ct. Albany May 6, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 100, 104, *aff’d*, (N.Y. Governor & Council Aug. 29, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 152.

116. *Id.* at 104.

117. *Sanders v. van Slichtenhorst* (Ordinary Ct. Albany Mar. 9-10, 1676/77), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 205.

118. *Id.* at 207.

119. *Pretty v. Sanders* (Ordinary Ct. Albany Mar. 6, 1682/83), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 328-29.



plaintiff asked for a review of the case following a verdict for the defendant, but the court, upon receiving the same verdict from the same jury, upheld its initial judgment.<sup>121</sup>

A fifth case, *Loveridge v. Ketelheyn*, a complicated dispute arising out of the harvest of the defendant's crops,<sup>122</sup> shows with exceptional clarity how old Dutch ways persisted even eighteen years after the English conquest. The jury made three findings: (1) that Loveridge must return tools lent to him by Ketelheyn; (2) that Loveridge must pay the wages of a worker hired by Ketelheyn to replace an unfit worker Loveridge had provided; and (3) that Loveridge had to compensate Ketelheyn for a wagon road built to bring in the crops since the road remained available for Loveridge's use.<sup>123</sup> Note that these findings were not responsive to narrow, precise issues framed by common-law pleadings, but sought to resolve a complicated dispute between parties, as those parties rather than their lawyers had framed the issues. Thus, the jury could not return a simple, though impenetrable verdict, such as guilty or not guilty; it had to report the facts, as it did, in all their complexity.

The plaintiff objected to the findings of the jury. One objection was to the court's refusal to replace a juror who had "told [the plaintiff] beforehand that he would lose the case."<sup>124</sup> But the plaintiff's main objection was to the jury's basing its verdict on the testimony of a single witness: in Loveridge's view, "to have a jury condemn any one without two witnesses at least [was] contrary to the just law of God and consequently a soul damning sin."<sup>125</sup> The court rejected the plaintiff's claims, but it nonetheless set aside the verdict in part and imposed a compromise relieving Loveridge of the obligation to pay for the road, upon his agreement to take an oath that he never had requested Ketelheyn to build it.<sup>126</sup> In acting as it did with the jury, the court, in the Dutch mode of facilitating compromise, behaved toward litigants exactly as it had in another case, where a defendant moved to nonsuit the

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120. *Stevens v. Pretty* (Ordinary Ct. Albany Mar. 29, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 219, 223.

121. *Stevens v. Pretty* (Ordinary Ct. Albany Mar. 30, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 223-24.

122. *Loveridge v. Ketelheyn* (Ordinary Ct. Albany Feb. 14, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 206-07.

123. *Id.* at 207.

124. *Id.* at 206.

125. *Id.* at 207.

126. *Id.* at 207-08; *see also* *Crigyer v. van Eps* (Ordinary Ct. Albany July 5, 1681), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 141-42 (ruling that an affidavit of one witness cannot overcome "conclusive evidence" to the contrary).

plaintiff on the ground that his “claim [was] of such general character that no one [was] able to make answer to it,” and the court denied the motion, instead “recommend[ing] that the parties settle their dispute through referees.”<sup>127</sup>

In a continuing effort to promote social solidarity and community morality and well-being, the Albany and Kingston courts also continued their earlier practice of regulating in detail their subjects’ lives. In addition to the usual sorts of criminal cases,<sup>128</sup> prosecutions occurred for fornication,<sup>129</sup> “slanderous language against the Protestant religion,”<sup>130</sup> working on the Sabbath,<sup>131</sup> selling real estate on the Sabbath,<sup>132</sup> otherwise “desecrating the Sabbath,”<sup>133</sup> unlawful trade with Native

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127. *Gerritse v. Gardner* (Ordinary Ct. Albany Feb. 3, 1684/85), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 509.

128. *See, e.g., Pretty v. Michielse* (Ordinary Ct. Albany Oct. 2, 1683), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 395 (adultery); *In re Schuyler* (Ordinary Ct. Albany July 24, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 274-75 (assault); *Pretty v. Cuyler* (Ordinary Ct. Albany Mar. 1, 1680/81), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 88 (insulting and affronting the sheriff); *Pretty v. Jacobse* (Ordinary Ct. Albany Feb. 21, 1680/81), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 76 (homicide); *Pretty v. Abrahamse* (Ordinary Ct. Albany Feb. 3, 1679/80), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 468-69 (serving liquor without a license); *Pretty v. Aukus* (Ordinary Ct. Albany Jan. 7, 1678/79), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 381 (transporting liquor without a license); *Siston v. Conell* (Ordinary Ct. Albany Dec. 11, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 181 (spreading rumors and false reports about impending attack on Indians); *Siston v. Conell* (Ordinary Ct. Albany Dec. 5, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 176 (same); *In re Sentencing of Janse* (Ordinary Ct. Albany Dec. 7, 1675), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 53 (burglary and theft).

129. *See Pretty v. Michielse* (Ordinary Ct. Albany June 3, 1679), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 417-18 (defendant acquitted by jury); *Siston v. Solders* (Ordinary Ct. Albany Nov. 6, 1677), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 279-80 (punishing with twenty-one lashes a woman who had intercourse with a second man so as to accuse him after the first man had gotten her pregnant); *cf. In re Pretty* (Ordinary Ct. Albany Apr. 1, 1679) in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 401 (ordering that a woman “be constrained, according to the extreme rigor of the law, to declare in her extreme need” during childbirth “who is the father of her child”). The penalty for fornication remained marriage, corporal punishment, or payment of a fine. *See Bruyns v. Marcelis* (Ordinary Ct. Albany Apr. 7, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 89.

130. *Pretty v. van Loon* (Ordinary Ct. Albany Jan. 3, 1681/82), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 195; *see also Arentse v. Borgerse* (Ordinary Ct. Albany Dec. 19, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 307 (alleging slander for insult of a local clergyman).

131. *See van Marcken v. Pitzersz* (Ordinary Ct. Albany Sept. 3-13, 1668), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 14.

132. *See Provoost v. Clute* (Ordinary Ct. Albany May 7, 1678), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 322-23.

133. *Siston v. Hollander* (Ordinary Ct. Albany May 2, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 95; *see also Albany, N.Y., Ordinance Regarding the Sabbath*, (Apr. 1, 1679), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 402.

Americans,<sup>134</sup> “fast and dangerous driving,”<sup>135</sup> drinking wine in a tavern after 8 p.m.,<sup>136</sup> “behav[ing] very improperly before the young people in such a way that it [did] not comport with decency to explain it,”<sup>137</sup> and “plant[ing] a scandalous withered tree . . . with a straw wreath, from which hung a dried bladder . . . [and] dried beaver testicles.”<sup>138</sup> Another man was punished for an apparently idle threat to kill his “negro” lover and commit suicide himself if her owner would not permit him to buy her,<sup>139</sup> while a somewhat unusual entry in the records directed the man acting as sheriff “to pay attention to the drunken women who all day long roam along the streets and make a vile spectacle of themselves . . . and put them in the dungeon . . . until they are sober and slept out.”<sup>140</sup>

Religion, as before the English conquest, presented special problems. It was necessary for the Albany court, which continued to take an oath, “to help maintain here the Reformed religion,”<sup>141</sup> to obtain ministers for the established church from Holland,<sup>142</sup> pay their salary and expenses,<sup>143</sup> provide them with housing,<sup>144</sup> and maintain church

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134. See *Schout v. Vedder* (Ordinary Ct. Albany Sept. 30, 1669), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 105; cf. *Order Prohibiting and Enjoining Trade with Indians*, (Ordinary Ct. Albany June 23, 1670), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 162-63.

135. *Provoost v. Harmense* (Ordinary Ct. Albany Feb. 19, 1677/78), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 295.

136. See *Schout v. Teller* (Ordinary Ct. Albany Dec. 2, 1669), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 118.

137. *Gerritse v. Bratt*, (Ordinary Ct. Albany June 6, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 261.

138. *Provoost v. Loveridge* (Ordinary Ct. Albany Jan. 2, 1677/78), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 288.

139. *Sanders v. Boffie* (Ordinary Ct. Albany Sept. 8, 1684), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 480-81.

140. *Order Regarding Drunken Women* (Ordinary Ct. Albany Sept. 2, 1669), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 96; cf. *In re Gilbert* (Ordinary Ct. Albany Aug. 2, 1681), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 152 (requesting that no one provide liquor to mother-in-law who “daily walks along the street intoxicated”).

141. *In re Oath of Judges* (Ordinary Ct. Albany Nov. 1, 1669), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 113-14.

142. See *In re Brockholes* (Ordinary Ct. Albany May 3, 1681), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 112; *In re Wessells* (Ordinary Ct. Albany Feb. 17, 1680/81), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 72.

143. See *In re Salary of Dellius* (Ordinary Ct. Albany Aug. 13, 1683), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 378; *In re van Baell* (Ordinary Ct. Albany June 7, 1681), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 130; see also *Order Enforcing Schout’s Proposal* (Nov. 22, 1664), *microformed on Reel 47*, slide 208 (on file with Queens County Library, Jamaica, N.Y.).

144. *In re Schaets* (Ordinary Ct. Albany Nov. 1, 1671), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 278-79; *Promise to Execute Deed* (Ordinary Ct. Albany Feb. 6, 1678/79), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 390; *In re Consistory*

edifices.<sup>145</sup> The court also received requests from neighboring towns for Albany's clergymen to minister to their spiritual needs, and it tried to grant those requests without depriving the people of Albany of spiritual services.<sup>146</sup> These were the easy issues. More difficult problems arose when factions within the Reformed Church found themselves at odds and sought the magistrates' mediation,<sup>147</sup> or when Lutherans complained, with some cause,<sup>148</sup> that they were "looked at askance by the majority of the inhabitants of this place on account of their religion."<sup>149</sup> It was not until 1684 that religion began to gain some independence from government, when the Reformed Church was granted the right to choose its own church masters without judicial approval.<sup>150</sup>

Meanwhile, courts in the upper Hudson region continued their intensive regulation of daily economic life as they set the price<sup>151</sup> and

(Ordinary Ct. Albany July 6, 1680), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 26; *cf.* Resolution Regarding Pews (Ordinary Ct. Albany Apr. 18, 1672), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 298 (allocating pews among various claimants).

145. See Resolution to Build New Gallery (Ordinary Ct. Albany May 15, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 248.

146. See *In re Meuse* (Ordinary Ct. Albany Jan. 9, 1678/79), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 383; Letter from Consistory of Esopus (Ordinary Ct. Albany Mar. 25, 1677/78), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 308; Letter of Consistory of Kingston (Ordinary Ct. Albany Feb. 12, 1675/76), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 70-71; *In re Prohibition of Schaets* (Ordinary Ct. Albany Oct. 19, 1675), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 36.

147. See *In re Request of Elders and Deacons* (Ordinary Ct. Albany Apr. 1, 1681), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 98; *In re Remonstrance of van Renslaer* (Ordinary Ct. Albany Sept. 3, 1678), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 355; Letter of Governor General (Ordinary Ct. Albany Sept. 26, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 162; *see also* *Schaets v. Renselaer* (Ordinary Ct. Albany Sept. 26, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 166 (ordering that the ministers are to "forget [their differences] and to forgive each other") (alteration in original).

148. See *In re Augsburg Confession* (Ordinary Ct. Albany Apr. 13, 1671), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 233 (granting Lutheran minister right to respond to controversial writing of Reformed minister); *In re Augsburg Confession* (Ordinary Ct. Albany Jan. 5, 1670/71), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 211 (denying the request of the Lutherans to ring church bell for Thursday services); *In re Otten* (Ordinary Ct. Albany May 13, 1669), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 69 (prohibiting Lutheran marriages without prior civil marriage); *In re Summons of Fabricius* (Ordinary Ct. Albany Apr. 1, 1669), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 66 (requiring a Lutheran minister to exhibit in court his license to preach).

149. *In re Augsburg Confession* (Ordinary Ct. Albany May 2, 1670), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 144.

150. See *In re Dellius* (Ordinary Ct. Albany Dec. 24, 1684), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 502.

151. See, e.g., Albany, N.Y., Ordinance for the Bakers (Sept. 11, 1675), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 24 (fixing the price of bread); *see also* Order of Governor Regarding Meat Excise (Ordinary Ct. Albany Sept. 17, 1675), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 23 (recommending that the court abolish the excise of meat).

quality of numerous commodities,<sup>152</sup> undertook to license individuals seeking to practice key occupations,<sup>153</sup> and policed laborers<sup>154</sup> and the conditions of labor.<sup>155</sup> Regulation of land use remained another subject of activity as the magistrates focused on fire prevention,<sup>156</sup> urban land use,<sup>157</sup> the building and maintenance of roads,<sup>158</sup> and the dumping of waste water near wells.<sup>159</sup>

The courts' regulation of marriage and family life became, if anything, even more intrusive after the English conquest than it had been before as magistrates strove to keep marriages intact. The Kingston magistrates' denial of Elisabeth Crafford's request for a divorce on grounds of desertion is illustrative: her husband responded "that his wife

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152. See, e.g., *In re* Inspectors of Stallions (Kingston Ordinary Ct. May 14, 1674), *microformed* on Reel 47, slide 30 (on file with the Queens Library, Jamaica, N.Y.) (authorizing the seizure of bad stallions in order to prevent their mating); Ordinance for the Bakers, *supra* note 151, at 24 (fixing the weight of loaves of bread); see also Albany, N.Y., Ordinance Prohibiting Export of Grain (Feb. 12, 1675/76), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 71, *repealed* by Albany, N.Y., Law of Mar. 6, 1675/76, in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 77.

153. See, e.g., *In re* Oath of Janse (Ordinary Ct. Albany Dec. 11, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 182 (swearing in the newly appointed city midwife); *In re* Appointment of Rooseboom (Albany County Ct. Sept. 4, 1675) (on file with the Albany County Clerk) (naming undertaker); see also *In re* Order in Council (Ordinary Ct. Albany May 19, 1679), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 413 (deferring to the governor's resolution of Albany's monopoly of Indian trade); *In re* Burghers of Albany (Ordinary Ct. Albany Apr. 30, 1679), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 405-06, 408 (requesting an end to the ban on overseas trade, which prompted the decision in *Order in Council*).

154. See, e.g., *Mynderse v. Hoffmayer* (Ordinary Ct. Albany Apr. 3, 1677), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 216.

155. See, e.g., *Bratt v. Gardinier* (Ordinary Ct. Albany June 3, 1679), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 416; *Aelberts v. Brat* (Ordinary Ct. Albany Sept. 16, 1669), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 99.

156. See, e.g., Albany, N.Y., Ordinance Regarding Houses Without Chimneys (Feb. 16, 1670/71), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 223; see also *Provoost v. Skaif* (Ordinary Ct. Albany Feb. 19, 1677/78), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 295 (fining defendant because his house "got on fire . . . through his carelessness").

157. See, e.g., Albany, N.Y., Ordinance to Regulate Trade, Streets, and Buildings §§ 2-3 (July 20, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 135-36 (regulating construction on empty lots and sizes of buildings); *Lespinard v. Ouderkerk* (Ordinary Ct. Albany June 4, 1678), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 333 (requiring defendant to place gutters on his house); *Grevenraedt v. Blansjan* (Kingston Ordinary Ct. Dec. 17, 1671), *microformed* on Reel 47, slide 611 (on file with the Queens Library, Jamaica, N.Y.) (fining defendant for failure to close up his lot); *In re* Appointment of Meeussen (Ordinary Ct. Albany Feb. 10, 1669/70), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 126.

158. See, e.g., *In re* Appointment of Visbeek (Ordinary Ct. Albany Aug. 7, 1683), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 377-78; see also *Siston v. van Ipendam* (Ordinary Ct. Albany June 12, 1677), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 242 (ordering the defendant to pave his sidewalk with planks or slate).

159. See, e.g., *Order Regarding Rinsing Clothes* (Ordinary Ct. Albany Mar. 1, 1680/81), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 90; *Pretty v. Cuyler* (Ordinary Ct. Albany Mar. 1, 1680/81), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 88.

[could not] serve him as wife, and [would] not serve him as servant, and further . . . she has said that she never loved him,” but that he nonetheless “never said that he would leave her[;]” the court ordered him to give security to continue living with her.<sup>160</sup> Similarly, when Susanna Bradt complained to the courts “about her husband’s godless life in drinking, clinking, beating and throwing, etc.” and asked the magistrates “to think of some means whereby he may improve his conduct,” the court “ordered” him “to conduct himself better and to live with his family in rest and peace,”<sup>161</sup> just as it had ordered another husband to “live properly with his wife as a good citizen ought to and is bound to do.”<sup>162</sup>

Even when a wife failed to appear in court and the judges accordingly granted her husband a separation, they continued to enforce “the marriage contract” and its obligation of support,<sup>163</sup> for, as they declared in another case, “a marriage settlement [was] a binding matrimonial tie” that could “not be annulled.”<sup>164</sup> On the other hand, judges would not protect wives from their husbands’ violence: in a case where a wife ran out of her house bleeding and her husband followed with sword in hand, the husband objected that the sheriff had “no business to concern himself with private disputes between husband and wife,” and the court dismissed the prosecution because “no complaint was made.”<sup>165</sup>

Courts also intervened to protect children. Thus, when the deacons of a local church grew concerned that the children of a neighborhood family could “not get enough to eat at their parents’” and requested the court “to see to it that the said children do not suffer want or damage,” the magistrates took the case under advisement, although they apparently declined to remove the children from the parental household.<sup>166</sup>

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160. *In re Crafford* (Kingston Ordinary Ct. Feb. 27, 1671/72), *microformed on* Reel 47, slide 622 (on file with the Queens Library, Jamaica, N.Y.).

161. *Bradt v. Bradt* (Ordinary Ct. Albany Feb. 1, 1680/81), *in* 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 70.

162. *In re Andriesz* (Ordinary Ct. Albany Feb. 10, 1669/70), *in* 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 126-27; *see also* *Davidtse v. Schaets* (Ordinary Ct. Albany July 19, 1681), *in* 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 148, 150 (hearing a complaint by the defendant against his father-in-law for interference in his marriage); *Id.* at 149-51 (ordering the parties, a husband and wife, to observe their mediated reconciliation).

163. *Andriesz v. Pietersz* (Ordinary Ct. Albany Mar. 29, 1670), *in* 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 136.

164. *Vosburch v. Brat* (Ordinary Ct. Albany Aug. 4, 1670), *in* 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 178.

165. *Pretty v. Lassing* (Ordinary Ct. Albany Jan. 7, 1678/79), *in* 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 381.

166. *In re Dellius* (Ordinary Ct. Albany Mar. 10, 1683/84), *in* 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 432.

Similarly, when someone sought to purchase the child of a black woman, the purported father responded that he could “not sell the child, as the same [was] his own bastard child,” and the court appeared to accept his legal argument when it demanded proof of paternity.<sup>167</sup> Of course, magistrates also continued to supervise the administration of estates.<sup>168</sup>

Finally, the courts continued to enforce property rights,<sup>169</sup> defamation law,<sup>170</sup> and contracts “as [was] customary in this country.”<sup>171</sup> They allowed married women, for example, to sue on their husband’s behalf,<sup>172</sup> ordered debtors to pay interest on back rent<sup>173</sup> and unprotested bills of exchange,<sup>174</sup> but not on book debt<sup>175</sup> or any interest whatsoever at a usurious rate;<sup>176</sup> excused a widow from her husband’s debts when she renounced his estate;<sup>177</sup> and excused insane people<sup>178</sup> but neither

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167. *In re* Appearance of Flodder (Ordinary Ct. Albany May 25, 1671), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 254. *But cf.* *In re* Beekman (Ordinary Ct. Albany May 1, 1677), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 231-32 (allowing creditors of an estate to challenge the manumission of a slave by will).

168. *See, e.g., In re* Accounting of Estate of Stuert (Ordinary Ct. Albany Aug. 15, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 142.

169. *See, e.g., Swart v. Teunise* (Ordinary Ct. Albany Mar. 6, 1682/83), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 324-26 (finding that children “are to inherit from their deceased sister according to law”); *van Sleyk v. Vyselaer* (Ordinary Ct. Albany Sept. 5, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 283-84 (ordering that a deed be delivered pursuant to the contract for sale of the land); *Daemen v. Clute* (Ordinary Ct. Albany Apr. 18, 1672), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 296 (dispute over ownership of a plot of land).

170. *See, e.g., Pretty v. Harmense* (Ordinary Ct. Albany June 7, 1681), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 126; *Renselaer v. Milburn* (Ordinary Ct. Albany Sept. 2, 1676), 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 153; *Bruyns v. de Winter* (Ordinary Ct. Albany Nov. 26, 1668), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 38.

171. *Swartwout v. Chambers* (Kingston Ordinary Ct. Mar. 16, 1666), *microformed on* Reel 47, slides 350-51 (on file with the Queens Library, Jamaica, N.Y.).

172. *See, e.g., Beekman v. Teunise* (Ordinary Ct. Albany Mar. 1, 1680/81), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 85.

173. *See, e.g., Swartwout v. Chambers* (Kingston Ordinary Ct. Mar. 16, 1666), *microformed on* Reel 47, slides 350-51 (on file with the Queens Library, Jamaica, N.Y.).

174. *See, e.g., Tyse v. Rinckhout* (Ordinary Ct. Albany July 4, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 125.

175. *See Withart v. Swart* (Ordinary Ct. Albany Aug. 31, 1671), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 273.

176. *See, e.g., Bruynsen v. Gerretsen* (Kingston Ordinary Ct. Nov. 18 1664), *microformed on* Reel 47, slides 203-04 (on file with the Queens Library, Jamaica, N.Y.).

177. *See, e.g., In re* Beekman (Ordinary Ct. Albany June 16, 1677), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 248-49.

178. *See, e.g., In re* de Peyster (Ordinary Ct. Albany May 7, 1678), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 323-24.

drunks<sup>179</sup> nor the poor<sup>180</sup> from performance of their contracts. They dismissed a suit seeking to enforce a gambling contract<sup>181</sup> and addressed issues of priority among creditors<sup>182</sup> and risk of loss by fire as between buyer and seller.<sup>183</sup> As had been true before the English conquest, magistrates sometimes “order[ed] the parties to settle with each other,”<sup>184</sup> pressured them to accept settlements that the court found fair,<sup>185</sup> and encouraged those seeking to “be reconciled in love and friendship” with each other.<sup>186</sup> They also dismissed cases they thought “very ill-founded” while simultaneously ordering defendants in those cases “to take care to mind [their] own business.”<sup>187</sup>

How can one account for the extraordinary willingness of the English Governor and Council to delegate to the conquered people of New Netherland such vast power to govern themselves pursuant to their customary Dutch law? Two explanations that are complementary to each other come to mind.

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179. See, e.g., *Conell v. Gansevoort* (Ordinary Ct. Albany May 7, 1678), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 315-18; *Theunisz v. Cornelisz* (Ordinary Ct. Albany Oct. 10, 1672), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 311. *But see* *Pieterse v. Ouderkerk* (Ordinary Ct. Albany Mar. 7, 1681/82), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 213-14 (annulling a contract written when one party “was not sober”); *Bradt v. Coster* (Ordinary Ct. Albany Mar. 16, 1677/78), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 302 (declaring a contract “null and void” because the defendant was “*non compos mentis* and drunk”).

180. See, e.g., *Pretty v. Appell* (Ordinary Ct. Albany May 6, 1684), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 446; *Gerbertsz v. Hansz* (Ordinary Ct. Albany June 24, 1669), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 83.

181. See *Gardinier v. Janse* (Ordinary Ct. Albany Mar. 2, 1679/80), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 472.

182. See, e.g., *Viele v. Matthys* (Ordinary Ct. Albany Oct. 2, 1683), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 393; *Prittie v. Becker* (Ordinary Ct. Albany Apr. 4, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 85; *Cornelisz v. Flodder* (Ordinary Ct. Albany Feb. 16, 1670/71), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 219.

183. See, e.g., *Harmense v. Gerritse* (Ordinary Ct. Albany Mar. 6, 1677/78), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 296-98.

184. *Lansinger v. Aelberts* (Ordinary Ct. Albany Nov. 26, 1668), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 38; see also *Salomonsz v. van Nes* (Ordinary Ct. Albany Nov. 26, 1668), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 41 (ordering the parties to settle their dispute via arbitration).

185. See, e.g., *Teunise v. Janse* (Ordinary Ct. Albany Mar. 16, 1680/81), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 95 (keeping defendant in jail until he would agree to a fair settlement); see also *Teunise v. Cloete* (Ordinary Ct. Albany May 7, 1678), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 318 (nonsuited a plaintiff where the defendant’s offer to repay the plaintiff was “fair”); *Bradt v. Gerritse* (Ordinary Ct. Albany Mar. 6, 1676/77), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 199-200 (giving plaintiffs two weeks to consider whether or not to accept defendant’s offer).

186. *Frederikse v. Schaets* (Ordinary Ct. Albany Mar. 12 1679/80), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 478.

187. *Coenraetse v. Pieterse* (Ordinary Ct. Albany Mar. 4, 1683/84), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 422-23.



The first was the near impossibility of governing by any other means. Many people in the upper Hudson region proved quite resistant to English assertions of authority.<sup>188</sup> Some simply disobeyed: when the governor, for example, issued an order prohibiting anyone from “go[ing] without a pass to the north,” many simply ignored it, and others failed to report them and even provided assistance.<sup>189</sup> On one occasion, when the sheriff stopped a man he suspected of carrying goods illegally to Schenectady, the man “boldly refused to let him inspect his wagon[,] . . . answering that he would not stop and that he did not ask for anybody’s permission,”<sup>190</sup> while on another occasion, the storekeepers of Schenectady prevented the sheriff from inspecting their shops for contraband.<sup>191</sup> Another man, charged with adultery and defamation, “ran into the woods with his gun” when the sheriff came to arrest him and told the sheriff where his assets were, “as he would get [them] anyway.”<sup>192</sup> Yet another, charged with setting up a “May pole,” responded in court “that he [could] not make any money and [did] not dare steal, so . . . they [could] do with him as they like[d].”<sup>193</sup> Others accused officials of violating the law, as in one case in which a householder accused a constable of forcibly breaking into his house at night.<sup>194</sup>

The English, in turn, tried to govern by force and sent small garrisons both to Albany and to Kingston to occupy the towns and, “in case of violence and opposition[,] . . . to assist” in enforcing the law.<sup>195</sup> But the garrisons appear to have created more problems than they solved. They needed to be housed and fed, and neither the Duke of York nor his brother, Charles II, had the wherewithal to do so. The military

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188. See KAMMEN, *supra* note 96, at 82-83.

189. See, e.g., *Siston v. Teunise* (Ordinary Ct. Albany Sept. 4, 1677), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 265; see also *Siston v. Melkers* (Ordinary Ct. Albany Aug. 15, 1676), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 140-41 (fining the defendant, a midwife, for failing to report an illegitimate birth).

190. *Pretty v. Aukus* (Ordinary Ct. Albany Dec. 17, 1678), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 377-78.

191. See Report of Sheriff (Ordinary Ct. Albany Oct. 22, 1678), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 361.

192. *Pretty v. Michielse* (Ordinary Ct. Albany Dec. 5, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 305. In fact, the sheriff already had attached the assets, as the defendant may well have known. See *In re Attachment of Michielse* (Ordinary Ct. Albany Nov. 13, 1682), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 301.

193. *In re Loveridge* (Ordinary Ct. Albany May 7, 1678), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 321.

194. See *Messie v. Thomson* (Ordinary Ct. Albany Jan. 4, 1675/76), in 2 MINUTES OF THE COURT OF ALBANY, *supra* note 102, at 60.

