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Justices of the Peace, Lawyers, and the People

Local Courts and the Contested Professionalization of Law in Late Colonial New York

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ABSTRACT OF THE DISSERTATION

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Legal professionalization in New York was a contested social process entailing myriad local struggles over the use of land and credit. New York's legal professionalization gained momentum in the mid-eighteenth century, as provincial lawyers pursued a collective mission to monopolize doctrinal interpretation and procedural application of English common law in the colony. The on-the-ground application of that mission frequently pitted lawyers against commoners, many of whom preferred the informal resolutions provided by lay justices, jurors, arbitrators, and town meetings. Professionalized law determined cases with doctrines and procedures alien to most laypeople. It disrupted the local communities' means of equitable dispute resolution, and aroused widespread suspicion that it solely benefited those who could hire lawyers.

Those suspicions were well grounded. Lawyers aided land speculators in every step of their contentious land grabs, and helped wealthy creditors profit from interest, penalties, and mortgaged property. New York's prohibitively high legal expenses made professionalized law more attractive to wealthy landowners, creditors, and speculators seeking to monopolize opportunities for further economic gain. In order to facilitate the economic elite's privileged commercial enterprises, New York's professionalized legal system continually deprived the people of opportunities for economic betterment, exposing them to further economic insecurity.

Popular anxiety over the law deepened further when the colony's leading lawyers vigorously sought to restrict a key area of localized adjudication—the small claims jurisdiction of justices of the peace. More attentive to popular legal needs than trained judges, many lay justices handled the colony's voluminous small debt claims in a distinctively speedy, flexible, and inexpensive manner. Lawyers opposed the enlarged jurisdiction of justices as inimical to their vision of orderly social development grounded in the stabilizing influence of professionalized law. Popular support of the enlarged justices' jurisdiction and the strong response to the DeLancey party's anti-lawyer electoral campaign in the late 1760s showed that many ordinary New Yorkers repudiated the lawyers' vision of legal and social development. They desired, instead, a more inclusive legal system in which lay people would have a larger say in shaping the laws that affected their daily economic lives.

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ABBREVIATIONS

AIHA	Albany Institute of History and Art
CUL	Columbia University, Rare Book and Manuscript Library
Doc. Rel. N.Y.	O'Callaghan, E. B, John Romeyn Brodhead, Berthold Fernow, New York (State), and Legislature. *Documents Relative to the Colonial History of the State of New-York: Procured in Holland, England, and France*. Albany, 1853.
Doc. Hist. N.Y.	O'Callaghan, E. B, and Christopher Morgan. *The Documentary History of the State of New-York*. 4 vols. Albany, N.Y.: Weed, Parsons, and Company, 1850.
N.Y. Col. Laws	*The Colonial Laws of New York from the Year 1664 to the Revolution*, 5 vols. (Albany, 1894).
NYHS	New-York Historical Society
NYPL	New York Public Library
NYSL	New York State Library and Archives

INTRODUCTION

In 1754, New York's provincial legislature passed a bill to enlarge the jurisdiction of individual justices of the peace to cases of up to five pounds' value—a more than two-fold increase from the previous ceiling of 40 shillings.[1] Often simply referred to as the "Five Pounds Act," the statute was renewed and continued throughout the remaining years of the colonial period, but not without facing strenuous opposition from some of the colony's prominent lawyers and judges. The crux of their dissent was that the act would worsen an already deplorable "debasement" of the colony's local legal practice, for which they blamed the ignorance and misconduct of lay justices. Enlarging the jurisdiction of these unqualified magistrates would seriously undermine the authority of law, leading to a "horrid confusion and disorder in [the] government."[2] William Smith, Jr., the eminent lawyer and historian, made sure this negative portrayal of the Five Pounds Act and New York's justices of the peace would be remembered by posterity, asserting in his *History of the Province of New-York* that there were some justices "who can neither write nor read," and that "the conduct of the justices has given just cause to innumerable complaints."[3]

A decade or so later, lawyers became the subject of a heated public debate surrounding their suitability as representatives of the people. The debate was occasioned by the candidacy of John Morin Scott, a leading lawyer in New York City and member of an influential political faction. Scott's opponents launched a negative campaign against him, which they quickly turned into an all-encompassing indictment of the colony's lawyers. They blamed lawyers for the rampant

[1] "An Act to impower Justices of the Peace to Try Causes from Forty Shillings to Five Pounds," Dec. 7, 1754, *N.Y. Col. Laws*, III: 1011-1016.
[2] *Journal of the Legislative Council of the Colony of New York - Began the Eighth Day of December, 1743; and Ended the 3Rd of April, 1775*, (New York Senate, 1861), 1329.
[3] William Smith, Jr., *The History of the Province of New-York*, 2 vols. (Cambridge, Mass.: Harvard University Press, 1972), ed. Michael G. Kammen, II: 244.

"abuses in the law, so generally and so justly complained of," and argued that lawyers, if seated in the provincial assembly, would "give up the liberties and interests of their constituents and wantonly dispose of their property, to serve their own private interest or that of individuals with whom they are connected." The lawyers' earlier opposition to the Five Pounds Act, which Scott's adversaries deemed a most "beneficial and useful law," was offered as proof that lawyers in public offices would "act inconsistent with, and repugnant to, the general interest of the community."[4]

Taken together, the two controversies suggest that New Yorkers were deeply dissatisfied with their legal system during the late colonial period, although with little agreement about whom and what to blame for the unsatisfactory state of the law. Was the incompetence of lay justices and the resultant inefficacy of local courts the main problem? Or was it the lawyers' self-interested subversion of justice and equity on behalf of clients that was ruining the system? Answering these questions is as difficult now as it was two and a half centuries ago. It entails a broad examination of the law *as was practiced* in late colonial New York. We would have to look well beyond official court records in order to find out how justices, lawyers, and litigants each sought to use the law, and to what extent each group was able to affect judicial processes and outcomes. Further, we would need to know how the law was *understood* by each of these parties, and how their disparate understandings of the law contributed to tensions both in and out of courtrooms. Upon examining all these aspects of late colonial New York's legal practice, we can finally explain what drove the New Yorkers' widespread discontent with the law, and why the enlarged jurisdiction of lay justices and the candidacy of lawyers as representatives aroused such controversy. Therein lies the immediate goal of this study.

In its broader reach, this is a study of the social dimension of legal change in early America,

[4] *A Few Observations on the Conduct of the General Assembly of New-York* (New York, 1768).

particularly regarding the rules governing the appropriation and use of land and credit. Much has been written on social change in early America. Although summarizing the vast literature under a single thread would be impossible, declension may be proposed as a theme underlying many recent studies of this period. In "declension models," to borrow Jack P. Greene's terms, early American social history is characterized by a transition, mostly spurred by the growth of commerce and population, from simple community-oriented societies to societies based on complex institutions and impersonal legal and commercial transactions.[5] One of the central questions long debated among historians of early American society has been whether such declension—whether viewed as a positive or negative development—actually took place, and if so, when and to what extent.[6]

The literature on early American socio-legal history has followed a similar trajectory. Numerous studies of colonial legal culture have outlined an earlier period of community-oriented dispute resolution, where inhabitants generally preferred intra-communal settlement "through

[5] Jack P. Greene, *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture* (Chapel Hill: University of North Carolina Press, 1998), 55-6.

[6] The question has been central especially to the debate about when and how capitalism emerged in North America. Arguing against earlier notions that colonial farmers, whenever the opportunities arose, acted as rational economic agents, James Henretta, Michael Merrill, and Allan Kulikoff have emphasized that colonial agrarian economy retained significantly non-capitalist characteristics, whether we call it subsistence, household, or moral economy. This position has been incorporated into several influential accounts of early American economic development, which pinpoint the post-revolutionary decades as the time when the communities' hold on economic life finally began to decline, and a genuine transition to a capitalist economy took place. Other historians such as Winifred Rothenberg and Naomi Lamoreaux have argued that the transition began much earlier. They found numerous signs of communal declension and emergent capitalist behavior in the colonies, such as widespread consumption of market commodities and commercially oriented household production. James A. Henretta, *The Origins of American Capitalism: Collected Essays* (Boston: Northeastern University Press, 1991); Michael Merrill, "Cash Is Good to Eat: Self-Sufficiency and Exchange in the Rural Economy of the United States," *Radical History Review* 3 (Fall 1976), 42-71; idem, "Putting 'Capitalism' in Its Place: A Review of Recent Literature," *William and Mary Quarterly*, 3rd Series, 52 (April 1995), 315-26; Allan Kulikoff, *The Agrarian Origins of American Capitalism* (Charlottesville: University Press of Virginia, 1992); Christopher Clark, *The Roots of Rural Capitalism: Western Massachusetts, 1780-1860* (Ithaca: Cornell University Press, 1990); Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (New York: Oxford University Press, 1991); Winifred Barr Rothenberg, *From Market-Places to a Market Economy: The Transformation of Rural Massachusetts, 1750-1850* (Chicago: University of Chicago Press, 1992); Naomi R. Lamoreaux, "Rethinking the Transition to Capitalism in the Early American Northeast," *Journal of American History* 90: 2 (Sep., 2003), 437-461; Joyce Oldham Appleby, "The Vexed Story of Capitalism Told by American Historians," *Journal of the Early Republic* 21 (2001), 1–18.

compromise, harmony, and unanimity," rather than taking their disputes to courts.[7] When they did resort to litigation, juries with broad law-finding powers gave practically incontrovertible verdicts which were typically grounded in communal norms. Those practices began to unravel, however, as society changed. The primary disruptive element, according to most historians, was demographic and commercial growth. What David Thomas Konig wrote about Essex County in seventeenth-century Massachusetts probably applied to many other cases: "As towns grew larger and commerce expanded," they became "less of a face-to-face society capable of sustaining any sort of communalism." These social changes were soon followed by changes in the law—rapid increase of litigation, refinement of formal court procedures, and a decline in the role and independence of juries.[8]

The main disagreement among legal historians has been about periodization. Morton Horwitz and William Nelson argued that the decline of communities and the birth of "modern American law" were precipitated by revolutionary-era social change. Both Horwitz and Nelson emphasized that antebellum judges led a dramatic departure from colonial practice, as they began to assume de-facto law-making powers while strictly confining the juries' role to fact-finding.[9] In recent years, historians of colonial law have successfully challenged Horwitz's and Nelsons' paradigm by making a case for the colonial era as a time of major legal developments. Bruce Mann and others argued that commercialization of the Atlantic economy engendered a rapid shift toward impersonal economic transactions (best represented by the increased use of written financial

[7] William Edward Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825* (Chapel Hill: University of North Carolina Press, 1981), 151.

[8] David Thomas Konig, *Law and Society in Puritan Massachusetts: Essex County, 1629-1692* (Chapel Hill: University of North Carolina Press, 1979), 65.

[9] Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977); William Edward Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, Mass.: Harvard University Press, 1975). The quote is from Nelson, p. 2.

instruments), which led to a heavier reliance on formal legal procedures. According to these historians, numerous symptoms of communal declension—decline of jury trial, a growing role of trained lawyers and judges, and the courts' transformation into rationalized "record-keeping" institutions—were already apparent in the colonies' legal practice by the early eighteenth century.[10]

To a large extent, New York's case corresponds with the pattern of declension identified by recent socio-legal historians. Up to the early eighteenth century, legal practice in New York was overwhelmingly informal, with most legal matters being decided by lay judges and juries. Many disputes never reached a courtroom, but were resolved within the community through arbitration and private settlement. That situation began to change in the early eighteenth century. The volume of litigation increased, the underlying property and debt relations became more impersonal, and a growing proportion of legal decisions were made upon formal rules. For the most part, these changes were clearly evident in the courts' increased reliance on formal procedures. Not only did the courts' processes become more regularized, but many disputes were now resolved by procedural motions based on technical points of law, circumventing jury trials or any other channel of communal input. Not all courts in colonial New York, however, conformed

[10] Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987); Cornelia Hughes Dayton, *Women before the Bar: Gender, Law, and Society in Connecticut, 1639-1789* (Chapel Hill: University of North Carolina Press, 1995); Deborah A. Rosen, *Courts and Commerce: Gender, Law, and the Market Economy in Colonial New York* (Columbus, OH: Ohio State University Press, 1997); idem, "The Supreme Court of Judicature of Colonial New York: Civil Practice in Transition, 1691-1760," *Law and History Review* 5, no. 1 (1987): 213–47; Simon Middleton, *From Privileges to Rights: Work and Politics in Colonial New York City* (University of Pennsylvania Press, 2006), Ch. 5; idem, "Private Credit in Eighteenth-Century New York City: The Mayors Court Papers, 1681-1776," *Journal of Early American History* 2, no. 2 (2012): 150–77. For an overview of this literature, see: Bruce H. Mann, "The Transformation of Law and Economy in Early America" in Michael Grossberg et al. ed., *The Cambridge History of Law in America*, 3 vols. (Cambridge: Cambridge University Press, 2008), I: 365–99; James A. Henretta, "Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America" in Ibid., I: 555–92. For a somewhat contrary view of colonial legal systems, which argues that their courts were not fully rationalized as debt-recording institutions, see: Claire Priest, "Colonial Courts and Secured Credit: Early American Commercial Litigation and Shays' Rebellion," *The Yale Law Journal* 108, no. 8 (June 1999): 2413–50.

to this trend of legal professionalization.

New York had a settled court system during most of the eighteenth century. Established in the late seventeenth century, the court system continued with little alteration throughout the remaining colonial period. Central to the system was the Supreme Court of Judicature, which held broad appellate power, and could thus affect the standard of legal practice throughout the colony. Justices of the Supreme Court also held circuit sessions in the counties, and usually presided over Courts of Oyer and Terminer on special criminal prosecutions. Ultimate appellate power rested in the Governor in Council, although he could only review errors made by lower courts on high-value cases. The colony also had an equity jurisdiction in the Court of Chancery, and matters of maritime law lay before the Court of Vice Admiralty. Each County had an Inferior Court of Common Pleas for civil cases, and a General Sessions of the Peace for criminal cases. New York City and Albany City had their own Mayors' Courts, which handled a large portion of the voluminous civil cases arising in their urban economies. The lowest-level jurisdictions were the summary sessions presided over by justices of the peace, which they held either individually, dually, or in quorums of three, depending on the type of case.

Most studies on early American law and society, for understandable reasons, have focused on county courts and higher tribunals. The summary jurisdictions of justices of the peace are not only poorly documented, but they were also limited to cases of small value. Hence, even studies investigating communal aspects of colonial adjudication have tended to overlook justices' courts, focusing instead on jury trials in higher courts to gauge the relevance of communal vs. formal modes of adjudication. At least for the case of New York, however, this is a significant oversight. Especially after the Five Pounds Act enlarged their civil jurisdiction, local justices' courts played a major part in handling late colonial New York's heavy volume of small debt litigation. As

contemporary lawyers correctly pointed out, this was a deviation from the traditional role of justices of the peace, which was meant to focus on criminal adjudication and local governance. The provincial innovation was quite successful, however. It worked mainly because most justices handled small civil cases in a distinctively informal, flexible manner responsive to popular needs and expectations. The attractiveness of justices' courts to ordinary New Yorkers lay in the fact that they did not operate like the higher courts, which were dominated by professionalized rules and procedures.

The strong role of justices' courts in supporting local credit networks shows that commercialization did not necessarily sweep away informal, community-based legal and economic practices. Regardless of the higher courts' transformation, many small farmers, tenants, artisans, and laborers continued to prefer informal, personalized forms of credit in exchanging daily necessities, and tried to settle most disputes within their communities. Property-related matters were less free from formal law, as their high value placed them outside the jurisdiction of local justices. Still, wherever possible, many small farmers and tenants sought to define property relations and resolve disputes in accordance with communal custom. Their notions of tenancy and possession persisted, and held that long residence, verbal agreements, and improvement of property through labor gave entitlement to land. This is not to say that they were resistant to change. Ordinary New Yorkers often responded to socio-economic change with considerable flexibility and selectiveness, searching for new ways to adapt credit and property relations to an increasingly commercialized economy. They actively engaged in commerce, embraced monetization, and used various types of contracts to facilitate a wider range of economic activities—without resorting, however, to costly court procedures and formal legal rules.

Legal professionalization, then, was not an inexorable change triggered by demographic

and commercial growth. Some New Yorkers preferred the change, but many others did not. Those who preferred professionalized law were mainly large landowners and wealthy creditors. The character of colonial New York's economic elite and their impact on provincial society has been the subject of numerous studies. Progressive historians such as Carl Becker emphasized the aristocratic nature of New York's provincial elite, their oligarchic control of the political system, and the resulting entrenchment of an unequal, exploitative socio-economic structure.[11] Many historians have challenged or qualified the progressive historians' analysis of colonial New York's society and politics, but few have done so as forcefully as did Sung Bok Kim, especially regarding the character of the landed elite. Based on close analysis of their development and operation of manorial estates, Kim concluded that New York's large landlords were hardly conservative aristocrats—they in fact acted much more like risk-taking entrepreneurs. Kim's analysis is marred by his dichotomized view of "feudal" vs. "capitalistic" elements, which induced him to deemphasize the landed elite's wealth, power, and status underlying their large-scale enterprises.[12] The elite's capitalist ventures were undoubtedly built upon their positions of privilege, whether we call them "feudal" or not. Kim was correct, however, to emphasize that New York's elite constantly sought to further their wealth by actively engaging in commercial enterprises.

This is precisely why professionalized law was in so much demand by the economic elite

[11] Carl Becker, *The History of Political Parties in the Province of New York, 1760-1776*, 2nd ed. (Madison (Wis.): The University of Wisconsin Press, 1960); idem, "Nominations in Colonial New York," *The American Historical Review* 6, no. 2 (1901): 260–75. Later historians' works that expanded upon Becker's thesis include: Irving Mark, *Agrarian Conflicts in Colonial New York, 1711-1775* (Port Washington, N.Y.: I.J. Friedman, 1965); Staughton Lynd, "Who Should Rule at Home? Dutchess County, New York, in the American Revolution," *The William and Mary Quarterly*, 3rd Series, 18, no. 3 (1961): 330–59; Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (Baltimore: Johns Hopkins University Press, 1981).

[12] Sung Bok Kim, *Landlord and Tenant in Colonial New York: Manorial Society, 1664-1775* (Chapel Hill: University of North Carolina Press, 1978). The quote is from p. 234. Joyce Appleby similarly sets up a stark contrast between feudal privilege and capitalist entrepreneurialism, and treats the removal of feudal socio-political constrictions as the necessary and sufficient condition for the emergence of free market capitalism. Joyce Oldham Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York: New York University Press, 1984).

in late colonial New York. They needed the law not only to conserve what they already had, but also to enlarge their wealth and possessions by exploiting the economic opportunities afforded by the colony's growth. Seizing those opportunities before others, establishing claims, and yielding profit were contentious processes. Professionalized law provided invaluable competitive advantage and security in every step of such commercial ventures. It was all the more valuable due to its exclusive nature—only a small group of trained judges and lawyers fully understood the language of formal law. The wealthy landowners' and creditors' desire to appropriate this advantage in law was a major driving force behind legal professionalization in late colonial New York.

Although the landed and mercantile elite's heavy demand for legal expertise provided the impetus, legal professionalization would have been impossible without the equally strong initiative of provincial lawyers. The Anglicization and formalization of legal practice led by provincial lawyers and judges, intertwined with their self-serving efforts to monopolize legal practice, has been well documented by historians.[13] Too often, however, this process has been implicitly portrayed as an inevitable outcome of legal and economic modernization, with legal professionals simply responding to the pecuniary opportunities arising from changes already in process.[14] New York's lawyers, on the contrary, actively sought to control the production and dissemination of legal knowledge in the colony, strove to raise the standard of provincial legal practice in

[13] Paul M. Hamlin, *Legal Education in Colonial New York* (New York: Da Capo Press, 1970); Milton M. Klein, *The American Whig: William Livingston of New York* (New York: Garland Pub., 1993); idem, "From Community to Status: The Development of the Legal Profession in Colonial New York," *New York History* 60, no. 2 (1979): 133–56; idem, "The Rise of the New York Bar: The Legal Career of William Livingston," *The William and Mary Quarterly*, 3rd Series, 15, no. 3 (1958), 334–58; Herbert Alan Johnson, *John Jay, Colonial Lawyer* (New York: Garland Pub., 1989); Catherine Snell Crary, "The American Dream: John Tabor Kempe's Rise from Poverty to Riches," *The William and Mary Quarterly*, 3rd Series, 14, no. 2 (1957): 176–95.

[14] Mann, *Neighbors and Strangers*, 93-100; Eben Moglen, "Settling the Law: Legal Development in New York, 1664-1776" (Ph.D. Diss., Yale University, 1993), Ch. 2; Gregory Afinogenov, "Lawyers and Politics in Eighteenth-Century New York," *New York History* 89, no. 2 (2008): 143-162.

accordance with their ideals, and tried to legitimize their enlarged role in shaping the direction of the colony's continued legal development.

During the early eighteenth century, a handful of trained lawyers, judges, and officials began to adapt formal English law to the daily operations of New York's courts. Their activities laid the ground for a growing body of professional legal knowledge combining both metropolitan and provincial elements. In the mid-eighteenth century, New York's legal professionalization received a further boost by the emergence of numerous local attorneys. If the leading lawyers in New York City anchored a powerful centralizing force, raising the standards of legal practice and pushing provincial courts toward legal professionalization, local attorneys were instrumental in extending the reach of professionalized law down to each local court, ensuring that formal procedures, technical pleadings, and common law doctrines would become regular aspects of local legal practice. Key to the local attorneys' success was the strong connections they built with New York City's elite lawyers—as they sought professional training from the latter, exchanged legal records, notes, and opinions with them, and frequently collaborated on lawsuits with them. With the two groups drawing closer to each other into a tight-knit professional community, New York's lawyers gained the collective power to produce, circulate, and promote their own brand of professionalized legal knowledge, and to impose concomitant standards of legal practice throughout the province.

Facing this vigorous thrust of legal professionalization entwined with the economic elite's monopolistic commercial enterprises, ordinary New Yorkers had good reason to see professionalized law as a coercive force perpetuating socio-economic inequality. Regarding early modern English rural society, Marxist historians and political scientists have long emphasized the historic role of coercion in socio-economic change. Analyzing a transitional period that he

described as the "predatory phase" of agrarian and commercial capitalism, E. P. Thompson argued that acquisitive aristocrats and gentry spearheaded change by coercing capitalist property relations upon the rural masses.[15] In a similar vein, Ellen Meiksins Wood pointed to privilege and coercion as the pillars of early capitalist accumulation in rural England. For Wood, it was no coincidence that the major purveyors of early capitalist transition were landed aristocrats intent on converting feudal privileges into commercial capital. They were the only ones, thanks to their "pre-capitalist" privileges, who could coerce others into participating in capitalist social and economic relations.[16] Socio-economic change in eighteenth-century New York followed a similar trajectory. Historians such as Deborah Rosen have persuasively demonstrated that many parts of New York's society and economy began to acquire a "capitalist nature" by the early eighteenth century.[17] The shift was not a consensual or inexorable one, however. It was a conflict-ridden process in which privilege-based coercion played a major role. Legal change was closely intertwined with this process.

The coercive capacity of professionalized law was especially useful for enterprising elites, since one of their main concerns was to circumvent communal customs and personal obligations that hindered their profit-oriented ventures. Deployed by lawyers for the landed and mercantile elite, professionalized law was often invoked to impose formal, impersonal property and credit relations upon the people, usually to their disadvantage. Far from supporting their modest goals of attaining basic economic competence, professionalized law tended to thwart the common people's aspirations and exposed them to further economic insecurity. Some New Yorkers expressed their growing alienation from the law by defying or evading it. Others refrained from such risky actions, but were ready to show their discontent when the opportunity arose.

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[15] E. P Thompson, *Customs in Common* (New York: New Press : Distributed by W.W. Norton, 1991), Ch. 3.
[16] Ellen Meiksins Wood, *The Pristine Culture of Capitalism: A Historical Essay on Old Regimes and Modern States* (London: Verso, 1991); idem, *The Origin of Capitalism* (New York: Monthly Review Press, 1999).
[17] Rosen, *Courts and Commerce*, 74–75.

During the last decade of the colonial era, competition among New York's political factions created a rare opportunity for the common people to express their dissatisfaction with the law. Although mediated through the DeLancey party's electoral campaign, popular antipathy toward New York's professionalized legal system was clearly evident in the public's disapproval of lawyers as representatives. Not just drawing upon negative stereotypes of lawyers, the DeLancey party's anti-lawyer campaign adroitly tapped into specific grievances and anxieties over the law spawned by legal professionalization. One of the specific issues they focused on was the Five Pounds Act. Bringing to public attention the lawyers' earlier opposition to the act within the legislature, DeLancey propagandists warned voters that the act would never be renewed if lawyers were seated in the assembly.

The escalating debate surrounding the Five Pounds Act raised fundamental questions about legislation and legal change. The legislature's main justification for renewing the act was popular support. New York's lawyers found this a dangerous idea. For them, the direction of provincial legal change should be in accordance with English common law, as interpreted by the province's legal professionals. It was the bench and the bar, rather than legislators representing the people, that should determine whether it was necessary and safe to make any changes to the legal system, even if it only involved a small expansion of the lowest courts' jurisdiction. Only when supported by a carefully managed and stabilized legal system, according to the lawyers, could the colony attain orderly social and political maturation. Most ordinary New Yorkers, however, did not regard the lawyers' legal conservatism in such an idealized light. To them, the stability of law and society espoused by lawyers represented an increasingly exclusive legal system perpetuating socio-economic inequality. Rather than have lawyers safely guide the colony through a continued path of legal professionalization, ordinary people desired to claim the power to change the law, in order

to ensure that local courts would better meet their needs and expectations. For the most part, that dream would not be realized. It left a small but lasting mark on New York's legal system, however, in the enlarged jurisdiction of justices of the peace.

Perhaps a few words on the approach and scope of the study are in order. One of my goals was to write a social and legal history from the bottom up. The immediate problem one encounters while pursuing a study of this nature is the dearth of sources. Information about individual justices' courts, a central subject of this study, are notoriously sparse. Fortunately, three justices of the peace of colonial New York left exceptionally full records of their judicial activities. Those records enabled quantitative and qualitative analyses which form an important empirical basis of this study. Other parts of this study, however, depart from the type of exhaustive examination of court records preferred by many legal historians. Court minutes and judgment rolls provide a wealth of information, but they tell little about the specific strategies and considerations of lawyers and litigants behind legal actions; the negotiations among judges, lawyers, and juries in shaping legal decisions; or the tensions and grievances that could arise in the process. To examine those hidden aspects of late colonial New York's legal practice, one must search for disparate pieces of information scattered in private correspondences among lawyers and litigants, in complaints and petitions sent to the attorney general, and in the lawyers' informal notes and commonplace books. Taken together, these fragmentary sources offer a unique look into the law as was practiced on the ground, and understood by the people.

Since the emphasis is on how the people used the law, and how the law impacted their economic lives, the study does not focus on tracing the development of particular doctrines or court conventions. Procedural law and civil law are featured more prominently throughout the

study, although substantive law and criminal law make occasional appearances, for instance regarding the legitimation of land titles, or the prosecution of squatters. I tried to take into consideration particular local circumstances wherever applicable, but stopped short of attempting to draw any general conclusions comparing different regional or ethnic legal cultures within New York. While this is certainly an important dimension of New York's colonial law that bears careful examination, I leave that task to other studies with a sharper geographical focus, for which I hope this work might provide some guidance. Compared with most studies of New York's early legal history, I devote much more attention to local courts outside of New York City. As the core of provincial legal professionalization and the seat of appellate courts, however, New York City is still very relevant to this study. Thankfully, much has already been written about legal practice in the city, including in its busy mayor's court.[18] I have drawn upon those studies to complement my findings about legal practice in the counties.

For the most part, the chapters do not follow a chronological order. Every chapter is essentially set in the same time-frame denoted as the "late colonial" period, by which I roughly mean the half-century before the American Revolution. I agree with other legal historians that some of the key legal changes in colonial New York, including the establishment of common law courts and the emergence of a provincial bench and bar, already took place during the early-eighteenth century. This development gave New York a nucleus of legal professionalization, but its impact was initially limited to the colony's highest courts sitting in New York City. The process of legal professionalization in the ensuing decades, then, took place on a spatial rather than

[18] Rosen, "The Supreme Court of Judicature of Colonial New York"; Middleton, "Private Credit in Eighteenth-Century New York City"; Richard B. Morris ed.., *Select Cases of the Mayor's Court of New York City: 1674-1784* (Washington, D.C.: American Historical Association, 1935); Herbert Alan Johnson, *Essays on New York Colonial Legal History* (Westport, Conn.: Greenwood Press, 1981); Julius Goebel, Jr., "The Courts and the Law in Colonial New York" in David H. Flaherty, ed., *Essays in the History of Early American Law* (Chapel Hill: University of North Carolina Press, 1969), 245-280; Jill Lepore, *New York Burning: Liberty, Slavery, and Conspiracy in Eighteenth-Century Manhattan* (New York: Alfred A. Knopf, 2005).

temporal dimension. Further, even within the same locales, legal professionalization touched different courts and individuals in varying degrees. Justices' courts, for example, continued to operate in an entirely different fashion from the more professionalized county courts, and litigants usually came to these courts with completely different sets of expectations. Hence, while the colony's overall legal practice in 1775 was certainly much more professionalized than in 1725, the changes that occurred in the intervening years could not be neatly summarized into a series of key developments.

Accordingly, I present my analyses in a thematic organization. One of my two major concerns in organizing the chapters is to underline the multiple layers of legal practice that coexisted in late colonial New York. To this purpose, I open with three chapters devoted to individual justices' courts, before shifting focus to the professionalized New York City courts and county-level courts in Chapter 4, then discussing the impact of legal centralization on various levels of local courts in Chapter 5. My second concern is to describe legal change as a social process. Thus, several chapters focus on the factors that drove legal professionalization (Chapters 4 and 6), while others deal with its social impact and the varied reactions it elicited (Chapters 5 and 7). Building upon the previous chapters' findings, Chapter 8 finally analyzes the causes and implications of the controversies over the jurisdiction of justices and the candidacy of lawyers as representatives.

CHAPTER 1

"Arbitrary and Unjust"

Complaints and Criticisms against Justices of the Peace

Because colonial New York's justices of the peace seldom bothered to record their activities, they have been represented to posterity mainly through the complaints and criticisms they received from contemporaries. Not surprisingly, this has led to a misrepresentation of their role in colonial adjudication. As subsequent chapters will show, available records of the justices' judicial operations suggest that they played a much larger role than has been previously understood by historians, especially in handling small debt litigation. The large volume of complaints and criticisms against justices, then, clearly tell only one half of the story. That does not make them any less valuable as historical sources, however. Addressing a wide range of issues often in rich detail, the various complaints and criticisms tell us as much about the complainants and their social surroundings as they do about the justices. They help us understand what ordinary people in late colonial New York expected from the law, and what disappointed them. By surveying the complaints and criticisms against justices of the peace, this chapter examines both the operation of colonial New York's lowest-level local courts, and the ways in which ordinary New Yorkers sought to use them.

The list of the English justice's powers and responsibilities in the early-modern period was a long and ever-expanding one. To the initial duties of maintaining the public peace were added a growing number of judicial responsibilities both in criminal and civil law; and to their expanding judicial role were added an array of responsibilities pertaining to local administration—from

assessing various taxes and rates, regulating wages and prices, and licensing shops and taverns, to constructing and maintaining roads, highways, and public buildings.[1]

English authorities in New York took little time to transplant the institution to their newly acquired colony. Delegating a substantial part of administrative and judicial powers to governor-appointed local magistrates probably made especially good sense in an incipient colony struggling to establish centralized power and English hegemony. Justices of the peace were instituted as an integral part of the colony's new legal system promulgated by Governor Richard Nicolls in the Duke of York's Laws of 1665. The colony's legal codes would later undergo some major changes, especially with the Judiciary Act of 1691, pushed forth by the newly empowered general assembly. The justices' powers were not only left intact in the new legal codes, but was also enlarged in several respects, most notably in the area of civil adjudication.[2]

By the mid-eighteenth century, then, justices of the peace were a well-established component of New York's legal system. If their political value to the provincial authorities had diminished, their role in the everyday operation of the law steadily expanded with the colony's maturation. Within each county, a handful of justices were also appointed to serve as judges of the general sessions of the peace and of the inferior court of common pleas. The two courts were the primary tribunals for criminal and civil cases, respectively, arising within the county's jurisdiction. The justices' active hand in both criminal and civil adjudication extended beyond the county courts. Petty criminal cases were handled out of sessions by three or more justices in quorum. Even for more serious cases that would ultimately be determined at higher courts, individual justices often

[1] Thomas Skyrme, *History of the Justices of the Peace* (Chichester, England: Barry Rose, 1991). Norma Landau, *The Justices of the Peace, 1679-1760* (Berkeley: University of California Press, 1984), 1–46.

[2] Eben Moglen, "Settling the Law: Legal Development in New York, 1664-1776" (Ph.D. Diss., Yale University, 1993), 29–31, 59-61; James A. Henretta, "Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America," in Michael Grossberg et al. ed., *The Cambridge History of Law in America*, 3 vols. (Cambridge: Cambridge University Press, 2008), I: 559–60.

played a significant role with their powers of preliminary examination—taking affidavits and depositions of litigants and witnesses, issuing summons and warrants, and deciding whether defendants should be bound to appear at the county's quarterly sessions of the peace. Although initially much smaller compared to their criminal jurisdiction, civil law also became a major domain of the justices' judicial activities in the late colonial period. Only a small portion of each county's justices was authorized to hear civil cases brought to the county court of common pleas. Even those justices who did not sit on the bench, however, handled various small civil claims in their individual capacities.