195. *In re Authorization of Swart* (Ordinary Ct. Albany Feb. 28, 1669/70), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 127.

accordingly demanded that the townspeople “provide them with bread and small b[e]er,”<sup>196</sup> either through taxes or, in lieu thereof, by quartering troops in the residents’ homes.<sup>197</sup> As young men with weapons are wont to do, the rank-and-file soldiers appear to have misbehaved; at least the local residents accused them of violence and extortion.<sup>198</sup> In response, the local court in Kingston, fearing “further similar violence and outrage which the soldiers hereafter may commit” and that “fearful quarrels will arise among the burghers and residents of this place, . . . protest[ed] . . . before God and the world, if any disasters and rebellion should arise on account of similar bad conduct,” and “absolve[d]” itself of “all responsibility for possible calamities.”<sup>199</sup> At least one resident did, indeed, assault the soldiers, and the English responded by placing him under house arrest.<sup>200</sup> They ordered others to “bridle their tongue[s].”<sup>201</sup>

In the end, lack of coercive power compelled the English to turn to the most Dutch of all legal techniques—urging adversaries to make peace. When the local court presented the case of the resident who had assaulted the soldiers to Thomas de la Val, a captain in the English army who was acting on the governor’s behalf, the captain

excuse[d] himself from pronouncing sentence about the same, much less from hearing the examination concerning the same, and postpone[d] the same till the [H]on. Gov. Gen[era]l’s arrival, but desire[d] . . . also, he would be pleased to see and hear, that the aforementioned affairs, in the meanwhile, might be amicably settled, so that upon the [H]on. Gov. Gen[era]l’s arrival he may not then find any differences, existing here between soldiers and inhabitants.<sup>202</sup>

Ultimately, one English commander in Kingston, who had prosecuted residents for trivial offenses such as celebrating Christmas in the Dutch

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196. Order of Berresfordt (Kingston Ordinary Ct. Nov. 16, 1669), *microformed on Reel 47*, slide 562 (on file with the Queens Library, Jamaica, N.Y.).

197. See Order for Assessment (Ordinary Ct. Albany May 9, 1672), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 299.

198. See *Jacobsen v. Berrisfort* (Kingston Ordinary Ct. Feb. 4, 166[5]), *microformed on Reel 47*, slide 247-48 (on file with the Queens Library, Jamaica, N.Y.); *Olivier v. Heymans* (Kingston Ordinary Ct. Nov. 18, 1664), *microformed on Reel 47*, slides 206-07 (on file with the Queens Library, Jamaica, N.Y.).

199. *In re Protest Against Berrisfort* (Kingston Ordinary Ct. Feb. 5, 1665), *microformed on Reel 47*, slide 249 (on file with the Queens Library, Jamaica, N.Y.).

200. See *In re Heymans* (Kingston Ordinary Ct. May 27, 1665), *microformed on Reel 47*, slides 282-83 (on file with the Queens Library, Jamaica, N.Y.).

201. *In re Berrisfort* (Kingston Ordinary Ct. July 16, 1665), *microformed on Reel 47*, slide 298 (on file with the Queens Library, Jamaica, N.Y.).

202. *In re Heymans* (Kingston Ordinary Ct. June 1, 1665), *microformed on Reel 47*, slide 286 (on file with the Queens Library, Jamaica, N.Y.).

rather than the English manner, had to be suspended in order to restore peace to the town.<sup>203</sup>

The second explanation for the extraordinary willingness of the English Governor and Council to permit the conquered people of the upper Hudson to govern themselves pursuant to their customary Dutch law is that the English got something vitally important in return—acceptance of their ultimate sovereignty.<sup>204</sup> Thus, when Captain John Backer, the commander of the Albany garrison,<sup>205</sup> was sued, in one case for assault and in another for calling Jochum the baker's wife “a whore,” the cases were referred to the governor “in consideration of the fact that the defendant appeal[ed] to military law”<sup>206</sup> and despite a demand for the “maintenance of justice by the civil courts.”<sup>207</sup> The local magistrates similarly recognized the governor's jurisdiction to determine the captain's authority to confiscate weapons.<sup>208</sup>

*Livingston v. De Lavall* best embodies the compromise the English made in order to govern the upper Hudson region.<sup>209</sup> Robert Livingston, by virtue of a commission from Governor Andros, sued to collect an excise tax on 510 gallons of rum, to which de Lavall responded by “request[ing] to know under what law, or under which of the well-known laws of this government[,]” the tax was authorized.<sup>210</sup> He further “request[ed] to know whether we are not considered to be free born subjects of the king” and “[i]f not, during which king's reign and by

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203. See KAMMEN, *supra* note 96, at 83.

204. *Id.* at 89.

205. See Swart v. Sanders (Ordinary Ct. Albany Dec. 10, 1668) in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 45 n.1.

206. Jochum v. Backer (Ordinary Ct. Albany Mar. 17, 1669 [1670]), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 133-34 (citing Letter from Governor Francis Lovelace to Captain Dudley Lovelace (Apr. 11, 1670), in 4 JOEL MUNSELL, ANNALS OF ALBANY 6 (2d ed., Albany, N.Y., Joel Munsell 1871) (referring to the dispute between Jochum and Backer)); see also Seubring v. Spitzer (N.Y. Mayor's Ct. Feb. 5, 1750/51), in SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 228 (Richard B. Morris ed., 1935) [hereinafter SELECT CASES] (ordering that defendant “be discharged” because he “produced a [c]ertificate . . . that before the [c]ommencement of this [s]uit[] he was a [s]old[i]er”).

207. Paterson v. Backer (Ordinary Ct. Albany Aug. 1, 1669), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 91. The issue of the jurisdiction of civilian courts over military personnel subsequently became a quite complex one. See DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, at 65-68 (2005).

208. See Backer v. Wessels (Ordinary Ct. Albany Feb. 10, 1669/70), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 124; Backer v. Wessels (Jan. 13, 1669 [Jan. 23, 1670]), in 1 MINUTES OF THE COURT OF ALBANY, *supra* note 106, at 120.

209. Livingston v. De Lavall (Ordinary Ct. Albany Aug. 29, 1681), in 3 MINUTES OF THE COURT OF ALBANY, *supra* note 105, at 153-55.

210. *Id.* at 154.

which act . . . we were made otherwise than free?”<sup>211</sup> The case went to a jury that returned the following verdict, which, in turn, elicited the following response from the local Albany court:

“The jury bring in an unanimous verdict that in the laws which prevail here they can not find any provision that such excise as is demanded must be paid, but if the order of the governor must be considered as being law, then the defendant is guilty.”

The honorable court, having read and examined the verdict, adjudge and decide that the power to interpret the verdict of the jury as regards the legality or illegality of the order does not vest in them. They therefore refer the same to the supreme authorities at New York.<sup>212</sup>

*Livingston v. De Lavall* made clear the pattern of authority that existed in the Hudson Valley during the early decades of British rule. The Crown allowed local authorities to govern by locally acceptable, established law; in return, when local law came into conflict with crown policy, the local authorities recognized the supremacy of royal officials in New York City and did nothing to obstruct them. But neither did they help them, and, as a result, the capacity of officials in the city to enforce royal law in the countryside was in doubt.

#### *B. New England Law on the Islands and in Westchester*

Superficially Long Island, Staten Island, and Westchester were totally different from the Hudson Valley, in that they governed themselves by English common law, not Dutch customary law. But the underlying pattern that Governor Nicolls adopted to rule them was quite similar.

As was suggested above, Governor Nicolls faced the problem in this region of not knowing what the law was. Indeed, he probably lacked the capacity to find out. As a result, he decided to promulgate by fiat a new code to govern the English regions of the colony.<sup>213</sup> In March 1665, at Hempstead, he accordingly published the Duke of York’s Laws.<sup>214</sup>

Nicolls understood, however, that his code had to be acceptable to the people it would govern, and for that reason, he derived it largely from the New England law they already were using. It took the form of

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211. *Id.*

212. *Id.* at 155 (quoting the jurymen).

213. 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 6 (Albany, James B. Lyon 1894) [hereinafter 1 THE COLONIAL LAWS OF NEW YORK].

214. *Id.* Initially, the Duke’s Laws applied only to formerly English portions of New York. See KAMMEN, *supra* note 96, at 83. They were extended to Manhattan in 1674 and the colony as a whole in 1676. *Id.*

the Massachusetts Code of 1648—an alphabetical arrangement of titles.<sup>215</sup> Its substance also mirrored either the Massachusetts Code or existing local New York practices, and, as a result, the Duke’s Laws were largely familiar and unobjectionable. After establishing a Court of Assizes to meet annually in New York City,<sup>216</sup> the Laws took note, for example, of the familiar common-law forms of action;<sup>217</sup> made murder, bestiality, sodomy, kidnapping, perjury committed with the design to take another’s life, treason, and adultery committed by two married people punishable by death;<sup>218</sup> made fornication punishable “by enjo[i]ning [m]arriage, fine or [c]orporal punishment” at the discretion of the court;<sup>219</sup> prohibited profanation of the Sabbath “by travelers[,] [l]abourers[,] or vicious [p]ersons”;<sup>220</sup> permitted marriage only after publication of the banns;<sup>221</sup> and left townships free to retain or enact local ordinances provided penalties for violation did not exceed twenty shillings and the ordinances were presented for confirmation to the Court of Assizes.<sup>222</sup>

Two sections of the Duke’s Laws displayed special solicitude for the New England way. The first required sheriffs to make the initial selection of jurors from among the overseers of the various towns, who, in turn, were elected by the freeholders of those towns, thereby insuring jury responsiveness to local electorates.<sup>223</sup> The second authorized the governor to license as ministers anyone ordained by “some [p]rotestant [b]ishop, or [m]inister within some part of his Majest[y]’s [d]ominions or the [d]ominions of any foreign [p]rince of the Reformed [r]eligion.”<sup>224</sup> Harvard graduates and other Congregationalists or Presbyterians, that is,

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215. See generally THE LAWS AND LIBERTIES OF MASSACHUSETTS (Max Farrand ed., Harvard Univ. Press, photo. reprint 1929) (1648).

216. The Duke of York’s Laws (1665-75), reprinted in 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 213, at 16. The Duke’s Laws also provided for courts of session, *see id.* at 27-28, and contained New York’s first public recognition of the existence of attorneys, when it regulated the contexts in which judges, sheriffs, constables, and clerks could serve as attorneys. *See id.* at 16. The Court of Assizes decided issues by majority vote. *See In re Howell* (N.Y. Ct. Assizes Oct. 7, 1672), in NEW YORK HISTORICAL MANUSCRIPTS: ENGLISH: RECORDS OF THE COURT OF ASSIZES FOR THE COLONY OF NEW YORK, 1665-1682, at 135 (Peter R. Christoph & Florence A. Christoph eds. 1983) [hereinafter RECORDS OF THE COURT OF ASSIZES].

217. *See* The Duke of York’s Laws, *supra* note 216, at 7-8.

218. *See id.* at 20-21. A single person who committed adultery was punishable by a fine, while the married person was subject to death. *Id.* at 21.

219. *See id.* at 35.

220. *See id.* at 25.

221. *See id.* at 45.

222. *See id.* at 63, 72.

223. *See id.* at 42, 55. Juries were to consist of six or seven members and to decide cases by majority vote, except in capital cases where the requisite number was twelve and unanimity was necessary. *Id.* at 42-43.

224. *Id.* at 25.

could become clergymen. In addition, the Laws provided that no congregations should “be disturbed in their private meetings in the time of prayer[,] preaching[,] or other divine [s]ervice” and that no one “who profess[ed] Christianity” should be “molested[,] fined[,] or [i]mprisoned for differing in [j]udgment in matters of [r]eligion.”<sup>225</sup>

On the other hand, the Duke’s Laws did contain two provisions that must have rankled those familiar, as Long Islanders appear to have been, with the debates in Massachusetts over the discretion of magistrates.<sup>226</sup> The first recognized that it was “almost impossible to provide [s]ufficient [l]aw[’s] in all [c]ases, or proper [p]unishments for all [c]rimes,” and prohibited lower courts from hearing cases where there was “not provi[s]ion made in some [l]aw[’s].”<sup>227</sup> But then it gave jurisdiction over such cases to the “Court of Assizes where matters of [e]quity shall be decided, or [p]unishment awarded *according to the discretion of the [b]ench*.”<sup>228</sup> The second provision specified that judges were to “direct[] the [j]ury in point of [l]aw” and the jury was only to “find the matter of fact”;<sup>229</sup> the Court of Assizes interpreted this provision to give judges power to set aside verdicts where the jury had undertaken to find the law in conjunction with the facts.<sup>230</sup>

The first and classic case setting aside a verdict was *Richbell v. Town of Huntington*, involving title to land that Huntington had acquired from Oyster Bay.<sup>231</sup> In March 1664, Governor Nicolls, while presiding

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225. *Id.* at 25-26. A good deal of ambiguity existed in the language of this provision. *Id.* at 24-26. Dutch policy in New Netherland had been to allow dissenters freedom of conscience, but not to tolerate public worship, and, as a result, New Netherland had refused to permit Lutherans to employ a clergyman. See JAAP JACOBS, *NEW NETHERLAND: A DUTCH COLONY IN SEVENTEENTH-CENTURY AMERICA* 295-304 (2005). The issue with the language of the Duke’s Laws was whether a religious service conducted by a dissenting minister behind closed doors that anyone was invited to attend would be deemed a private or a public meeting; unlike the Dutch, the English did permit Lutherans to employ a clergyman, see *id.* at 304, and thus, it appears that dissenting services were deemed private. The subject, however, is one that calls for further research.

226. For discussion of those debates, see WILLIAM E. NELSON, *1 THE COMMON LAW IN COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1607-1660*, at 72-79 (2008). Long Islanders, it appears, were familiar. See *The Duke of York’s Laws*, *supra* note 216, at 43-45.

227. *The Duke of York’s Laws*, *supra* note 216, at 44.

228. *Id.* at 44-45 (emphasis added). The court was prohibited, however, from making decisions “[c]ontrary to the known [l]aw[’s] of England,” *id.* at 45, and, as early as 1666, a case was appealed “into England to his Majesty.” *Udall v. Salter* (N.Y. Ct. Assizes Sept. 29, 1666), in *RECORDS OF THE COURT OF ASSIZES*, *supra* note 216, at 40. For a later appeal, see, for example, *Mann v. Mull* (N.Y. Ct. Assizes Oct. 5-6, 1681), in *RECORDS OF THE COURT OF ASSIZES*, *supra* note 216, at 282.

229. *The Duke of York’s Laws*, *supra* note 216, at 42. In cases where “the [l]aw [was] obscure,” the jury was given liberty in “open [c]ourt (but not otherwise) to advi[s]e with any particular man upon the [b]ench” or to return a special verdict. *Id.* at 43.

230. See *infra* notes 231-37 and accompanying text.

231. *Richbell v. Town of Huntington* (N.Y. Ct. Assizes Sept. 28, 1665), in *RECORDS OF THE COURT OF ASSIZES*, *supra* note 216, at 2-3.

over a “General[] Meeting”<sup>232</sup> at Hempstead prior to the English attack on New Netherland, had awarded title to Richbell, who had been sued for the land by one Conkling.<sup>233</sup> But later, when Richbell sought a remedy for trespasses by the town, a local jury found the town’s title superior to Richbell’s and decided in its favor.<sup>234</sup> The Court of Assizes assumed jurisdiction over the case, set aside the jury’s verdict, apparently because the jury had made a legal judgment in deciding who had superior title, and confirmed the governor’s prior award of title to Richbell.<sup>235</sup> The court would continue to act in a similar fashion in the future,<sup>236</sup> even in a criminal case for rioting in which a jury returned a not guilty verdict; declaring that the jury’s function was “to judge matter of fact not law,” the court sent the criminal jury “out again[.]”<sup>237</sup>

The Court of Assizes strove with considerable success to abide by the forms of common-law pleading: at its first term, it heard an action of case on an account,<sup>238</sup> a writ of trespass for carrying off hay,<sup>239</sup> and a bill in equity.<sup>240</sup> It also gave attention to issues of jurisdiction, both its own<sup>241</sup> and that of the lower courts which it policed.<sup>242</sup> Finally, the court

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232. *Id.* at 3. It is unclear who attended the General Meeting or what its institutional jurisdiction was. *See id.*

233. *Id.*

234. *Id.* at 4.

235. *Id.* at 5.

236. *See* More v. Edsall (N.Y. Ct. Assizes Oct. 5-6, 1681), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 280 (setting aside a verdict in favor of defendant and declaring defendant’s letters of administration to be illegal).

237. King v. Anonymous (N.Y. Ct. Assizes May 27, 1680), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 265. Of course, on some occasions the Court of Assizes, after hearing a case, affirmed a jury’s verdict. *See, e.g.,* Town of Huntington v. Seely (N.Y. Ct. Assizes Sept. 27, 1666), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 20.

238. *See* Dennis v. Masculine (N.Y. Ct. Assizes Sept. 30, 1665), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 7.

239. *See* Smith v. Jenner (N.Y. Ct. Assizes Sept. 29, 1665), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 6.

240. *See* Doughty v. Hicks (N.Y. Ct. Assizes Sept. 30, 1665), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 7.

241. *See* Moore v. Brinley (N.Y. Ct. Assizes Oct. 6, 1680), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 270 (refusing to hear appeal in absence of final judgment below); Groenendyke v. Avery (N.Y. Ct. Assizes Oct. 3-5, 1677), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 239-40 (dismissing case where defendant was not served with a summons and declaration “according to law”); Graves v. Newman (N.Y. Ct. Assizes Oct. 9, 1668), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 82 (dismissing case when neither defendant nor his goods were found within the jurisdiction); Argent v. Ashman (N.Y. Ct. Assizes Oct. 9, 1668), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 81 (dismissing case when summons gives wrong date for defendant to appear and defendant is absent when case is called); Holden v. Smith (N.Y. Ct. Assizes Oct. 8, 1668), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 79 (dismissing case when the amount in controversy was below jurisdictional minimum). *But see* Lovelace v. Pell (N.Y. Ct. Assizes Oct. 2, 1672), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 126 (declaring valid the service of a summons at the house of an absent defendant).

was prepared to entertain objections to pleadings in the form of demurrers<sup>243</sup> and followed rules of evidence at trial.<sup>244</sup> All this appears to have been the work of a nascent legal profession recently arrived from England: we know that the clerk of the court and secretary of the colony was a trained barrister who had practiced in England<sup>245</sup> and that the court, as early as 1667, was policing its bar when it ruled that one Francis Hall was “not thought fit[] or qualified to be[] [a]ttor[ne]y in this [c]ourt.”<sup>246</sup> Frequent entries in the records further suggest that representation by counsel with English surnames quickly became the norm in civil cases.<sup>247</sup>

Taken together, the enactment of the Duke’s Laws with their establishment of the Court of Assizes with the governor as presiding judge, the reservation of law-finding and lawmaking power to the court, and the early steps taken toward founding a legal profession to assist the court and regularize its practices<sup>248</sup> suggest the dawn of a new approach to colonial governance on the part of English authorities: reliance on a central court under gubernatorial control and a legal profession beholden to the court. Examined from the perspective of those who administered the central court, the policy appeared quite successful.

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242. See *In re Turner* (N.Y. Ct. Assizes Nov. 2, 1667), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 65 (ordering the expungement of a judgment rendered by the town court in excess of its jurisdiction).

243. See *Archer v. Betts* (N.Y. Ct. Assizes Oct. 3, 1672), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 127.

244. See *Barker v. Scudmore* (N.Y. Ct. Assizes Oct. 7, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 151 (refusing to hear testimony of witnesses who were too young to take oath).

245. See Peter R. Christoph & Florence A. Christoph, *Introduction* to RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at xii.

246. *Revell v. Richbell* (N.Y. Ct. Assizes Nov. 4, 1667), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 66.

247. See, e.g., *De Haart v. Denis* (N.Y. Ct. Assizes Oct. 30, 1667), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 54 (noting John Sharpe as attorney for the plaintiff and John Rider as attorney for the defendant).

248. Professor Eben Moglen states that three English-trained lawyers, two of whom are not identified, accompanied Governor Nicolls to New York, but suggests that they all held government posts and were not available to private litigants. See EBEN MOGLEN, *SETTLING THE LAW: LEGAL DEVELOPMENT IN NEW YORK, 1664-1776*, at 210-11 (1993). On the basis of my reading of Court of Assizes records, I am convinced that some of those lawyers, other English immigrant lawyers, or New Yorkers who had learned the necessary skills were, in fact, practicing law as early as the 1660s. I agree with Moglen that the number of practitioners was few—too few to permeate the law beyond the city’s limits—and that their practice was unregulated, *see id.* at 212, but it does appear that the same individuals appeared frequently on behalf of others in Court of Assizes cases, and after 1674, in the Mayor’s Court. Further research beyond the scope of this project is needed, however, into the individuals in question, the frequency of the appearances in court, and to their life histories.



The subject of perhaps greatest importance to the colonial administration was land titles, and here the Court of Assizes enjoyed success in ensuring “the better [c]ertainty of [e]very one[']s [r]ight.”<sup>249</sup> Numerous title disputes came before the court, which had little difficulty rendering judgment.<sup>250</sup> Enforcement also raised little difficulty: loss of a title action renders a claimed title unmarketable and accordingly tends to be self-enforcing.<sup>251</sup> Similarly, the court encountered little difficulty in the administration of estates<sup>252</sup> or the granting of divorces.<sup>253</sup> The court also persisted in various regulations of trade<sup>254</sup> and in licensing a number of occupations.<sup>255</sup>

Criminal law enforcement was also important, and the Court of Assizes performed that task adequately in the usual run of cases, such as homicide,<sup>256</sup> theft,<sup>257</sup> rape,<sup>258</sup> adultery,<sup>259</sup> witchcraft,<sup>260</sup> bigamy,<sup>261</sup>

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249. An Answer to the Petition of the Severall Townes (N.Y. Ct. Assizes Nov. 5, 1669), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 105.

250. *See, e.g.*, Smith v. Town of Huntington (N.Y. Ct. Assizes Oct. 5-7, 1670), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 108-14; Inhabitants of Gravesend v. Browne (N.Y. Ct. Assizes Nov. 3, 1669), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 99.

251. *See, e.g.*, Oneale v. Ramsden (N.Y. Ct. Assizes Sept. 27, 1666), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 24-26.

252. *See, e.g.*, Estate of Morgan (N.Y. Ct. Assizes Oct. 7, 1668), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 76.

253. *See, e.g.*, *In re Lane* (N.Y. Ct. Assizes Oct. 9, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 161; *cf. In re Denton* (N.Y. Ct. Assizes Oct. 4, 1672), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 132 (permitting divorced woman to remarry).

254. *See, e.g.*, An Order Concerning Negroes and Indian Slaves (N.Y. Ct. Assizes Oct. 4-6, 1682), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 293 (requiring passes of slaves traveling without their masters); Order Prohibiting Export of Flour and Corn (N.Y. Ct. Assizes Oct. 6-13, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 186; Order Regarding Breeding Mares (N.Y. Ct. Assizes Oct. 11, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 171 (establishing rules for keeping horses); An Answer to the Petition of the Severall Townes (N.Y. Ct. Assizes Nov. 2, 1669), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 104-05 (regulating the price of corn, the export of deer skins, and the use of English weights and measures); Inhabitants of Gravesend v. Inhabitants of Flatt Bush (N.Y. Ct. Assizes Sept. 27, 1666), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 27-29 (upholding right of Gravesend to put a highway through Flatbush).

255. *See, e.g.*, *In re Wood* (N.Y. Ct. Assizes Oct. 3-5, 1677), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 243-44 (licensing a medical doctor).

256. *See, e.g.*, Barker v. Scudamore (N.Y. Ct. Assizes Oct. 7, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 151. One of the prosecutions for homicide was brought against “a [s]o[.]ldier in this [g]arrison.” Du Four v. Coperstaffe (N.Y. Ct. Assizes Oct. 7-12, 1668), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 73.

257. *See, e.g.*, Laurensen v. Riley (N.Y. Ct. Assizes Oct. 7, 1670), in RECORDS OF THE COURT OF ASSIZES, *supra* note 218, at 114.

258. *See, e.g.*, Palmer v. Archer (N.Y. Ct. Assizes Mar. 2, 1668), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 92.

259. *See, e.g.*, King v. Bucklien (N.Y. Ct. Assizes Oct. 7, 1670), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 115.

unlawful marriage,<sup>262</sup> and malicious mischief.<sup>263</sup> Inexplicably, the high court also troubled itself with fornication cases, in which it behaved exactly as lower court magistrates typically did, fining the man<sup>264</sup> and ordering a whipping for the woman.<sup>265</sup>

What mattered more, however, were political cases, and here the court's record was mixed. One man was successfully prosecuted for seditiously claiming that "he[] had not the privile[]ge of an Englishman";<sup>266</sup> another, for claiming to be a "prophet" who had had a "revelation";<sup>267</sup> a third, "[f]or scandalous contuma[c]ious words against the [g]overnment of his Royal Highness";<sup>268</sup> a fourth, for "tra[i]torously[,] [m]aliciously and [a]dvisedly . . . [e]xercis[ing] [r]egal[] [p]ower and [a]uthority over the King[']s [s]ubjects";<sup>269</sup> and a woman, for being a Quaker and "com[]ing to disturb[] the [c]ourt."<sup>270</sup>

In other cases, though, the court faced pushback. In one prosecution "for dangerous and scandalous words[] against his Majest[y]," for example, the defendant fled.<sup>271</sup> In another case, a prosecution for riot, the jury returned a not guilty verdict, and when the court suggested that the prosecution proceed on an amended indictment, defense counsel raised a

260. See, e.g., *King v. Harryson* (N.Y. Ct. Assizes Oct. 7, 1670), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 116; *King v. Hall* (N.Y. Ct. Assizes Oct. 2, 1665), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 10.

261. See, e.g., *In re Cole* (N.Y. Ct. Assizes Oct. 4, 1672), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 132.

262. See, e.g., *King v. Underhill* (N.Y. Ct. Assizes Nov. 4, 1669), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 101.

263. See, e.g., *Hubbard v. Applegate* (N.Y. Ct. Assizes Oct. 5, 1671), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 119 (ordering that defendants pay fine and compensate plaintiff for damage to a water mill).

264. See *King v. Serix* (N.Y. Ct. Assizes Oct. 1, 1679), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 256.

265. See *King v. Dircks* (N.Y. Ct. Assizes Oct. 1, 1679), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 256.

266. *Ashton v. Heathcott* (N.Y. Ct. Assizes Oct. 26, 1676), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 230.

267. *King v. Gerritz* (N.Y. Ct. Assizes Oct. 12, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 173.

268. *King v. Onclbank* (N.Y. Ct. Assizes Oct. 4, 1672), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 130-31.

269. *King v. Dyre* (N.Y. Ct. Assizes June 29-July 2, 1681), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 272-73. The defendant Dyre, who claimed to be mayor, was sent to England for trial. *Id.*

270. *King v. Appleby* (N.Y. Ct. Assizes Oct. 9, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 165. Another Quaker was also prosecuted at the same term. See *King v. Scudder* (N.Y. Ct. Assizes Oct. 9, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 165.