Following English precedent, New York's legislature treated justices of the peace as the nuclei of local justice and law enforcement, adjusting with statutes the specific functions and jurisdictions pertaining to justices in various formations—in their individual or dual capacities, or as the bench of the general sessions, common pleas, and other special sessions. The general trend in the late colonial period was toward a greater reliance on justices of the peace, which is not surprising given the growth of the colony's population, economy, and volume of legal activities. Almost every year new statutes added to the justices' duties. Often pertaining to specific counties, the myriad statutes empowered justices to examine, punish, and expel vagrants and vagabonds; enforce laws related to market regulations and maintenance of roads; punish gambling and the keeping of disorderly houses, and so on.[3]

The expansion of the justices' powers was not limited to such specific duties, however. Two statutes in particular substantially enlarged the summary jurisdiction of justices both in criminal and civil law. First passed in 1732, the "Act for the speedy punishing and releasing such

[3] Julius Goebel, while surveying the justices' myriad duties in early New York, wrote that "it would be tedious to enumerate the long array of provincial statutes" related to justices out of sessions. Julius Goebel and T Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* (Montclair, N.J.: Patterson Smith, 1970), 127–35.

persons from imprisonment as shall commit any criminal offences, under the degree of grand larceny" (hereafter referred to as the "Less than Grand Larceny Act") empowered justices out of sessions, under certain conditions, to give summary judgment on petty offenses.[4] For civil matters, the "Act to empower Justices of the Peace to try causes from forty shillings to five pounds," often referred to as the "Five Pounds Act," greatly enlarged the justices' summary jurisdiction in civil matters. Under the act, justices could hear civil cases of up to five pounds' value, rather than limited to cases of twenty shillings (two pounds) or lesser value.[5] Initially excluding the cities of New York and Albany and the borough of Westchester, in 1759 it was enlarged to encompass the entire province, empowering mayors, recorders, and aldermen to assume the same authority as justices of the peace regarding civil matters of up to five pounds' value.[6]

The justices' summary jurisdiction was further bolstered by a statute restricting appeals against their judgments.[7] Passed in 1765, the "Act to restrain the bringing of Writs of Certiorari and Writs of Error for removal of Judgments given before Justices of the Peace" required that appellants make an affidavit before a judge within one month of the justice's judgment, specifying, under oath, the error or unfair practice of the justice. Many appellants still went through the trouble to challenge the justices' rulings in higher courts, and neither did the act prevent aggrieved litigants from sending letters of complaint to the colony's attorney general or petitioning to the governor's council. But the act certainly showed the colony's increasing reliance upon the justices' summary powers both in criminal and civil matters.

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[4] "An Act for the speedy punishing and releasing such persons from imprisonment as shall commit, any criminal offences, under the degree of grand larceny...," *N.Y. Col. Laws*. II: 745; "An Act to relieve the cities and counties of this colony by the speedy trial of petty offenders," Ibid., IV: 969.

[5] "An Act to impower Justices of the Peace to Try Causes from forty Shillings to Five Pounds," Ibid., III: 1011-1016. The act was renewed throughout the remainder of the colonial period. Ibid., IV: 296-301, 372-377, 736-737, V: 304-314.

[6] Ibid., IV: 372, 736.

[7] "An Act to restrain the bringing of Writs of Certiorari and Writs of Error for removal of Judgments given before Justices of the Peace within this Colony," Ibid., IV: 861, V: 313–4.

Not everyone in the colony welcomed the increased role and authority of justices of the peace. The Five Pounds Act, in particular, faced vigorous opposition from the colony's legal elite. After letting an initial version of the act (which had a limited term and smaller geographical jurisdiction) pass in 1754, the governor's council, composed mainly of the colony's older generation of prominent lawyers, twice rejected the general assembly's bill to enlarge and continue the act in 1755 and 1756.[8] When the council finally seemed ready to give in to the assembly's persistent demands in 1758, fifteen of the colony's leading lawyers presented a lengthy petition to council to prevent the passing of the act.[9] While the assembly nonetheless succeeded in enlarging and renewing the act throughout the remaining years of the colonial period, the legal elite did not rest its opposition, as shall be seen in subsequent chapters.

The legal elite's opposition to the act stemmed from its deeply critical view of the colony's justices of the peace. The Five Pounds Act, they warned, would worsen the already deplorable state of the colony's local legal practice, for which they blamed the ignorance and misconduct of unqualified lay justices.[10] The colony's Supreme Court, according to the 1758 petition of lawyers, had already been receiving a handful of complaints against justices of the peace every year, and there were probably many more complaints "permitted to die unheard" on account of the "poverty of the sufferer." The lawyers found the profusion of complaints hardly surprising, given the "known ill characters and extream ignorance" of the colony's justices of the peace. There were justices, the lawyers' petition detailed, "who were so poor as not to have a freehold, and so ignorant as to be unable to write their own names."[11]

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[8] *Journal of the Legislative Council of the Colony of New York - Began the Eighth Day of December, 1743; and Ended the 3Rd of April, 1775.* (New York Senate, 1861), II: 1235, 1240. For a detailed discussion of the legislative debate surrounding the Five Pounds Act, see Chapter 8, pp. 399-413.

[9] Ibid., 1323-6.

[10] Ibid., 1329.

[11] Ibid., 1323-6

Historian Douglas Greenberg, one of the foremost students of law enforcement in colonial New York, generally agreed with the colonial lawyers' viewpoint. Greenberg emphasized that the colony suffered from lax and arbitrary law enforcement, due in large part to the incompetence of the justices of the peace, sheriffs, and constables. "Justices of the peace," Greenberg wrote, "were not always anxious to perform their duty, and they sometimes even failed to appear at their own court sessions." They were, on the whole, "an ignorant lot, ill-suited to hold office and often anxious to abuse the power which such office afforded them."[12]

Available evidence seemingly confirms Greenberg's observations. Both William Kempe and his son John Tabor Kempe, whose combined terms as attorney general lasted from 1752 to 1777, received numerous petitions and letters of complaint against justices of the peace. Some of those complaints led to indictment for maladministration in the provincial Supreme Court. In 1767 alone, fifteen justices of the peace from several counties were together indicted at the Supreme Court for maladministration.[13] The governor's council also received complaints about justices, and sometimes suspended them upon the authority of the governor. In 1731, for instance, Justice Jonathan Haight of Orange County was suspended for "unfairness, unjustness, and drunkenness," as was Justice Lancaster Symes of the same county for maladministration and disloyalty.[14]

Upon closer examination, however, the complaints and appeals often reveal stories far more complex than can be reduced to a blanket indictment of early New York's justices. They tell us of the types of disputes and claims that the people frequently brought before justices, and also

[12] Douglas Greenberg, "The Effectiveness of Law Enforcement in Eighteenth-Century New York," *The American Journal of Legal History* 19, no. 3 (1975): 173–207.

[13] "Information on maladministration as justices of peace," May 23, 1767, *John Tabor Kempe Papers,* NYHS, Box 1, Folder 3.

[14] *Transcriptions of New York Council Minutes and Council Papers, 1683-1767*, NYSL, VI: 126, 128-30, 132-4. Following Attorney General Richard Bradley's harsh and unpopular prosecutions against justices of the peace of Queens and Albany in the 1720s, the Council seems briefly assumed the responsibility of regulating justices' conducts. Goebel and Naughton, *Law Enforcement in Colonial New York,* 173-4.

hint at the social context that gave rise to such disputes, many of which were difficult for any magistrate to resolve. The complaints also provide valuable insight into the specific processes and considerations involved in the justices' summary jurisdiction, and help us comprehend the various problems and difficulties that could arise in each step of the summary process.[15]

Complaints against Justices: Warrants, Judgments, Jurisdiction

A particularly frequent area of contention in the justices' exercise of judicial authority was the issuing of warrants. A typical example was the warrant issued by Justice Johannes DeWitt of Dutchess County against William Hogelandt in 1761. On finding that "a certain parcell of rails" was missing, Peter Monfort, a yeoman in Rumbout precinct in Dutchess County, reported the supposed theft to Justice DeWitt. Monfort claimed he had "reason to suspect" that his neighbor Hogelandt had stolen the rails. DeWitt accordingly issued a warrant directed toward the constables of Rumbout precinct, authorizing them to search Hogelandt's property or "anywhere else" where the stolen rails "may be suspected" to be hidden. If found, the constables were to "seize" the rails for Monfort.[16]

As local attorney Bartholomew Crannell opined in his letter to Attorney General John Tabor Kempe, DeWitt's warrant was problematic on several accounts. It was questionable, for one, whether Monfort's vague suspicion constituted sufficient grounds for authorizing a search of Hogelandt's property. Second, the justice's warrant delegated too much power to the constable who would conduct the search. In the terms laid down by Justice DeWitt, the constable was

[15] An indispensable reference for complaints and appeals against justices of the peace is Goebel's *Law Enforcement in Colonial New York.* Particularly helpful is Goebel's exhaustive survey of cases recorded in the attorney generals' manuscripts and in the minutes of the Governor's Council. One should bear in mind, however, that Goebel's case summaries mostly focus on criminal cases and the legal procedures involved in them, and that his survey leaves out the numerous complaints appearing only in private letters sent to the attorney general.

[16] Justice Johannes DeWitt's warrant against William Hogelandt, Jan. 20, 1761, *Kempe Papers,* Box 11, Folder 10.

effectively given "judicial authority" to make the thorny decision of whether any rails he should find were in fact the stolen ones. Finally, if he decided that he found the stolen rails, the constable was instructed to confiscate them for the plaintiff, without the defendant being properly tried before DeWitt or any other magistrate.[17]

Defendants arrested upon a dubious warrant would ultimately be discharged, of course, if found not guilty. Even so, being served with a warrant was often a great nuisance and could incur substantial direct and indirect costs, as vividly attested to by Stanford Cormehill of Dutchess County. One night in 1755, Cormehill was awoken by a constable who charged into Cormehill's bedroom and, "with threats," forced him out of bed, to the "great disturbance & surprize of the whole family." The constable curtly declared that he was acting upon a "special warrant for debt" issued by Justice John Bailey, but refused to state the specific charge. Following the abrupt and forceful arrest, Cormehill was "hurried like a fellon that night above ten miles & detain'd at a publick inn until day." The charge, as it turned out, was on a debt he owed to school master Morris Jones, which amounted to a mere six shillings.

Cormehill complained that he could have easily paid "a much larger sum if lawfully due" instead of suffering the humiliating and "vexatious" arrest, detention, and trial, not to mention being charged more than a pound (nearly four times the amount of the debt) for court fees and the cost of trial. The usual procedure in small debt claims was for the justice to issue a summons. The Five Pounds Act directed that any defendant summoned on such claims should be given at least six days to appear before the justice—time enough for the defendant to prepare for the hearing, try to raise the claimed sum if necessary, or reach private settlement with the creditor.[18] Many a debtor opted for out-of-court settlement, thus saving the trouble of appearing before the justice, and

[17] Bartholomew Crannell's legal opinion on Justice DeWitt's warrant, n.d., *Kempe Papers*, Box 11, Folder 10.
[18] *N.Y. Col. Laws*, III: 1011-1016, IV: 296-301, 372-377, 736-737, V: 304-314.

avoiding any further costs beyond the constable's and justice's fees for summoning.[19] Not only was Cormehill deprived of that option, but by being served a warrant and abruptly taken to court, he was hindered from conducting his business, some of which was time-sensitive and involved much "more important affairs" relating to his estate.[20] Colonial statute did allow justices to issue warrants on debt claims in certain situations—when the plaintiff, "upon oath or affirmation," gave strong reasons to fear that the debtor would abscond on being served a summons.[21] As Cormehill's case illustrates, justices did not always ensure that such conditions were met before deciding to issue a warrant.

Justices could abuse their power not only by issuing warrants, but also by refusing to issue them. Justice Henry Vandenbergh of Dutchess County was admonished by the attorney general on one such occasion. In 1763, Vandenbergh received a complaint from one Thomas Strickland that he had been "much abused and robbed" by John Edwards and a few other persons. Strickland desired a warrant against them on a charge of felony, but Vandenbergh refused to grant a warrant. Instead he summoned Edwards and the other assaulters, permitted them to swear they were not guilty of the charge, and discharged them immediately. Vandenbergh furthermore charged the court fees (one pound six shillings) to Strickland, judging that his accusations had been groundless. Attorney General John Tabor Kempe sternly admonished Vandenbergh, reminding him that it was the "duty of a magistrate" to secure the accused party with a warrant upon receiving a charge of felony.[22]

One of the reasons that the issuing of warrants often aroused controversy, as the above

[19] See Chapter 2, pp. 87-88, 93-94.
[20] Stanford Cormehill's complaint against John Bailey, Esquire, on maladministration as justice of the peace, n.d., *Kempe Papers,* Box 3, Folder 1; Draft of an affidavit on case of the King against John Bailey, n.d., Ibid., Box 3, Folder 1.
[21] See note 18 above.
[22] John Tabor Kempe to Henry Vandenbergh, Apr. 30, 1763, *Kempe Papers,* Box 15, Folder 6. This case is also discussed in Greenberg, "The Effectiveness of Law Enforcement in Eighteenth-Century New York," 185.

cases illustrate, was because the evidence was often weak. The justice's decision to issue a warrant was typically based on the complaint or testimony of a single individual. The same problem of scant evidentiary basis carried over to the justice's judgment, especially when it relied on the testimony of a single plaintiff or witness. Peter Farris of Eastchester, for example, complained he had been unjustly charged 40 shillings in damage and costs by Justice Sneden in 1753. Sneden's judgment, according to Farris, was based on the "false witness" given by one Edward Burlong, who had been bent upon "contriv[ing]" a libel against Farris.[23]

Amos Mills of Jamaica, Queens County, was similarly disgruntled by a judgment against him based on one witness's testimony. The underlying dispute, which led to Mills' being summoned before Justice Samuel Clowes in 1768, surrounded an informal agreement made between Mills and Samuel Smith, Jr. three years earlier. Sometime in February 1765, Mills and Smith agreed upon the sale of a small farm owned by Mills. According to the agreement, Mills was to move out of the farm on May 1st, by which time Smith would pay him. The seeds of dispute were sown when Smith was unable to pay by the fixed date. While Smith promised to fulfill the payment within a few days, Mills stayed on the farm on account of the late payment. Being a poor man, as he later explained, he simply could not make the travel to his new home without receiving the money from the land sale. The transaction ultimately went through when Smith finally made payment on May 4th, four days later than the date initially agreed upon. Mills moved out immediately.

The dispute arose over what happened during those four days. Smith complained that Mills had "emptied a tub of ashes," broken some glass in the house and neglected to mend it, consumed eggs from a turkey that was now Smith's, and allowed his hogs to run over the field and damage

[23] Peter Farris to William Kempe, Mar. 27, 1754. *Kempe Papers,* Box 15, Folder 9.

the crops. Mills had also taken away a "cheese shelf," a pail, an old spade, and some hay, all which should have stayed with the farm as Smith's possessions. Citing these various consumptions and damages, Smith sued Mills for trespassing four days on the farm, to the damage of five pounds (an amount likely tailored to fit the lawsuit into a single justices' jurisdiction).[24]

While Smith claimed that according to their prior agreement Mills was not to use or take any of those items after May 1st, Mills hotly denied that any such verbal agreement beyond the written terms of the land transaction had ever been made. Justice Clowes, nonetheless, gave judgment for Smith, based on the testimony of a witness. The witness claiming to have been present when Smith and Mills made the agreement and swearing that all the specific articles Smith mentioned had indeed been agreed to, was none other than the father of Smith the plaintiff—"Old Justice" Samuel Smith. As his title indicates, he also happened to be a justice of the county himself, seemingly well acquainted with Justice Clowes. The law did not bar testimonies of witnesses related to a litigant, but one could easily see why Mills would find it hard to accept a judgment based entirely upon the claims of the plaintiff and his father. Later examination by other justices, in fact, gave strong reason to doubt that Justice Smith had been present while the alleged agreement was made. According to several witnesses, moreover, Smith later confessed that what he knew about the agreement was entirely from his son's account.[25]

The problem of the sparse evidentiary bases of justices' judgments was compounded by the fact that justices seldom recorded their summary proceedings.[26] One attorney, while working for a client seeking redress against a local justices' ruling, lamented that "what ever judgment was

[24] Notes on the dispute between Amos Mills and Samuel Smith, Jr., n.d., *Kempe Papers*, Box 11, Folder 7.
[25] Nathaniel Mills v. Samuel Smith, Esq., Notes on Trial, Sept. 10, 1772, *Kempe Papers,* Box 11, Folder 7.
[26] William Smith, Jr. enumerated this as one of his reasons for objecting to the continuation of the Five Pounds Act. The act, Smith complained, should have directed "some kind of minutes or short record to be made of [the justices'] proceedings." *Journal of the Legislative Council*, II: 1678.

given" by them was a "secret to all people but the justices themselves."[27] The difficulty of recovering what transpired during a justice's trial posed a special challenge to the litigant seeking redress against a justice's judgment. This happened to Amos Mills when he decided to appeal Justice Clowes' judgment in his dispute with Samuel Smith, Jr. It was a challenging task, as he soon discovered. Mills not only had to refute the claim of key witness Justice Smith that Mills had made a certain agreement with Smith, Jr., but later also found himself in disagreement with Justice Clowes over what had transpired during the trial. Clowes claimed Mills confessed during trial that he had indeed made the said agreement with Smith, Jr. Mills flatly denied this: All he had admitted to during the trial was the fact that he and Smith, Jr. did *discuss* such terms on the latter's proposing them, but he had never consented to the terms, nor made any such admission before Justice Clowes.[28]

Discrediting Justice Smith's testimony was also not an easy task. Shortly after the trial before Justice Clowes, Mills took the dispute to another local justice, Hendrick Brinkerhoff, this time squarely upon the issue of whether Mills had made the agreement alleged by Smith, Jr. and his father. Justice Smith was summoned once more, and was questioned whether he had truly witnessed the alleged agreement being made. According to Mills and Justice Brinkerhoff, Justice Smith backed out of his earlier claim, now saying that although he had been present while Mills and his son were discussing the terms of the said agreement, the agreement was not concluded during that meeting, as Mills did not consent to the terms. Smith claimed that he subsequently heard from another son of his that Mills had later agreed to the same terms as had been discussed at the meeting, and hence thought he could safely say that he "knew" the agreement to be true.[29]

[27] William Corry to William Kempe, Jul. 24, 1755, *Kempe Papers*, Box 15, Folder 8.
[28] Nathaniel Mills v. Samuel Smith, Esq., Notes on Trial, Sept. 10, 1772, Ibid., Box 11, Folder 7.
[29] Minutes of Justice Hendrick Brinkerhoff's proceedings in a tryal before him, between Samuel Smith Jr. plaintiff & Amos Mills defendant, Sep. 6, 1771, Ibid., Box 11, Folder 7.

This was tantamount, of course, to confessing that he had committed perjury during the earlier trial before Justice Clowes.

Mills ultimately succeeded in reversing Justice Clowes' decision, but not before taking his case before the grand jury at the general sessions, hiring a lawyer, and calling in a large number of witnesses. The main difficulty was simply in proving what Justice Smith had uttered during the two trials. The key witness on Mill's side was John Troup, Jr., who had been present at the trial before Justice Brinkerhoff, and testified that he "heard" Justice Smith confess that all he knew about the alleged agreement was from his sons. But even this witness could not ascertain everything that had transpired in the trial—he was unsure whether Smith had made his confession upon oath.[30] Such were the uncertainties that could surround the summary proceedings of justices.

The informal physical settings in which justices heard and examined litigants and witnesses could also add to the arbitrariness. When out of sessions, a justice typically tried causes in his own house, at a nearby tavern, or sometimes even at one of the litigants' houses. Proceedings at such venues, as the colony's lawyers never tired of pointing out, could easily descend into tumultuous affairs.[31] One defendant, for instance, complained that a justice, after having him forcefully brought from nearly a mile's distance through "exceeding hard rain," tried him at a tavern "filled with a mobb of people drinking." Moreover, the justice had already been counseling the plaintiff on the case while sitting in the tavern together for "most of the day." Thus predisposed against the defendant, the justice unsurprisingly treated him with "a great deal of arrogance and rudeness" throughout the trial.[32]

The justices' ability to exercise their authority almost at any time and in any venue was

[30] Nathaniel Mills v. Samuel Smith, Esq., Notes on Trial, Sept. 10, 1772, Ibid., Box 11, Folder 7.
[31] *Journal of the Legislative Council,* 1325.
[32] Mr. Hatton to John Tabor Kempe, n.d., *Kempe Papers,* Box 11, Folder 9.

dramatically highlighted in the dispute between James Haviland and Caleb Pells in Rye, Westchester County, in 1765. Five years earlier Haviland had received from Pells, his father in law, a "wench and a child" as a "marriage portion." Given that Pells treated both the woman and her progeny as transferrable property, it would be safe to assume that the "wench" was a slave. Haviland claimed that Pells had recently helped the slave run away, taking her back to his house. Hearing Haviland's accusation and taking his oath, a local justice issued a search warrant and sent a constable to Pell's house. On being accosted by the constable, Pells stalled for time, and secretly sent for Justice John Fowler, with whom he was apparently on close terms. Fowler quickly arrived at the house, demanded that the constable peruse the warrant again, and while having him thus distracted, secretly instructed Pells to bring the slave before him. Before the constable could serve the warrant from the other justice, Fowler quickly proclaimed in front of the slave that upon examination of her case, he decided that she belonged to Pells and should not be taken away by the constable.[33]

Arbitrariness could seep into the justices' proceedings not only in the issuing of warrants and in the subsequent hearings and judgments, but also in the claiming of jurisdiction. The issuing of warrants itself was of course a major part of the justice's claim to jurisdiction, but upon examining a defendant brought before him, the justice also had to decide whether he was entitled to give summary judgment, or whether the case should be sent to a higher court. Colonial statute provided rules for determining jurisdiction, but justices did not always interpret those rules in a strict and uniform way. This was especially a frequent source of complaint regarding criminal cases, for which justices, under certain conditions, could claim summary jurisdiction according to the Less than Grand Larceny Act. According to the statute, justices could try persons accused of

[33] James Haviland to John Tabor Kempe, Sept. 2, 1765, Ibid., Box 13, Folder 8.

petty offenses summarily without a jury, if the accused could not post bail within 48 hours.[34] It was not infrequent for justices to either misinterpret or ignore one or more of the terms specified in the statute, and give summary judgment upon a defendant who should have been tried before a jury at the general sessions of the peace.

In 1769, for example, Andrew Seaton of Suffolk County in Long Island wrote to the governor complaining of three justices of the county, Richard Woodhull, Benajah Strong and Silas Strong. The three justices had issued a warrant against one of Seaton's servants as a criminal in breaking the public peace, when in fact all he had done, according to Seaton, was to "defend the property of his master" against the depredation of one William Buchanan, a local inhabitant. Two of the justices subsequently tried the servant, found him guilty of the offense, and fined him accordingly. As Seaton pointed out, the justices examined the servant and gave judgment immediately on his being brought before them, without waiting 48 hours as the law directed. Attorney General Kempe admonished the three justices for their "irregular and wrong" practice, especially in abusing the Less than Grand Larceny Act. The act, Kempe was at pains to explain, was clearly intended only to apply to "vagrants & other disorderly persons not able to maintain themselves in gaol," and who would thus incur unnecessary cost to the county if left imprisoned until the next session of the count court. An exasperated Kempe lamented that not just the three justices in question, but many more justices throughout the colony had made it "too frequent a practice to extend this act to almost every case," depriving defendants who might easily have found bail or could have afforded jury trial of due process.[35]

[34] See note 3 above.

[35] John Tabor Kempe to Richard Woodhull, Benajah Strong & Silas Strong, Mar. 3, 1769 & June 9, 1769, *Kempe Papers*, Box 15, Folder 5.

Corrupt Magistrates: Two Cases

For most justices who received complaints, the problem was limited to one or two areas of their judicial proceedings. Justice Joseph Kissam of Queens County and Justice James McLaghry of Ulster County, on the other hand, demonstrate the extent to which unscrupulous justices could abuse their summary powers within late colonial New York's legal system, exploiting nearly every opening for arbitrariness.

In 1755, Justice Kissam was called to defend himself in the governor's council against the petition of several inhabitants of Hempstead, Queens County complaining of his conduct. The main petitioner, Josiah Martin, complained that his slave was charged with theft by Justice Kissam for no other apparent reason than the justice having "contracted some dislike or prejudice against" Martin, and wanting to use "lies to vex and oppress" him. Upon being summoned, Quaminah, Martin's slave, was initially discharged for want of evidence. But the justice, ignoring due procedure, immediately summoned Quaminah again to be tried at another place. This time Kissam was able to find him guilty, based on the testimony of another slave who claimed that he bought the stolen goods from Quaminah soon after the supposed theft had taken place. The racial injustice of the legal code aside, Martin had good reason to complain that the justice had ignored colonial statute in admitting the "evidence of one negro against another."[36] Moreover, the slave's testimony should be discredited, claimed Martin, since Kissam had "severely whipped & punished [him] in order to make him accuse" Quaminah. Despite Quaminah pleading not guilty, Kissam had him punished with twenty lashes and in "so severe a manner" that he was "unfitt for service several days after," according to Martin. Kissam was still not done with Quaminah. Sometime later when

[36] According to a colonial statute passed in 1730, slaves were not allowed as evidence except in cases of a "plotting or confederacy among themselves" to run away or rebel against their masters. "An act for the more effectual preventing and punishing the conspiracy and insurrection of negro and other slaves; for the better regulating them...," *N.Y. Col. Laws,* II: 684.

another inhabitant reported that several goods and some money had been stolen from his store in the night, Kissam, "without any deposition that any particular houses were suspected of having stolen the goods," issued a general search warrant authorizing constables to search any house in the county. Martin's house was quickly targeted, and Kissam once again arrested Quaminah despite not finding any stolen goods or evidence, then threatened him so harshly, according to Martin, that Quaminah attempted to cut his own throat.

In a separate incident, deputy sheriff Adam Wright complained of having been obstructed by Justice Kissam in making an arrest. While transporting the prisoner with the assistance of two freeholders, Wright came across Kissam. The justice strenuously cajoled the prisoner to resist the arrest, with violence if necessary, and tried to command the two assistants to free the prisoner and arrest Wright instead. Fearing a violent altercation given Kissam's increasingly fierce demeanor, Wright finally released the prisoner, although he had been duly arrested according to a writ from the court of common pleas. These were but few of the "many other extraordinary proceedings" of Justice Kissam, according to the petitioners demanding his suspension.[37]

Justice James McLaghry of Ulster County was also accused of abusing his authority on multiple accounts. One of the complaints was from Fletcher Matthews in 1769, who wrote to the attorney general on behalf of his close neighbors Mr. and Mrs. Mills. Mrs. Mills in particular had recently suffered from a public accusation by McLaghry that greatly tarnished her character and subjected her to much insult and abuse in the neighborhood, but was entirely "without foundation and proceed[ed] from malice." Matthews claimed that if needed he could obtain a "certificate from all the principle people in the country" that the justice's charges were false, and opined that the justice's proceedings had always been "very arbitrary and unjust." Matthews cautioned Kempe not

[37] *New York Colonial Manuscripts, 1638-1800,* NYSL, IV: 439-46.

to give Justice McLaghry "the least hint" of his writing the letter of complaint, fearing the "malice and vengeance" of the justice should he find out.[38]

Barely a few months earlier, McLaghry had also been accused of misconduct in another, much more complicated case worth our extended attention. Sometime in early 1769, Emmanuel Smelliger, a miller in New Windsor in Ulster County, had taken a one-year lease on a mill owned by John Stuart. According to the lease, Smelliger was to pay Stuart 40 pounds at the end of the year, and was also to take care of a small lot "sowed with wheat" and "keep it from being damaged by hogs or cattle." Peter John, a farmer living nearby, became Smelliger's security for the lease.[39] The trouble began sometime in spring, when the neighbors' hogs repeatedly ran in to the wheat lot. Stuart, the landlord, instructed Smelliger to kill the hogs if he saw them running over the wheat. Accordingly, Smelliger's wife set a dog at neighbor John Davis's hog when she saw it break into the lot again. The hog was injured but not killed, and was taken away by Davis when Smelliger notifyied him.[40]

A few days later Smelliger, was summoned before a justice, not on account of Davis's hog, but regarding some grain that he had ground in the mill.[41] Alexander Trumble, a recent customer of the mill who had brought a large quantity (250 bushels) of wheat to be ground, complained that the flour he received was of very bad quality, insinuating that Smelliger had secretly replaced Trumble's with lower quality wheat before grinding. Trumble came to Smelliger demanding fifteen pounds for damages, which Smelliger refused, denying Trumble's accusations.

Peter John, Smelliger's security in his lease of the mill, was apparently well acquainted with Trumble. He accompanied Trumble when he came to Smelliger's house to demand the fifteen

[38] Fletcher Mathews to John Tabor Kempe, July 7, 1769, *Kempe Papers*, Box 14, Folder 2.
[39] John Stuart's affidavit, sworn before Justice Charles Clinton, Jun. 3, 1769, Ibid., Box 11, Folder 3.
[40] John Tabor Kempe's notes on the complaint of Emmanuel Smelliger, n.d., Ibid., Box 11, Folder 3.
[41] Henry Mancelly, Jr.'s deposition, taken by Justice Charles Clinton, Jul. 10, 1769. Ibid., Box 11, Folder 3.

pounds. After Trumble left, John warned Smelliger that Trumble, together with John Davis and a constable, would be returning very soon on account of both Trumble's wheat and Davis's hog, and that they would "take away all that he had." John advised Smelliger to quickly revise the terms of his lease of the mill, temporarily making John the lessee and giving him possession of the mill and attached lot, along with the considerable amount of wheat, flour, and several cattle and hogs owned by Smelliger. This would prevent Smelliger from losing the mill, lot, and possessions, John explained, in case the court ordered distraint of Smelliger's property to recover the plaintiffs' damages. John promised to return the title to the lease when the trial was over. Smelliger, trusting him, complied with the plan.[42]

Less than an hour later, Trumble returned to Smelliger's house, this time accompanied by John Davis and Constable Reuben Weed, as Peter John had predicted. The three men pressed Smelliger to pay Trumble the fifteen pounds, informing him that they had just been to Justice McLaghry and obtained a warrant for the same amount. Smelliger succumbed to the threat, but not having enough money, gave Trumble a cow, and waived the five pounds Trumble owed Smelliger for grinding the wheat. Trumble remarked that it was still short of the damage he had sustained, but agreed not to press charges further at the moment. The constable accordingly went back to Justice McLaghry reporting that the matter had been settled between the parties.[43] Smelliger's troubles, however, had only just begun.

On the evening of the same day, the constable returned with another warrant, pulling Smelliger "out of his bed." Another complaint, similar to Trumble's, had been made by three men (who later turned out to be John Davis's brother, cousin, and brother-in-law). A few days earlier, and four days after Davis's hog had been injured by Smelliger's dog, the three men had brought

[42] John Tabor Kempe's notes, Ibid., Box 11, Folder 3.
[43] Arthur Parker's deposition, taken by Justice Charles Clinton, Jun. 10, 1769, Ibid., Box 11, Folder 3.

two bushels of rye to the mill and asked Smelliger to grind them. Being ill at that time, Smelliger had his assistant, James Mackee, perform the task. The three men left with the ground rye without any comment, but soon thereafter complained to Justice McLaghry that what they received was substantially less than the amount of rye they had ordered Smelliger to grind. Although an entirely separate issue, John Davis simultaneously presented his complaint about his hog to the same justice. It is unclear whether there was a temporal gap between when McLaghry received Trumble's complaint and John Davis and his kinsmen's complaints, but as it happened, McLaghry issued both warrants on the same day, but at different hours. Smelliger was not arrested on the first warrant, on his settling the matter with Trumble as aforementioned. On hearing of this settlement from the constable, it seems, McLaghry immediately issued the second warrant based on John Davis and his kinsmen's complaints.[44]

Smelliger was arrested by the constable and brought to McLaghry's house. Without offering him any explanation, McLaghry had Smelliger detained over night at a nearby tavern. The following day McLaghry brought two more justices, Charles Clinton and Samuel Sands, to the tavern, and tried Smelliger, apparently on both causes (Davis's hog and his three kinsmen's rye). Smelliger was charged £4 14*s.* on account of the damage he had inflicted upon Davis's hog, along with costs of the trial.[45] He was also ordered to be whipped, along with his assistant Mackee, 33 lashes each on account of their stealing from the three men's rye.

Smelliger was saved from the full corporal punishment thanks to "people interfering" after the constable gave him six lashes, but he still owed money both to the court and to Trumble, on what he felt were false charges and irregular judgments. Seeking redress, Smelliger went down to

[44] Emmanuel Smelliger's complaint against the Justices McLaghry, Clinton & Sands, and other persons, May 24, 1769, Ibid., Box 11, Folder 3.

[45] Brief state of the case between John Davis plaintiff and Emmanuel Smelliger as it was layed before Justice James McLaghry, Jun. 2, 1769, Ibid., Box 11, Folder 3.

New York City, which is probably when he presented his case to the attorney general. As for the title to the mill, lot, and possessions he had transferred to Peter John, he still firmly believed in John's promise that this was but a temporary arrangement existing only on paper until the trial was over. Smelliger further entrusted John to take care of the property during his absence. On returning from New York City, Smelliger was shocked to find that John had locked up the mill, taken all of Smelliger's cattle and hogs to his own house, and was claiming the mill and lot as his own.