271. *King v. Hand* (N.Y. Ct. Assizes Nov. 2, 1667), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 64. Flight was a problem in civil cases as well. See, e.g., *Broadhead v. Crisp* (N.Y. Ct. Assizes Oct. 4, 1672), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 131.

valid legal objection; accordingly, the governor instead “gave a [c]harge to the [j]ury,” which went out again and later returned a guilty verdict.<sup>272</sup> A third case, which came before the court “as matter of [l]aw” because the magistrates on the lower court “could not [a]gree,” produced “ill words” from a Mr. Laurence, who was arguing the case either as counsel or as one of the lower court judges; the court revealed its insecurity by declaring Laurence “incapable of bearing any place of [t]rust in the [g]overnment.”<sup>273</sup>

A final sort of problem occurred when a justice of the peace was indicted “for several[] [w]ords and [e]xpressions . . . [u]ttered and [s]poken” from the bench; the Court of Assizes judged the indictment to be “[i]llegal[] and [v]exatious” and quashed it.<sup>274</sup> Extremely troubled by this “[h]indrance of the . . . [m]agistrates in [e]xecut[ing] their [o]ffices,”<sup>275</sup> the court further directed that, in the future, accusations could proceed against magistrates only if two justices of the peace found probable cause, to which it added:

And that if any person or persons shall from [h]ence forth presume to [q]uestion or [e]ndeavour [i]nnova[t]ion or [a]ltera[t]ion or make any other [d]isturbance in the [g]overnment as [s]ettled and [e]stablished they shall be proceeded against according to [l]aw. This [c]ourt [b]eing [r]esolved to [s]upport[] and [m]aintain[] the same as settled and all [i]nferior officers in the [d]ue [e]xecu[t]ion of their [o]ffices and trusts until[] further orders from his Majest[y].<sup>276</sup>

In short, the Court of Assizes’s bark was much stronger than its bite. It pretended to exercise vast authority, and in the cases it actually adjudicated, its judgments often took hold. On the other hand, it sometimes failed to project its power effectively. Its greatest failure occurred when it proved unable to accomplish an important objective that Governor Nicolls had needed it to achieve: to control and ultimately

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272. *King v. Pierson* (N.Y. Ct. Assizes Oct. 25-26, 1676), in *RECORDS OF THE COURT OF ASSIZES*, *supra* note 216, at 222, 226. Counsel’s legal objection was that a trial under the proposed amended indictment would require a twelve-man jury instead of the smaller jury that was present. *Id.* at 222.

273. *Cornell v. Osborne* (N.Y. Ct. Assizes Oct. 9, 1675), in *RECORDS OF THE COURT OF ASSIZES*, *supra* note 216, at 162-63.

274. *Mann v. Mull* (N.Y. Ct. Assizes Oct. 5-6, 1681), in *RECORDS OF THE COURT OF ASSIZES*, *supra* note 216, at 282.

275. *Order Regulating Accusations Against Magistrates* (N.Y. Ct. Assizes Oct. 5-6, 1681), in *RECORDS OF THE COURT OF ASSIZES*, *supra* note 216, at 283.

276. *Id.*

change the course of adjudication in the local courts of Long Island, Staten Island, and Westchester.<sup>277</sup>

Those courts continued after 1664 to pursue their rude, untechnical, customary New England ways as if the Court of Assizes and its lawyers did not exist. They continued to use the forms of action, sometimes correctly, as when case was brought for breach of an agreement,<sup>278</sup> for negligence,<sup>279</sup> for slander,<sup>280</sup> or on an account,<sup>281</sup> or trespass was brought for a physical invasion of a field,<sup>282</sup> or to test title to land.<sup>283</sup> At least as often, however, they used writs incorrectly, as when debt was brought for wages,<sup>284</sup> for breach of a covenant,<sup>285</sup> on a sworn but unsealed instrument,<sup>286</sup> or to balance accounts,<sup>287</sup> or case brought for seizing land<sup>288</sup> or seizing goods.<sup>289</sup> They also behaved irregularly when they

277. EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 80-81 (1999).

278. *See, e.g.*, *Joel v. Turner* (Staten Island Constable's Ct. Feb. 5, 1681/82), in *TRANSCRIPTIONS OF EARLY TOWN RECORDS OF NEW YORK: THE EARLIEST VOLUME OF STATEN ISLAND RECORDS 1678-1813*, at 58 (Historical Records Survey ed., 1942) [hereinafter *TRANSCRIPTIONS OF EARLY TOWN RECORDS OF NEW YORK*].

279. *See, e.g.*, *Wandall v. James* (Town Ct. Newtown June 8, 1669), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 223.

280. *See, e.g.*, *Lorance v. Lauton* (Town Ct. Newtown May 8, 1665), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 47.

281. *See, e.g.*, *Backer v. Skidmore* (Suffolk County Ct. Sess. Mar. 6, 1671/72), in *THE RECORDS OF THE COURT OF SESSIONS OF SUFFOLK COUNTY IN THE PROVINCE OF NEW YORK 1670-1688*, at 30 (Thomas W. Cooper ed., 1993) [hereinafter *RECORDS OF THE COURT OF SESSIONS OF SUFFOLK COUNTY*].

282. *See, e.g.*, *Evans v. Thurstan* (Town Ct. Jamaica Sept. 5, 1682), in 1 *RECORDS OF THE TOWN OF JAMAICA LONG ISLAND, NEW YORK 1656-1751*, at 109 (Josephine C. Frost ed., 1914) [hereinafter 1 *RECORDS OF THE TOWN OF JAMAICA LONG ISLAND*]. Occasionally other writs were used, but the records are too scant to know if they were used correctly. *See Bedient v. Disbrow* (June 7-9, 1687), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 58 (trover and conversion); *Firman v. Lintch* (Town Ct. Newtown June 8, 1669), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 222 (replevin).

283. *See, e.g.*, *Corbett v. Wright* (Yorkshire Ct. Sess. West Riding Dec. 21, 1681), in *TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND 1668-1688*, at 33-34 (Loring McMillen ed., 1989) [hereinafter *TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND*].

284. *See, e.g.*, *Horten v. Carter* (Town Ct. Newtown Mar. 24, 1665), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 60.

285. *See, e.g.*, *Willit v. Johanas* (Mar. 1673/74), in *RECORDS OF THE TOWNS OF NORTH AND SOUTH HEMPSTEAD, LONG ISLAND, N.Y. 333-34* (Jamaica, N.Y., Long Island Farmer Print 1896).

286. *See, e.g.*, *Billop v. Bridges* (Yorkshire Ct. Sess. West Riding Dec. 21, 1681), in *TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND*, *supra* note 283, at 35.

287. *See, e.g.*, *Uslton v. Pew* (Staten Island Constable's Ct. Mar. 7, 1680), in *TRANSCRIPTIONS OF EARLY TOWN RECORDS OF NEW YORK*, *supra* note 278, at 5.

288. *See, e.g.*, *Higbe v. John* (Town Ct. Jamaica Aug. 7, 1683), in 1 *RECORDS OF THE TOWN OF JAMAICA LONG ISLAND*, *supra* note 282, at 131.

289. *See, e.g.*, *Balew v. Pitne* (Staten Island Constable's Ct. Dec. 5, 1681), in *TRANSCRIPTIONS OF EARLY TOWN RECORDS OF NEW YORK*, *supra* note 278, at 20.

gave litigants relief beyond what they had sought<sup>290</sup> or penalized them for bringing suits deemed “needles[s].”<sup>291</sup> The “custom of the county” remained more significant than the Duke’s Laws,<sup>292</sup> and traditional sorts of administrative work, such as supervising highway building and maintenance,<sup>293</sup> appointing administrators<sup>294</sup> and guardians,<sup>295</sup> recording legal instruments,<sup>296</sup> and legislating for various purposes, such as preventing fire,<sup>297</sup> regulating black slaves,<sup>298</sup> and protecting the Sabbath,<sup>299</sup> continued to be done.

One important change was that local courts became more sensitive to the limits that the Duke’s Laws placed on their jurisdiction. They dismissed civil actions where the amount in controversy exceeded their jurisdictional limits,<sup>300</sup> and, of course, they allowed litigants to appeal to

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290. See, e.g., *Salmon v. Forde* (Town Ct. Jamaica Mar. 6, 1682/83), in 1 RECORDS OF THE TOWN OF JAMAICA LONG ISLAND, *supra* note 282, at 114-15 (plaintiff sought payment for one pair of shoes; after hearing testimony, the court awarded payment for two pairs of shoes); *Simkings v. Sampson* (Oyster Bay Town Ct. May 14, 1674), in 1 OYSTER BAY TOWN RECORDS 1653-1690, at 224 (John Cox, Jr. ed., 1916) (awarding a successful plaintiff his mortgage as well as judgment); *cf.* *Whittman v. Guyon* (Yorkshire Sess. Ct. West Riding June 15, 1675), in TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND, *supra* note 283, at 6 (reducing damages awarded by jury).

291. *Barlo v. Loroson* (Town Ct. Newtown May 4, 1680), in MINUTES OF THE TOWN COURTS OF NEWTOWN, *supra* note 50, at 118.

292. *Brittain v. Whitman* (Yorkshire Ct. Sess. West Riding June 21, 1676), in TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND, *supra* note 283, at 13.

293. *Order to Constable & Overseers* (Yorkshire Ct. Sess. West Riding Dec. 20, 1682), in TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND, *supra* note 283, at 40 (directing the laying out of a highway and guaranteeing compensation to owners whose land was taken); *cf.* *Town of Newtown v. Scudder* (Town Ct. Newtown Oct. 23, 1668), in MINUTES OF THE TOWN COURTS OF NEWTOWN, *supra* note 50, at 193 (ordering defendant to take down a dam that was blocking a stream).

294. See *In re* Appointment of Whitman (Yorkshire Ct. Sess. West Riding Dec. 17, 1679), in TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND, *supra* note 283, at 24.

295. See *In re* Coomes (Westchester Ct. Sess. June 7-9, 1687), in MINUTES OF THE WESTCHESTER COURT OF SESSIONS, *supra* note 50, at 50-51.

296. See *In re* Mott (Westchester Ct. Sess. June 7-9, 1687), in MINUTES OF THE WESTCHESTER COURT OF SESSIONS, *supra* note 50, at 52.

297. See *Oyster Bay, N.Y., Ordinance Regulating Ladders* (Mar. 17, 1669), in 1 OYSTER BAY TOWN RECORDS 1653-1690, *supra* note 290, at 216.

298. See *Order Regulating Black Slaves* (Westchester Ct. Sess. 1692), in MINUTES OF THE WESTCHESTER COURT OF SESSIONS, *supra* note 50, at 66-67.

299. See *Order Regulating Sabbath* (Westchester Ct. Sess. 1693), in MINUTES OF THE WESTCHESTER COURT OF SESSIONS, *supra* note 50, at 81-84.

300. See, e.g., *Jonson v. Kingdom* (Staten Island Constable’s Ct. Oct. 4, 1680), in TRANSCRIPTIONS OF EARLY TOWN RECORDS OF NEW YORK, *supra* note 278, at 1; *Etherington v. Gleane* (Town Ct. Newtown Oct. 4, 1681), in MINUTES OF THE TOWN COURTS OF NEWTOWN, *supra* note 50, at 129-30; *cf.* *Billeau v. Walton* (Yorkshire Ct. Sess. West Riding Dec. 15, 1680), in TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND, *supra* note 283, at 30 (dismissing for failure to serve process on defendant); *Gee v. Masters* (Westchester Ct. Sess. June 7-

higher courts.<sup>301</sup> The Duke's Laws had the greatest impact in criminal cases, where fines were the only punishments that remained to town courts.<sup>302</sup> With occasional exceptions,<sup>303</sup> the town courts obeyed this restriction and criminal cases largely disappeared from their dockets.

But at the court of sessions level, the criminal process proceeded largely as it had in town courts prior to 1664. Along with standard sorts of prosecutions,<sup>304</sup> the sessions courts had two main areas of concern: contempt of authority<sup>305</sup> and the New England favorite, fornication,<sup>306</sup>

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9, 1687), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 42 (nonsuittng plaintiff for a variance between the writ and the declaration).

301. See, e.g., *Corbett v. Wright* (Yorkshire Ct. Sess. West Riding Dec. 21, 1681), in *TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND*, *supra* note 283, at 33-34; *Turford v. Lambart* (Town Ct. Newtown Aug. 23, 1681), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 125-26; cf. *Sharpe v. Brittain* (Yorkshire Ct. Sess. West Riding June 21, 1676), in *TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND*, *supra* note 283, at 12-13 (referring the issue of damages to the governor after the jury left it to the trial court). In addition to an appeal, litigants also could seek review of a judgment against them in the trial court. See *Lawrison v. Mills* (Town Ct. Newtown Nov. 7, 1671), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 180. Appeal or review would not be allowed, however, in the absence of legislation authorizing it. See *In re Palmer* (Westchester Ct. Sess. June 7-9, 1687), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 47.

302. See 1 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 459 (1906) (noting that after promulgation of the Duke's Laws, "[a] local court was created in each town for the trial of actions of debt or trespass under £5"); see also *Observations on the Particular Jurisprudence of New York*, 21 ALB. L.J. 267, 267 (1880) ("The practice in the courts of justice . . . was prescribed by the Duke's Law[s], with considerable minuteness of detail. . . . Inferior [c]ourts were forbidden cognizance of crimes not punishable by the 'Duke's Laws.'").

303. See *Meggs v. Soper* (Town Ct. Huntington Mar. 13, 1672), in *HUNTINGTON TOWN RECORDS*, *supra* note 52, at 185, *enforcing* *Meggs v. Soper* (Town Ct. Huntington n.d.), in *HUNTINGTON TOWN RECORDS*, *supra* note 52, at 119 (placing defendant in stocks and whipping for defamation, railing at victim in his house, and abuse of authority); *Loranaces v. Etherington* (Town Ct. Newtown July 5, 1667), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 74 (defendants placed in stocks for theft). The boundary between the civil and criminal processes was, of course, not entirely clear, as the presence of private plaintiffs in the two cases above suggests, and thus, when a husband sued another man for entertaining his wife at night, it was not clear whether the court was giving a civil remedy or imposing a criminal penalty when it required the wife to apologize to her husband, promise to obey him, and threatened her with time in the stocks if she did not. See *Ffirman v. Cochran* (Town Ct. Newtown Dec. 3, 1668), in *MINUTES OF THE TOWN COURTS OF NEWTOWN*, *supra* note 50, at 194-98.

304. See, e.g., *Rex v. Leggett* (Westchester Ct. Sess. Dec. 5, 1693), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 86-87 (theft); *Legatt v. Maxey* (Westchester Ct. Sess. June 7-9, 1687), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 57 (assault and battery); *Hunt v. Jenings* (Westchester Ct. Sess. June 7-9, 1687), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 57 (arson).

305. See, e.g., *In re Jones* (Westchester Ct. Sess. Oct. 4-5, 1694), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 100 (ordering fine for failing to report for grand jury duty); *King v. Ponton* (Westchester Ct. Sess. June 8, 1692), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 67-68 (riot and sedition); *Constable v. Land* (Yorkshire Ct. Sess. West Riding Dec. 17, 1679), in *TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND*, *supra* note 283, at 23 (noting that the defendant said "he[] did not value the [c]onstable[]'s [s]taff and [tha]t he[] could cut as good a stick out of the woods

especially between a husband and wife prior to their marriage.<sup>307</sup> In one case, a court paid attention to legal niceties when it quashed an indictment for want of a sufficient addition.<sup>308</sup>

In the end, it is necessary to ask, as it was in connection with the Dutch towns along the upper Hudson, why the colonial administration was only partially successful in projecting its power into the English settlements surrounding New York City. Part of the answer is that it did not even attempt to govern those settlements through military force. Garrisons were not needed to oversee one of the matters about which the administration most cared: control over the adjudication of title to land. But the main reason for the administration's failure was its inability to appreciate why the Court of Assizes, the vehicle it created to exercise control, was ill-suited for that purpose.

The difficulty with the Court of Assizes was that it did not ride circuit, and, as a result, it remained inconveniently distant from the locales in which litigation arose.<sup>309</sup> Litigants, accordingly, did not institute their suits in the court, nor was it worthwhile for most of them to bother taking an appeal. That meant that the colonial administration continued to have limited knowledge of the law that local courts were applying and little capacity to impose its own law.<sup>310</sup>

Moreover, since the Court of Assizes did not travel, neither did the lawyers who attended it.<sup>311</sup> They never reached the countryside to ensure that the local people attended to legal technicality when they appeared in court.<sup>312</sup> The rude, untechnical New England law that local courts had grown accustomed to administering, without the assistance of a

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himself["]"); *King v. Diment* (Suffolk County Ct. Sess. Mar. 4, 1669), in *RECORDS OF THE COURT OF SESSIONS OF SUFFOLK COUNTY*, *supra* note 281, at 7 (fining defendant for forging a justice's warrant).

306. *See, e.g., In re Lancaster* (Westchester Ct. Sess. Oct. 4-5, 1693), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 107; *King v. Mott* (Westchester Ct. Sess. June 7-8, 1692), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 68.

307. *See, e.g., Constable v. Garison* (Suffolk County Ct. Sess. Mar. 6, 1671/72), in *RECORDS OF THE COURT OF SESSIONS OF SUFFOLK COUNTY*, *supra* note 281, at 30-31; *King v. Avery* (Suffolk County Ct. Sess. Mar. 4, 1669), in *RECORDS OF THE COURT OF SESSIONS OF SUFFOLK COUNTY*, *supra* note 281, at 7.

308. *See Rex v. Leggett* (Westchester Ct. Sess. Dec. 5, 1693), in *MINUTES OF THE WESTCHESTER COURT OF SESSIONS*, *supra* note 50, at 86.

309. *See Christoph & Christoph*, *supra* note 245, at xi.

310. It is unclear whether a court which brought itself to bear in places like Suffolk County would have been able to impose law on the recalcitrant New England types who had settled there. The difficulties that such a court might have faced have been adumbrated in prior scholarship. *See* WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 31-35 (1975).

311. *See Christoph & Christoph*, *supra* note 245, at xi-xiii.

312. *Id.* at xiii.

professionalized bar, remained all that the people had.<sup>313</sup> Governed as they were by that law, the English settlements of Long Island, Staten Island, and Westchester were scarcely part of the colony of New York.

### *C. The Emergence of New Law in New York City*

Manhattan was different. Along with the English soldiers who landed in the fall of 1664 came three lawyers trained at the Inns of Court. At least a few other professionally trained practitioners continued to arrive in the colony over the next two decades.<sup>314</sup> So did other Englishmen, to join the significant English minority already living in New Amsterdam. As the governing class, those Englishmen found themselves dumped together with the Dutch majority, whose law the English had agreed to respect, into the first melting pot in American history. As the pot cooked, Dutch law slowly melted away and the common law, with a few Dutch blendings, became New York City's law.

One week after writing the directors of the West India Company to inform them of New Amsterdam's surrender to England,<sup>315</sup> the Court of Burgomasters and Schepens met in City Hall to conduct business as usual.<sup>316</sup> Over the next several sessions, the court handled routine cases<sup>317</sup> and dealt with important ministerial questions arising out of the transfer of power, such as to whom to pay customs duties it collected,<sup>318</sup> from whom to obtain salaries for the clergy, the schoolmaster, and former Dutch soldiers,<sup>319</sup> and how to deal with matters whose processing

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313. See *Observations on the Particular Jurisprudence of New York*, *supra* note 302, at 267 (describing practice in local courts as "extremely simple, and devoid of the archaic niceties of the contemporaneous English law").

314. See MOGLEN, *supra* note 248, at 210-13.

315. See Letter from Pieter Tonneman et al. to Lords Directors (Sept. 16, 1664), in 5 THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674 ANNO DOMINI: MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS JAN. 8, 1664, TO MAY 1, 1666, INCLUSIVE, at 114-16 (Berthold Fernow ed., New York, N.Y., Knickerbocker Press 1897) [hereinafter 5 RECORDS OF NEW AMSTERDAM].

316. See 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 116-20.

317. Some of the cases raised issues arising out of the English conquest. See, e.g., Koocku v. Hardenbroek (Ct. Burgomasters & Schepens Oct. 11, 1664), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 136 (hearing a suit to recover the hide of ox seized by the English army from plaintiff and then sold by the army to a bona fide purchaser); Doeckles v. Lauwerens (Ct. Burgomasters & Schepens Oct. 3, 1664), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 131 (holding that an order of the governor prohibiting the departure of vessels renders the contract void).

318. See, e.g., *In re Wessels* (Ct. Burgomasters & Schepens Sept. 30, 1664), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 317, at 122.

319. See *Hermzen v. Stuyvesant* (Ct. Burgomasters & Schepens Apr. 18, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 214 (hearing a complaint of a soldier for back pay); *In re*



was interdicted by the Articles of Surrender.<sup>320</sup> It seems clear that the Dutch magistrates were not cowed by the English conquest or garrison, for when Governor Nicolls directed them to take an oath of allegiance to King Charles and the Duke of York, they refused.<sup>321</sup> They feared that taking the oath might nullify rights reserved to them under the Articles of Surrender and accordingly insisted upon the addition to the oath of the following language: “*Conformable to the Articles concluded on the Surrender of this place.*”<sup>322</sup> Nicolls responded four days later in a letter assuring the magistrates that the oath would not nullify their rights,<sup>323</sup> and when he agreed several days after that to place his seal on the letter, the magistrates took the oath.<sup>324</sup>

The English military occupation of New York was not easy on the colony’s residents and its courts.<sup>325</sup> Governor Nicolls himself had to take note of “the insolence and disturbances committed by the soldiers”;<sup>326</sup> they groped women, used force to compel residents to provide them with liquor, and threatened people with displays of violence.<sup>327</sup> When they violated the city’s laws, by drinking on Sundays or after hours, for example, the magistrates could not punish them, although they did punish the residents who abetted them.<sup>328</sup> Nicolls’s solution was to quarter the soldiers in private houses so that they could “protect the house[s] from disturbances”;<sup>329</sup> quartering, of course, would also place

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Pieterzen (Ct. Burgomasters & Schepens Oct. 11, 1664), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 137 (petitioning the court for his salary as the schoolmaster); *In re Megapolensis* (Ct. Burgomasters & Schepens Oct. 11, 1664), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 133-34 (petitioning the court for salary as clergymen).

320. Letter from Joannes Nevius to Hon. Affectionate Friends (October 11, 1664), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 317, at 137-38.

321. 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 142-43 (recording the minutes of Oct. 14, 1664).

322. *Id.* at 143 (quoting the minutes of Oct. 14, 1664).

323. Letter from Richard Nicolls, Governor, to the Burgomasters and other Magistrates of New York (Oct. 18, 1664), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 144.

324. *See* Governor’s Seal (Oct. 20, 1664), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 144-45.

325. For a detailed, book-length portrayal of the ways in which English law and culture imposed themselves on Dutch subjects and impoverished their lives, see generally MERWICK, *supra* note 101, which describes the difficulty that one Dutchman had in adapting to the English system.

326. Governor’s Order Regulating the Quartering of Soldiers (Apr. 7, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 212.

327. *See, e.g., In re Maan* (Ct. Burgomasters & Schepens Apr. 7, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 211.

328. *See* Anthony v. Storm (Ct. Burgomasters & Schepens Feb. 21, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 189 (punishing residents who aided soldiers in drinking after hours); *Tonneman v. Meinderzen* (Ct. Burgomasters & Schepens Nov. 8, 1664), 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 152 (punishing residents who aided soldiers in drinking on Sunday).

329. Governor’s Order Regulating the Quartering of Soldiers, *supra* note 326, at 212.

some of the cost of the occupation army on the city rather than the administration. In response, the city burghers, who were “afraid of being robbed,”<sup>330</sup> made it clear that “they would rather contribute than receive the soldiers into the house.”<sup>331</sup> Nicolls nonetheless ordered one hundred troops quartered,<sup>332</sup> and the burgomasters were able to find the necessary houses only by increasing the payment Nicolls had agreed to give each homeowner. To raise the necessary money, they imposed a tax.<sup>333</sup>

Meanwhile, the magistrates continued doing their ordinary work in the ordinary fashion. Thus, they continued to rely on oath-taking as a principal form of evidence,<sup>334</sup> except that they refused, with the approval of the governor, to accept “evidence of an Indian” as “sufficient.”<sup>335</sup> They determined legal issues “according to the custom heretofore.”<sup>336</sup> When evidence left a matter “doubtful”<sup>337</sup> and the magistrates found a “case to be obscure” so that it could not “be disposed of by them,” they continued to press litigants “to be reconciled to each other”<sup>338</sup> or to accept a disposition by arbitrators. They continued to regulate the details of everyday life, including family life, ordering one husband to increase the maintenance he was paying to his estranged wife,<sup>339</sup> while a second husband whose wife had deserted him promised “to keep peaceable house with his wife and to live with her as an honest man ought to do,” and she, in turn, promised “to demean herself toward her husband, as she is bound to do, whereupon they went home together.”<sup>340</sup>

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330. Andries Rees, Statement at City Hall Regarding Quartering of Soldiers (Mar. 31, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 317, at 209.

331. Governor’s Order Regulating the Quartering of Soldiers, *supra* note 326, at 212.

332. *Id.*

333. Order Resolving to Pay Those Quartering Soldiers (Apr. 19, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 220-21.

334. *See, e.g.,* Turcq v. Lewis (Ct. Burgomasters & Schepens July 18, 1669), in 6 THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674 ANNO DOMINI: MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS MAY 8, 1666, TO SEPT. 5, 1673, INCLUSIVE, at 182 (Berthold Fernow ed., New York, N.Y., Knickerbocker Press 1897) [hereinafter 6 RECORDS OF NEW AMSTERDAM]; Stuyvesant v. Vinge (Ct. Burgomasters & Schepens Mar. 14, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 199-200.

335. Niuman v. van Brugge (Ct. Burgomasters & Schepens Apr. 1, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 210.

336. Onckelbagh v. Flipzen (Ct. Burgomasters & Schepens Jan. 17, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 176.

337. van Tright v. van Bergen (Ct. Burgomasters & Schepens Apr. 7, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 213.

338. Freeman v. Maan (Ct. Burgomasters & Schepens Apr. 25, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 230.

339. *In re* Roeloff (Ct. Burgomasters & Schepens Mar. 21, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 202.

340. *In re* Lantsman (Ct. Burgomasters & Schepens Mar. 29, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 206-07. But they did not live happily ever after. Three months

But the Dutch system could not withstand the pressures that the presence of Englishmen, both the governor and lawyers from above and ordinary litigants from below, imposed on it. When one Englishman was arrested for smuggling, for instance, he “demand[ed], that justice be done him according to the English laws and that his accusers shall appear face to face.”<sup>341</sup>

Less than two months later, in June 1665, Governor Nicolls “found it necessary to discharge the [f]orm of [g]overnm[ent] . . . of New Yor[k], under the name and [s]tyle of Sc[h]out, Burgomast[ers,] and Schepens, which [were] not known[] or [c]ustomary, in any of his Ma[jesty’s] [d]ominions.”<sup>342</sup> In its place, he constituted the inhabitants of Manhattan Island into a “[b]ody [p]oliti[c] & [c]orporate, under the [g]overnm[ent] of a Mayor, Aldermen and Sher[iff]” and directed them to “[g]overn[,]” not by Dutch custom, but “according to the [g]eneral [l]aw[s] of this [g]overnment, and such [p]eculiar [l]aw[s] as are, or shall be thought convenient and necessary for the good and wel[l]fare” of the corporation.<sup>343</sup> Nicolls ensured a blending of English and Dutch law by appointing an Englishman who had lived in the Netherlands and traded in New Amsterdam as mayor, continuing the old schout as sheriff, and appointing sitting burgomasters as two of the five new aldermen. At

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later, the wife appeared in court and petitioned for a divorce. See *In re Pos* (Ct. Burgomasters & Schepens June 22, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 262. The divorce was not granted. See *In re Lantsman* (Ct. Burgomasters & Schepens July 25, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 282. For related litigation, see *In re Lantsman* (Ct. Burgomasters & Schepens Oct. 24, 1671), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 340; *Post v. Lansman* (Ct. Burgomasters & Schepens Mar. 5, 1666/67), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 62; *In re Lantsman* (Ct. Burgomasters & Schepens July 11, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 275-76; *In re Lantsman* (Ct. Burgomasters & Schepens July 4, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 272; *Pos v. Lantsman* (Ct. Burgomasters & Schepens July 4, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 271.