On being accosted by Smelliger, John promptly went to Justice McLaghry, claiming that Smelliger had tried to break into his mill. Further, John claimed that Smelliger threatened to burn the mill down if the court forced him to pay for John Davis's hogs or punished him for defrauding customers at the mill. In the event, John pointed out, he would sustain substantial damages as the current lessee of the mill. He would owe costs of repair to the lessor Stuart, in addition to the already considerable rent. On hearing how John was thus "afraid" of being ruined my Smelliger, who was "an ill natured man," McLaghry issued a warrant, which was again served by Constable Reuben Weed. Brought before McLaghry, Smelliger denied that he had made any such threat, but was again detained at the tavern. The next day, Smelliger was brought before Justices McLaghry and Clinton, who proceeded to try him. With Smelliger unable to offer bail for appearing at the next general sessions for the county, the two justices assumed the authority to dispense judgment, referring to the Less than Grand Larceny Act. Peter John, who had been present throughout the arrest, imprisonment, and trial, interposed at this moment, offering to drop his charges on the condition that Smelliger "leave the country" within 48 hours. Smelliger did not agree to the terms, but the justices seemingly acknowledged the condition as binding, and discharged Smelliger upon that understanding. Needless to say, the mill, lot, and possessions remained in John's hands.[46]

[46] Emmanuel Smelliger's complaint; John Tabor Kempe's notes, Ibid., Box 11, Folder 3.

As Attorney General John Tabor Kempe surmised, it is likely that the series of events were concocted by Peter John, with the connivance of neighbors Alexander Trumble and John Davis, in a scheme to take over the mill from Smelliger. The way in which the three separate charges on the hog, wheat, and rye were made to coincide with each other, the readiness with which John approached Smelliger at the perfect moment to talk him into transferring possession of the mill, and the fact that he later tried to silence Smelliger by threatening him and inducing him to leave the country, give strong credence to Kempe's theory that the three men "had laid their heads together, to hurt Smelliger."[47] The fact that Smelliger was a German immigrant not very fluent in English, and with few local connections, must have made the scheme all the more attractive to Peter John and his accomplices.[48]

Justice McLaghry played a key role in every step of this elaborate scheme. It was McLaghry who readily issued all of the warrants against Smelliger, ordered Smelliger to be detained as prisoner, and led the summary trials and judgments against Smelliger in each case. On the crucial day in which Smelliger was served two different warrants, making him vulnerable to John's veiled offer of help, John seemed to act with perfect confidence not only that Justice McLaghry would issue the warrants, but also with precise knowledge of when McLaghry would send the constable with the warrants. In the later cause of Smelliger's supposed threat of arson, McLaghry allowed John, the plaintiff, to accompany the constable throughout the arrest and imprisonment, during which John threatened Smelliger that he would be sent to jail unless he confessed guilt. During the trial, McLaghry, together with Justice Clinton, condoned John's

[47] John Tabor Kempe's notes, Ibid., Box 11, Folder 3.

[48] During one of the trials Smelliger "begged" the justices to send for somebody fluent in both German and English, since he "could not speak English." The request was denied. The fact that Smelliger had trouble finding anyone to translate for him, or to stand bail for him, suggests that he did not have many local connections. Emmanuel Smelliger's complaint, Ibid., Box 11, Folder 3.

negotiation with Smelliger, effectively allowing John to use the court to threaten Smelliger to leave the country, and not giving him the chance to try and recover the mill.

While it would be difficult to prove that McLaghry was an accomplice in John's scheme, his conduct as magistrate, at the very least, was "irregular" and "oppressive."[49] Take his treatment of Alexander Trumble's complaint. It is ambiguous whether McLaghry was treating this as a civil or criminal case when he issued his warrant against Smelliger, but in either case, his decision was problematic. If he was construing it as a criminal case, on account of Smelliger's stealing some of Trumble's wheat, then Smelliger should have been bound to appear at the next general sessions of the peace, or tried according to the Less than Grand Larceny Act. What happened, instead, was that Trumble and Smelliger "settled" out of court, and McLaghry dropped the case on hearing this from the constable. If a criminal case, technically the Crown would be the plaintiff, and Smelliger should be tried on the criminal charge regardless of any personal satisfaction he may have later given to Trumble. Neither did McLaghry, as justice of the peace, have the authority to drop the case on his discretion. That would be tantamount, as Kempe pointed out, to McLaghry's giving judgment on the case without a hearing, or worse, acknowledging a judgment that was effectively given by the constable.

If McLaghry's intention was to treat Trumble's complaint as a civil case, then there would have been nothing improper in acknowledging the out-of-court settlement between the plaintiff and defendant. The problem here, however, is that the damage claimed (fifteen pounds) by Trumble laid the case beyond the jurisdiction of an individual justice of the peace set in the Five Pounds Act. It is doubly problematic, then, that Trumble and the constable together cajoled Smelliger to succumb to Trumble's demands, giving him the impression that Justice McLaghry in

[49] John Tabor Kempe's notes, Ibid., Box 11, Folder 3.

his individual capacity could immediately determine the case and charge the damage and court fees to Smelliger. While the constable may have been most responsible for this particular injustice, Justice McLaghry made it possible by issuing the warrant, and by condoning the private settlement without questioning whether Smelliger had been misinformed or unduly threatened in giving in to Trumble's demands.

The second warrant McLaghry issued later that day suffers from similar ambiguity. Was it issued upon John Davis's complaint about his hog? Or was it upon Davis's kinsmen's complaint about the rye? One was a civil case, and the other a criminal one, for which the due processes entitled to the defendant were entirely different. Smelliger, it should be recalled, was arrested and immediately detained, then tried on both cases. For the criminal charge regarding the "stolen" rye, this was unlawful process in that Smelliger was not given 48 hours to find bail, as the Less than Grand Larceny Act entitled him. The process was equally problematic regarding Davis's complaint about his hog. As aforementioned, colonial statute directed justices to allow defendants at least six days (but no less than twelve days) from the date when they were notified of the summons to the date appointed for trial. Only in case the plaintiff, upon oath, gave good reason to judge that the defendant would try to escape justice, could the justice of the peace issue a warrant in a civil case. At the time Davis presented his complaint, it should be remembered, Smelliger was still in possession of the mill, lot, wheat, and cattle. And this was also before Smelliger was convicted of other offenses (defrauding customers and threatening arson). Thus it is hard to imagine how Davis, or Justice McLaghry, could find sufficient reason to believe that Smelliger would leave all his possessions, simply to evade the damage he might have to pay for Davis' hog—that is, unless Davis and McLaghry had been colluding with Peter John and already knew the latter's plans to take over possession of the mill from Smelliger.

McLaghry abused the Less than Grand Larceny Act a second time in the matter of a few days, in the trial of Peter John v. Smelliger regarding the supposed threat of arson. During the trial, Joseph Sweezy, a neighbor of Smelliger, in fact tried to offer bail. He changed his mind, however, after John strenuously dissuaded him, suggesting that Smelliger was a very dangerous and unreliable man who might even "kill his own wife & children" if not bound by law. Not only did McLaghry allow John to conduct this conversation during the trial, but he also joined the effort to discourage Sweezy, by emphasizing that whoever stood bail for Smelliger would run the risk of losing a considerable sum "if any person whatever burnt the mill."[50]

After eliminating Smelliger's chances of finding bail, and thus subjecting him to the justice's summary jurisdiction, McLaghry apparently stood by as John now turned to threaten Smelliger. John's offer to "waive" all charges if Smelliger would leave the country within 48 hours, if not entirely illegal, certainly could not be acknowledged as legally binding. Just as in the case of Alexander Trumble's charges against Smelliger, John did not have any power to discontinue the lawsuit. Whatever private settlement he might come up with Smelliger could have no effect on the proceedings of the criminal charge that Smelliger had threatened arson. McLaghry, nonetheless, condoned this "agreement" forced upon Smelliger by John and concluded the trial, effectively substituting legal judgment with a private threat. What made McLaghry's acknowledgment of this dubious settlement further problematic was the money Smelliger still owed the court and John Davis, according to McLaghry's own judgment in the other cases. McLaghry's duty as magistrate, then, would have been to ensure that Smelliger did not escape before satisfying those payments—that is, if he did take his own judgments against Smelliger seriously, and considered the damage and costs he charged upon him lawful.

[50] Ibid.

Charges of Justices' Ignorance and Partiality

Justices like Kissam and McLaghry were hardly typical, of course. At least among the complaints on record, there are few other cases where a justice willfully abused his summary powers to such extent, motivated by personal grudge or private gains. The more typical accusation behind a complaint was that the justice mishandled a case out of ignorance, or failed to dispense justice in an impartial manner.

Many justices misinterpreted or overlooked stipulations even in the most basic statutes regarding criminal justice such as the Less than Grand Larceny Act. Some might have done this intentionally, as Justice James McLaghry most likely did in order to frighten Emmanuel Smelliger. Those were exceptional cases, however. Ignorance, Attorney General Kempe was certain, was the main cause behind the justices' lax interpretation of statutes.[51] The lawyers chimed in in their 1758 petition against the Five Pounds Act, claiming that most of the colony's justices were woefully ignorant of the law, and that in several counties it was "difficult to find justices of the peace able to copy a warrant for apprehending a felon."[52] The lay justices' ignorance of the law was not limited to criminal justice. In 1763, Sir William Johnson asked Lieutenant-Governor Cadwallader Colden to provide instruction for the "severall justices of the peace in these parts," who were "greatly at a loss how to dem[ea]n themselves concerning the £ 5 Act."[53]

If the justices' ignorance of law occasioned scattered instances of complaints and criticisms, accusations of partiality incurred a steady stream of complaints against lay justices throughout the

[51] John Tabor Kempe to Richard Woodhull, Benajah Strong & Silas Strong, Mar. 3, 1769 & June 9, 1769, Ibid., Box 15, Folder 5.
[52] *Journal of the Legislative Council*, 1324.
[53] Sir William Johnson to Cadwallader Colden, Dec.5, 1763, Sir William Johnson, *The Papers of Sir William Johnson* (Albany: University of the State of New York, 1921-1965), IV: 261-2.

late colonial period. Most of the cases examined earlier, in fact, involved accusations that the justice in question was being partial toward one of the litigants. In the case of James Haviland against his father-in-law regarding the female slave, for instance, Haviland's complaint was ultimately that Justice John Fowler had been biased toward the father-in-law in exercising his summary power.[54] Similarly, in many of the instances of justices dubiously issuing warrants, claiming jurisdiction, or dispensing judgment, the complainant either directly or implicitly accused the justice of putting undue weight on the testimony of a certain litigant or witness with whom he was closely connected.

Some complainants gave specific reasons for suspecting a justice's partiality. Widow Elisabeth Clarke and her son in Dutchess County, for example, complained in 1764 that they could not expect impartial justice when the "rioters" who had assaulted them and caused damage to their property had extensive kinship ties in the neighborhood, including with several justices of the peace.[55] For Sir William Johnson, the problem was the justices' ethnicity. In Albany and Schenectady, Johnson complained, no Englishman could expect justice when the "bench of judges & justices is composed entirely of Dutch."[56] Whether Johnson's accusations were justifiable is difficult to ascertain. But it is true that Dutch families controlled most public offices in Albany City and its vicinities—a situation which could easily arouse suspicions that the local government and courts favored the interests of Dutch inhabitants.[57]

The justices' religious affiliation could also incite complaints of partiality. Such was

[54] James Haviland to John Tabor Kempe, Sept. 2, 1765, *Kempe Papers*, Box 13, Folder 8.

[55] Elisabeth Clarke to John Tabor Kempe, Dec. 29, 1764, William Clarke to John Tabor Kempe, Dec. 29 1764, Elizabeth Clarke to John Tabor kempe, Jan. 1765, Ibid., Box 13, Folder 3; William Humfrey to John Tabor Kempe, Feb. 4, 1765, Ibid., Box 13, Folder 8.

[56] Sir William Johnson to Cadwallader Colden, Feb. 20, 1761, *The Letters and Papers of Cadwallader Colden*, 9 vols. (New York: AMS Press, 1973), VI: 13-4; Sir William Johnson to Goldsbrow Banyar, Feb. 22, 1770, Johnson, *The Papers of Sir William Johnson*, XII: 782.

[57] Patricia U. Bonomi, *A Factious People: Politics and Society in Colonial New York* (New York, N.Y.: Columbia University Press, 1971), 48-55.

Reverend Gerhard Daniel Cock's complaint in 1766 against Justices Levi Pawling and Joseph Hardenbergh of Kingston, Ulster County, on account of the latter compelling Cock to take an oath of allegiance to the Crown. While Cock did take the oath, he complained that the justices did not have the authority to demand and administer such oaths.[58] The true cause for Pawling and Hardenbergh's actions, Cock suggested, was a dispute within Kingston's Dutch Congregation over whether to subordinate to the classis of Amsterdam.[59] As supporters of an independent American classis, Pawling and Hardenbergh had been abusing their power to administer oaths, according to Cock, solely as a means to "frighten others into their party."[60]

The Elusiveness of Impartiality

The abundance of documented complaints seemingly lend support to the lawyers' critical view of the colony's justices. But the negative perception of late colonial New York's justices should be tempered by a due consideration of the larger social context in which justices operated. More than just commentary on the magistrates' performance, the myriad complaints New York's inhabitants made against local courts are equally testimony to how "factious" the people were, to borrow historian Patricia Bonomi's term. Conflicting economic interests, political allegiances, and ethnic, religious, and familial loyalties had created numerous factions and divisions in the colony since its earliest days. The rapid demographic and economic growth during the eighteenth century only intensified such divisions, leaving few parts of colonial society unscathed.[61] In such an

[58] Gerhard Daniel Cock's Petition, read in the Governor's Council on May 17, 1766, *Kempe Papers,* Box 10, Folder 8.
[59] Since the early eighteenth century, New York's Dutch Reformed congregations in Kingston and elsewhere had been internally divided over whether to accept close Dutch oversight of provincial ecclesiastical affairs. Alan Tully, *Forming American Politics: Ideals, Interests, and Institutions in Colonial New York and Pennsylvania* (Baltimore: Johns Hopkins University Press, 1994), 125.
[60] Levi Pawling & Joseph Hardenbergh v. Domini Cock, Notes on the Case, *Kempe Papers,* Box 10, Folder 8.
[61] Bonomi, *A Factious People*.

environment, the goal of attaining communal consensus, or reaching an equitable legal resolution all parties could accept, often proved elusive. This was true not only for justices, but also for juries, despite their reputation as the bulwark of community-based equitable justice in Anglo-American legal systems.

Just as they did with justices, litigants frequently complained of jurors that were unduly connected by kinship, ethnicity, faith, or economic interest to one of the parties in dispute. In the complaint of Elizabeth Clarke and her son, for instance, they feared the partiality not only of Fishkill's local justices, but also of the men likely to sit as jurors in the local court, many of whom were kinsmen of the "rioters" who had assaulted Clarke and her son.[62] Yeoman John Cooper also accused Fishkill's jurors of partiality. Cooper had brought an action of trespass against a neighbor with whom he had an ongoing boundary dispute. In an effort to establish his boundary, the neighbor had laid down fences on parts which Cooper believed to be his land, to his "great damage." Nonetheless, when Cooper presented his case before the petit jury, they gave "no regard to the evidence" he provided, and swiftly gave judgment against him. Cooper later found out that the jurors had based their verdict upon "some private information" given by the defendant, which, according to Cooper, was never presented as legal evidence during the actual trial.[63]

Complaints against biased Dutch judges and justices similarly extended to juries. Albany attorney William Correy, for instance, complained that Englishmen were often disadvantaged in the local courts controlled by a "Dutch bench, a Dutch jury, a Dutch clerk, and a Dutch sheriff."[64] Juries were also frequently suspected of bias in cases involving clergymen and churches. Episcopalian Reverend James Lyons of Brookhaven, for instance, complained that he was indicted

[62] Elisabeth Clarke to John Tabor Kempe, Dec. 29, 1764 & Jan. 1765, *Kempe Papers*, Box 13, Folder 3.
[63] William Humfrey to John Tabor Kempe, Aug. 5, 1771, Ibid., Box 13, Folder 8.
[64] William Correy to William Kempe, Sep. 17, 1756, Ibid., Box 15, Folder 8.

on a dubious charge of assaulting a neighbor.[65] Lyons was convinced that the "dissenting justice" who issued a warrant against him upon the "pitifull oath" of the plaintiff, a "drunken, crazy fellow," was simply using the occasion to "hurt [Lyon's] character as a clergyman."[66] Lyons' main reason for writing to Attorney General Kempe, however, was not to complain about the justice. Bound to appear at the next general sessions of the peace for the county, Lyons was certain that the court would decide unjustly against him, as he could not "expect much justice" from a "partial and new-light jury."[67]

Disputes over land, a particularly divisive issue in colonial New York, also gave rise to numerous complaints of juries' partiality. The jury's verdict in an ejectment case in Westchester County's Inferior Court of Common Pleas in 1733, for example, was later disputed when it was discovered that two of the jurors had been "interested in the land in question." According to several witnesses, one of the parties had promised to give the two jurors 50 acres each of the contested land, should they help him win judgment.[68]

Even when direct suborning was not involved, the extensive personal and economic connections among inhabitants often made it difficult to find jurors who could serve impartially. In 1764, manor lord Stephen Van Rensselaer brought a plea of trespass and ejectment against Abraham Jacob Lansing on a disputed tract of land in Albany County, to be tried before a jury at the county court of common pleas. Lansing objected to having an Albany jury try the case, however, on account of Van Rensselaer being "related to very many of the inhabitants [...] who have a great

[65] New York Genealogical and Biographical Society, *The New York Genealogical and Biographical Record*, XIX (1888): 150. The strife between Episcopalians and members of other denominations in New York reached a high point during the last two decades of the colonial period. Thomas Jones, *History of New York during the Revolutionary War, and of the Leading Events in the Other Colonies at that Period,* ed. Edward F. DeLancey (New York: New York Historical Society, 1879). Ch. 1.

[66] James Lyons to John Tabor Kempe, Apr. 19, 1764, Ibid., Box 14, Folder 1.

[67] James Lyons to John Tabor Kempe, Jun. 20, 1764, Ibid., Box 14, Folder 1.

[68] Affidavit of Jeremiah Fowler, sworn before Lewis Morris, Mar. 31, 1733, Affidavit of Mercy Fowler, Mar. 31, 1733, Affidavit of Joseph Seely, Mar. 30, 1733, *John Chambers Papers,* NYSL, Box 6.

and extensive influence in the said county." Even when excluding those directly related to Van Rensselaer, Lansing continued, it would be almost impossible to find indifferent jurors from within the county, when almost everyone was interested to some extent on Van Rensselaer's side. "The inhabitants of the city of Albany," for example, were "supplied with firewood from the said manor of Renselaerwyck," which saved them much trouble and expense in procuring fuel.

Upon Lansing's complaint, it was decided that jurors would instead be called in from Ulster County. But even a jury from the neighboring county, it turned out, could not be relied upon. One of the jurors, Dirck Swart, was in some manner interested in Van Rensselaer's cause. On finding out that several of his neighbors (carpenter Adam Swart and cordwainers Cornelius Jansen and Cornelius Van Buren) had also been chosen as jurors, Swart approached them and with "divers favourable words and speeches" in "praise of the title of" Van Rensselaer, "corruptly moved and perswaded" them to give judgment for him.[69]

Judges and justices tried to ensure an impartial jury by instructing the sheriff or constables to find persons not "related by any affinity" with either party or "interested" in either's cause.[70] But this was easier said than done, as the above examples suggest. Moreover, in some instances the sheriff or constable willfully ignored such instructions to serve the interest of one of the parties. One such person was Lewis Dubois of Poughkeepsie, who was charged of "corruptly summoning a jury" while serving as deputy sheriff. To protect neighbors Peter Harris and Thomas Woolly, who had been summoned to the General Sessions for Dutchess County on an indictment of coining false dollars, DuBois "corruptly and partially" procured jurors close to the defendants.[71] DuBois boldly lied to the judge, claiming that he was delivering a list of jurors composed by the high

[69] The King against Dirck Swart, Copy of Information, January Term, 1768, *Kempe Papers,* Box 2, Folder 3. On the frequent use of foreign juries in late colonial New York, see Chapter 5, pp. 218-220.
[70] Justice Louis Bevier to the Constables of Kingston, May 5, 1769, Ibid., Box 11, Folder 4.
[71] The King against Lewis DuBois, Indictment for corruptly summoning a jury, 1771, Ibid., Box 10, Folder 2.

sheriff of the county, when in fact he himself, together with one of the defendant's relatives, had concocted it.[72]

In such an environment, even the more prudent justices could have a hard time finding impartial resolutions to local disputes. One day in 1762, Justice John Bogert heard his neighbors Cornelius Kortright and Francis Welsh fighting near his door, upon which he came out and "commanded the peace." They seemed to comply, but only to resume as soon as Bogert left. A few days later Bogert found out that Cornelius's brother Lawrence Kortright had also joined the fight, accosting Welsh. Soon thereafter Lawrence came to Bogert "with a cloak on him and a sword under it," to "swear the peace against" Welsh. Lawrence's visit was followed by another from Welsh, who, in turn, swore the peace against Lawrence and Cornelius Kortright. In both instances Bogert endeavored to persuade the parties to drop their charges, but to no avail. As both were willing to swear upon oath that the other party was threatening his life, Bogert had no choice but to take recognizances accordingly, binding both Welsh and the Kortright brothers to appear at the next general sessions of the peace for the county.[73]

It was not solely intense rancor among the neighbors that made some disputes especially hard to resolve. Despite colonial statutes limiting the jurisdiction of individual justices to petty criminal and civil cases, justices could easily find themselves embroiled in larger disputes over property or contracts. Such was the dispute between Thomas Menzies and Bazaleel Tyler brought before Justice John Rider of Dutchess County in 1767. Tyler complained that Menzies had charged into his property, assaulted him, and taken away some of his cattle. Upon Tyler's insistence, Rider "examine[d] him under oath" and granted a warrant to apprehend Menzies upon Tyler's charges.[74]

[72] The King against Lewis DuBois, Indictment for false swearing, 1771, Ibid., Box 10, Folder 2.
[73] Affidavit of John Bogert, Esq., Apr. 14, 1762, Ibid., Box 10, Folder 2.
[74] Justice John Rider's Warrant against Thomas Menzies, Jan. 10, 1767, Ibid., Box 11, Folder 10.

After subsequently examining Menzies, however, Rider decided to discharge him. While it was true that Menzies had driven the cattle out of the pasture as Tyler testified, the pasture itself, as Rider found out, was claimed by both Menzies and Tyler.

Justice Rider prudently decided that the underlying dispute over the land was beyond his jurisdiction, and focused on the narrow issue of whether a felony was committed. Rider decided that Menzies was not guilty on this account, since he had acted under the assumption that the pasture rightfully belonged to him, and that Tyler had no right to set his cattle into the pasture. Neither did Rider think it necessary to proceed against Tyler. While Rider deemed it "very wrong" that Tyler did not inform him of the pasture's disputed status, he nonetheless decided Tyler could not be charged with perjury, since the incident he reported did take place. While Tyler's insinuation that Menzies stole his cattle was false (Menzies simply drove the cattle away to an open pasture), Rider reasoned that since Tyler did not know where Menzies intended to drive the cattle to, he could easily have thought that Menzies was taking them for his own possession. Despite Rider's prudent proceedings, both Tyler and Menzies remained unsatisfied with the result—Tyler still wanting Menzies punished for the supposed trespass, and Menzies accusing Tyler of perjury.[75]

Cases of this nature were not infrequent. Evidently reluctant to turn disputes over land into costly lawsuits in higher courts, parties often resorted to various extra-legal means to establish their possession, such as setting up fences, cutting trees, or letting livestock onto disputed land. Those methods, unsurprisingly, frequently led to altercations, and then to lawsuits before local justices. Justices were naturally helpless when trying to resolve such cases, which, while masquerading as petty offenses or trespasses, hid deeper underlying disputes beyond the justices' jurisdiction. The frequent complaints of partiality lodged against justices of the peace, then, should

[75] John Rider to John Tabor Kempe, Feb. 10, 1767, Ibid., Box 14, Folder 5.

be reevaluated in light of the overall social context of late colonial New York, which often made impartiality in local adjudication difficult to attain.

Justices Look to Improve their Performance

The overall "factiousness" of provincial society does not exculpate corrupt justices like Joseph Kissam or James McLaghry, and neither does it erase the fact that there were many instances of justices abusing their authority either out of ignorance or partiality. It would be equally unjust, however, to let the worst examples represent late colonial New York's justices as a whole. Even within the recorded complaints, many justices strove to offset both personal and institutional shortcomings.

Justice Samuel Sneden of East Chester offers one example. In the aforementioned case of Peter Farris against Edward Burlong, Sneden was the justice who had given judgment upon Burlong's false testimony. A few months after the trial, when Farris decided to appeal his case to the general sessions of the peace for the county, several justices of the peace and local inhabitants signed their names on Farris's deposition to support his appeal. Justice Sneden's name appeared on top of the list of signees. After the trial, Sneden had evidently become convinced that he had given a wrong judgment, probably on hearing several neighbors' attestations that Burlong's testimony against Farris was a groundless one, and on Farris providing further evidence that Burlong had been maliciously publishing libels against him. On realizing his fault, Sneden swiftly decided to lend full support behind Burlong's efforts to gain redress.[76]

As Sneden's example suggests, and as Attorney General Kempe opined, the scant evidentiary basis of the justices' decisions was primarily a shortcoming of the legal system, rather

[76] Peter Farris to William Kempe, Mar. 27, 1754. Ibid., Box 15, Folder 9.

than of the justices.[77] Moreover, although the aggrieved litigant seeking redress would have to bear further costs and trouble, the system did have a built-in safety device against false testimonies: justices were strictly instructed only to acknowledge testimonies made under oath, thus allowing appellants to win redress simply by focusing on discrediting the testimony in question. It also helped when justices like Sneden actively sought to help correct a judgment given upon false testimony.

Justices also sought to rectify problems arising from their ignorance of the law. The three justices of Suffolk County accused of abusing the Less than Grand Larceny Act, for instance, wrote to Attorney General Kempe on receiving complaint. It may have been a face-saving gesture, but they admitted their confusion over the scope of the act, and asked the Attorney General for further instructions on "how the justices ought to proceed" agreeable to the act.[78] Kempe's lengthy response suggests that he himself, in fact, was well aware that there were ambiguities in the statute that could easily lead to misinterpretation.

Underlying Kempe's admonishment of the way the three justices and many others applied the act was his opinion that the act should be applied only to "disorderly inhabitants and vagrants." This condition was not specifically attached to the actual terms of the statute, however. It was only mentioned in the preamble explaining the necessity of the act, which was to relieve counties from the unnecessary burden of keeping petty offenders imprisoned until the next general sessions of the peace.[79] Kempe argued that "the preamble is the key to the act," but this was according to his own reading. Kempe's interpretation was colored by his opinion that the act itself was of a "very extraordinary nature," conferring excessive summary power upon justices of the peace. "It may at

[77] John Tabor Kempe's Opinion on the Case of Mr. Hatten, Aug. 10, 1771. Ibid., Box 11, Folder 9.
[78] Benajah Strong, Silas Strong, & Richard Woodhull to John Tabor Kempe, May 10, 1769, Ibid., Box 14, Folder 6.
[79] Less than Grand Larceny Act, *N.Y. Col. Laws*, II: 745, IV: 969.

least be doubted," opined Kempe, "whether the act be not in itself void for its repugnancy to the laws and the first principles of the constitution." Thus, while Kempe may have had good reasons to believe that the act "ought to be construed in the most confined sense possible," we can hardly blame the colony's justices for failing to share his interpretation.[80] Not all of the controversy surrounding the act was due to the justices' abuse or ignorance, then, and the three Suffolk Justices' query to the attorney general may have well stemmed from a genuine effort to "direct [their] practice as near the intent of ye law."[81]

Although direct evidence is lacking, it is possible that some justices further tried to compensate for their lack of professional legal knowledge by consulting English manuals written for justices of the peace. Such books printed or imported and sold in New York during the late colonial period include *Conductor Generalis: or the Office, Duty and Authority of Justices of the Peace,* Richard Burns's *Justice of the Peace, in 3 Vols.,* and William Nelson's *The Office and Duty of a Justice of the Peace, in 2 vols.*[82] Also printed several times was *Every Man His Own Lawyer,* a manual covering more general subjects, but including a section on justices of the peace.[83] These manuals, in contrast to legal treatises written for lawyers, focused on providing practical instructions for justices, and for easy reference, often took the form of dictionaries.[84] We do not know, unfortunately, how many justices bought and consulted such volumes. But given their style and content, it would be reasonable to assume that they were printed and imported mainly for the justices' usage.

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[80] John Tabor Kempe to Richard Woodhull, Benajah Strong, & Silas Strong, June 9, 1769, *Kempe Papers,* Box 15, Folder 5.
[81] Benajah Strong, Silas Strong, & Richard Woodhull to John Tabor Kempe, May 10, 1769, Ibid., Box 14, Folder 6.
[82] Eldon Revare James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801* (Cambridge, Mass.: Harvard University Press, 1934), 166, 168; Hugh Gaines, *The Journal of Hugh Gaines* (New York: Dodd, Mead and Co., 1902), 189, 198.
[83] *Journal of Hugh Gaines*, 118, 198
[84] Larry M. Boyer, "The Justice of the Peace in England and America from 1506 to 1776: A Bibliographic History," *The Quarterly Journal of the Library of Congress*, 34: 4 (Oct. 1977), 315-326.

More importantly, key colonial statutes such as the Five Pounds Act were widely published—printed in newspapers and also sold as separate publications.[85] As many of the cases above illustrate, the Five Pounds Act and Less than Grand Larceny Act together formed the pillars of the justices' summary jurisdiction in late colonial New York. Anticipating their frequent application, these statutes were written essentially as compact manuals for lay justices, explaining in plain terms when and how to summon litigants, witnesses, and jurors, what directions to give constables, and what procedures to follow in each step of the trial and execution, and so on. While such instructions could not prevent unscrupulous justices from abusing their authority, for those justices who faithfully perused them, the statutes provided enough guidelines to help circumscribe the arbitrariness latent in summary adjudication.

Historian Douglas Greenberg, while acknowledging the availability of legal guides for justices in the colony, doubted that they could have had much effect on the justices' performance, since such written manuals "were of no use to a man who was illiterate."[86] Greenberg's premise here—that illiteracy was widespread among New York's justices—was based on an oft-cited passage from William Smith, Jr.'s *History of the Province of New-York*, in which Smith claimed that there were numerous justices in the colony "who can neither write nor read."[87] It was a claim that Smith and several other lawyers first brought up in 1758 as they petitioned against the Five Pounds Act, and repeated throughout their lasting opposition to the enlarged jurisdiction of lay justices. As far as the records show, the 1758 petition was the only time they actually backed up the claim with any evidence. Henceforth they simply reiterated the claim, as Smith did in his

[85] "Supplement to the New-York Mercury, Number 344," *New-York Mercury*, Mar. 19, 1759; *Journal of Hugh Gaines*, 122.
[86] Greenberg, "The Effectiveness of Law Enforcement in Eighteenth-Century New York," 184.
[87] William Smith, Jr., *The History of the Province of New-York*, 2 vols. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1972), ed. Michael G. Kammen, II: 244.

History, treating it as an established fact.

The evidence the lawyers gave in 1758 was a passage from the general assembly's 1753 address to newly appointed Lieutenant-Governor James DeLancey.[88] In the address (and also in a subsequent address of similar content to the Board of Trade), the assembly complained that under the previous governor George Clinton, numerous men of "known ill characters and extream ignorance" had been commissioned as judges and justices, and that some were so "shamefully ignorant and illiterate, as to be unable to write their own names."[89] The address was written in response to a charge that the assembly had been passing laws of "extraordinary nature," undermining the government's authority in the colony.[90] To deflect this criticism, the assembly was trying to put all the blame upon the late governor Clinton. If recently "the course of justice had been obstructed, or in any case perverted," it was entirely due, claimed the assembly, to Clinton's corrupt and arbitrary exercise of power, including his commission of ignorant, illiterate justices.[91]

It was certainly a clever move on the part of the lawyers, as they prepared their petition five years later against an act proposed by the assembly, to cite something that the assembly itself had proclaimed earlier. The lawyers were taking the passage out of its original context, of course, but the assembly would have been unable to openly refute its own recent claim, even if they might have exaggerated the degree of illiteracy and ignorance among justices in their eagerness to vilify Clinton's administration. The assembly's limited claims, however, pertained entirely to commissions made under Clintons' administration, and hardly constituted conclusive proof of

[88] *Journal of the Legislative Council*, 1324.
[89] Address to James DeLancey, Nov. 6, 1753, New York (State) and General Assembly, *Journal of the Votes and Proceedings of the General Assembly of the Colony of New-York. Began the 8th Day of November, 1743; and Ended the 23rd of December, 1765* (New York, 1766), II: 353.
[90] Extract of his His Majesty's Instructions directed to Sir Danvers Osborne, Aug. 13, 1753, Ibid., 352.
[91] Address to the Lords Commissioners for Trade and Plantations, Dec. 2, 1753, Ibid., 369-70.

widespread illiteracy among the colony's justices. Thus, while it is likely that there were indeed some illiterate justices (one could surmise that many of these must have been Dutch and German justices lacking fluency in English), there is little if any evidence, beyond the repeated claims of some of the colony's legal and political elite, to suggest widespread illiteracy among New York's justices.

There is also little reason to believe, then, that legal guides and printed statutes could not help improve the justices' performance. The extent of the lay justices' ignorance of the law, much as the extent of their illiteracy, was likely exaggerated by lawyers such as William Smith, Jr. who were intent upon discrediting the justices' abilities and circumscribing their powers.[92] While there were certainly numerous justices who failed to adhere to the law either out of ignorance or irresponsibleness, it would be inaccurate to take those instances of ignorance and misconduct as representing the performance of the colony's justices as a whole.