341. *Anthony v. Salter* (Ct. Burgomasters & Schepens Apr. 20, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 226. When the accuser the next day appeared, his memory on examination proved limited and the case was continued, until it disappeared off the docket. *Anthony v. Salter* (Ct. Burgomasters & Schepens Apr. 25, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 227; *Anthony v. Salter* (Ct. Burgomasters & Schepens May 23, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 235; see also *Archer v. Tuder* (Feb. 2, 1679/80), in SELECT CASES, *supra* note 206, at 742-43 (describing a somewhat later case in which defendants advanced an ambiguous claim that “the [c]ourt acted unlawfully, by their going about to [e]xamine witnesses, and not giv[ing] them the benefit[] of[] a jury”); *GOEBEL & NAUGHTON*, *supra* note 49, at 604-05; *HULSEBOSCH*, *supra* note 207, at 48.

342. The Mayor and Aldermen’s Commission (June 12, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 249.

343. *Id.* at 249-50.

least two of the remaining three aldermen were old Dutch residents of New Amsterdam.<sup>344</sup>

The common law immediately worked its way into the practice and proceedings of the new Mayor's Court. Thirteen days after the new court had been established, the first jury verdict was rendered.<sup>345</sup> And, by the end of the year, common-law actions of debt,<sup>346</sup> case,<sup>347</sup> and slander<sup>348</sup> were being filed, apparently with the assistance of the lawyers who had come to New York to practice before the Court of Assizes.<sup>349</sup> But there was confusion. For example, the sheriff, seeking a fine on behalf of the public, filed a civil rather than criminal "action of [a]ssa[u]lt and [b]attery[],"<sup>350</sup> while in another case, the same individual, now suing on his own behalf, tried to plead orally and had to be directed by the court

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344. Compare *id.* at 250 (listing the magistrates as Thomas Willett, Thomas de la Vall, Oloff Stuyvesant, John Brugges, Cornelius van Ruyven, John Laurence, and Allard Anthony), with Governor's Installing New Officers (June 14, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 251 (installing Thomas Willett as Mayor; Thomas de la Vall, Olof Stevenzen van Cortlant, Johannes van Brugh, Cornelis van Ruyven, and John Laurens as Aldermen; and Allard Anthony as Sheriff). Judgments about the ethnicity of the three new aldermen were made on the basis of their names and entries in volume one of the *Records of New Amsterdam*, which indicate that two of them had been present in the city at least since the mid-1650s. See *In re Stevensen* (Ct. Burgomasters & Schepens Mar. 15, 1655), in 1 THE RECORDS OF NEW AMSTERDAM, *supra* note 37, at 300 (naming "Oloff Stevensen" and "Johannes van Brug" as signatories of a petition to the court); KAMMEN, *supra* note 96, at 82-83.

345. *Douthy v. Hinxman* (N.Y. Mayor's Ct. June 27, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 267.

346. See, e.g., *Lodowycx v. Cousterier* (N.Y. Mayor's Ct. Nov. 21, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 320.

347. See, e.g., *Shakerly v. Kase* (N.Y. Mayor's Ct. Jan. 16, 1665/66), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 331.

348. See, e.g., *Sharp v. Myndersen* (N.Y. Mayor's Ct. Jan. 16, 1665/66), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 331.

349. See *Rider ex rel. Halls v. Cockril* (N.Y. Mayor's Ct. Nov. 21, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 322 (stating that John Rider was acting "in the behalf[] of" the plaintiff). Earlier Rider, identified as "[d]ef[endant]'s attorney," had requested that a copy of the plaintiff's petition be furnished to him, although it previously had been furnished to the defendant. See *Davits v. Hoppens* (N.Y. Mayor's Ct. Aug. 22, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 288. In the same case, "Mattheus de Vos, substitute of Thomas Hal," was identified as "attorney" for the plaintiff. *Id.* Rider had been counsel for the plaintiff in *Richbell v. Town of Huntington* (N.Y. Ct. Assizes Sept. 28, 1665), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 2. In another case, a defendant's attorney had requested that the plaintiff's petition, which had been delivered to him in Dutch, be translated into English. See *Hall v. Hendrick* (N.Y. Mayor's Ct. Mar. 20, 1665/66), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 343. The role of attorneys, as agents who could appear in court even in the absence of the parties, was formalized by court order on October 12, 1672. Order Obliging the Appearance of Parties or Their Attorneys, in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 393.

350. *Anthony v. Adely* (N.Y. Mayor's Ct. June 27, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 268.

to plead in writing.<sup>351</sup> Another instance of confusion occurred when a divorce suit was submitted to a jury.<sup>352</sup>

For the next several years, the new Mayor's Court nonetheless succeeded in governing New York City effectively through a mixture of Dutch and English law. It prosecuted people for offenses such as arson,<sup>353</sup> fornication,<sup>354</sup> infanticide,<sup>355</sup> theft,<sup>356</sup> contempt of authority,<sup>357</sup> receiving stolen goods,<sup>358</sup> selling liquor to Native Americans,<sup>359</sup> and violating the Sabbath.<sup>360</sup> It ordered a resident of a small village in the northern reaches of the city not to "tak[e] up[on him self] to [r]u[le] and [g]overn[ ] [his neighbors] by [r]ig[or] and force."<sup>361</sup> It reassumed its old regulatory functions as it set prices,<sup>362</sup> policed labor arrangements,<sup>363</sup> granted monopolies,<sup>364</sup> controlled who could reside within the city,<sup>365</sup>

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351. See *Anthony v. Waecker* (N.Y. Mayor's Ct. July 18, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 276.

352. See *In re Lantsman* (N.Y. Mayor's Ct. July 25, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 282.

353. See, e.g., *Sheriff v. Dyckman* (N.Y. Mayor's Ct. Mar. 7, 1670/71), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 287.

354. See, e.g., *Anthony v. Cley* (N.Y. Mayor's Ct. Feb. 13, 1665/66), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 338.

355. See *Sheriff v. Hendrix* (N.Y. Mayor's Ct. Sept. 13, 1666), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 35.

356. See, e.g., *Sheriff v. Servant Boy of Sharp* (N.Y. Mayor's Ct. Jan. 17, 1670/71), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 279.

357. See, e.g., *Antony v. Wolfertsen* (N.Y. Mayor's Ct. Feb. 5, 1666/67), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 56 (fining defendant for contempt of the Court of Assizes); see also *Constable v. Hamor* (N.Y. Mayor's Ct. June 11, 1672), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 377 (requesting that the governor discipline a corporal that had obstructed performance of the constable's duty).

358. See, e.g., *Sheriff v. Otten* (N.Y. Mayor's Ct. June 6, 1666), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 14.

359. See, e.g., *Anthony v. Corbyn* (N.Y. Mayor's Ct. Oct. 31, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 311; see also *Anthony v. Carpyn* (N.Y. Mayor's Ct. Aug. 21, 1666), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 32 (prosecuting defendant for allowing Native Americans to sleep in his house at night).

360. See, e.g., *Anthony v. Lodowycx* (N.Y. Mayor's Ct. Aug. 22, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 290.

361. *Town of Fordham v. Archer* (N.Y. Mayor's Ct. Sept. 8, 1671), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 325.

362. See, e.g., *In re Butchers* (N.Y. Mayor's Ct. Oct. 31, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 312 (regulating the fees and wages of butchers).

363. See, e.g., *Hardenbroock v. van der Borgh* (N.Y. Mayor's Ct. Mar. 7, 1670/71), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 288 (hearing a dispute between a shoemaker and his hired servant); *Order Regulating Entertaining Servants* (N.Y. Mayor's Ct. Mar. 7, 1670/71), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 335, at 286; cf. *Constable v. Petel* (N.Y. Mayor's Ct. Jan. 29, 1666/67), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 54 (removing rebellious seamen from their ship).

364. See, e.g., *In re Carters* (N.Y. Mayor's Ct. Apr. 16, 1667), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 70.

watched over the administration of estates,<sup>366</sup> protected minors from lawsuits,<sup>367</sup> oversaw marriages,<sup>368</sup> provided salaries for clergymen,<sup>369</sup> supervised churches in their support of the poor,<sup>370</sup> and authorized carmen to travel the city's streets at slow speeds.<sup>371</sup> Not surprisingly, though, the Mayor's Court favored "free [t]rade" when ending Albany's monopoly of the Indian trade would have allowed New York City merchants to enter it.<sup>372</sup>

In dealing with matters such as these, the court continued to act "according to [c]ustom[]"<sup>373</sup> and to rely on institutions like the jury of merchants that facilitated recourse to custom.<sup>374</sup> At the same time, unlike courts in surrounding towns or along the upper Hudson, it made itself into part of a chain of hierarchical authority that communicated law from the highest rungs of government to the lowest levels of society. It took cases on appeal from lower courts,<sup>375</sup> authorized numerous appeals to the Court of Assizes,<sup>376</sup> and heard cases sent to it by that court.<sup>377</sup> It

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365. See, e.g., *In re Ackleton* (N.Y. Mayor's Ct. Nov. 19, 1667), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 101.

366. See, e.g., *In re Estate of Van Couwenhoven* (N.Y. Mayor's Ct. Apr. 12, 1670), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 231.

367. See, e.g., *Gabrie v. Gerrits* (N.Y. Mayor's Ct. Sept. 19, 1665), in 5 RECORDS OF NEW AMSTERDAM, *supra* note 315, at 293-94.

368. See, e.g., *Davenport v. Davenport* (N.Y. Mayor's Ct. July 14, 1671), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 309-10; *Order Announcing Banns of Marriage* (N.Y. Mayor's Ct. Oct. 15, 1670), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 262. But the court did lose patience in one case when it directed the parties "not [to] trouble the [c]ourt with such trifles." *Renart v. van Nas* (N.Y. Mayor's Ct. June 13, 1666), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 21.

369. See, e.g., *Order Regarding Ministers' Salaries* (N.Y. Mayor's Ct. July 14, 1671), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 310-11.

370. See *In re Deakons* (N.Y. Mayor's Ct. Dec. 5, 1671), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 348; *In re Deakons* (N.Y. Mayor's Ct. Dec. 21, 1671), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 353.

371. See *In re Karre Men* (N.Y. Mayor's Ct. Dec. 17, 1667), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 105.

372. *In re Philipsen* (N.Y. Mayor's Ct. July 7, 1668), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 138-39.

373. *In re Deakons* (N.Y. Mayor's Ct. Dec. 21, 1671), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 352-53; see also *Shappleigh v. Rich* (N.Y. Mayor's Ct. July 13, 1670), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 246-47 (ordering defendant to satisfy a debt "according to [c]ustom[]").

374. See, e.g., *Shappleigh v. Rich* (N.Y. Mayor's Ct. July 13, 1670), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 247.

375. See, e.g., *In re de Mareest* (N.Y. Mayor's Ct. Oct. 9, 1666), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 335, at 36.

376. See, e.g., *de Haert v. Vander Coele* (N.Y. Mayor's Ct. June 21, 1666), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 24; *In re Hall* (N.Y. Mayor's Ct. June 6, 1666), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 14-15.

explicitly declared that in “a matter which concern[ed] the Court of Assizes, . . . nothing [could] be done . . . by the Mayor[']s Court.”<sup>378</sup> It also became attentive to other matters of jurisdiction, transferring one case, for example, to a sessions court on Long Island, where jurisdiction properly lay<sup>379</sup> and dismissing others where process was improperly served.<sup>380</sup>

Finally, the Mayor’s Court took on an important characteristic of a common law court as it came to appreciate its capacity to make law interstitially as when, in one case, it released a debtor from imprisonment for debt.<sup>381</sup> And, in another matter decided in 1670, which it described as too “[l]ong[] & tedious for [the court] to [v]iew & [e]xamin[e] all the papers brought in [c]ourt,” the Mayor’s Court declined to act as a Dutch court and send the case to referees; instead, it recognized one of the virtues of the common law and “ordered that the [c]ase should be pleaded by att[o]rn[ey]s at [l]aw, who might bring the [c]ontroversy to a narrow [c]ompass[.]”<sup>382</sup>

This last case suggests that by 1670 the Mayor’s Court was on the cusp of becoming a common-law court. But for several more years that did not happen. The reason for the court’s considerable success in bridging the gap between the highest rungs of government and the lowest levels of society and thereby governing New York City effectively was its hybrid nature. The court was cognizant of its duties and powers, but it did not force the Dutch majority of the city to accept law for which it was not yet ready. It continued, for example, to use its customary procedure of compelling parties to respond to interrogatories over the objection of a defendant that, at common law, he was “not

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377. See, e.g., *Steenwyck v. Mills* (N.Y. Mayor’s Ct. Oct. 24, 1671), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 336; *Argent v. Ashman* (N.Y. Mayor’s Ct. Oct. 20, 1668), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 151.

378. *In re Gabrie* (N.Y. Mayor’s Ct. Apr. 16, 1667), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 68.

379. See *Manningh v. Bresier* (N.Y. Mayor’s Ct. Oct. 8, 1672), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 391.

380. See *Crisp v. Taylor* (N.Y. Mayor’s Ct. Apr. 6, 1669), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 176; see also *Romeyn v. Van de Water* (N.Y. Mayor’s Ct. May 18, 1669), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 180 (describing a situation where it appears that the plaintiff was nonsuited because process had been served on Long Island rather than in Manhattan). For a rule concerning the form of process to be served on burghers, see Order Requiring Burgers be Brought to Court by Summons (Jan. 11, 1667/78), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 116.

381. *In re Fisher* (N.Y. Mayor’s Ct. Jan. 16, 1671/72), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 355.

382. *Cousseau v. Van Tright* (N.Y. Mayor’s Ct. Jan. 25, 1669/70), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 212.

bound to such form of answer.”<sup>383</sup> When another defendant requested that a case “not be put to a [j]ury,” but submitted to arbitrators instead, the court agreed.<sup>384</sup> Similarly, when other parties requested the judges to give their judgment rather than have a case “determined by a jury,” the court also agreed and gave a tentative judgment, although it informed the parties that if they did not accept the judgment, a jury would be impaneled at the next court session.<sup>385</sup> And one was.<sup>386</sup>

In short, New York City was governed effectively because it was governed gently by a court that gave respect to all elements in the community. Once Governor Nicolls had imposed quartering on the city and had replaced the Court of Burgomasters and Schepens with the Mayor’s Court, which, in turn, fully accepted its subordination to the Court of Assizes, no one could doubt that English common law, as administered by the Court of Assizes and its lawyers, reigned supreme.<sup>387</sup> But the Mayor’s Court kept that supremacy disguised and thereby made it unnecessary for anyone to challenge it. Dutch customary law, which often suited the judges’ needs as well as anything could, thereby remained a vibrant partner alongside English common law.<sup>388</sup>

Gentle government ended, however, in 1673, when a Dutch fleet reconquered New York.<sup>389</sup> The new Dutch governor immediately abolished the Mayor’s Court and reinstated the Court of the Schout, Burgomasters, and Schepens,<sup>390</sup> and for over a year, Dutch customary law alone governed New York.<sup>391</sup> The Dutch West India Company did

383. Slegtenhorst v. Van Aecken (N.Y. Mayor’s Ct. Dec. 7, 1669), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 205.

384. Wessels v. Davenport (N.Y. Mayor’s Ct. July 12, 1670), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 241.

385. Obe v. Philipsen (N.Y. Mayor’s Ct. June 6, 1666), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 335, at 12.

386. Obe v. Philipsen (N.Y. Mayor’s Ct. June 12, 1666), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 15-16; *see also In re Morton* (N.Y. Mayor’s Ct. May 18, 1669), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 181 (agreeing to suspend judgment on jury verdict to give litigants time to negotiate a settlement).

387. *See, e.g., de Haert v. Vander Coele* (N.Y. Mayor’s Ct. June 21, 1666), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 24 (granting appeal to the Court of Assizes and ordering the petitioner to perform “what by the s[aid] Court of [A]ssizes shal[l] be ordered in the [c]ase”).

388. Richard B. Morris, *Introduction* to SELECT CASES, *supra* note 206, at 40-45.

389. *Id.* at 45.

390. *See Order Reducing the Form of Government of the City* (Ct. Burgomasters & Schepens Aug. 17, 1673), in 6 RECORDS OF NEW AMSTERDAM, *supra* note 334, at 397-98.

391. *See Morris, supra* note 388, at 45. Cases from the period fill volume seven of the *Records of New Amsterdam*. *See generally* 7 THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674 ANNO DOMINI: MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS SEPT. 11, 1673, TO NOV. 10, 1674, INCLUSIVE ADMINISTRATIVE MINUTES MAR. 8, 1657 TO JAN. 28, 1661, INCLUSIVE INDEX (Berthold Fernow ed., New York, N.Y., Knickerbocker Press 1897) [hereinafter 7 RECORDS OF NEW AMSTERDAM]. In addition to the usual run of cases, cases dealing with wartime issues, of



not really care about retaining New York, however, and accordingly ceded it back to England in 1674.<sup>392</sup> The Dutch of New York thereby knew that, although their fleet had won the battle, their nation had lost the war and that Dutch customary law would never again be of major force in their city. Their knowledge was confirmed by a poignant final order upon the closure of the Court of Burgomasters and Schepens in November 1674, when the court's substantial library of Dutch legal materials was distributed into private hands.<sup>393</sup>

Within five years of the reconstitution of the Mayor's Court late in 1674, a new legal order had been born. In the words of Richard B. Morris, "[b]y the early eighties English verbiage culled from the standard folios on writs and entries published in the mother county supplanted the informal language of the previous record."<sup>394</sup> The records contain clear examples of writs of *assumpsit*<sup>395</sup> debt,<sup>396</sup> and *detinue*,<sup>397</sup> although they also show, somewhat oddly, that case rather than trespass was being brought to recover for forcible seizures of goods.<sup>398</sup> Judicial sensitivity to jurisdiction—a sensitivity that often resulted in reaffirmation of the power of the governor and his administration—continued.<sup>399</sup> New sorts of common law, procedural motions, also

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course, arose. *See, e.g.*, *Hardenbroeck v. Gillissen* (Ct. Burgomasters & Schepens Nov. 14, 1673), in 7 RECORDS OF NEW AMSTERDAM, *supra*, at 20 (directing a litigant dissatisfied with a judgment of the Mayor's Court to appeal to governor, "inasmuch as it [did] not belong to" the Court of Burgomasters and Schepens "to annul said judgment"); *Minviele v. Schackerly* (Ct. Burgomasters and Schepens Nov. 7, 1673), in 7 RECORDS OF NEW AMSTERDAM, *supra*, at 19 (declaring shipping contract unenforceable since no vessel was able to leave the harbor).

392. *KAMMEN*, *supra* note 96, at 89.

393. *See* Order Regarding Inventory of Books (Ct. Burgomasters and Schepens Nov. 9, 1674), in 7 RECORDS OF NEW AMSTERDAM, *supra* note 391, at 139.

394. *Morris*, *supra* note 388, at 43.

395. *See* *Blagg v. Hill* (N.Y. Mayor's Ct. Nov. 25, 1684), in SELECT CASES, *supra* note 206, at 419; *Graham v. Wright* (N.Y. Mayor's Ct. June 5, 1683), in SELECT CASES, *supra* note 206, at 419. Defense attorneys also knew how to plead the proper defense, "did not assume," in response. *See* *Attkenson v. Cobby* (N.Y. Ct. Gen. Sess. Aug. 5, 1684), in COURT OF GENERAL AND QUARTER SESSIONS OF THE PEACE: 1694-1731, at 13-14 (n.p. n.d.) (on file with the New York County Clerk).

396. *See* *Tinker v. De Foreest* (Ct. Gen. Sess. New York County Nov. 3, 1685), in COURT OF GENERAL AND QUARTER SESSIONS OF THE PEACE: 1683-1693, at 60 (n.p. n.d.) (on file with the New York County Clerk) (properly bringing an action for debt on a sealed instrument).

397. *See* *Stevenson v. Yuerksen* (N.Y. Mayor's Ct. May 1, 1683), in SELECT CASES, *supra* note 206, at 182; *Mandevile v. Shackerley* (N.Y. Mayor's Ct. Mar. 23, 1674/75), in SELECT CASES, *supra* note 206, at 246.

398. *See* *Bawdon v. Billop* (N.Y. Mayor's Ct. June 5, 1683), in SELECT CASES, *supra* note 206, at 648-49; *Lawrence v. Bayard* (N.Y. Mayor's Ct. Feb. 9, 1674/75), in SELECT CASES, *supra* note 206, at 390.

399. *See* *Inians v. Andros* (N.Y. Mayor's Ct. Nov. 28, 1682), in SELECT CASES, *supra* note 206, at 64 (nonsuited governor who was not subject to suit for his official acts); *Story v. Andros* (N.Y. Mayor's Ct. Oct. 25, 1681), in SELECT CASES, *supra* note 206, at 63 (nonsuited plaintiff because the court lacks the power to review a judgment of the admiralty court). *But see* *Melyne v.*

appeared: motions to abate actions because of variances between a writ and declaration<sup>400</sup> and demurrers for errors in declarations.<sup>401</sup> Finally, jury practice was regularized when the court insisted on unanimity for a verdict.<sup>402</sup> Little more than a decade after their arrival in New York City, in short, English lawyers had taken charge and were firmly implanting the common law.

It is important, however, not to exaggerate. Occasional Dutch practices did survive if they proved useful to the court. In one case, for example, where the court had “great difficulty,” it directed four men “to peruse the acco[unts] and to bring the same into as br[ie]f[] a method for the finding out the difference, as possibl[y] they can,”<sup>403</sup> while in another, it appointed two men to “bring[]” the case “to a narrow [c]ompass, for the [c]ourt[']s more facile understanding [of] the mer[itt] of the cause.”<sup>404</sup> Of course, many cases continued to be referred to arbitrators,<sup>405</sup> although arbitration was routine in other colonies as well and thus did not necessarily reflect Dutch practice. The Mayor’s Court also continued to enforce mortgages and trusts,<sup>406</sup> which in England was a task for chancery.

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Cregoe (N.Y. Mayor’s Ct. Aug. 7, 1683), in SELECT CASES, *supra* note 206, at 655 (accepting jurisdiction over contracts made on the high seas); Delavall v. Cregier (N.Y. Mayor’s Ct. Dec. 12, 1682), in SELECT CASES, *supra* note 206, at 85-86 (accepting jurisdiction over suit begun by seizure of goods in Albany). The Mayor’s Court also recognized the jurisdiction of the Court of Assizes by processing appeals to it. *See In re Rider* (N.Y. Mayor’s Ct. Aug. 1678), in SELECT CASES, *supra* note 206, at 738-39.

400. *See* Ryder v. Young (N.Y. Mayor’s Ct. Sept. 18, 1683), in SELECT CASES, *supra* note 206, at 111; Meyer v. Palmer (N.Y. Mayor’s Ct. May 1, 1683), in SELECT CASES, *supra* note 206, at 111; *cf.* Van Twist v. Vander Clyffe (N.Y. Mayor’s Ct. Aug. 19, 1684), in SELECT CASES, *supra* note 206, at 739 (granting a motion to quash verdict on the ground that the suit brought in attorney’s rather than creditor’s name on the condition that the defendant confesses judgment to the creditor).

401. *See* Mandevile v. De Mayor (N.Y. Mayor’s Ct. Mar. 23, 1674/75), in SELECT CASES, *supra* note 206, at 111.

402. *See* Dechamp v. Archer (N.Y. Mayor’s Ct. Dec. 4, 1683), in SELECT CASES, *supra* note 206, at 160-61 (quashing a nonunanimous verdict); *see also* Pinhorne v. Griffith (N.Y. Mayor’s Ct. Jan. 31, 1681/82), in SELECT CASES, *supra* note 206, at 160 (allowing review in an action where the jury returned a 9-3 verdict).

403. Phillipps v. Cousson (N.Y. Mayor’s Ct. June 24, 1675), in SELECT CASES, *supra* note 206, at 257-58.

404. Stevenson v. De Haert (N.Y. Mayor’s Ct. Sept. 7, 1675), in SELECT CASES, *supra* note 206, at 258.

405. *See, e.g.,* Moyne v. Sharpe (N.Y. Mayor’s Ct. Aug. 3, 1680), in SELECT CASES, *supra* note 206, at 551. Another practice that continued, which was familiar to other colonies as well, authorized the taking of depositions from witnesses who would not be present in court. *See In re Doxycy* (N.Y. Mayor’s Ct. Oct. 10, 1676), in SELECT CASES, *supra* note 206, at 738.

406. *See, e.g.,* Webly v. Cregier (N.Y. Mayor’s Ct. Mar. 8, 1674/75), in SELECT CASES, *supra* note 206, at 737 (enforcing a trust); Manning v. van Cleyffe (N.Y. Mayor’s Ct. Jan. 19, 1674/75), in SELECT CASES, *supra* note 206, at 737 (enforcing a mortgage).

The Court of Assizes, in turn, displayed its continuing respect for the Dutch by enforcing orders issued by Dutch authorities during the interim in which they had governed. During the Dutch occupation, the governor, in order to prepare the city's defenses, had taken a number of houses by eminent domain and had compensated the owners with other land.<sup>407</sup> In subsequent litigation between the new owners who had received compensation and the original owners of the land used to compensate them, the court ruled in favor of the new owners, upholding the validity of their "patent[s] from the Dutch Governor."<sup>408</sup> Similarly, in cases in which Dutch officials had seized chattels and sold them to third parties pursuant to legal process, the court upheld the title of the purchasers.<sup>409</sup> The Court of Assizes even upheld a judgment against the Town of Huntington involving title to land in the town, which had been rendered against the town when it refused during hostilities to recognize the jurisdiction of Dutch authorities and thus had not appeared to defend the suit.<sup>410</sup>

Finally, the Mayor's Court for several years retained the criminal jurisdiction of the old Dutch court and behaved in a somewhat similar fashion, as it adjudicated prosecutions for theft,<sup>411</sup> assault,<sup>412</sup> arson,<sup>413</sup>

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407. See Governor's Placard Regarding Demolishing and Removal of Houses (Ct. Burgomasters & Schepens Oct. 17, 1673), in 7 RECORDS OF NEW AMSTERDAM, *supra* note 391, at 12-14. For a subsequent example of an eminent domain taking under English rule, see *In re Persons in Maiden Lane* (N.Y. Mayor's Ct. July 30, 1696), in SELECT CASES, *supra* note 206, at 72.

408. *Hendricks v. Nath* (N.Y. Ct. Assizes Oct. 13, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 181; see also *van Dewater v. Davenport* (N.Y. Ct. Assizes Oct. 8, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 160 (ruling in favor of the new owner on account of his "[p]atent from [the] [g]overnor").

409. See, e.g., *Luyck v. Darvall* (N.Y. Ct. Assizes Oct. 13, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 180. In the absence of legal process, however, the court gave judgment for the original owner. See, e.g., *Alricks v. Darvall* (N.Y. Ct. Assizes Oct. 13, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 182. Cases arising out of seizures of chattels by Dutch authorities also occurred on Staten Island, but the court records are unclear as to their disposition. See *Walton v. Belei* (Yorkshire Ct. Sess. West Riding June 19, 1677), in TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND, *supra* note 283, at 14-15 (referring the case to the governor since the court no longer had jurisdiction over "the place of [r]esidence of both [parties]"); *Kingdome v. Billieu* (Yorkshire Ct. Sess. West Riding June 15, 1675), in TRANSCRIPTIONS OF THE EARLIEST COURT RECORDS OF STATEN ISLAND, *supra* note 283, at 7 (referring a dispute over cattle to "the [j]udgm[ent] of the next [c]o[urt]" due to a lack of records in the Dutch court proceedings that previously heard the case).

410. See *Smith v. Inhabitants of Huntington* (N.Y. Ct. Assizes Oct. 11, 1675), in RECORDS OF THE COURT OF ASSIZES, *supra* note 216, at 169-70.

411. See, e.g., *Lawson's Case* (N.Y. Mayor's Ct. Sept. 21, 1680), in SELECT CASES, *supra* note 206, at 744-45; *King v. Bowman* (N.Y. Mayor's Ct. July 31, 1675), in SELECT CASES, *supra* note 206, at 741.

412. See, e.g., *Danielle's Case* (N.Y. Mayor's Ct. Apr. 16, 1679), in SELECT CASES, *supra* note 206, at 742; *Derryne v. Segovian* (N.Y. Mayor's Ct. Apr. 1, 1679), in SELECT CASES, *supra* note 206, at 742.

fornication,<sup>414</sup> gambling,<sup>415</sup> and landing passengers without proper notice to the mayor.<sup>416</sup> But it also heard cases, one against a Dutch owner, for violating the Navigation Act and condemned vessels that had done so.<sup>417</sup>

Like many other Dutch practices, however, the criminal jurisdiction of the Mayor's Court did not long endure. In 1683, a court of sessions was established to deal with crime, and the charter granted to the city by Governor Thomas Dongan in 1686 clearly distinguished between the Mayor's Court, which received jurisdiction equivalent to the "Court of Common Pleas for all [a]c[tions of [d]ebt[,] [t]res[pass][,] [t]res[pass] upon the [c]ase[,] [d]etinue[,] [e]jectments[,] and other [p]ersonal [a]c[tions,"<sup>418</sup> and the Court of Sessions, which received criminal jurisdiction.<sup>419</sup> Another Dutch practice that did not last was that of permitting married woman to appear in court; certainly by the early eighteenth century, common law rules of coverture were firmly in place.<sup>420</sup> Likewise, it is unclear whether the Dutch practice of admitting account books in evidence if validated by an oath endured; account books kept in the ordinary course of business remained admissible throughout the colonial period, as was true in most colonies and in the London Mayor's Court, but it seems that no oath was required.<sup>421</sup>

New York City was unique in the extent to which true common law permeated the legal system and facilitated the city's effective governance. Elsewhere in the colony of New York, the role of the common law and its lawyers remained marginal as late as the 1680s. The questions for the remainder of this Article are whether common law institutions could expand their jurisdiction over the entire colony and whether the colonial administration could use them as effective tools of governance.

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413. See, e.g., *Roberts's Case* (N.Y. Mayor's Ct. Mar. 8, 1680/81), in *SELECT CASES*, *supra* note 206, at 745.

414. See, e.g., *Coague v. Coale* (N.Y. Mayor's Ct. Apr. 1, 1680), in *SELECT CASES*, *supra* note 206, at 744; *Darvall v. Phillips* (N.Y. Mayor's Ct. Oct. [], 1678), in *SELECT CASES*, *supra* note 206, at 741-42.

415. See, e.g., *Archer v. Tuder* (N.Y. Mayor's Ct. Feb. 2, 1679/80), in *SELECT CASES*, *supra* note 206, at 742-44.

416. See, e.g., *Ashton v. Pattishall* (N.Y. Mayor's Ct. Feb. 25, 1678/79), in *SELECT CASES*, *supra* note 206, at 742.

417. See *Radney v. Gerritz* (N.Y. Mayor's Ct. July 27, 1675), in *SELECT CASES*, *supra* note 206, at 566.

418. Dongan Charter of the City of New York (1686), in 1 *THE COLONIAL LAWS OF NEW YORK*, *supra* note 213, at 194.

419. *Morris*, *supra* note 388, at 47.

420. *Id.* at 25-26.

421. *Id.* at 31-32.

## IV. SECURING THE LAW, BUT WITHOUT ORDER

*A. Law*

Major events, some of them cataclysmic, transformed New York law and politics over the course of ten years starting in 1683. In that year, the Duke of York finally yielded to popular demand and authorized the calling of the colony's first legislative body.<sup>422</sup> A few years later, however, now as King James II, he reneged and merged New York into the Dominion of New England, which he hoped to govern despotically without any legislature whatsoever.<sup>423</sup> Two years later, James was overthrown and his lieutenant governor in New York arrested and shipped back to England. Jacob Leisler, assuming the duties of governor, ruled for two years, until a new governor arrived from England. The new governor promptly had Leisler tried and executed for treason.<sup>424</sup>

Two important pieces of legislation, both of semi-constitutional stature, were enacted around the time of this turmoil. The one was the Charter of Liberties of 1683.<sup>425</sup> After establishing the structure of government, it provided *inter alia* that no freeman should be imprisoned or deprived of freehold “[b]ut by the [l]awful[] [j]udgment of his peers and by the [l]aw of this province,” that no tax be levied without the consent of the legislature, that all trials “be by the verdict of twelve men” of the vicinage, that no troops be quartered, and that no commissions of martial law be issued against civilians.<sup>426</sup> It next provided that “[n]o[] person . . . profess[ing] []faith in God by Jesus Christ . . . be . . . molested [or] punished . . . for any [d]ifference in opinion or [m]atter of [r]eligious [c]oncernment,”<sup>427</sup> after which it specifically conferred legal status on the Congregational religious establishment on Long Island and the existing churches of New York City.<sup>428</sup>

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422. See KAMMEN, *supra* note 96, at 102-03.

423. *Id.* at 105.

424. *Id.* at 126.

425. See The Charter of Libertyes and Priviledges Granted by His Royall Highnesse to the Inhabitants of New Yorke and its Dependencies (Oct. 30, 1683), in 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 213, at 111 [hereinafter Charter of Libertyes]. As Duke of York, James II signed the charter, but less than five months later, after becoming king, he disallowed it. See KAMMEN, *supra* note 96, at 105. Nonetheless, many New Yorkers continued to rely on the Charter and to act as if it remained in force. See HULSEBOSCH, *supra* note 207, at 53-54, 88.

426. Charter of Libertyes, *supra* note 425, at 113-14.

427. *Id.* at 115.

428. *Id.* at 115-16.

The other was the Judicature Act of 1691,<sup>429</sup> as amended by the Judicature Act of 1692,<sup>430</sup> which, in the main, continued in force until the Revolution.<sup>431</sup> This legislation gave individual justices of the peace jurisdiction in petty cases, county-wide courts of general sessions jurisdiction over criminal cases, and county-wide courts of common pleas and the mayor's courts of Albany and New York jurisdiction equivalent to the Court of Common Pleas in England, except over suits involving title to land.<sup>432</sup> Any case in excess of twenty pounds value or involving land title could be commenced in the Supreme Court or appealed to it by way of certiorari, habeas corpus, or writ of error.<sup>433</sup> In all these cases, litigants had a right to have the facts "found by the verdict of twelve men of the [n]eighbourhood as it ought to be done by the [l]aw."<sup>434</sup> Further appeal lay in cases in excess of specified values to the Governor and Council and ultimately to the Privy Council.<sup>435</sup> There was also a separate court of chancery, consisting of the Governor and Council or a specially appointed chancellor.<sup>436</sup> One key difference existed between the 1691 and 1692 Acts: the first provided that the Supreme Court would sit only in New York City, while the second directed it to ride circuit.<sup>437</sup>

Examination of the 1692 Judicature Act along with a short-lived 1683 Act reveals what was at stake in the judiciary's structure. The issue was between local access to and popular control over the law, on the one hand, and centralized authority, ultimately that of the governor, on the

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429. See An Act for the Establishing Courts of Judicature for the Ease and Benefit of Each Respective City Town and County Within this Province (May 6, 1691), in 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 213, at 226 [hereinafter Judicature Act of 1691].

430. An Act for the Establishing Courts of Judicature for the Ease and Benefit of Each Respective City, Towne and County Within the Province (Nov. 11, 1692), in 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 213, at 303 [hereinafter Judicature Act of 1692], *amended by* An Act for Confirming & Continuing an Act of Generall Assembly Entituled an Act for the Establishing Courts of Judicature for the Ease and Benefit of Each Respective City Town and County Within this Province (Oct. 24, 1695), in 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 213, at 359, *amended by* An Act for the Confirming & Continueing Two Acts Passed in the Fifth and Seventh Year of His Majesties Reign for the Establishing Courts of Judicature &[] for One Year Longer After the Times Mentioned in the Said Acts Expired by their Limitation (Apr. 21, 1697), in 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 213, at 380.

431. After 1698, the validity of the court system rested on gubernatorial proclamation. See HULSEBOSCH, *supra* note 207, at 54.

432. Judicature Act of 1692, *supra* note 430, at 303-05.

433. *Id.* at 306.

434. *Id.* at 307.

435. *Id.* at 308.

436. *Id.* at 307-08.

437. Compare Judicature Act of 1691, *supra* note 429, at 229 (stating that the Supreme Court will sit in New York only), with Judicature Act of 1692, *supra* note 430, at 306-07 (directing the Supreme Court to ride circuit).

other.<sup>438</sup> There were two important differences between the 1683 and 1692 Acts. First, the 1683 Act placed town courts, elected by townspeople, rather than county-wide courts with judges chosen by the governor at the base of the judicial hierarchy.<sup>439</sup> Second, the 1683 Act gave county-wide courts of oyer and terminer, consisting of one judge and four local justices of the peace, rather than a colony-wide supreme court, based out of New York City, jurisdiction over appeals from local courts.<sup>440</sup> The 1692 judiciary thus was far more centralized than that of 1683. Moreover, it was centralized in a fashion that its drafters undoubtedly hoped would make central control effective. Recall that the Court of Assizes was under the governor's complete control; he presided over it. It also had broad jurisdiction, including unabridged authority to overturn jury verdicts, over all cases decided below. But, as a result of its inaccessibility and deficiencies in its knowledge of local doings, the Court of Assizes lacked effective power to control the law that lower courts applied. The 1692 Judicature Act sought to solve this problem by requiring the new Supreme Court to ride circuit.<sup>441</sup> It would be accessible to the people of the counties, and it would learn and thereby become able to secure the law those people were employing.

But in return for a highly centralized judiciary, the administration made two concessions, one in 1683 and one in the 1690s. The Duke's Laws, it will be remembered, gave the Court of Assizes over which the governor presided equitable discretion to make law whenever there was no clear preexisting rule;<sup>442</sup> the Charter of Liberties, in contrast, made it plain that "[s]upreme [l]egislative [a]uthority" could be exercised only with the consent of the General Assembly and that the governor could govern only "according to [established] [l]aw[s]."<sup>443</sup> Meanwhile, the 1691 and 1692 Judicature Acts protected the role of juries, which

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438. Compare An Act to Settle Courts of Justice (Nov. 1, 1683), in 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 213, at 125, 127 (allowing greater local access to the court system by establishing town courts and allowing appeals from those courts to be heard by county courts), with Judicature Act of 1692, *supra* note 430, at 303, 306 (creating a more centralized government by establishing local courts at the county level and creating a supreme court where appeals from those courts were heard).

439. Compare An Act to Settle Courts of Justice (Nov. 1, 1683), in 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 213, at 125 (establishing town courts "for the hearing and determining of small causes"), with Judicature Act of 1692, *supra* note 430, at 303 (establishing a county-wide court to be headed by the justice of the peace).

440. Compare An Act to Settle Courts of Justice (Nov. 1, 1683), in 1 THE COLONIAL LAWS OF NEW YORK, *supra* note 213, at 127 (describing the courts of oyer and terminer and their appellate jurisdiction), with Judicature Act of 1692, *supra* note 430, at 306 (establishing the colony-wide appellate jurisdiction of the Supreme Court).

441. Judicature Act of 1692, *supra* note 430, at 306-07.

442. Duke of York's Laws, *supra* note 216, at 44-45.

443. Charter of Liberties, *supra* note 425, at 111.

represented local communities in the litigation process, by declaring explicitly that only juries could determine matters of fact, as well as limiting the judicial role of the Governor and Council to hearing appeals in cases where the amount in controversy exceeded the quite large sum of one hundred pounds and to acting as a court of chancery in cases above the same jurisdictional amount.<sup>444</sup>

Unfortunately, the provisions of the Judicature Acts were somewhat ambiguous. Would the Governor and Council, sitting perhaps as a chancery court, try to assume the same equitable powers, including power to overturn jury verdicts, that the Court of Assizes had exercised in the 1660s, 1670s, and early 1680s? Would governors, in short, use chancery to centralize political power and thereby advance their policies? Or would they allow it to become a professionalized entity possessing only the carefully hedged jurisdiction of the Court of Chancery in England? Similarly, ambiguity existed in the concept of “matter[is of fact]” to be left in the hands of juries.<sup>445</sup> How was one to distinguish matters of fact from mixed questions of law and fact? Would a court be free, that is, to overturn a jury verdict resolving the facts if the jury also had applied law to those facts contrary to what the court thought the law ought to be?

Both issues, pitting centralized power wielded by the Crown against localized power of semi-autonomous communities, would plague New York law for the rest of the colonial period. Let us turn first to chancery.

In establishing a court of chancery, New York’s governors did not rely on the 1691 and 1692 Acts, but on their own prerogative power, specifically ordinances of 1701 and 1704 and a gubernatorial proclamation of 1711.<sup>446</sup> This claimed reliance on prerogative in and of itself raised constitutional objections to the court, which met only sporadically before 1711.<sup>447</sup> When Governor William Burnet used the court in the 1720s to collect quitrents, he only exacerbated the opposition, so much so that his successor, Governor John Montgomerie, who was allied with the anti-prerogative faction, declined to sit as chancellor.<sup>448</sup>

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444. Judicature Act of 1692, *supra* note 430, at 307-08; Judicature Act of 1691, *supra* note 429, at 230-31.

445. Judicature Act of 1692, *supra* note 430, at 307.

446. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 20-21, 178-79 (Julius Goebel Jr. ed., 1964).

447. Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in LAW IN AMERICAN HISTORY 257, 273-74 (Donald Fleming & Bernard Bailyn eds., 1971).

448. *Id.* at 274-76.



The constitutional conflict came to a head under Montgomerie's successor, William Cosby. Between Montgomerie's death and Cosby's arrival, Council President Rip Van Dam had served as acting governor, and, when he refused to give Cosby half of his emoluments in that office, which Cosby claimed were his, Cosby decided to sue.<sup>449</sup> The problem was choosing a court. The Supreme Court seemed inappropriate because of a concern that trial would be to a jury that would likely favor a popular local leader, Van Dam, over a royal governor, as well as a procedural possibility that Van Dam could set off against Cosby's potential recovery any outside revenues Cosby had obtained from the governor's post prior to his arrival. Cosby accordingly decided to sue in equity.<sup>450</sup> He could not sue in chancery, however, since he was the chancellor and could not be judge in his own case.<sup>451</sup>

Cosby invented a solution. He issued an ordinance conferring equity jurisdiction on the exchequer division of the Supreme Court and brought suit there.<sup>452</sup> Cosby's use of the prerogative to advance his personal interest monumentally raised the political stakes, and Chief Justice Lewis Morris, ruling against the prerogative, held that his court lacked jurisdiction and sought to dismiss Cosby's suit.<sup>453</sup> Cosby, in turn, dismissed Morris from office, raising the stakes even further and provoking a debate in the colonial assembly about the constitutionality of prerogative equity.<sup>454</sup>

Cosby then made matters even worse, if that was possible, when he entertained a suit in his own chancery court challenging the title of a group of his political opponents to a large tract of land along the New York-Connecticut border.<sup>455</sup> Cosby's opposition responded with a newspaper campaign alleging that, since most titles in New York were technically imperfect, "there [was] not one patent in the whole [c]ountry for the setting aside of which a cunning [l]awyer [might] not find a [p]retence."<sup>456</sup> The argument continued that, "if a Governour [could] set aside patents without a tr[i]al at [l]aw, a Governour [could] soon make himself master of any man[']s [l]anded [e]state . . . [and] . . . the whole people [would] in consequence soon become tenants at will and slaves to Governours."<sup>457</sup>

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449. *Id.* at 277-78.

450. *Id.* at 278-79.

451. *See id.* at 278.

452. *Id.*

453. *Id.* at 279.

454. *See id.* at 279; *see also* BONOMI, *supra* note 98, at 108-12.

455. Katz, *supra* note 447, at 280.

456. *Id.* at 281.

457. *Id.* at 280.

The debate over chancery consumed Cosby and made him one of the most ineffective governors in New York history.<sup>458</sup> It ended, however, with his death in 1736, and no governor thereafter sought to use the colony's chancery court to centralize political power and achieve gubernatorial policy ends.<sup>459</sup> Controversy over chancery diminished and, after mid-century, the court developed as a professionalized entity possessing the carefully hedged jurisdiction of the Court of Chancery in England.<sup>460</sup> It heard mainly commercial cases arising in the city, dealing with mercantile instruments and issues of accounting, contracts, insurance, and fraud.<sup>461</sup> It also administered mortgage law and enforced testamentary trusts.<sup>462</sup>

Conflict about the role of juries, in contrast, did not subside.<sup>463</sup> Rather, as will appear below, it increased.

In most cases before the 1730s, little conflict occurred between trial judges and juries. Juries returned their verdicts, and judges typically and routinely accepted them. If juries had doubt about the law, they could

458. See BONOMI, *supra* note 98, at 106.

459. Katz, *supra* note 447, at 282.

460. *Id.* at 283.

461. 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY, *supra* note 446, at 181.

462. See *id.*; see also HULSEBOSCH, *supra* note 207, at 59-64 (discussing chancery jurisdiction). Prior to the frequent exercise of the Court of Chancery's power, the Mayor's Court of New York had filled the gap by assuming needed equity jurisdiction. See Morris, *supra* note 388, at 35. One finds occasional entries in the records of law courts of injunctions issued by Chancery. See, e.g., McDermont v. van Schadick (Sup. Ct. Apr. 26, 1774), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 21, 1772-JANUARY 17, 1776, at 153 (rough ed. n.p. n.d.) (on file with the New York County Clerk); Shelby v. Myers (Sup. Ct. Oct. 19, 1764), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JULY 31, 1764-OCTOBER 28, 1767, at 20 (rough ed. n.p. n.d.) (on file with the New York County Clerk); Smith v. Bym (Ct. C.P. Ulster County Sept. 20, 1774), *microformed on* Reel 50 (on file with the Queens Library, Jamaica, N.Y.).

463. Courts gave substantial attention to insuring that the jury selection process was fair. In cases, for example, in which the sheriff was related to one party and the coroner to the other, special elizors were appointed to conduct the discretionary process of jury summoning normally conducted by the sheriff. See Jackson v. Staats (Sup. Ct. Apr. 28, 1764), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: OCTOBER 19, 1762-APRIL 28, 1764, at 428 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk); Stevenson v. Thomas (Ct. C.P. Westchester County Nov. 6, 1759), in RECORD OF THE COURT OF COMMON PLEAS 154 (n.p. n.d.) (on file with the Westchester County Archives). In another case, a potentially interested coroner was directed not to interfere in the jury selection process. See Gale v. Wisner (Sup. Ct. Apr. 24, 1760), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 20, 1756-OCTOBER 23, 1761, at 316 (rough ed. n.p. n.d.) (on file with the New York County Clerk); see also Lyne v. Osborn (Sup. Ct. Apr. 26, 1736), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: MARCH 13, 1732/33-OCTOBER 23, 1739, at 214 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (changing venue in order to achieve an impartial jury). Judges also policed the internal functioning of juries. See Crook v. Homan (Sup. Ct. Oct. 25, 1737), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: MARCH 13, 1732/33-OCTOBER 23, 1739, at 283 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (prohibiting balloting of the jury during deliberations).

return a special verdict, in which they found only the facts and left it to the court to apply the law to the facts;<sup>464</sup> juries returned special verdicts with some frequency.<sup>465</sup> And when conflicts arose in cases employing general verdicts, judges had several procedural devices available at trial to keep control of the law in their hands rather than the hands of the jury.

Thus, numerous post-verdict motions for new trials<sup>466</sup> and in arrest of judgment<sup>467</sup> were granted, although the court records frequently do not state the legal grounds of those motions. At the other end of the litigation, defendants could interpose a demurrer to a plaintiff's action, seeking its dismissal for lack of legal merit even before it reached a jury;<sup>468</sup> plaintiffs similarly could obtain rulings on the legal sufficiency

464. See, e.g., *Hunter v. Schuylor* (Sup. Ct. Oct. 23, 1739), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: MARCH 13, 1732/33-OCTOBER 23, 1739*, at 369 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk).

465. See, e.g., *id.*; *Tuder v. Van Laer* (N.Y. Mayor's Ct. Dec. 21, 1703), in *SELECT CASES, supra* note 206, at 162; *cf. [Illegible] v. Harison* (Sup. Ct. Aug. 2, 1734), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: MARCH 13, 1732/33-OCTOBER 23, 1739*, at 43 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (requesting that the jury identify evidence on which it relied); *Gilbert v. Haynes* (Sup. Ct. Oct. 23, 1733), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: MARCH 13, 1732/33-OCTOBER 23, 1739*, at 66 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (dismissing jury where parties agree to submit case to the court).

466. See, e.g., *Lansnigh v. Jackson* (Sup. Ct. Oct. 22, 1767), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JULY 31, 1764-OCTOBER 28, 1767*, at 269 (rough ed. n.p. n.d.) (on file with the New York County Clerk) (granting a post-verdict motion for a new trial); *Jennings v. Scott* (Ct. C.P. Suffolk County Mar. 1738) (on file with the Suffolk County Clerk); see also *Rushton v. Anderson* (Sup. Ct. Apr. 24, 1733), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: MARCH 13, 1732/33-OCTOBER 23, 1739*, at 29 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (denying motion for new trial); *cf. Crook v. Homan* (Sup. Ct. Apr. 22, 1738), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: MARCH 13, 1732/33-OCTOBER 23, 1739*, at 304 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (fining jurors from the first trial at the conclusion of the new trial).

467. See, e.g., *Bush v. Reynolds* (Ct. C.P. Dutchess County Oct. 17, 1758), *microformed on* Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review); *Nealy v. Peck* (Ct. C.P. Ulster County Nov. 4, 1740), *microformed on* Reel 50 (on file with the Queens Library, Jamaica, N.Y.); *cf. Veenos v. Gerrits* (N.Y. Mayor's Ct. Jan. 16, 1710/11), in *SELECT CASES, supra* note 206, at 173 (granting a motion in arrest of judgment on the ground that weights were expressed in Dutch rather than English measures); *Queen v. Rosenkrans* (Ct. Gen. Sess. Ulster County Sept. 4, 1705), *microformed on* Reel 28, slide 505 (on file with the Queens Library, Jamaica, N.Y.) (seeking a motion in arrest of judgment on the ground that "most of the [j]urors did not[] understand the English tongue"); *Shearman v. Spencer* (N.Y. Mayor's Ct. Nov. 23, 1703), in *SELECT CASES, supra* note 206, at 147 (denying a motion in arrest due to erroneously admitted evidence).

468. See, e.g., *D'Lucnia v. Rambants* (N.Y. Sup. Ct. Oct. 10, 1706), *microformed on* Reel 30, slide 104 (Archival Sys., Inc.) (on file with author); *Fowler v. Hunt* (Ct. C.P. Westchester County Oct. 22, 1745), in *RECORD OF THE COURT OF COMMON PLEAS 57* (n.p. n.d.) (on file with the Westchester County Archives). Many demurrers may have been interposed on procedural grounds, but at least some raised substantive issues about the legal sufficiency of a plaintiff's claims. See, e.g., *Lodge v. Holly* (Sup. Ct. Oct. 25, 1756), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 20, 1756-OCTOBER 23, 1761*, at 371 (rough ed. n.p. n.d.) (on file with the New York County Clerk) (dismissing plaintiff's suit because it was "groundless and contentious");

of defendants' defenses.<sup>469</sup> The most frequently used jury-control device, however, was the demurrer to the evidence, by which one litigant at the close of the other litigant's evidence moved for judgment on the ground the other side's evidence was insufficient as a matter of law to warrant submission of the case to the jury.<sup>470</sup>

*Clarkson v. Elphinston*, a 1729 suit in the Mayor's Court of New York, classically illustrates the use of the demurrer to the evidence.<sup>471</sup> *Clarkson* was an action of assumpsit seeking payment for the delivery to Anne Elphinston of one pipe of Madeira wine.<sup>472</sup> Anne's defense was that she was a married woman and hence could not be sued separately, and she entered into evidence requisite documents and testimony of witnesses to her marriage ceremony at Trinity Church.<sup>473</sup> Clarkson replied that her marriage was void because her claimed husband was already married to a woman in England at the time of the New York ceremony.<sup>474</sup> Three witnesses testified on Clarkson's behalf to their personal contacts with the English wife, to letters between her and Anne's purported New York husband, and even to Anne's knowledge of the English wife, about whom she allegedly said, "[s]he [d]id not [c]are but if Warren[], [her alleged husband,] had ninety nine wives [s]he would make the [h]undredth."<sup>475</sup>

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Elsworth v. Paton (Sup. Ct. Dec. 3, 1723), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JUNE 4, 1723-JUNE 13, 1727, at 58 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (ordering plaintiff to "sh[o]w his cause of [a]ction at the [j]udge[']s [c]hamber"); Vanderpool v. Vandeburgh (Ct. C.P. Albany County June 1765) (on file with the Albany County Clerk) (holding words "actionable" in a defamation case); Bowditch v. Havens (Ct. C.P. Suffolk County Mar. 1742) (on file with the Suffolk County Clerk) (dismissing suit on the ground that the "[p]laintiff had no [j]ust [c]ause to bring this [a]ction").

469. See, e.g., Everitt v. D'Burgh (Ct. C.P. Dutchess County Oct. 17, 1758), *microformed on* Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review).

470. See, e.g., Bayan v. Williams (Sup. Ct. July 31, 1754), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: OCTOBER 16, 1750-APRIL 21, 1756, at 200 (rough ed. n.p. n.d.) (on file with the New York County Clerk); Hammond v. Torry (Ct. C.P. Suffolk County Oct. 1769) (on file with the Suffolk County Clerk); Magin v. Herkimer (Ct. C.P. Albany County July 1769) (on file with the Albany County Clerk); Cleament v. Johnson (Ct. C.P. Westchester County May 25, 1749), in RECORD OF THE COURT OF COMMON PLEAS 79 (n.p. n.d.) (on file with the Westchester County Archives); cf. Bensen v. Griffiths (Ct. C.P. Albany County Jan. 1771) (on file with the Albany County Clerk) (overruling an objection to a written record and admitting the record into evidence); Porter v. Elwell (Ct. C.P. Dutchess County Jan. 6, 1767), *microformed on* Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review) (overruling an objection to the admission of a printed act of legislature as distinguished from a certified copy).

471. (N.Y. Mayor's Ct. Oct. 28, 1729), in SELECT CASES, *supra* note 206, at 217.

472. *Id.*

473. *Id.* at 218-19.

474. *Id.* at 219-20.

475. *Id.* at 220.