In the controversy over Kingston justices Hardenbergh and Pawling demanding oaths from a Dutch minister, for example, several neighbors and the constable later recounted how the two justices took great care to act according to the law. In summoning the minister Gerhard Daniel

[92] Along with the quote from Smith's *History*, Greenberg cites a statistic from Goebel's *Law Enforcement in Colonial New York* as evidence of the widespread ignorance of New York's justices. Goebel's statistic showed that among the 328 justices of the peace in New York in 1763 (excluding New York City), 134 were *quorum* justices. Based on this statistic, Greenberg concluded that the remaining 194 (59%) justices had "no legal training or knowledge at all." While proficiency in law was certainly one of the main criteria in deciding which justices would belong to the quorum, inclusion in the quorum was also frequently granted as recognition of the justice's tenure and social stature. According to Skyrme, for instance, by the seventeenth century the quorum had "lost its significance" in England "because by then most justices were included in it even when they had no legal qualification." Skyrme, *History of the Justices of the Peace*, II: 9. Thus it would be erroneous to equate inclusion in the quorum with formal training and proficiency in law. More importantly, even if the status of quorum justice was conferred purely based on legal training, which seems to be Greenberg's assumption, in the absence of any clear definition of the type and degree of training, it would be hasty to conclude that those justices who did not receive that "training" were completely ignorant of the law. Probably following Greenberg's analysis, James Henretta, in a recent article synthesizing scholarship's current knowledge of Early American legal systems and the magistrates' role in them, also remarked that in New York "60 percent of the justices of the peace outside of New York City had no formal legal training"—a more tempered statement, but nonetheless based on the same problematic reading of Goebel's statistic. Goebel and Naughton, *Law Enforcement in Colonial New York*, 91 n. 159; Greenberg, "The Effectiveness of Law Enforcement in Eighteenth-Century New York," 184; Henretta, "Magistrates, Common Law Lawyers, Legislators," 583.

Cock, Constable Blanthan was strictly instructed by Justices Hardenbergh and Pawling "not to lay hands on Cock or take him as a prisoner." The constable was instructed only to deliver the summons, inquiring if Cock would be able to appear at the appointed time.[93] When Cock appeared before Hardenbergh and Pawling, they explained their reasons for suspecting that Cock, who had recently arrived in the country, was stirring commotion among the people with dangerous ideas. Eliciting Cock's public stance that the Dutch Congregations in the American colonies should subordinate to the authority of the classis of Amsterdam in all ecclesiastical matters, Hardenbergh and Pawling argued that Cock's stance was "inconsistent to [the] English constitution & laws"; hence their demands that Cock take the "oath of allegiance to his majesty as prescribed by law." On Cock's remarking that he was unfamiliar with the province's laws, the two justices "sent for the law" and read it to Cock, first in English, then translated into Dutch. Cock finally agreed to take the oath, after which the two justices made a certificate and gave it to him.[94]

Hardenbergh and Pawling, in fact, were not the ones who had initiated the demands of oath. It was Abraham Hasbrouck and several other locals, staunchly opposed to Daniel Cock's position on the supremacy of the classis of Amsterdam, who had importuned the two justices to administer the oath. Upon hearing Hasbrouck's arguments and reports of Cock's effect on the inhabitants, Hardenbergh and Pawling decided that there were enough grounds to deem that Cock was potentially endangering the public peace, and hence to ensure his loyalty to the Crown and to the province's laws.[95] While this does not rule out the possibility that Hardenbergh and Pawling favored the cause of Hasbrouck and his party, their conduct nonetheless demonstrates that some

[93] Johannis Blanthan's Deposition, Oct. 10, 1764, *Kempe Papers*, Box 10, Folder 8; John Tabor Kempe's Notes on Pawling & Hardenbergh v. Domini Cock, n.d., Ibid., Box 10, Folder 8.
[94] The answer of Levi Pawling and Johannes Hardenbergh Esquires to the petition and complaint exhibited against them by the Reverend Gerhard Daniel Cock, Nov. 15, 1766, Ibid., Box 10, Folder 8.
[95] Abraham Hasbrouck's notes on the case of Cock against Pawling & Hardenbergh, n.d., Ibid., Box 10, Folder 8.

justices took great care to proceed in a lawful and informed manner, especially as they strove to resolve the increasingly divisive disputes presented before them.

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Given the overall dearth of information, our knowledge of the justices' exercise of summary power has had to rely heavily on an obviously biased body of evidence—the complaints and criticisms against them. When approached with caution, however, the complaints themselves strongly suggest that the colony's lawyers greatly exaggerated the ignorance, partiality, malice, and overall arbitrariness of the justices. Not only did many justices prudently seek to offset both personal and institutional shortcomings, but many complaints owed more to deeply divisive underlying disputes than to any fault in the justices' conduct.

But even if justices of the peace could not be blamed for all of the complaints mounted against them, it cannot be denied that the justices' summary jurisdiction easily lent itself to various abuses and causes of complaint. And if part of the justices' trouble was due to the difficulty of attaining any kind of communal consensus, one could question the merit in having lay magistrates handle so many civil and criminal cases in an often futile effort to resolve local disputes. This, indeed, was a question that the lawyers continuously posed as they argued for a drastically reduced role of justices in the colony's legal system. To answer that question would require a more comprehensive appraisal of the role and position of justices of the peace in late colonial New York. Fortunately, other sources beyond the complaints against justices guide us in that query.

CHAPTER 2

"Those Innumerable Litigations of a Civil Nature Arising among the Lower Sort"

Justices of the Peace and Small Debt Litigation

Gysbert Fonda, a merchant in Albany city, actively engaged in money-lending throughout the last decade of the colonial period. When advancing large sums, such as when he lent 95 pounds to yeomen Philip Walter and Christopher Terahan in 1771, he made his debtors sign a conditional bond. These bonds included strict terms enforcing compliance—the debtor was required to pay with interest within a fixed term, and if he or she did not, would be charged an additional penalty equivalent to the amount of the original loan. Also included in the bonds were warrants of attorney, which, in case of default, allowed any licensed attorney in the county to confess judgment for the debtor, hence enabling immediate legal action for recovery of the debt.[1] In the same city and during the same period, butcher Benjamin Williamson also frequently advanced credit, but in a very different fashion. During the mid-1760s, for example, Thomas Barry, a skipper also dwelling in Albany, bought small quantities of meat on credit from Williamson in more than twenty different occasions. When Williamson finally sued Barry in 1768 for the unpaid sum, Barry's total debt still came up to less than four pounds.[2]

These two forms of credit, lying at opposite ends of the spectrum in terms of their size, underlying socio-economic relations, and degrees of formality, also entailed two distinct sets of

[1] *Fonda Family Papers*, AIHA, Box 1, Folder 1.

[2] *Henry I. Bogart Papers*, New York State Library, Albany, N.Y., Folders 1-6; Benjamin Williamson's occupation is noted in a 1756 census of Albany's citizens made for Lord Loudoun. *Loudoun papers: Americana, 1682-1780*, Henry E. Huntington Library, Ca. Online reproduction by the Colonial Albany Project of the New York State Museum. http://www.nysm.nysed.gov/albany/census1756.html.

legal norms and procedures. This chapter focuses on the type of credit transaction that Williamson and Barry engaged in—small debt obligations arising from interpersonal exchanges of goods and services. Despite their informal nature, these credit-based exchanges nonetheless needed the legal system's support to function smoothly. Legal recourse for small credit claims, in addition to enhancing the security of the underlying transactions, also had to be speedy and affordable, and amenable to the particular needs of creditors and debtors. As the following pages show, justices of the peace met these needs by handling small debt claims in a uniquely flexible manner. By doing so, they assumed a central role in facilitating daily economic exchanges among ordinary New Yorkers.

Led by the groundbreaking work of Bruce Mann, recent scholarship on early American law has paid strong attention to the variegated credit relations underlying legal practice in the American colonies. Disputing earlier arguments that fundamental transformations in American civil law did not take place until after the American Revolution,[3] Mann argued that commercialization had already spurred significant changes in Connecticut's legal practice no later than the early eighteenth century. Pointing to the increase of complex credit relations across distant towns and the rise of written credit instruments abetted by law, Mann showed a clear shift in colonial civil legal practice toward impersonal relations and formal procedure.[4] For the case of New York, Deborah Rosen discovered similar transformations also having taken place during the early eighteenth century. Highlighting signs of legal formalization such as a steep decline in jury trial and concomitant increases in out-of-court settlements, cases decided by default, and cases

[3] William Edward Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, Mass.: Harvard University Press, 1975); Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977).

[4] Bruce H Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987).

decided by technical issues, Rosen attributed these legal changes to commercialization and the increased use of formal written instruments.[5]

Although focusing respectively on Connecticut and New York, Mann's and Rosen's findings have increasingly been understood as representative of transformations in early American law in general. The *Cambridge History of Law in America*, for example, uses Bruce Mann's essay for its section on the transformation of law and economy in Early America.[6] James Henretta's overview of early American legal systems and their transformation, included in the same volume, acknowledges that legal development in the colonies was not always linear, with older legal systems often persisting and overlapping with newer systems. Ultimately, however, Henretta adopts Mann's and Rosen's theses in characterizing the emergent lawerly legal system and culture in eighteenth-century America.[7]

Central to both Mann's and Rosen's theses are their in-depth analyses of local court records, which reveal rich information on credit relations and legal procedures in colonial America. This chapter seeks to complement their analyses with a similar approach, but with two important departures: first, it focuses on courts of single justices of the peace, and secondly, makes a direct comparative analysis of how debt cases were handled in the two lowest-level civil courts in colonial New York—the single justice's court and the inferior court of common pleas. This focus on the lower level courts, as shall be seen, leads to several conclusions about late colonial New York's law and economy that significantly depart from Mann's and Rosen's theses.

Historians have long acknowledged the distinctive role of justices of the peace in early

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[5] Deborah A. Rosen, "The Supreme Court of Judicature of Colonial New York: Civil Practice in Transition, 1691-1760," *Law and History Review* 5, no. 1 (1987): 213–247; idem, *Courts and Commerce: Gender, Law, and the Market Economy in Colonial New York* (Columbus, OH: Ohio State University Press, 1997).

[6] Bruce H. Mann, "The Transformation of Law and Economy in Early America," in Michael Grossberg et al. ed., *The Cambridge History of Law in America*, 3 vols. (Cambridge: Cambridge University Press, 2008), I: 365–399.

[7] James A. Henretta, "Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America," in Ibid., I: 555–592.

American legal systems, but few have explained how their courts actually operated. More importantly, those historians who have touched upon the subject have focused most attention upon the justices' role in criminal law and local administration.[8] This is not without reason, given that maintaining public order and peace was originally the institution's main purpose.[9] But in the American colonies, justices of the peace, despite their general lack of formal legal training, sometimes served an expanded role in civil law, including in their individual capacities.[10] In New York, this role was bolstered by the Five Pounds Act, which greatly enlarged the scope of civil

[8] See, for example, David Thomas Konig, "Country Justice: The Rural Roots of Constitutionalism in Colonial Virginia," in Kermit L. Hall and James W. Ely, Jr., eds., *An Uncertain Tradition: Constitutionalism and the History of the South* (Athens, GA, 1989), 63–82; George L. Haskins, "Lay Judges: Magistrates and Justices in Early Massachusetts," in *Law in Colonial Massachusetts, 1630-1800*, ed. Daniel R. Coquillette (Boston, 1984), 39–56. For the case of New York, see Julius Goebel and T Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* (Montclair, N.J.: Patterson Smith, 1970), 136-137, 382-383; Douglas Greenberg, "The Effectiveness of Law Enforcement in Eighteenth-Century New York," *The American Journal of Legal History* 19, no. 3 (1975): 173–207.

[9] Thomas Skyrme, *History of the Justices of the Peace* (Chichester, England: Barry Rose, 1991), II: 39-134; Norma Landau, *The Justices of the Peace, 1679-1760* (Berkeley: University of California Press, 1984), 1–46.

[10] In mid-eighteenth century Virginia, justices of the peace were often the ultimate authority in small debt cases, with attorneys and jurors playing a minimal role. Anthony Gregg Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810* (Chapel Hill: University of North Carolina Press, 1981), 83-86. In colonial South Carolina, justices of the peace had power to hear all sorts of civil cases of up to £20 value. Aaron J Palmer, "'All Matters and Things Shall Center There': A Study of Elite Political Power in South Carolina, 1763-1776" (Ph.D. Diss., Georgetown University, 2009), 51. Russell Osgood's case study of a justice in Massachusetts found debt cases taking up about two-thirds of the justice's caseload. Russell K. Osgood, "John Clark, Esq., Justice of the Peace, 1667-1728," in *Law in Colonial Massachusetts, 1630-1800*, ed. Daniel R. Coquillette (Boston, 1984), 135–141. Although based on less detailed records left by four justices, Ronald Snell also showed that civil matters, including small debt claims, composed a significant portion of the justices' caseload in colonial Massachusetts. Ronald K. Snell, "The County Magistracy in Eighteenth-Century Massachusetts, 1692-1750" (Ph.D. Diss., Princeton University, 1970), 88-89, 93-98; Bruce Mann and Deborah Rosen also included brief discussions of single justices' courts in their studies of law and credit in the American colonies. But partly due to the scant information included in the records they found, and partly due to Mann's and Rosen's particular interests, their treatments of justices' courts were confined to narrow aspects such as the proportion of cases on credit instruments (Mann), or of those that proceeded to jury trial (Rosen). Mann, *Neighbors and Strangers,* 57-59, 129-130; Rosen, *Courts and Commerce,* 65. Mann, for example, notes that one of the justices' records he found consisted of nothing more than "seventeen uncrowded pages" (page 57). Another work that briefly explores the civil law side of colonial justices' courts is Claire Priest's study of debt litigation in Massachusetts. While Priest was able to glean interesting results regarding the average fees charged by a single justice, her analysis, due to the paucity of records, was based on a very limited sample—18 debt cases handled by one Plymouth justice. Claire Priest, "Colonial Courts and Secured Credit: Early American Commercial Litigation and Shays' Rebellion," *The Yale Law Journal* 108, no. 8 (June 1999), 2413-2450. See pp. 2424 & 2428 for the part on justices' courts.

causes that could be tried summarily by an individual justice.[11] Numerous small farmers, tenants, shopkeepers, and artisans of the colony took advantage of this act, frequenting the local justice's court on myriad small debt cases.

When acting out of sessions, justices of the peace were not required to leave formal documentation of their adjudications or report them to provincial authorities, which explains the overall dearth of information on their activities. Fortunately, there are at least two exceptionally full records left by late colonial New York's justices—the receipt book of Justice John Macombe and Alderman Henry Bogart of Albany County for the years 1763 to 1769, and the docket of Justice John Frey of Tryon County for the years 1772 to 1775.[12] Taken together, Macombe and Bogart's receipt book and Frey's docket allow us to reconstruct the justices' summary process in handling small debt cases—summoning debtors after inspecting the creditors' personal bills or account books; taking oaths on the veracity of the claims and dispensing judgment when called for; and also collecting and disbursing money on behalf of creditors and debtors who were often absent during court proceedings. The informal, flexible, and personal nature of the justices' summary procedure, coupled with its relative speed and low costs, made the single justice's court

[11] "An Act to impower Justices of the Peace to Try Causes from forty Shillings to Five Pounds, Dec. 7, 1754, *N.Y. Col. Laws*, III: 1011-1016. The act was renewed throughout the remainder of the colonial period. Ibid, IV: 296-301, 372-377, 736-737, V: 304-314.

[12] *Bogart Papers*, Folders 1-6; *Samuel Ludlow Frey Papers*, NYSL, Box 3 (Justice's Docket). Whereas Macombe and Bogart's receipt book is simply a collection of litigants' personal bills and accounts, with notes added by the magistrate on each piece of paper where necessary, Frey's docket is a bounded volume with entries written in a standardized style resembling shopkeepers' and manorial agents' ledgers. In addition to the litigants' names and the amount of debt or damage in question, Frey's docket efficiently details the procedures and judgments applied to each case, and the accompanying fees and costs. Macombe and Bogart's receipt book, while less systematic, offers greater detail on the underlying disputes or contracts for each case. The enlarged Five Pounds Act of 1759 gave mayors, aldermen, and recorders of the cities of New York and Albany and the borough of Westchester, along with the country justices, civil jurisdiction on cases of up to five pounds value. Henceforth aldermen such as Bogart could exercise the same summary powers as justices of the peace on small civil cases. "An Act to impower Justices of the Peace Mayors Recorders and aldermen to try Causes to the value of Five pounds and under and for Repealing an act therein Mentioned," *N.Y. Col. Laws*, VI: 372-377. Although they shared the receipt book, it is unlikely that Bogart and Macombe tried cases together. Among the 124 cases noting the presiding justice, there are no instances of both names appearing together.

particularly valuable to New York's middling and lower sorts, whose daily exchanges among each other often necessitated myriad small debt obligations.

The chapter focuses on the Upper Hudson Valley and Mohawk Valley due to the availability of sources, but this geographical choice is not without its advantages. First, it complements the many studies on colonial New York's law and economy which have overall paid stronger attention to New York City and the Lower Hudson Valley. Secondly, the Upper Hudson Valley and Mohawk Valley were populated predominantly by small farmers and tenants, whose legal activities have been relatively less explored by historians compared to those of colonial New York's merchants and artisans.