Anne filed a demurrer to this evidence, claiming that it was “not sufficient in [l]aw to [d]isprove the [e]vidence” she had introduced of her marriage.<sup>476</sup> The plaintiff responded that “the [m]atter for the [j]ury to try was a [m]atter of fact properly tr[i]able by them” and that the jurors “were [the] sole [j]udges” of “whether the [e]vidence given [was] [s]ufficient.”<sup>477</sup> He requested the court so to direct the jury. “[B]ut the [c]ourt [r]efused to give [s]uch [d]irections and ordered that the plaintiff [d]o [j]oin in [d]emurrer or waive his . . . [e]vidence,” thereby removing the case from the jury’s purview.<sup>478</sup> At a subsequent term it ruled on the merits in Clarkson’s favor that Anne was not married and hence was liable on the contract.<sup>479</sup>

On at least three other occasions, trial courts engaged in even stronger, though quite irregular, manhandling of juries. In the first case, a civil suit for a battery, “[t]he [c]ourt [would] not [c]ertify upon the [r]ecord that the [b]attery was proved, [it] not being [s]ufficiently proved,” and, although it did not set aside the jury’s verdict awarding damages to the plaintiff, it refused to award costs.<sup>480</sup> In the second case, also for a civil battery, the court “upon view of the wound” increased the jury’s damage award five times.<sup>481</sup> The third case, a criminal prosecution, was most extreme: “[t]he [c]ourt demur[red] upon [th]e verdict of [th]e jury [and could] not agree w[i]th them, therein, it having in [th]e opinion of [th]e whole court appeared [tha]t [th]e evidences given . . . fully prove[d]” the charge.<sup>482</sup> In this case, the court did not dare hold the defendant guilty, but it did set aside the jury verdict of not guilty and did remit the defendant to custody until the next term.<sup>483</sup>

Trial judges thus possessed ample procedures with which to control juries.<sup>484</sup> It was unclear, however, whether they were prepared to use them. Thus, one chief justice in an early eighteenth-century case

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476. *Id.*

477. *Id.* at 221.

478. *Id.*

479. *Id.* at 222-23.

480. *Boyvanke v. Carroll* (N.Y. Sup. Ct. Oct. 13, 1705), *microformed on* Reel 30, slide 45 (Archival Sys., Inc.) (on file with author). *But see* *Emmons v. Veal* (Ct. C.P. Westchester County Oct. 7, 1747), *in* RECORD OF THE COURT OF COMMON PLEAS 70 (n.p. n.d.) (on file with the Westchester County Archives) (certifying that “[b]attery was fully proved in order to [e]ntitle the pl[aintiff] to full costs”).

481. *Dingman v. Philip* (Ct. C.P. Albany County Jan. 18, 1770) (on file with the Albany County Clerk).

482. *Queen v. Fisher* (Ct. Gen. Sess. Westchester County June 5, 1711), *in* LIBER D 12 (n.p. n.d.) (on file with the Westchester County Archives).

483. *Id.*

484. *See* DEBORAH A. ROSEN, COURTS AND COMMERCE: GENDER, LAW, AND THE MARKET ECONOMY IN COLONIAL NEW YORK 181 n.21 (1997).

instructed a jury that “if [y]ou will take upon you to judge of [l]aw, you may, or bring in the fact specially,”<sup>485</sup> while three decades later another judge told a jury that the evidence against defendants warranted a conviction “if you have no particular reasons in your own breasts, in your own consciences to discredit them.”<sup>486</sup> These judges, and others as well, were quite willing to let juries determine the law. Even more unclear was whether officials of the central administration in New York City could piggyback on the power of trial judges in their effort to impose imperial policies on the colony—whether the Crown, in short, could control local trial judges.

The simplest form of control would have been the governor’s appointment and removal power, but by mid-century that power had atrophied. The removal power arguably disappeared entirely after Governor Cosby discharged Chief Justice Morris: the commission of Morris’s successor, James DeLancey, and of several other judges explicitly granted them tenure during good behavior, and all judges may have had such tenure by implication once DeLancey obtained it.<sup>487</sup> Moreover, the governor did not possess a free hand in the appointment process; he appointed judges at the county level following nomination by the assembly, which almost certainly meant nomination by local assemblymen.<sup>488</sup> The assembly had even further influence over judges, in that it controlled their remuneration.<sup>489</sup> Another device used with some frequency—proceedings against local judges<sup>490</sup> and other

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485. GOEBEL & NAUGHTON, *supra* note 49, at 666 (quoting Makemies Tryal: A Particular Narrative of the Imprisonment of Two Non-conformist Ministers; and Prosecution or Tryal of One of Them, for Preaching a Sermon in the City of New-York, in 4 TRACTS AND OTHER PAPERS, RELATING PRINCIPALLY TO THE ORIGIN, SETTLEMENT, AND PROGRESS OF THE COLONIES IN NORTH AMERICA, FROM THE DISCOVERY OF THE COUNTRY TO THE YEAR 1776, No. 4, at 44 (Peter Force ed., Washington, Wm. Q. Force 1847) [hereinafter Makemie’s Trial] (quoting Chief Justice Mompesson’s charge in *Queen v. Makemie* (N.Y. Sup. Ct. 1707))).

486. GOEBEL & NAUGHTON, *supra* note 49, at 667 (quoting DANIEL HORSMANDEN, THE NEW-YORK CONSPIRACY 120 (New York, Southwick & Pelsue 2d ed. 1810) (quoting Chief Justice Horsmanden’s charge in the Trial of the Hughsons)).

487. HULSEBOSCH, *supra* note 207, at 59, 67, 127.

488. *Id.* at 120.

489. *See id.* at 120, 127.

490. *See, e.g.,* *King v. Vroman* (Sup. Ct. Oct. 26, 1752), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: OCTOBER 16, 1750-APRIL 21, 1756, at 195 (rough ed. n.p. n.d.) (on file with the New York County Clerk); *King v. Justices of Queens County* (Sup. Ct. June 5, 1724), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JUNE 4, 1723-JUNE 13, 1727, at 83 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk); *cf. King v. Van Kleeck* (Sup. Ct. Apr. 30, 1763), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: OCTOBER 19, 1762-APRIL 28, 1764, at 175 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (ordering defendant to explain failure of Dutchess justices to proceed against alleged robbers).

officials<sup>491</sup> for failure to perform the duties of their office—superficially appears to have provided a means of centralized control, but it was used only in cases of egregious misconduct.

Therefore it became necessary to exercise control through the appeals process—the process by which higher courts, mainly the Supreme Court, but ultimately the Governor and Council and the Privy Council, controlled lower courts. If appellate courts sitting without juries could review the entirety of the proceedings below, they would have even more power over jury verdicts than trial judges. If, on the other hand, they could review only what was contained in the record below, their power would be limited by the scope of that record.

Three writs existed for transferring cases from a lower to a higher court—habeas corpus, certiorari, and error. In addition, transfer of criminal cases could occur prior to verdict through more informal procedures.<sup>492</sup>

Habeas corpus lay to transfer jurisdiction over a litigant from a lower to a higher court at any time prior to final judgment.<sup>493</sup> But it could only be used if the lower court had sufficient control over the body of a litigant to deliver that control to the higher court—that is, if a litigant was in custody or had given bail to insure his or her appearance.<sup>494</sup> That requirement somewhat limited the utility of the writ. It could only be used in criminal cases and in civil actions instituted by *capias* rather than attachment of property.<sup>495</sup> In addition, habeas presented another problem: it did not allow a litigant to seek victory in a lower court and appeal only if he lost; he or she would have had to waive whatever opportunities the lower court offered.<sup>496</sup> Finally, since

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491. See, e.g., Att’y Gen. v. Supervisors of Ulster County (Sup. Ct. Apr. 28, 1737), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: MARCH 13, 1732/33-OCTOBER 23, 1739, at 261 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk); King v. Mayor of New York (Sup. Ct. June 13, 1727), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JUNE 4, 1723-JUNE 13, 1727, at 276 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk).

492. See MOGLEN, *supra* note 248, at 182-84.

493. See, e.g., Habeas Corpus of Underhill (Ct. C.P. Westchester County Nov. 1, 1768), in RECORD OF THE COURT OF COMMON PLEAS 218 (n.p. n.d.) (on file with the Westchester County Archives).

494. See Habeas Corpus of Haight (Ct. C.P. Dutchess County Jan. 7, 1766), *microformed on* Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review) (declaring that the court cannot “have the body” before the Supreme Court, “the said . . . Haight not being a defendant in any action depending in this court”).

495. See Edward Jenks, *The Story of the Habeas Corpus*, 18 L.Q. REV. 64, 67-68 (1902).

496. See Frank v. Mangum, 237 U.S. 309, 330 (1915) (“The rule at the common law . . . seems to have been that a showing in the return to a writ of *habeas corpus* that the prisoner was held under final process based upon a judgment or decree of a court of competent jurisdiction, closed the inquiry.”).

habeas was used invariably before juries began deliberation, it could not serve as a device for controlling jury law-finding.<sup>497</sup>

The writs of certiorari<sup>498</sup> and error<sup>499</sup> were available to all litigants—certiorari before and error after final judgment—but brought only the record of the proceedings below before the appellate court. Matters outside the record, such as jury verdicts, were not within the scope of the writs.<sup>500</sup> The appellate process, at least as it existed in mid-century, accordingly did not enable central authorities to control either juries or more generally the outcome of proceedings below.

The capacity to review the record did enable central courts, however, in conjunction with New York City's legal profession, to impose common law procedural formalities, which are the main component of any common law record, on localities. And, inasmuch as a good deal of substantive common law was embraced within the interstices of procedure, that too, as will appear below, triumphed throughout the colony.

Julius Goebel and T. Raymond Naughton have exhaustively studied criminal law and procedure in colonial New York, and no subsequent scholar ever has or will match the depth of their research.<sup>501</sup> In their view, criminal "law administration in New York rapidly [came] to

497. See WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 172, at 253-55 (San Francisco, Bancroft-Whitney Co. 2d ed. 1893) (noting that under the common law, judges decided questions of law and fact with respect to writs of habeas corpus).

498. See, e.g., King v. Little (Sup. Ct. Mar. 15, 1727/28), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JUNE 4, 1723-JUNE 13, 1727, at 35 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk); Soaper v. Platt (Sup. Ct. Mar. 15, 1711/12), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JUNE 6, 1710-JUNE 5, 1714, at 375 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk); cf. Edminster v. West (Sup. Ct. Oct. 21, 1773), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 21, 1772-JANUARY 17, 1776, at 123 (rough ed. n.p. n.d.) (on file with the New York County Clerk) (summoning a justice for contempt for issuing execution after certiorari had been granted); King v. Schnyder (Sup. Ct. Apr. 16, 1758), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 20, 1756-OCTOBER 23, 1761, at 92 (rough ed. n.p. n.d.) (on file with the New York County Clerk) (ordering clerk to return record on certiorari).

499. See, e.g., Levy v. Rollins (Sup. Ct. Oct. 15, 1726), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JUNE 4, 1723-JUNE 13, 1727, at 216 (rough ed. n.p. n.d.) (on file with the New York County Clerk); Codington v. Philipse (Sup. Ct. June 2, 1725), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JUNE 4, 1723-JUNE 13, 1727, at 142 (rough ed. n.p. n.d.) (on file with the New York County Clerk); cf. Wendell v. Vroisman (Sup. Ct. April 26, 1736), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: MARCH 13, 1732/33-OCTOBER 23, 1739, at 216 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (ordering the Albany Court of Common Pleas to show cause why it did not return writ of error).

500. See CHURCH, *supra* note 497, § 172, at 254.

501. See GOEBEL & NAUGHTON, *supra* note 49, at xiii-xiv; see also Daniel J. Boorstin, Book Review, 53 YALE L.J. 822, 822 (1944) (characterizing Goebel and Naughton's work as "the richest store of material yet to be gathered on the difficult subject of the reception of English common law in America").



resemble that in England,” with practice in the Supreme Court becoming “comparable with that in King’s Bench” and in sessions courts “the same . . . as . . . in English Quarter Sessions.”<sup>502</sup> Collectively, judges dealt with the usual run of cases, such as homicide, theft, assault, counterfeiting, receiving stolen goods, fraud, perjury, and maladministration by public officials.<sup>503</sup> Political offenses, such as treason, riot, sedition, and contempt of court, likewise remained matters of major concern.<sup>504</sup>

But prosecutions for sin, vice, and immorality atrophied. Presentments for fornication and bastardy became “very rare” after the middle of the eighteenth century, as individual justices of the peace discharged accused fathers as long as they posted a bond to support their child.<sup>505</sup> Goebel and Naughton found early indictments for adultery and gambling and unusual prosecutions for religious offenses, such as blasphemy, sacrilege, and dissenters preaching without a license,<sup>506</sup> but few such indictments from mid-century on.<sup>507</sup> Similarly the last indictment in the New York City Mayor’s Court of a woman for being a common scold occurred in 1733.<sup>508</sup>

More importantly, English criminal procedure superseded that of the Dutch. The “procedural apparatus [of the common law criminal process] was set up with rapidity and nearly in its entirety,” as colonial New Yorkers became “aware that justice not dispatched by tested instruments was vulnerable” and “that proper forms were the sinews of the individual’s protection.”<sup>509</sup> The “[g]rand [b]ulwark of . . . [f]reedom [and] [s]afety, the tr[i]al by [j]ury,”<sup>510</sup> along with “motions to postpone trial, presentments put into indictment form[,] and . . . motion[s] in arrest based upon nice technical reasons, testify to the extent of common law procedural reception.”<sup>511</sup> Local prosecutors to represent the Crown in criminal proceedings were appointed at least from the outset of the

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502. GOEBEL & NAUGHTON, *supra* note 49, at 59; *see also id.* at 413 (noting the importance of studying the history of court processes in order “to ascertain when the common law itself[] and the practices of English superior courts displace[d] the replicas of English country practices”).

503. *Id.* at 76, 98-99.

504. *See id.* at 76.

505. *Id.* at 102-03.

506. *See id.* at 77 n.105a.

507. *See id.* at 102.

508. *See King v. Tingley* (N.Y. Mayor’s Ct. June 12, 1733), in SELECT CASES, *supra* note 206, at 746. I have not examined in full the Mayor’s Court files, and perhaps later cases, of which Morris did not take note, exist.

509. GOEBEL & NAUGHTON, *supra* note 49, at xxv.

510. *Id.* at 607 (quoting a letter from Attorney General J.T. Kempe).

511. *Id.* at xxv.

1700s.<sup>512</sup> The use of torture, placing people in irons, multiple prosecutions for the same offense, and unlimited powers of search and seizure disappeared.<sup>513</sup> Judicial power in the criminal process, while still vast, became limited.

The turn to common law similarly narrowed the regulatory power that New York judges had inherited from the Dutch. Administrative jurisdiction, especially that of the courts of general sessions, became more like that of the town courts in the New England settlements surrounding New Amsterdam and that of the sessions courts in other British North American colonies.<sup>514</sup>

One subject with which New York judges, like those in many other colonies, remained deeply involved was slavery. New York had the largest slave population north of the Chesapeake, and, especially in New York City, where slaves were employed mainly in urban, nonagricultural pursuits, slaves had considerable mobility. White New Yorkers lived in terror of slave rebellion, and a number of alleged slave conspiracies were prosecuted, most notably one in 1741 that resulted in the burning at the stake of thirteen blacks and the hanging of seventeen others.<sup>515</sup> The fear of rebellion led the legislature to enact a slave code that, like those in the south, required slaves to have passes to travel, prohibited them from selling goods, and regulated their possession and use of guns.<sup>516</sup> On the other hand, courts protected slaves from cruelty and tyrannical abuse and required masters to provide them with adequate food and clothing, even

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512. See, e.g., *In re* Appointment of Cossins (Ct. Gen. Sess. Ulster County Sept. 4, 1705), *microformed on* Reel 28, slide 505 (on file with the Queens Library, Jamaica, N.Y.).

513. For two cases refusing to grant officials standing power to search, see Motion of Attorney General for Writs of Assistance (Sup. Ct. Jan. 23, 1773), *in* NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 21, 1772-JANUARY 17, 1776, at 70 (rough ed. n.p. n.d.) (on file with the New York County Clerk), and Motion for Standing Writ of Assistance (Sup. Ct. Apr. 21, 1772), *in* NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 21, 1772-JANUARY 17, 1776, at 3 (rough ed. n.p. n.d.) (on file with the New York County Clerk). *But see In re* Elliot (Sup. Ct. Apr. 28, 1768), *in* NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: OCTOBER 21, 1766-JANUARY 21, 1769, at 453 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (granting writ of assistance “agreeable to an Act of Parliament”).

514. See *supra* Part II.

515. See BURROWS & WALLACE, *supra* note 277, at 159-63; KAMMEN, *supra* note 96, at 283-86; WILLIAM E. NELSON, *FIGHTING FOR THE CITY: A HISTORY OF THE NEW YORK CITY CORPORATION COUNSEL 7-12* (2008). The 1741 prosecutions, in particular, have been the subject of vast scholarship, including several recent works. See MARK S. WEINER, *BLACK TRIALS: CITIZENSHIP FROM THE BEGINNINGS OF SLAVERY TO THE END OF CASTE 52-69* (2004). See generally PETER CHARLES HOFFER, *THE GREAT NEW YORK CONSPIRACY OF 1741: SLAVERY, CRIME, AND COLONIAL LAW* (2003); JILL LEPORE, *NEW YORK BURNING: LIBERTY, SLAVERY, AND CONSPIRACY IN EIGHTEENTH-CENTURY MANHATTAN* (2005).

516. KAMMEN, *supra* note 96, at 283-84.

when they became aged or infirm.<sup>517</sup> Even more importantly, perhaps, judges protected free blacks: one sheriff, for instance, was ordered “not [to] detain . . . in his custody[,] under pretence of his being a [s]lave,” a man who had been adjudged by the court to be free.<sup>518</sup> Courts also sanctioned the manumission of slaves on condition that someone give a bond to save municipalities from any obligation of support.<sup>519</sup>

Mid-eighteenth-century New York judges, like those in other British North American colonies, also continued to supervise the administration of the poor law by local officials,<sup>520</sup> build and maintain bridges and highways,<sup>521</sup> police elections,<sup>522</sup> naturalize immigrants from foreign countries,<sup>523</sup> appoint administrators<sup>524</sup> and guardians,<sup>525</sup> and

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517. *Id.* at 284. Kammen attributes this solicitude for slaves to masters’ property interest in their slaves. *Id.* For a clear example of a master seeking to protect his property interest by seeking compensation for a slave executed for a crime, see *In re Dunham* (Ct. Gen. Sess. Westchester County Dec. 2, 1719), in LIBER D 93-94 (n.p. n.d.) (on file with the Westchester County Archives), and *In re Dunham* (Ct. Gen. Sess. Westchester County Jan. 7, 1713/14), in LIBER D 36a-36b (n.p. n.d.) (on file with the Westchester County Archives).

518. *In re Malungo* (Sup. Ct. July 29, 1763), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: OCTOBER 19, 1762-APRIL 28, 1764, at 222 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk); see also *In re Primus* (Ct. Gen. Sess. New York County Nov. 6, 1754), microformed on Reel 2 (Archival Sys., Inc.) (on file with author) (finding that applicant is a free man).

519. See, e.g., *In re Manumission of Toby* (Ct. Gen. Sess. New York County May 6, 1766), microformed on MN No. 10002, Roll 2 (Archival Sys., Inc.) (on file with author); *In re Manumission of Jansen* (Ct. Gen. Sess. Dutchess County May 17, 1763), microformed on Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review); *In re Manumission of Christian* (Ct. Gen. Sess. Ulster County Nov. 4, 1740), microformed on Reel 50 (on file with the Queens Library, Jamaica, N.Y.).

520. See, e.g., *Overseers of the Poor of Southold v. Overseers of the Poor of Easthampton* (Ct. Gen. Sess. Suffolk County Mar. 27, 1771) (on file with the Suffolk County Clerk); *King v. Rolph* (Sup. Ct. July 29, 1757), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 20, 1756-OCTOBER 23, 1761, at 74 (rough ed. n.p. n.d.) (on file with the New York County Clerk); cf. *In re Oliver* (Ct. Gen. Sess. Ulster County Sept. 16, 1746), microformed on Reel 50 (on file with the Queens Library, Jamaica, N.Y.) (directing parents unable to support children to “put [them] out”); *In re Brown* (N.Y. Mayor’s Ct. Mar. 20, 1715/16), in SELECT CASES, *supra* note 206, at 68 (striking “[a] lew[.]d [w]oman” off the poor relief rolls).

521. See, e.g., *In re Inhabitants of Rhinebeck* (Ct. Gen. Sess. Dutchess County Oct. 18, 1757), microformed on Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review); Order Regarding the Building of a Bridge Over the Hutchinson River (Ct. Gen. Sess. Westchester County Dec. 1, 1715), in LIBER D 55 (n.p. n.d.) (on file with the Westchester County Archives).

522. See *In re Undue Election* (Ct. Gen. Sess. Dutchess County May 19, 1761), microformed on Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review); cf. *In re Cooke* (Ct. Gen. Sess. Dutchess County May 17, 1770), microformed on Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review) (discharging Cooke from service in elected office); *In re Appointment of Wright* (N.Y. Mayor’s Ct. Mar. 3, 1751/52), in SELECT CASES, *supra* note 206, at 71 (appointing a midwife).

523. See, e.g., *In re Naturalization of Adolphus* (Sup. Ct. July 27, 1758), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 20, 1756-OCTOBER 23, 1761, at 104 (rough ed. n.p. n.d.) (on file with the New York County Clerk) (noting that Adolphus was Jewish); *In re Naturalization of Jacobi* (N.Y. Sup. Ct. Jan. 15, 1750/51), microformed on Reel 31 (on file with

resolve disputes between masters and apprentices.<sup>526</sup> Magistrates in New York City had some additional duties, such as regulating use of public wells<sup>527</sup> and maintaining the night watch.<sup>528</sup>

But old Dutch patterns of intrusive regulation of the details of everyday life disappeared. An important subject over which the courts had lost nearly all jurisdiction by the end of the colonial era was Native American affairs.<sup>529</sup> In part, the loss of jurisdiction resulted from the extirpation of Native Americans in New York City and surrounding regions. But the Iroquois remained a major presence in the north, and in this connection the Crown consciously took jurisdiction away from local courts and conferred it on a superintendent of Indian affairs, William Johnson.<sup>530</sup> Initially, Johnson still had to resort to courts to prosecute individuals violating his directives, but during the final decades of the colonial period he worked hard, though without great success, to bypass common law courts and juries in cases involving Native Americans

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author) (noting upon production of his certificate that an immigrant “ha[d] received the sacrament within three months”); *In re* Naturalization of Sevenbergh (Ct. Gen. Sess. New York County May 7, 1755), *microformed on* Reel 2 (Archival Sys., Inc.) (on file with author).

524. *See, e.g., In re* Appointment of Cooper (Ct. Gen. Sess. Dutchess County May 18, 1762), *microformed on* Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review); *In re* Appointment of Cloves (Ct. C.P. Suffolk County Apr. 1, 1725) (on file with the Suffolk County Clerk). Relatives of a decedent were entitled to first preference as administrators, followed by an estate’s principal creditor. *See In re* Renunciation of Hogg (Ct. C.P. Dutchess County May 18, 1756), *microformed on* Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review).

525. *See, e.g., In re* Guardian of Clarke (Ct. C.P. Suffolk County Mar. 1731) (on file with the Suffolk County Clerk); *cf. In re* Cear (Ct. Gen. Sess. Westchester County Jan. 3, 1720), *in* LIBER D 107 (n.p. n.d.) (on file with the Westchester County Archives) (guardian requests to remain after ward attains age of twenty-one since ward “[was] not capable of himself[] now when he comes [of] age to make bargain[]s for his own maint[e]nance”); *In re* Kirkpatrick (Ct. Gen. Sess. Westchester County Oct. 2, 1716), *in* LIBER D 63-64 (n.p. n.d.) (on file with the Westchester County Archives) (directing a husband to confine his “lunatic[]” wife, who was “disturbed with an evil[] spirit[],” at home at his expense).

526. *See, e.g., In re* Ostrander (Ct. Gen. Sess. Dutchess County May 1, 1765), *microformed on* Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review); *In re* Reeves (Ct. Gen. Sess. Suffolk County Mar. 28, 1732) (on file with the Suffolk County Clerk); *In re* Moore (Ct. Gen. Sess. N.Y. County Aug. 3, 1720), *microformed on* Reel 1, slide 376 (Archival Sys., Inc.) (on file with author); *Troop v. Bouquett* (N.Y. Mayor’s Ct. Feb. 20, 1710/11), *in* SELECT CASES, *supra* note 206, at 182-84. Richard Morris discusses the subject of apprenticeship at some length. *See* Morris, *supra* note 388, at 27-31. Michael Kammen, who has examined cases statistically, finds that the judiciary was “remarkably sympathetic” to apprentices and other complaining servants. KAMMEN, *supra* note 96, at 183.

527. *See In re* Appointment of Van Hook (Ct. Gen. Sess. N.Y. County Feb. 1, 1763), *microformed on* MN No. 10002, Roll 2 (Archival Sys., Inc.) (on file with author).

528. *See* Order Regarding Night Watch (Ct. Gen. Sess. N.Y. County May 3, 1698), *microformed on* Reel 1, slides 35-36 (Archival Sys., Inc.) (on file with author).

529. *See* HULSEBOSCH, *supra* note 207, at 106-17.

530. *Id.* at 79-80.

against whom, he believed, whites were consumed by prejudices of which they were not even fully aware.<sup>531</sup>

New York courts also stopped using criminal law to regulate marriage; thus, when Governor William Cosby's daughter, while under the age of eighteen, married without his consent and without prior publication of the banns, his only remedy—and one of questionable legality—was an action of trespass against the minister who married her on the theory that the minister had entered Cosby's house at night and removed Cosby's daughter without Cosby's consent.<sup>532</sup> And, after a case in Albany in the 1690s, one no longer finds judges ordering wives "to go and live" with their husbands;<sup>533</sup> the happiness of husbands and wives became a private matter, not one fit for judicial scrutiny. Similarly, the New Amsterdam Orphan Chamber,<sup>534</sup> which had monitored the care taken by guardians of their wards, passed out of existence, and the guardian-ward relationship became an essentially private one,<sup>535</sup> subject only theoretically to a common law action of waste by a ward who, after attaining the age of twenty-one, found his assets had been dissipated.

Government control of religion, which had been declining since the English conquest in 1664,<sup>536</sup> also came to an end after a 1707 case arising out of Governor Edward Cornbury's denial of a preacher's license to Francis Makemie, a Presbyterian minister from Philadelphia.<sup>537</sup> When Makemie preached anyway, Cornbury had him prosecuted.<sup>538</sup> The basis for the prosecution was Cornbury's instructions, and the core issue in the case was whether the Crown's instructions to its governor had the force of law, particularly if they were never formally published.<sup>539</sup> When Makemie first sought the license from Cornbury, he

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531. *See id.* at 106-17. In fact, English efforts to take jurisdiction over Native American affairs away from local courts and place it in the hands of separate commissioners dated back at least to the 1670s. *See* MERWICK, *supra* note 101, at 37.

532. *See* *Cosby v. Campbell* (N.Y. Mayor's Ct. June 2, 1733), in *SELECT CASES*, *supra* note 206, at 407-08.

533. *In re Vanobsida* (Albany Mayor's Ct. Feb. 1696/97) (on file with the Albany County Clerk). In a somewhat later case, a husband was ordered to allow his wife and children to live in the "great [r]oom of his dwelling house," but the stated purpose of that order was to prevent them from becoming public charges. *In re Delamontagno* (Ct. Gen. Sess. New York County May 3, 1709), *microformed on Reel 1*, slide 160 (Archival Sys., Inc.) (on file with author).

534. For an excellent article on the institution, see generally Adriana E. van Zwieten, *The Orphan Chamber of New Amsterdam*, 53 WM. & MARY Q. 319 (1996).

535. *Id.* at 339 & 339-40 n.72.

536. *See supra* note 225 and accompanying text.

537. KAMMEN, *supra* note 96, at 157-58.

538. Makemie's Trial, *supra* note 485, at 7-8.

539. *Id.* at 9-26; *see also* GOEBEL & NAUGHTON, *supra* note 49, at 666, 669; KAMMEN, *supra* note 96, 157-58. For a more recent and revisionist perspective, see PATRICIA U. BONOMI, *THE LORD*

had told the Governor, “[y]our instructions are no law to me,”<sup>540</sup> and when Chief Justice Roger Mompesson instructed the jury, he was “not . . . prepared to answer[] [h]ow far [i]nstructions may go[] in having the force of a [l]aw.”<sup>541</sup> He accordingly invited the jury to “bring in the fact specially” or itself to “judge of [l]aw,”<sup>542</sup> and, when the jury returned a general verdict of not guilty and thereby determined the law by itself, Cornbury’s instructions and his claimed right to license clergymen became a dead letter.<sup>543</sup> The only religious regulations remaining were 1693 legislation requiring all residents of New York, Queens, Richmond, and Westchester counties, except members of the Dutch Reformed Church, to pay taxes to support an Anglican establishment<sup>544</sup> and a practice on the part of justices of the peace of designating buildings as meeting places for dissenting congregations.<sup>545</sup>

Land use regulation likewise atrophied. While a prosecutor could still indict a landowner for nuisance if that owner caused tangible damage to his neighbors, as, for example, by maintaining a building that was so dilapidated that it might collapse,<sup>546</sup> there was no longer a need to obtain approval of building plans prior to construction, nor was there any objection to keeping land vacant and holding it for speculation.

Finally, economic regulation declined. Courts no longer required people to obtain a license before entering most occupations, and they ceased completely to regulate wages. Although regulation of the price of bread continued into the 1700s,<sup>547</sup> courts ultimately got entirely out of

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CORNBURY SCANDAL: THE POLITICS OF REPUTATION IN BRITISH AMERICA 71-72 (1998). Bonomi’s account raises no issues regarding the legal matters discussed herein in the text.

540. KAMMEN, *supra* note 96, at 157; *see* Makemie’s Trial, *supra* note 485, at 9.

541. Makemie’s Trial, *supra* note 485, at 44.

542. *Id.*

543. *Id.*

544. *See* KAMMEN, *supra* note 96, at 220-21. Dutch Reformed congregants paid taxes to their own ministers. *See id.* at 221.

545. *See In re Phillips* (Ct. Gen. Sess. New York County Feb. 1715/16), *microformed on Reel 1* (Archival Sys., Inc.) (on file with author).

546. *See King v. Beekman* (Sup. Ct. Oct. 25, 1757), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: April 20, 1756-October 23, 1761*, at 84 (rough ed. n.p. n.d.) (on file with the New York County Clerk); *see also In re Att’y Gen.* (N.Y. Sup. Ct. Jan. 19, 1771), *microformed on Reel 34* (Archival Sys., Inc.) (on file with author) (directing the sheriff “to prostrate without delay the Oswego Market[,] a [n]u[is]sance”); *King v. Travis* (Ct. Gen. Sess. Westchester County Dec. 8, 1714), in *LIBER D 45* (on file with the Westchester County Archives) (indicting defendant for “keeping a wide house”).

547. The Mayor’s Court of New York fixed bread prices as late as 1736. *See Ordering the Assize of Bread* (N.Y. Mayor’s Ct. Apr. 6, 1736), in *SELECT CASES*, *supra* note 206, at 67. Prosecutions for violating the assize, however, appear to have ceased two decades earlier. *See, e.g., Rex v. Thurman* (Ct. Gen. Sess. New York County May 3, 1715), in *COURT OF GENERAL AND QUARTER SESSIONS OF THE PEACE 1694-1731*, at 286 (n.p. n.d.) (on file with the New York County Clerk); *Regina v. Kingston* (Ct. Gen. Sess. New York County May 2, 1704), *microformed on Reel*

the business of setting commodity prices. Long before the middle of the eighteenth century, they had come to the understanding that “the price of goods . . . must be regulated . . . as parties on both sides can agree.”<sup>548</sup>

The common law also superseded Dutch law in the realm of civil procedure and, as far as the sources reveal, private law more generally. The Courts of Common Pleas, along with the noncriminal docket of the Supreme Court, became repositories of common law technicality. Thus, one finds writs of *assumpsit*,<sup>549</sup> along with the proper plea of the general issue of “did not [a]ssume”,<sup>550</sup> case,<sup>551</sup> covenant,<sup>552</sup> debt,<sup>553</sup> along with the proper general issue of “do[es] not [o]we”,<sup>554</sup> dower,<sup>555</sup> ejectment,<sup>556</sup> replevin,<sup>557</sup> trespass,<sup>558</sup> and trover.<sup>559</sup> One plaintiff was nonsuited when

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1, slide 88 (Archival Sys., Inc.) (on file with the author). A criminal conspiracy prosecution brought in 1741 against a combination of bakers who refused to bake and sell bread at the price set by the assize resulted in a not guilty verdict and thereby confirmed marketplace freedom. *See* KAMMEN, *supra* note 96, at 214.

548. *In re Sandor* (Ct. Gen. Sess. Ulster County May 7, 1745), *microformed* on Reel 50 (on file with the Queens Library, Jamaica, N.Y.); *see also* ROSEN, *supra* note 484, at 74-92.

549. *See, e.g.,* Van Sligtenhorst v. Rosenkrans (Ct. C.P. Ulster County Sept. 7, 1705), *microformed* on Reel 28, slide 507 (on file with the Queens Library, Jamaica, N.Y.). *See* SELECT CASES, *supra* note 206, at 419-510, for examples of the vast variety of *assumpsit* writs brought in the Mayor’s Court.

550. *Tohill v. Van Duerse* (N.Y. Mayor’s Ct. Aug. 15, 1710), *in* SELECT CASES, *supra* note 206, at 114-16; *Rosenkrans v. Sligtenhorst* (Ct. C.P. Ulster County Oct. 15, 1705), *microformed* on Reel 28, slide 507 (on file with the Queens Library, Jamaica, N.Y.).

551. *See, e.g.,* Ferrile v. Sell (Ct. C.P. Suffolk County Sept. 26, 1728) (on file with the Suffolk County Clerk); *Williams v. Jourdain* (N.Y. Mayor’s Ct. Apr. 25, 1721), *in* SELECT CASES, *supra* note 206, at 370.

552. *See* *Nixon v. Brinkerhoff* (Ct. C.P. Dutchess County Oct. 7, 1766), *microformed* on Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review).

553. *See, e.g.,* Jamison v. Cook (Jan. 8, 1722/23), *in* SELECT CASES, *supra* note 206, at 238-40. For an example of a writ of *scire facias* to revive an old judgment debt, *see* *Proctor v. North* (N.Y. Sup. Ct. April 18, 1769), *microformed* on Reel 33 (Archival Sys., Inc.) (on file with author).

554. *Bradley v. Ellison* (N.Y. Mayor’s Ct. June 23, 1724), *in* SELECT CASES, *supra* note 206, at 241.

555. *See, e.g.,* Eddowes v. Strong (Ct. C.P. Suffolk County Mar. 1736) (on file with the Suffolk County Clerk).

556. *See, e.g.,* Denn v. Fenn (Ct. C.P. Dutchess County Oct. 21, 1755), *microformed* on Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review). For an example of a writ of entry *sur disseisin* in the post, *see* *Walton v. Johnston* (Sup. Ct. July 31, 1739), *in* NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: MARCH 13, 1732/33-OCTOBER 23, 1739, at 346 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk).

557. *See, e.g.,* Lovejoy v. Mathews (Ct. C.P. Albany County Oct. 5, 1764) (on file with the Albany County Clerk); *Conkling v. Corey* (Ct. C.P. Suffolk County Oct. 1748) (on file with the Suffolk County Clerk).

558. *See, e.g.,* Lester v. Wyley (Ct. C.P. Dutchess County May 15, 1753), *microformed* on Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review); *Howard v. Burling* (N.Y. Mayor’s Ct. Dec. 16, 1719), *in* SELECT CASES, *supra* note 206, at 295-96.

559. *See, e.g.,* Hopkins v. Sarinbury (Ct. C.P. Dutchess County Oct. 7, 1766), *microformed* on Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review).

the court concluded that his “action ought to be brought on covenant and not on the case.”<sup>560</sup> There were demurrers,<sup>561</sup> confessions of judgment entered on the basis of documents executed at the time of a loan,<sup>562</sup> nonsuits entered for filing documents in improper form,<sup>563</sup> motions to quash writs,<sup>564</sup> and motions to abate for infancy,<sup>565</sup> misnomers,<sup>566</sup> improper service of process,<sup>567</sup> and variances between “the [d]eclara[tion] and the [w]rit[.]”<sup>568</sup> Special pleading also occurred on occasion.<sup>569</sup> Of course, eighteenth-century New York courts also continued to rely on older methods of disposing of disputes, such as reference to arbitrators, at a rate comparable to that of courts in other

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560. *Nellson v. McNeal* (Ct. C.P. Dutchess County May 1756), *microformed on Reel 126* (Hudson Microimaging) (on file with the Hofstra Law Review).

561. *See, e.g., Margison v. Hammersley* (N.Y. Mayor’s Ct. June 22, 1725), *in SELECT CASES, supra* note 206, at 376, 379 (containing citations to the English authorities argued); *Gansvoort v. van Loon* (Albany Mayor’s Ct. Feb. 15, 1714/15) (on file with the Albany County Clerk); *cf. Quinby v. Roosevelt* (N.Y. Sup. Ct. Oct. 21, 1729), *microformed on Reel 30* (Archival Sys., Inc.) (demurrer “for matter of form” waived by defendant).

562. *See, e.g., Robinson v. McGinis* (Ct. C.P. Suffolk County Oct. 5, 1773) (on file with the Suffolk County Clerk); *Newton v. Stevenson* (Ct. C.P. Westchester County Nov. 5, 1754), *in RECORD OF THE COURT OF COMMON PLEAS 123* (n.p. n.d.) (on file with the Westchester County Archives); *cf. Vanhorne v. Luff* (Sup. Ct. Mar. 17, 1723/24), *in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JUNE 4, 1723-JUNE 13, 1727*, at 71 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk) (defendant confesses judgment in return for stay of execution).

563. *See, e.g., Babington v. Viscar* (Albany Mayor’s Ct. Sept. 21, 1719), *microformed on City of Albany Common Council Minutes, Vol. 6* (on file with author).

564. *See, e.g., Southard v. DePeyster* (Ct. C.P. Dutchess County May 21, 1765), *microformed on Reel 126* (Hudson Microimaging) (on file with the Hofstra Law Review); *Boolis v. Earll* (Ct. C.P. Dutchess County May 17, 1763), *microformed on Reel 126* (Hudson Microimaging) (on file with the Hofstra Law Review).

565. *See, e.g., Jandine v. Jones* (N.Y. Mayor’s Ct. Mar. 11, 1728/29), *in SELECT CASES, supra* note 206, at 131. Infancy also could be pleaded in bar as an affirmative defense. *See Stillwell v. Williams* (N.Y. Sup. Ct. Nov. 28, 1729), *microformed on Reel 30* (Archival Sys., Inc.) (on file with author); *Doolhagen v. Pieroa* (N.Y. Mayor’s Ct. Dec. 8, 1713), *in SELECT CASES, supra* note 206, at 118-20.

566. *See, e.g., Ter Boss v. Polhemius* (Ct. C.P. Dutchess County Oct. 16, 1753), *microformed on Reel 126* (Hudson Microimaging) (on file with the Hofstra Law Review) (misnomer corrected); *Huling v. Petitbois* (N.Y. Mayor’s Ct. June 24, 1701), *in SELECT CASES, supra* note 206, at 113-14 (finding no misnomer). Legislation in 1684 had directed the amendment of pleadings rather than the dismissal of cases for technical defects such as misnomers. *See An Act to Prevent Arrests of Judgments and Superseding Execucons* (Oct. 27, 1684), *in 1 THE COLONIAL LAWS OF NEW YORK, supra* note 213, at 162-63.

567. *See, e.g., Kimble v. Dyck* (N.Y. Mayor’s Ct. Oct. 29, 1754), *in SELECT CASES, supra* note 206, at 179.

568. *Anderson v. Wake* (Ct. Gen. Sess. New York County Aug. 3, 1688), *in COURT OF GENERAL AND QUARTER SESSIONS OF THE PEACE: 1683-1693*, at 99 (n.p. n.d.) (on file with the New York County Clerk).

569. *See, e.g., Remsen v. Remsen* (N.Y. Mayor’s Ct. Feb. 6, 1753/54), *in SELECT CASES, supra* note 206, at 137-41.



colonies,<sup>570</sup> especially when, as one court in a rare resort to Dutch ways noted, recourse to trial would “require the [e]xamination of a long account”<sup>571</sup> or other extensive, complex labor on a court’s and jury’s part.

The adoption of common law procedure brought New York practice more into line with that of other colonies. Like many other colonies, New York allowed litigants to take depositions of witnesses who had legitimate reasons not to attend court and to use those depositions as evidence.<sup>572</sup> Courts also granted witnesses immunity from arrest while attending court and traveling to and from court.<sup>573</sup> And, they required nonresident plaintiffs to post security for costs before filing suit.<sup>574</sup>

The same was true of substantive law. New York, like other colonies, enacted legislation that courts applied with frequency for the relief of insolvent debtors,<sup>575</sup> as well as legislation to prevent fraud on creditors.<sup>576</sup> Like other jurisdictions, New York adopted the common-

570. See, e.g., *Van Antwerp v. Peters* (Ct. C.P. Albany County June 5, 1772) (on file with the Albany County Clerk); *Jenner v. Owen* (Ct. C.P. Suffolk County Oct. 6, 1730) (on file with the Suffolk County Clerk); *Jenner v. Owen* (Ct. C.P. Suffolk County Mar. 30, 1730) (on file with the Suffolk County Clerk).

571. *Abell v. Van Bergen* (Ct. C.P. Albany County June 3, 1773) (on file with the Albany County Clerk); see also *DeLancy v. Owen* (Sup. Ct. Apr. 29, 1773), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 21, 1772-JANUARY 17, 1776*, at 80 (rough ed. n.p. n.d.) (on file with the New York County Clerk) (stating same).

572. See, e.g., *Winchell v. Moore* (Ct. C.P. Dutchess County May 16, 1758), *microformed on* Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review); *Bronin v. Boutin* (Ct. C.P. Ulster County May 3, 1743), *microformed on* Reel 50 (on file with the Queens Library, Jamaica, N.Y.). For a discussion of legislation designed to ease the use of such depositions, see GOEBEL & NAUGHTON, *supra* note 49, at 637.

573. See, e.g., *Leelin v. Vrooman* (Ct. C.P. Albany County Jan. 16, 1770) (on file with the Albany County Clerk); *Ackor v. Hughson* (Ct. C.P. Westchester County Oct. 27, 1730), in *RECORD OF THE COURT OF COMMON PLEAS 20* (n.p. n.d.) (on file with the Westchester County Archives).

574. See, e.g., *Canby v. Meeker* (Sup. Ct. Dec. 3, 1723), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JUNE 4, 1723-JUNE 13, 1727*, at 60 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk); *Grey v. Starr* (Ct. C.P. Dutchess County May 17, 1757), *microformed on* Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review).

575. See, e.g., *An Act for the Relief of Insolvent Debtors and for Repealing the Acts Therein Mentioned* (May 19, 1761), in 4 *THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION* 526 (Albany, James B. Lyon 1894); *An Act for the Relief of Insolvent Debtors Within the Colony of New York with Respect to the Imprisonment of Their Persons* (Oct. 29, 1730), in 2 *THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION* 669 (Albany, James B. Lyon 1894); *In re Cosgaiff* (N.Y. Sup. Ct. Apr. 28, 1770), *microformed on* Reel 33 (Archival Sys., Inc.) (on file with author); *In re Vander Hayden* (Ct. C.P. Albany County Oct. 5, 1770) (on file with the Albany County Clerk); *In re Murray* (N.Y. Mayor’s Ct. Jan. 28, 1755), in *SELECT CASES*, *supra* note 206, at 191; *Alexander v. Pound* (N.Y. Mayor’s Ct. Oct. 3, 1732), in *SELECT CASES*, *supra* note 206, at 190-91.

576. See, e.g., *In re Appointment of Townsend* (Sup. Ct. Oct. 15, 1765), in *NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JULY 31, 1764-OCTOBER 28, 1767*, at 105-06

law system of estates in land and inheritance,<sup>577</sup> along with the use of the common recovery to bar entails<sup>578</sup> and the practice of judicial examination of wives to ensure their consent to conveyances relinquishing dower.<sup>579</sup> Like other colonies but unlike England, New York was influenced by conditions on the ground to enact a system for recordation of land titles.<sup>580</sup> Despite earlier Dutch law to the contrary that persisted until the end of the seventeenth century, New York along with other colonies also adopted common law rules of coverture, thereby reducing severely the equality and independence of married women.<sup>581</sup>

In view of New York City's far-flung trade along the Atlantic coast and to the Caribbean, England, and even continental Europe,<sup>582</sup> uniformity of commercial law was of utmost importance. Accordingly, New York's common law courts, especially the Mayor's Court of New York City, exercised important maritime and admiralty jurisdiction, especially in civil cases.<sup>583</sup> Like other commercially oriented jurisdictions where economic actors were in constant motion, the colony adopted rules authorizing the seizure of goods of debtors who had left or were about to leave the jurisdiction.<sup>584</sup> It also applied the same law to

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(rough ed. n.p. n.d.) (on file with the New York County Clerk); *In re Estate of Gorow* (Ct. C.P. Westchester County Nov. 1773), in RECORD OF THE COURT OF COMMON PLEAS 277-79 (n.p. n.d.) (on file with the Westchester County Archives).

577. Developments in real property law are best summarized in MOGLEN, *supra* note 248, at 70-73, 77-79, 88-91, 100-02. An important first step in the process of replacing Dutch with English law was the provision in the 1683 Charter of Liberties that all land was to be held as "an [e]state of [i]nheritance according to the [c]ustom[] and practice of his Majest[y]'s [r]ealm[] of England." Charter of Liberties, *supra* note 425, at 114; MOGLEN, *supra* note 248, at 70-71. Landowners who held pursuant to Dutch titles, which had been confirmed both in 1664 and 1674, did not lose their land as a result of this provision, but the provision apparently did affect the nature of title, as Dutch concepts had to be analogized to English ones. It should be noted that the development of land law was significantly influenced by political pressures from the manor lords of the Hudson Valley and Taconic region, some of whom had titles traceable to Dutch grants, and that the unique, noncommon law nature of their tenants' estates was largely a product of market forces. See KAMMEN, *supra* note 96, at 83; MOGLEN, *supra* note 248, at 77-88.

578. See, e.g., *Jackson v. Styles* (Ct. C.P. Albany County June 8, 1763) (on file with the Albany County Clerk).

579. Provision for both dower and judicial examination was made in the Charter of Liberties and Privileges. See Charter of Liberties, *supra* note 425, at 114-115. For an example of an examination, see *Bay v. Martin* (*In re Covenant for Lands in Albany*) (N.Y. Sup. Ct. Apr. 16, 1771), *microformed on Reel 33* (Archival Sys., Inc.) (on file with author).

580. See MOGLEN, *supra* note 248, at 72-73.

581. See Morris, *supra* note 388, at 21-26. For an example of the persistence of the Dutch approach, see *Ashford v. Hall* (Ct. C.P. Ulster County March 8, 1693/94), *microformed on Reel 1*, slides 609-10 (on file with the Queens Library, Jamaica, N.Y.) (motion to nonsuit plaintiff because she was a married woman, but court did "not[] find[] it [c]onvenient that a nonsuit[] should be[] granted"). See ROSEN, *supra* note 484, 95-134.

582. See Morris, *supra* note 388, at 13.

583. See *id.* at 37-40.

584. See *id.* at 14-21.

bills of exchange that was “generally applied throughout . . . Europe,”<sup>585</sup> including both England and the Netherlands, and thus no significant change in practices relating to bills of exchange occurred as a result of the English takeover; the New York “bill of exchange possessed all of its modern attributes by 1664.”<sup>586</sup>

On the other hand, there was change in regard to promissory notes, as English ways and English legislation superseded the Dutch practice of executing such instruments before notaries public.<sup>587</sup> The English practice of sealing bonds in the presence of witnesses was simpler, and when the Duke’s Laws made such bonds assignable, though subject to all defenses available against the assignor, the English practice quickly replaced the Dutch. Informal promissory notes could not be assigned until 1684, when colonial legislation made them so.<sup>588</sup> Definitive change did not occur, however, until Parliament, “for the benefit of trade and commerce,”<sup>589</sup> passed the Promissory Note Act of 1704, which had the effect of making notes assignable throughout the Empire and no longer subject to most defenses in suits by assignees.<sup>590</sup> Bills of exchange and promissory notes thereby became a form of circulating currency in New York’s specie-starved economy.<sup>591</sup>

The crowning achievement of the early eighteenth century was the domestication and formal establishment of the legal profession. As seen above, lawyers trained at the Inns of Court had begun to practice in New York shortly after the arrival of the fleet that conquered New Amsterdam. Although other scholars may disagree,<sup>592</sup> surviving court records show that those lawyers and others who represented litigants, chiefly before the Court of Assizes, possessed considerable sophistication about the rules and procedures of the common law. From the outset of English rule, in short, New York possessed a legal profession as advanced as that in many other mainland colonies even a century later.

Then, beginning early in the eighteenth century, something more occurred to place the profession in New York ahead of those in most other colonies. It began when the city’s lawyers organized North

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585. HERBERT ALAN JOHNSON, *THE LAW MERCHANT AND NEGOTIABLE INSTRUMENTS IN COLONIAL NEW YORK 1664 TO 1730*, at 40 (1963).

586. *Id.*

587. *Id.* at 32. Under Dutch law, instruments of debt could be assigned in the presence of a notary, and only defenses of payment and fraud were available against the assignee. *See id.* at 30-31.

588. *Id.* at 33.

589. *Id.* at 35.

590. *See id.* at 35-36.

591. *See* ROSEN, *supra* note 484, at 36-42.

592. *See, e.g.,* MOGLEN, *supra* note 248, at 210-12.

America's first bar association in 1709.<sup>593</sup> Next, with judicial sanction, the lawyers developed an apprenticeship system insuring that students could learn the law in New York rather than at the Inns of Court and hence that the bar could replicate itself domestically.<sup>594</sup> In 1730, eight leading lawyers obtained a monopoly over the most lucrative practice in the colony, that in the Mayor's Court of the City of New York, where most commercial litigation took place.<sup>595</sup> In 1758, the profession attained another milestone, when the Supreme Court came to be composed only of professional lawyers, nearly all of whom had enjoyed long careers in New York practice.<sup>596</sup>

New York's legal profession, as Daniel Hulsebosch has astutely shown, was learned in what academics today would call political theory as well as legal doctrine. Lawyers developed and put into print a coherent conception of the place of New York, in general, and of its lawyers, in particular, in the British imperial system. More importantly, the profession's political theory, grounded in a faith about the centrality of the common law to the preservation of liberty, kept members of the profession who ascended the bench loyal to the local legal community's vague constitutional values, even when they were politically in disagreement.<sup>597</sup> The New York bench, that is, was tied intellectually to the New York bar in a fashion familiar to lawyers in England, but unusual in the American colonies. The result, as will appear below, was that in key constitutional conflicts, judges often did what the profession understood the law required rather than what the Crown desired.

By the 1720s, in sum, the displacement of the Dutch legal system by English common law was nearly complete. What was the significance, however, of that displacement? Three points need emphasis.

First, as already noted, New York's law in most of its essentials became the same as that of England's twelve other mainland North American colonies. Whereas a lawyer from the Chesapeake or New

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593. *Id.* at 218.

594. See HULSEBOSCH, *supra* note 207, at 128-29; Morris, *supra* note 388, at 55-57; see also MOGLEN, *supra* note 248, at 219 (discussing the law practices of the newly formed New York Bar as "the foundation of a lifetime's prosperity, to be preserved . . . to future generations").

595. Morris, *supra* note 388, at 52-53.

596. See MOGLEN, *supra* note 248, at 234-35.

597. See HULSEBOSCH, *supra* note 207, at 83-96, 122-25, 130. On a day-to-day level, the links between bench and bar were confirmed by the willingness of lawyers to serve as appointed counsel, even in civil matters brought in forma pauperis. See *In re Spencer* (Sup. Ct. April 24, 1760), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 20, 1756-OCTOBER 23, 1761, at 308-09 (rough ed. n.p. n.d.) (on file with the New York County Clerk); *Hart v. Willets* (Ct. C.P. Suffolk County Oct. 5, 1774) (on file with the Suffolk County Clerk); *Jones v. May* (N.Y. Mayor's Ct. June 24, 1755), in SELECT CASES, *supra* note 206, at 177.

England who came to New York in 1660 would have confronted a foreign legal order (that also may be true of a Chesapeake lawyer coming to New England, and vice versa), it was feasible in 1735 for John Peter Zenger to retain a Philadelphia lawyer, Andrew Hamilton, to take over his case.<sup>598</sup> Hamilton had to learn nothing fundamentally new when crossing jurisdictional boundaries. It is difficult to imagine how New Yorkers could have participated a mere four decades later in the American Revolution if they had not developed a legal and constitutional culture that they shared in common with their fellow rebels.

Second, the English common law's displacement of Dutch law helps us better understand why eighteenth-century Americans so readily accepted the concept of "the common law as a repository of liberty"<sup>599</sup> and "the primary guarantor of English liberties"<sup>600</sup>—why American revolutionaries such as James Duane understood "that the [c]ommon [l]aw of England and such [s]tatutes as existed prior to our [e]migration [were] fundamentals"<sup>601</sup> of their constitution essential "for [s]ecuring the [r]ights and [l]iberties of the [s]ubject."<sup>602</sup> One need only compare the structure of power in Dutch New Netherland with that which the common law brought to New York. Local Dutch courts intrusively and randomly regulated the details of everyday life—economic life, family life, religious life—and local judgments were readily and fully appealable to the Governor and Council in New Amsterdam.<sup>603</sup> It is only a slight exaggeration to observe that, if a husband and wife were quarreling in Albany, nothing in Dutch law prevented Governor Peter Stuyvesant from directing them how to resolve their quarrel.

The common law, in contrast, restricted the power of government in general and central government in particular. The common law authorized use of government's prosecutorial and regulatory powers only when precedent justified that use, and, as Goebel and Naughton's study of law enforcement and the survey above of eighteenth-century

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598. See Stanley Nider Katz, *Introduction* to JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER: PRINTER OF THE NEW YORK WEEKLY JOURNAL* 1, 21-22 (Stanley Nider Katz ed., 1963).

599. HULSEBOSCH, *supra* note 207, at 35.

600. *Id.* at 42.

601. James Duane, Address Before the Committee to State the Rights of the Colonies (Sept. 8, 1774), in 1 *LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS* 24 (Edmund C. Burnett ed., 1921); see also GOEBEL & NAUGHTON, *supra* note 49, at 325 n.1.

602. James Rutledge, Resolution Proposed in Committee on Rights (Sept. 7-22, 1774), in 1 *LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS*; *supra* note 601, at 44. The Rutledge resolution appears among John Duane's papers. See *id.* nn.1-2; see also GOEBEL & NAUGHTON, *supra* note 49, at 325 n.1.

603. See Nelson, *supra* note 4, at 8-10.

regulation show, those powers were far more constrained in eighteenth-century New York than they had been in seventeenth-century New Netherland.<sup>604</sup> Even more significant were the differences between Dutch private law and English common law. Dutch adjudicators appear to have been willing to entertain and adjudicate any dispute that private individuals brought to them and to decide it in whatever fashion their understanding of justice dictated.<sup>605</sup> However, common law courts, perhaps because they originated in England as courts of limited, central jurisdiction, could only hear cases that could be shoehorned into one of the categories contained in the Register of Writs, and even the catchall writ of case failed to capture most categories of human conflict.<sup>606</sup> Moreover, a court could only grant remedies authorized in a particular writ.<sup>607</sup> The common law simply left vastly wider domains of human endeavor to private ordering and informal community regulation than Dutch law had done.

Moreover, even when the common law in theory authorized government intervention, Crown officials were restrained by the power of the jury. Ultimately, no major penalty could be imposed or significant civil judgment authorized without the interposition of a jury—representatives of local communities that stood between the Crown and the subject.<sup>608</sup> And, while trial judges, as was shown above, possessed ample power to control juries,<sup>609</sup> it still remained to be resolved—and the resolution will be discussed below—whether the Crown could piggyback on that power to impose imperial policies on localities.

Of course, the liberty that the common law fostered was not an unmixed blessing. People of wealth and power are often better positioned than the poor and the weak to take advantage of their liberty either in the private marketplace or in local forums of community governance. Sometimes, only institutions of central government have sufficient capacity to restrain the rich and the strong. As we are about to see, the central institutions of New York's colonial government lacked that capacity.

### *B. And Order*

The third reason why the displacement of Dutch law with English law mattered was the change it produced in the nature of record-keeping.

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604. See *supra* notes 501-48 and accompanying text.

605. See Nelson, *supra* note 4, at 18-19.

606. See MAITLAND, *supra* note 86, at 2.

607. *Id.*

608. Nelson, *supra* note 4, at 12-13.

609. See *supra* notes 464-86 and accompanying text.

The court records of New Netherland bring to life the rich detail of everyday human endeavor and the inevitable human conflict it produces. The historian of today can read a case record from New Netherland and make a judgment on the facts presented about how to resolve in a just fashion the conflict those facts reveal. Governor Stuyvesant and his Council, sitting in the fort in New Amsterdam, were able to do the same.<sup>610</sup>

A common law record from the eighteenth century, in contrast, is much less revealing. In most cases that went to trial, the record contained no more than a writ directing a court officer to serve process, a declaration or formulary statement of the plaintiff's claim, a defendant's general denial, and an inscrutable jury verdict.<sup>611</sup> The real matter in dispute and the evidence with which to resolve it were hidden. A few records contained more data—special pleadings, motions, and, in instances of demurrers to the evidence, the evidentiary allegations of the party whose claim was being challenged.<sup>612</sup> But the additional data was not designed to enable a reader of the record, either the historian of today or the appellate court of the past, to comprehend the facts beneath a dispute. The point of pleadings, motions, and demurrers was to suppress the facts and thereby abstract from the complexity of life a narrow issue of law appropriate for a judge to decide.

Of course, a judge on the ground who presided over a trial would have known in rich detail what the case was about. He would have possessed the information necessary to make a fair judgment about how best to resolve the dispute and would have had substantial power to influence or alternatively set aside an unfair or erroneous jury verdict. But transmission of the record alone did not give similar power to the ultimate appellate judges—first, the Governor and Council and second, the Privy Council.<sup>613</sup>

Two colonial governors, William Cosby and Cadwallader Colden, tried to solve the problem that the limitations of the common law record placed on their power. Both failed.

As was outlined above, Governor Cosby first sought to use equity jurisdiction to avoid a jury trial he would have lost and thereby to achieve his personal political ends. When his turn to equity failed to produce the legal victory he sought and instead brought vehement denunciations in the opposition newspaper, the *New York Weekly Journal*, Cosby decided to prosecute the printer of the *Journal*, John

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610. See Nelson, *supra* note 4, at 5-7.

611. See *id.* at 13, 18-19.

612. See *supra* notes 400, 470, 569, and accompanying text.

613. See Judicature Act of 1692, *supra* note 430, at 308.

Peter Zenger, for seditious libel.<sup>614</sup> Again, for Cosby to succeed, he would have to circumvent the ordinary criminal process, in particular the power of the jury.

Cosby began effectively enough by having Zenger arrested on a special warrant of the Governor's Council rather than by ordinary legal process.<sup>615</sup> He next tried to induce a grand jury to indict Zenger, but it refused and Cosby had to proceed by having the Attorney General file an information, "generally regarded as a high-handed, unfair procedure which undercut the popular basis of the jury system."<sup>616</sup> Still, the petit jury remained: how could Cosby and his minions circumvent it?

Their technique was to have the Attorney General argue that the jury had power only to return a verdict on the narrow question of whether Zenger had actually published the allegedly libelous words; whether the words amounted to libel was, according to the Attorney General, a question of law solely for the court. On the other side, Andrew Hamilton, Zenger's lawyer, argued that the jury should return a general verdict of not guilty.<sup>617</sup> Chief Justice James DeLancey, pressured by the governor but loyal to the profession and holding tenure during good behavior, equivocated, declining to use his power to control the jury. He instructed the jury that "as [the] facts or words in the information are confessed the only thing that can come before you is whether the words as set forth in the information make a libel. And that is a matter of law, no doubt which you *may* leave to the court."<sup>618</sup> He also read from a charge in an earlier English libel case in which a jury had been instructed "to consider whether the words tended to beget an ill opinion of the government."<sup>619</sup> As the Chief Justice thus had left it open for them to do, the jurors accepted Hamilton's argument, decided the law in Zenger's favor, and returned a general verdict of not guilty.<sup>620</sup>

What was the significance of the Zenger case, beyond being a crushing defeat for Governor Cosby, who died shortly thereafter? New

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614. See Katz, *supra* note 598, at 17.

615. See *id.* at 17-18.

616. *Id.* at 19.

617. See *id.* at 22-23.

618. GOEBEL & NAUGHTON, *supra* note 49, at 666 (quoting the charge of Chief Justice DeLancey) (emphasis added). Note the use of the word "may," rather than "must." *Id.* Note also the parallelism in the manner in which De Lancey instructed the Zenger jury and the Albany court had dealt with *Livingston v. de Lavall*, discussed above. See *supra* notes 209-12 and accompanying text.

619. GOEBEL & NAUGHTON, *supra* note 49, at 666 (citing The Trial of John Tutchin, at the Guildhall of London, for Libel, Entitled, 'The Observer,' in 14 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 1128 (T.B. Howell ed., London, T.C. Hansard 1816) (citing R v. Tutchin, (1795) 91 Eng. Rep. 50 (Q.B.))).

620. Katz, *supra* note 598, at 29-30.



Yorkers cheered the jury's verdict as a great victory for liberty, and much of the British world reacted noisily to the news.<sup>621</sup> And to insure that that world understood what the Zenger victory was about, James Alexander, one of Zenger's lawyers, in 1736 published the proceedings of the case in *A Brief Narrative of the Case and Trial of John Peter Zenger*.<sup>622</sup>

The main thrust of Alexander's narrative, which summarized all the arguments in the case but focused on Andrew Hamilton's, was that freedom of the press was the primary bulwark of a free society and truth a defense to any libel prosecution.<sup>623</sup> But Hamilton's second main point had concerned the power of the jury. Hamilton had "insist[ed] that where matter of law [was] complicated with matter of fact, the jury [had] . . . at least as good a right"<sup>624</sup> in a seditious libel case as in any other "to determine both."<sup>625</sup> He had urged

*that in all general issues, as upon non cul. in trespass, non tort., nul disseizen in assize, etc., though it is matter of law whether the defendant is a trespasser, a disseizer, etc. . . ., yet the jury . . . find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately.*<sup>626</sup>

Hamilton had explained that jurors were entitled to a different opinion than the court because one man could not "'see with another's eye, nor hear by another's ear; no more [could] a man conclude or infer the thing by another's understanding or reasoning."<sup>627</sup> He therefore had found it "very plain that the jury are by law at liberty . . . to find both the law and the fact" in all cases submitted for their verdict.<sup>628</sup> The Chief Justice implicitly had agreed when he had sent the jurors out to deliberate upon the case even though the only issue that the Attorney General thought they should decide—the fact of publication—had been conceded by the defense.<sup>629</sup>

The Zenger case was not a precedent in the sense of binding subsequent courts to follow what it had done. The case did not establish, as a matter of law, that truth was a defense. But it cast doubt upon what had been largely accepted doctrine in New York until that time—that

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621. *Id.*

622. *Id.* at 26.

623. *Id.* at 27.

624. ALEXANDER, *supra* note 598, at 91.

625. *Id.*

626. *Id.* at 91-92 (quoting *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1013 (C.P.)).

627. *Id.* at 92 (quoting *Bushell's Case*, 124 Eng. Rep. at 1013).

628. *Id.*

629. *Id.* at 100.

juries decided the facts, and judges, the law. By virtue of the publicity it received, the Zenger case made the politically conscious class—the men, that is, who would sit on juries—aware of their power to determine law as well as fact, and thereby made the agents of the Crown aware of the difficulty of circumventing the jury's, and hence the people's, opinions on the law.<sup>630</sup>

Three decades later Cadwallader Colden, who was acting governor at the time, nonetheless tried circumvention. He had a new argument, applicable at least in civil cases. He tested it in another of the eighteenth century's great constitutional cases, *Forsey v. Cunningham*.<sup>631</sup>

The case arose when Cunningham, in what had appearances of a premeditated attack, stabbed Forsey in the chest with a sword he had concealed beneath his clothing.<sup>632</sup> Forsey commenced a civil action in the Supreme Court for battery, and in October 1764 the jury returned an astronomically large verdict of 1500 pounds in the plaintiff's favor.<sup>633</sup> Cunningham determined to appeal to the Governor and Council and ultimately, if necessary, to the Privy Council.<sup>634</sup> Colden, who was acting governor at the time, was eager to consider the appeal as a means of limiting the power of juries and thereby enhancing that of the Crown.<sup>635</sup>

The difficulty for Cunningham and Colden was that no error appeared on the face of the record. The proceedings below had been legally simple: Forsey had filed his writ and declaration, Cunningham had properly pleaded the general issue and moved for a struck jury, which motion had been granted, and the case had been submitted to the jury on the evidence, not reported in the record, which the parties had presented.<sup>636</sup> Cunningham's only objection was to the size of the verdict, but if he took his appeal by writ of error, that objection could not be raised.<sup>637</sup> There simply was no error in the proceedings below.

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630. See Katz, *supra* note 598, at 29-30. It is important to note that Andrew Hamilton did not treat juries in seditious libel cases differently than any other juries; in his argument, they all had power to determine law along with fact. See *id.* at 25. Conferring such power only on libel juries and not others was a late eighteenth- and early nineteenth-century idea, not a mid-eighteenth-century one. See *id.* at 31-33.

631. The case is most thoroughly analyzed in JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 390-416 (Octagon Books, Inc. 1965) (1950). The following discussion is based entirely upon Smith's analysis.

632. *Id.* at 390.

633. *Id.*

634. *Id.* at 391-92.

635. *Id.* at 393-94.

636. *Id.* at 391.

637. *Id.*

Cunningham accordingly sought to proceed by filing an appeal rather than a writ of error.<sup>638</sup> The distinction was that on a writ of error, where a general verdict had been given, the merits of a case did not appear in the record and thus could not be considered by the higher court, only whether an issue of law had been improperly decided below.<sup>639</sup> On an appeal, in contrast, the entire cause was open to reconsideration, both on the evidence below and on such new evidence as the litigants might present.<sup>640</sup> Colden conceded that under prior New York practice no one had ever proceeded by this form of appeal from the Supreme Court to the Governor and Council, but he saw Cunningham's case as a device to alter this preexisting practice and thereby enhance the Crown's power to reexamine jury verdicts contrary to royal policies.<sup>641</sup> Colden sought to allow an appeal on the technical argument that a clause in the instructions of the governor specifying the writ of error as the proper mode of appeal had been omitted from those instructions in 1753.<sup>642</sup>

Relying on its precedents and on its understanding that, at common law in England, cases proceeded from lower to higher courts only by writ of error, the lawyer-dominated Supreme Court denied Cunningham's appeal.<sup>643</sup> The Council, on the advice of the judges and the Attorney General, agreed and also denied the appeal, over Colden's dissent.<sup>644</sup> In 1765, Cunningham next sought leave to appeal from the Privy Council.<sup>645</sup> The Council denied leave, but at the same time directed Colden to allow an appeal from the Supreme Court to the Court of Appeal, presumably the Governor and Council, in New York.<sup>646</sup> Colden thereupon issued a writ of appeal to the Supreme Court. The court declined to obey the writ on the grounds that the attorney seeking to appeal had not been properly retained, that it had no power to assign counsel to proceed in a court over which it lacked jurisdiction, and that, in any event, it had received no proper writ directing it to send up the record.<sup>647</sup> These matters rested until November 1765, when a new

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638. *Id.* at 392.

639. *Id.* at 393.

640. *Id.*

641. *Id.*

642. Colden's position raised two issues. First, had the language been omitted to change practice or only because it was superfluous? Second, could the common law of a province be altered merely by a change in the governor's instructions? *Id.* at 391, 395.

643. *Id.* at 398.

644. *Id.* at 405.

645. *Id.* at 406; *see also* KAMMEN, *supra* note 96, at 346.

646. SMITH, *supra* note 631, at 408; *see also* KAMMEN, *supra* note 96, at 346.

647. SMITH, *supra* note 631, at 410-11.

governor arrived with new instructions restoring the language omitted from the 1753 instructions and confining appeals to the Governor and Council to “cases of error only.”<sup>648</sup>

*Forsey v. Cunningham* “shook the province and had repercussions the whole length of the Atlantic seaboard.”<sup>649</sup> It resulted in petitions to Parliament and in the publication of a pamphlet, similar to Alexander’s *Brief Narrative* in the Zenger case, that circulated widely.<sup>650</sup> And it left jurors with power to determine law as well as fact unless a trial judge, in the exercise of his unreviewable discretion, tried to use one of the procedural mechanisms at his command to stop them.<sup>651</sup> If he declined to do so, no one else, including an appellate court, subsequently could.

The result was that the radical dispersion of power that Governor Nicolls had confronted in the 1660s still persisted in New York a century later. Law was not what the Governor or even the Assembly by statute commanded; law was what local people, either jurors or trial judges beholden to local constituencies, or in the case of Supreme Court justices, to the bar, declared the law to be. New York’s peripheries remained ungovernable from the center.

The “impression one gains from the records of criminal courts for the period after the French and Indian War,” to quote the only slightly exaggerated language of Julius Goebel, “is one of a general and nearly continuous state of riot throughout the province.”<sup>652</sup> That was because, as Douglas Greenberg has shown, law was effectively unenforceable except by local people on local terms, not by the center.<sup>653</sup>

Greenberg thinks it “a mistake to regard eighteenth-century New York as one society.”<sup>654</sup> Instead, New York was “a congeries of societies under the aegis of a single political system, with each society functioning with relative autonomy.”<sup>655</sup> Suffolk County, for example, had a pattern of criminal law enforcement completely different from the rest of the colony.<sup>656</sup> “The Puritan presence,” Greenberg suggests, “colored law enforcement in a variety of ways,” making the leadership

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648. *Id.* at 409 (quoting Representation of the Lords of Trade on Appeals from the New-York Courts (Sept. 24, 1765), in 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 762-63 (E.B. O’Callaghan ed., Albany, N.Y., Weed, Parsons & Co. 1856)); see also KAMMEN, *supra* note 96, at 346.

649. SMITH, *supra* note 631, at 390.

650. *Id.* at 390 n.179.

651. *Id.* at 409-10.

652. GOEBEL & NAUGHTON, *supra* note 49, at 86.

653. See DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK 1691-1776, at 218 (1974).

654. *Id.*

655. *Id.*

656. *Id.*

of the county “more attentive to matters of morality than other New Yorkers”<sup>657</sup> and far more efficient than leaders in any other county in pushing cases through the system and obtaining convictions—for nearly three out of every four people charged.<sup>658</sup> Arguably, though, Suffolk was not really enforcing New York law but a law of its own—something suggested by a reprimand that Attorney General John Tabor Kempe delivered to several Suffolk justices who in one case, in Kempe’s view, had exceeded “[b]ounds beyond which they ought not to pass.”<sup>659</sup>

Albany and the regions to its north were another outlier, but in the direction of nearly complete ineffectiveness. Only one-third of Albany cases resulted in conviction,<sup>660</sup> while some sixty percent—more than three times Suffolk’s rate—simply disappeared off judicial dockets for want of processing.<sup>661</sup> As Greenberg explains, the extensive size and thin population of the northern counties, along with the harshness of their climate, alone made capture of defendants difficult.<sup>662</sup> But there was more. One Albany sheriff, for instance, reported that when he tried to make an arrest, the defendant “seized a pistol, swore he would blow my [b]rains out, and so kept me off from further prosecuting the arrest, uttering all the time the most violent oaths and other abusive [l]anguage against me. It [was] impossible for me to execute my office.”<sup>663</sup>

Another Albany sheriff, Harmanus Schuyler, was equally unsuccessful when he tried to arrest two members of the Lydius family, father and son, for intrusion on crown lands.<sup>664</sup> Attorney General Kempe directed Schuyler on at least five occasions to arrest the Lydiuses and finally prosecuted Schuyler for failing to obey.<sup>665</sup> Schuyler informed the court that “he did not think it safe, the said Lydius and son being very resolute fellows,”<sup>666</sup> but the court refused to accept his excuse and fined him.<sup>667</sup> Subsequently, the Lydiuses assaulted Schuyler when he tried to serve process in another matter, for which assault they were prosecuted.

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657. *Id.* at 87.

658. *Id.* at 85 & tbl.11, 87, 190.

659. *Id.* at 226 (quoting Letter from John Tabor Kempe to Benjamin Strong, Selah Strong, and Richard Woodhull (Mar. 3, 1769)).

660. *Id.* at 85 tbl.11.

661. *Id.* at 190.

662. *Id.* at 193.

663. *Id.* at 159 (quoting Letter from Jacob Van Schaick, Sheriff, to Cadwallader Colden (Dec. 21, 1760), reprinted in 5 THE LETTERS AND PAPERS OF CADWALLADER COLDEN 1755-1760, in COLLECTIONS OF THE NEW-YORK HISTORICAL SOCIETY FOR THE YEAR 1921, at 383 (1923)).

664. *Id.* at 162.

665. *Id.*

666. *Id.*

667. *Id.*

But even that case never came to a resolution, since Schuyler, who was sent to arrest them, did not succeed in bringing them in.<sup>668</sup>

These cases were minor nuisances compared to a situation in a remote region northeast of Albany where “a number of [p]eople . . . [l]ive[d] in open [d]efiance of the [a]uthority of [g]overnment—pretending to appoint officers and to erect [c]ourts among themselves—executing in the most illegal and cruel [m]anner, the high [p]ower of trying, condemning and punishing their [f]ellow [s]ubjects.”<sup>669</sup>

And they were not alone. During the 1750s and especially the 1760s, the entire Taconic region on the border between New York and New England as often as not was in open rebellion as tenants rose up against landlords claiming title under New York law.<sup>670</sup> Lawlessness was equally prevalent on the Mohawk frontier, although sparsity of population meant that lawbreakers were fewer in number and less well organized.<sup>671</sup>

After 1750, in short, New York experienced increases in violent and serious crime that outstripped population growth.<sup>672</sup> New York City experienced a higher rate of theft than ever before, while collective violence in rural areas rose to new heights.<sup>673</sup> Courts could not keep up with the increases.<sup>674</sup> Instead, they found themselves confronted with witnesses who would not testify before grand juries<sup>675</sup> or for the prosecution at trial,<sup>676</sup> large numbers of jurors who failed to appear in

668. *Id.* at 162-63 & nn.17-18.

669. Letter from Cadwallader Colden to General Gage (Sept. 7, 1774), in 2 THE COLDEN LETTER BOOKS: 1765-1775, at 358 (New York, New-York Historical Soc’y 1878); cf. *King v. Underhill* (Sup. Ct. July 9, 1772), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: APRIL 21, 1772-JANUARY 17, 1776, at 26 (rough ed. n.p. n.d.) (on file with the New York County Clerk) (prosecuting defendant “for usurping the [o]ffice of [m]ayor of the Borough Town of West Chester”).

670. The New York rent strikes are a subject of vast scholarship and historiographical debate, into which there is no need to enter here. The now classic work on the subject is SUNG BOK KIM, LANDLORD AND TENANT IN COLONIAL NEW YORK: MANORIAL SOCIETY, 1664-1775 (1978). The colonial rent strikes are addressed peripherally in the more recent work of CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS 1839-1865 (2001).

671. See HULSEBOSCH, *supra* note 207, at 107-08.

672. See GREENBERG, *supra* note 653, at 137.

673. See GOEBEL & NAUGHTON, *supra* note 49, at 99; GREENBERG, *supra* note 653, at 216.

674. See GREENBERG, *supra* note 653, at 217.

675. See, e.g., *King v. Kelly* (Sup. Ct. Oct. 22, 1764), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: JULY 31, 1764-OCTOBER 28, 1767, at 24 (rough ed. n.p. n.d.) (on file with the New York County Clerk).

676. See, e.g., *King v. Martine* (Sup. Ct. Apr. 30, 1763), in NEW YORK SUPREME COURT OF JUDICATURE MINUTE BOOK: OCTOBER 19, 1762-APRIL 28, 1764, at 170 (engrossed ed. n.p. n.d.) (on file with the New York County Clerk).

court,<sup>677</sup> and trials requiring cancellation on account of a sheriff's inability to summon a jury.<sup>678</sup>

Why did law not result seamlessly in order? The answer, I suggest, goes back to the New York over which Governor Nicolls had been placed in charge in 1664 and to his failure and the failure of his successors to create a legal-political order suitable for the colony's governance.

Perhaps, Britain could have governed New York coercively with a large army and bureaucracy. But that was never an option. The Crown simply lacked necessary financial resources, Parliament never would have appropriated English taxes for that purpose, and collecting substantial revenues from New Yorkers proved to be difficult. Law and government therefore had to be based on consent.

In the English settlements surrounding New Amsterdam and the Dutch communities on the upper Hudson, consent had constituted the basis of authority. Recognizing the reality of his limited governance options, Nicolls did not destroy the legal systems already in place in either of those locales. But, from the very start of his administration, through the Duke's Laws and the Court of Assizes, he set out to undermine them. His successors in large part pursued the same approach. Indeed, one can write the political history of colonial New York mainly as a conflict between crown officials seeking to centralize power in their own hands and local subjects seeking to preserve power in theirs. In some places, like the hinterlands of Albany, the Crown succeeded in the task of destruction, and the older societal institutions through which consent had been made manifest crumbled. Law likewise foundered. In other places, like Suffolk County, local community institutions survived, and the law retained at least some effectiveness.

An even more powerful force than government also had an impact—ethnic and religious diversity. The communitarian societal institutions of Suffolk survived because the communities of Suffolk survived as English Puritan enclaves, inhabited by descendants of the original settlers and an occasional like-minded immigrant.<sup>679</sup> In the regions east, west, and north of Albany, in contrast, English settlers, who, as shown above, would not live under a Dutch legal order, eventually came to outnumber the original Dutch inhabitants; with the

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677. See, e.g., *King v. Braisher* (N.Y. Sup. Ct. April 26, 1769), *microformed on* Reel 33 (Archival Sys., Inc.) (on file with author).

678. See, e.g., *Barns v. Bookhout* (Ct. C.P. Dutchess County May 18, 1762), *microformed on* Reel 126 (Hudson Microimaging) (on file with the Hofstra Law Review).

679. See GREENBERG, *supra* note 653, at 191, 194.

Crown's tacit approval, if not its assistance, the English settlers rendered inconsequential whatever older institutions remained.

What of Manhattan? There the capacity of the Crown to undermine preexisting legal and political institutions and the power of religious and ethnic diversity to destroy communitarian structures were at their greatest. Nonetheless, the eighteenth-century colonial legal order functioned reasonably effectively in the city: in fact, law was enforced more effectively in the city than in any county other than Suffolk.<sup>680</sup> How?

The answer lies in money, tolerance, and the delegation of power to local institutions. There is no question that Governor Nicolls and his immediate successors destroyed preexisting Dutch legal and political institutions more quickly in New York City than anywhere else in the colony. But they did not destroy the economic underpinnings of the Dutch merchant class: with the English conquest, New York became "the only port city" in the world "plugged directly into both of the world's two major trading empires," and it would have been foolhardy to sever New York's connections to "the great trading firms of Amsterdam."<sup>681</sup> Aspiring English entrepreneurs accordingly had to work with the Dutch rather than compete against them. Over time, economic cooperation led to mutual tolerance and ultimately to mutual understanding.

Entrepreneurs, of course, need a stable legal framework within which to conduct their business dealings. The Anglo-Dutch merchants of New York, in particular, needed stable commercial law consistent with that which governed their major trading partners and stable property law to structure their exploitation of land along the Manhattan shoreline, where they located their docks and piers. The Crown responded by effectively delegating to the city jurisdiction both to administer commercial law and to control exploitation of the shoreline.<sup>682</sup>

For a century from 1675 to 1775, the mass of civil litigation in New York City, including innumerable commercial and maritime cases, was brought to final determination in the Mayor's Court, over which merchants as a class possessed great influence, with only rare appeals taken to the Supreme Court.<sup>683</sup> Similarly, in the Montgomerie Charter of 1730, the Crown granted title to all lots along the shoreline to the city's Common Council, which like the Mayor's Court was heavily influenced

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680. *See id.* at 194.

681. SHORTO, *supra* note 3, at 303.

682. *See id.* at 304-05.

683. *See Morris, supra* note 388, at 47.



by the merchants collectively.<sup>684</sup> The Council then granted lots to individual merchants, but always by deeds containing restrictive conditions and covenants providing in the alternative for forfeiture to the city or damages if an individual merchant did not use a lot consistently with city plans for development.<sup>685</sup>

The mercantile class, as a result, had almost unlimited control over the economic well-being of individual merchants, who would become pariahs if they failed to obey the rules that the Mayor's Court and the Common Council generated in their favor. Individual merchants, in turn, had vast power over the lives and economic opportunities of those with whom they dealt—tradesmen, artisans, laborers, etc., who would become paupers at best and outcasts at worst if they failed to deal with the merchants in accordance with the city's rules. In short, the power of city government, functioning under the influence, if not the domination, of the merchant class, to formulate rules facilitating economic growth and wealth accumulation gave it vast control over individuals of all classes, from the highest to the lowest, residing within it.<sup>686</sup>

In part because of legal doctrines confirmed in *Forsey v. Cunningham*, the royal governor and his administration never really controlled the colony of New York.<sup>687</sup> Law functioned effectively in a few places like Suffolk County where homogeneous, local populations continued to govern themselves largely as they had a century earlier, when they had been independent of New Amsterdam. Law functioned effectively in New York City because local government had been delegated a combination of economic and legal powers that individuals found it profitable to obey. But, when local government was weak, as it was in much of the colony, law scarcely functioned at all, and order and authority were close to nonexistent. The Crown truly governed nowhere.

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684. See HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 16 (1983); NELSON, *supra* note 515, at 19.

685. See HARTOG, *supra* note 684, at 50; NELSON, *supra* note 515, at 19-20.

686. See HARTOG, *supra* note 684, at 40-43, 48-58; NELSON, *supra* note 515, at 12-21.

687. See *supra* notes 649-51 and accompanying text.