According to censuses reported to the Board of Trade by the governor of New York, the white population of Albany County nearly tripled in size between 1756 and 1771.[13] Although Albany City had a substantial number of merchants, artisans, shopkeepers and urban laborers, the bulk of Albany County's population were tenants and small farmers, many of whom worked in the vast manorial holdings of the Van Rensselaer and Livingston families.[14] The population of Tryon County, which was partitioned from Albany County in 1772, is estimated to have been somewhere between five and ten thousand at the eve of the Revolution.[15] Although the fur trade was a significant part of the county's commerce, and although Sir William Johnson strove to attract skilled craftsmen to the county, the majority of Tryon County's white population remained tenants

[13] 14,805 in 1756, and 38,829 in 1771. *Doc. Rel. N.Y.*, I: 696–697.

[14] Albany's population swelled especially after the Seven Year's War, the conclusion of which made the Upper Hudson Valley and western frontiers a more attractive destination for prospective farmers. Sung Bok Kim, *Landlord and Tenant in Colonial New York: Manorial Society, 1664-1775* (Chapel Hill: University of North Carolina Press, 1978), 240-241.

[15] Nelson Greene, *History of the Mohawk Valley, Gateway to the West, 1614-1925; Covering the Six Counties of Schenectady, Schoharie, Montgomery, Fulton, Herkimer, and Oneida*, 4 vols. (Chicago: S.J. Clarke, 1925), I: 631–632; Christopher Ward, *The War of the Revolution*, 2 vols. (New York: MacMillan, 1952), II: 477.

and small farmers.[16] The rapidly increasing population of the area and the concomitant need for a separate jurisdiction, in fact, were two of the main rationales for dividing it from Albany County in 1772.[17]

While the records seldom reveal where Alderman Bogart and Justice Macombe held court, we can be fairly certain that Albany City was their stage of operation.[18] The jurisdiction of Bogart and Macombe, however, was not limited to Albany City and its vicinities.[19] A comparison of

Table 2.1. Litigants appearing in Justices John Macombe and Henry Bogart's receipt book for Albany in the 1760s

Sources: *Henry Bogart Papers*, Folders 1-6; Christoph, *Upstate New York in the 1760s*, 1-146.

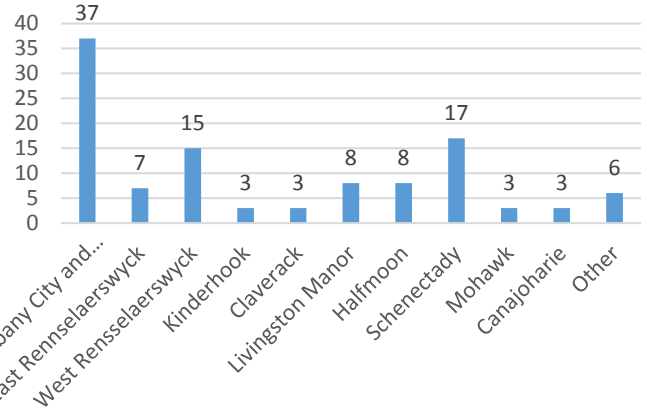
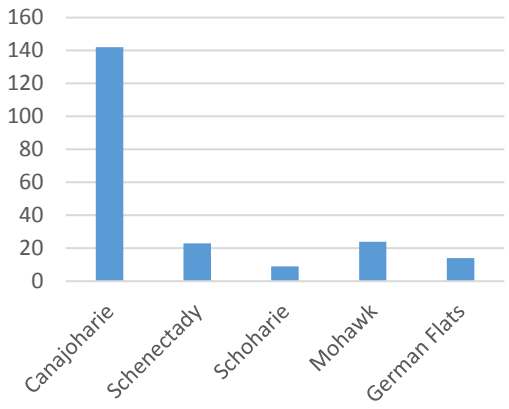


Table 2.2. Litigants appearing in Justice Frey's docket for Tryon County, 1772-1775

Sources: *Samuel Ludlow Frey Papers*, Box 3; Christoph, *Upstate New York in the 1760s*, 1-146



[16] In the east of Mohawk Valley were between 500 and 1000 tenants tilling the Johnson family's lands, while on the west were numerous small farmer families, many of whom were of German or Dutch descent. Greene, *History of the Mohawk Valley*, I: 660-668; Robert W. Venables, "Tryon County, 1775-1783: A Frontier in Revolution" (Ph.D. Diss., Vanderbilt University, 1967), 71-72.

[17] In justifying the division, the act notes that "the inhabitants thereof are already very numerous and continue to increase," and that "many people as county officers, jury-men, suitors and witnesses [are] being obliged to travel near two hundred miles to the city of Albany" while under the jurisdiction of Albany County. "An Act to Divide the County of Albany into Three Counties," Mar. 12, 1772, *N.Y. Col. Laws*, V: 319-322.

[18] During much of the 1760s Bogart served either as alderman or assistant in the city council, and regularly attended the council's frequent meetings. Also, in at least one instance Bogart specified that the defendant he summoned should appear before Bogart at his "dwellinghouse in the first ward in Albany." Joel Munsell, *Collections on the History of Albany: From Its Discovery to the Present Time ; with Notices of Its Public Institutions, and Biographical Sketches of Citizens Deceased*, 4 vols. (Albany, N.Y.: J. Munsell, 1865), I: 126, 128, 130-131, 135, 138, 144; Summons issued to Thomas Barry, Jan. 19, 1767, *Henry Bogart Papers*, Folder 4. Macombe, similarly, owned a house in one of the city's wards, and served as an elder in the city's English Presbyterian Congregation. Munsell, *Collections on the History of Albany*, 130, 170.

[19] Colonial statute defined the justices' geographical jurisdictions quite broadly at the county level—allowing litigants to take lawsuits to any justice within the same county. *Journal of the Legislative Council*, 1677.

Bogart's receipt book with a 1766-1767 tax assessment on Albany County's freeholders lets us identify 110 of the plaintiffs and defendants who appeared in the justices' court. One third of those litigants lived in Albany City, while the rest were dispersed among other districts—many came from populous rural areas not far from the city, such as the East and West manors of Rensselaerwyck, Livingston manor, and Schenectady, while a handful of litigants travelled all the way from remote parts such as the Mohawk Valley, which would later become the stage of the newborn Tryon County.[20] In Tryon County, Justice Frey held his court in Johnstown, which had been the political and economic center of Mohawk Valley since it was built by William Johnson in the 1750s, and in 1772 became the county seat. But similarly to Justices Bogart and Macombe in Albany, the reach of Frey's court was not limited to Johnstown. Many litigants were from Canajoharie near Johnstown, but a considerable number also came from outlying areas such as Schenectady, Schoharie, the Mohawk district, and the German Flats.[21] It would be safe to say, then, that Macombe and Bogart's receipt book and Frey's docket together offer a fairly broad sample of the legal activities of those who populated the Upper Hudson and Mohawk Valleys during the late colonial period.

i) volume of debt cases

The rise of debt litigation, a well-noted feature of late colonial society, is clearly reflected in the two records.[22] At least 89% of the cases were debt-related in both the Albany and Tryon

[20] Florence A Christoph, *Upstate New York in the 1760s: Tax Lists and Selected Militia Rolls of Old Albany County, 1760-1768* (Camden, Me.: Picton Press, 1992).

[21] *Samuel Ludlow Frey Papers*, Folder 3; Christoph, *Upstate New York in the 1760s*.

[22] Deborah Rosen, for example, estimates that the rate of civil litigation in New York's Supreme Court of Judicature rose by 80% between the 1690s and the 1750s; by 75% over roughly the same period in the New York City Mayor's Court; and by 250% from 1731 to 1756 in the Dutchess County Court of Common Pleas. Rosen, *Courts and Commerce*, 84–85. Eben Moglen cautions that it may be hasty to draw conclusions on the rise of debt litigation from such "summary statistics," however, especially given the fact that the 1690s included a period of exceptional wartime

County justices' courts, and this was not out of a small number of cases. Henry Bogart and John Macombe together handled 171 debt cases in the span of eight or fewer years, and John Frey at least 340 debt cases, possibly as many as 1219, in the span of less than four years.[23] To put these numbers into perspective, during the mid-1750s, according to Deborah Rosen, New York's Supreme Court handled about 350 civil lawsuits per year, the Mayor's Court of New York City about 200 cases per year, and the Dutchess County Court of Common Pleas also about 200 cases per year.[24] Especially considering the smaller jurisdiction of the single justices' courts, the volume of debt litigation found in Bogart's receipt book and Frey's docket is quite impressive, suggesting that courts of single justices of the peace were no less a part of New York's growing credit economy and concomitant legal activities than the higher courts. Such was the volume of debt litigation, indeed, that on one of his busier days, Justice Frey could be found handling up to eight debt cases in a single day.[25]

The debt cases brought to the justices' courts were of course generally much smaller in value compared to those brought to the provincial Supreme Court, or even the county courts of common pleas.[26] Reflecting the aforementioned Five Pounds Act, which limited the jurisdiction of single justice's courts to cases of five pounds value or less, the average debt claimed by creditors was slightly above two pounds (£2 4*s*.) for Macombe and Bogart's receipt book, and about one

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prosperity, and that the 1750s included a period of peacetime recession and credit famine. Eben Moglen, "Settling the Law: Legal Development in New York, 1664-1776" (Ph.D. Diss., Yale University, 1993), 239, n. 97.

[23] *Henry Bogart Papers,* Folders 1-6. *Samuel Ludlow Frey Papers,* Box 3. Frey's docket has no less than 1380 entries, of which 1033 cases do not specify the cause. 901 (87%) of these cases are simply noted by the names of the plaintiff and defendant, and a monetary value. Such entries become the norm after roughly one third of the docket, indicating that Frey began omitting recurring information such as the underlying cause after the court's operation had become routine. Judging from the fact that 98% of the specified causes were debt cases, it is reasonable to suppose that after a while the justice simply decided it unnecessary to specify "debt" next to the amount claimed.

[24] Rosen, "The Supreme Court of Judicature of Colonial New York," 223; idem, *Courts and Commerce,* 155.

[25] On August 11, 1772, Frey handled eight debt cases. The next day was rather quiet, with only one case, but on the following day he handled six debt cases, and on the 14th he took another two. *Samuel Ludlow Frey Papers,* Box 1.

[26] New York City's Mayor's Court also handled numerous small debt cases of less than five pounds value during much of the colonial period. Simon Middleton, "Private Credit in Eighteenth-Century New York City: The Mayors Court Papers, 1681-1776," *Journal of Early American History* 2, no. 2 (2012): 150–177.

and a half pounds (£1 12*s*.) for Frey's docket. These figures, taken together with the substantial volume of such cases brought to the Albany and Tryon county justices, show that courts of single justices of the peace were filling a certain niche in late colonial New York's law and economy—handling small debt cases.

The Five Pounds Act, then, did have its desired impact, which was to let individual justices of the peace handle a substantial share of the small debt litigations arising throughout the colony.[27] Although our two sets of records from Albany and Tryon county cover too short a span of time to allow longitudinal analysis, analyzing the volume of debt cases by underlying value can offer an idea of the act's impact. The percentage of debt cases of up to 40 shillings value is 54% for Bogart's record from Albany during the 1760s, and 72% for Frey's record from Tryon County during the 1770s. In other words, nearly half of Bogart's debt cases, and more than a quarter of Frey's debt cases would not have fallen into the justices' jurisdiction before the Five Pounds Act. The higher proportion of small debt cases below 40 shillings' value in Tryon County may be related to several factors: Compared to Albany City and its vicinities, Tryon County was populated by more small farmers, many of whom had recently arrived and probably had to rely frequently on shopkeepers and neighbors for daily necessities before their farming and improvement could generate sufficient revenue. Also, it is possible that by the 1770s, New York's justices of peace had become more efficient in dealing with debt cases at low cost, hence attracting more plaintiffs, including those with very small claims. At any rate, the figures suggest that while the courts of single justices of the peace would have been frequented even without the Five Pounds Act, the act did significantly enlarge the number of plaintiffs deciding to take their cases to local justices. It is probably not a coincidence that the two justices' records we found pertain to the last decades of the colonial period,

[27] For a more detailed analysis of the economic context surrounding the passing of the statute, see Moglen, "Settling the Law," 239-240.

when the act was in force.

The heavy volume of small debt claims handled by lay justices was in fact acknowledged most vocally by their foremost critics—the colony's legal elite, who staunchly opposed the enlarged civil jurisdiction of lay justices under the Five Pounds Act. William Smith, Sr., "from long experience and an intimate knowledge of the state of this province," estimated that probably "above three fourths of the causes" brought to the colony's courts were small cases of less than five pounds value.[28] Chorusing Smith's warnings of the immense impact of the Five Pounds Act, the colony's leading lawyers lamented that, since the passing of the act, "there scarce passed a day without a tryal before a Justice, in some part of every county in the province; not to mention that some of us, have heard a Justice declare upon his oath, that himself had no less than sixty causes under consideration at a time."[29] According to the lawyers, such heavy reliance on lay justices in civil matters would only worsen the damage they were already inflicting upon the legal system through their ignorance and misconduct.[30] To determine whether this was a fair criticism, especially regarding the justices' handling of small debt cases, we must first take a closer look into the nature of credit obligations underlying those cases.

ii) types and terms of debt

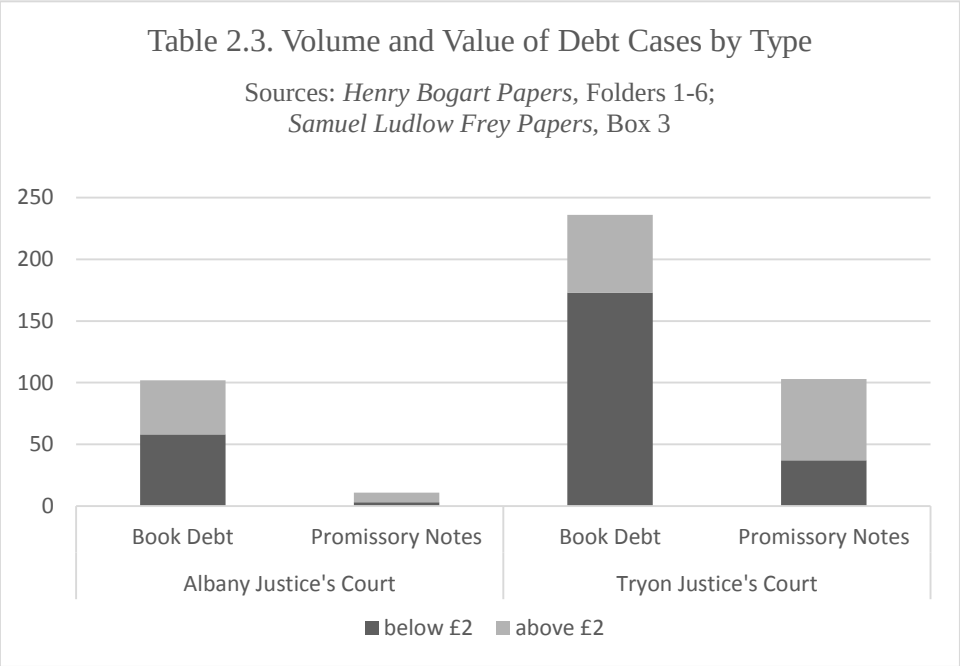
Recent scholarship on early American civil law, as discussed earlier, has emphasized the colonials' increased usage of formal credit instruments, the near disappearance of informal book debts, and the concomitant formalization of legal procedure. The financial instruments frequently used in late colonial New York were promissory notes, bills obligatory, conditional bonds, and

[28] *Journal of the Legislative Council*, 1328-1329.
[29] Ibid, 1326.
[30] Ibid, 1329.

bills of exchange. Promissory notes were the least formal, often consisting of little more than a bare statement of obligation for a given sum, with no provision for interest or penalty. Bills obligatory added more formality by adding the signature of two or three witnesses, lengthier explanations of the obligation, and express assurance that the obligation would be fulfilled—sometimes with provision for a penal sum. Conditional bonds, the most formal, further assured fulfillment of the obligation by adding the seals of the contracting parties, and by reversing the structure of the obligation: Instead of describing the original obligation and later specifying the penalty in case of default, the language of conditional bonds treated the penalty itself as the main contract, stating how that penalty would be enforced after a given date, except if a certain condition—such as payment of the debt—was met before that time. Lastly, bills of exchange were mostly valuable to merchants, giving them much-needed flexibility in their vast and expanding trade networks. At the other end of the spectrum were book debts, an informal debt without written specification of terms, with nothing to support the claim other than a verbal promise and the private account book or receipt held by the creditor.[31] Echoing Mann's finding that book debt, which had been the prevalent form of debt in earlier periods, began to decline in the eighteenth century, Rosen found that in 1750 book debt took up only one-fifth of the debt cases brought to the Dutchess County Court of Common Pleas, with the other cases based on written instruments. Rosen saw this as a clear manifestation of commercialization sweeping away informal legal and economic practices.[32]

The Albany and Tryon County justices' records bring these conclusions into question. In

[31] Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Cambridge, MA: Harvard University Press, 2002), 9-18; idem, *Neighbors and Strangers*, 12–40; Herbert Alan Johnson, *The Law Merchant and Negotiable Instruments in Colonial New York, 1664 to 1730* (Chicago, Ill.: Loyola University Press, 1963), 28–40; Middleton, "Private Credit in Eighteenth-Century New York City," 150-177.
[32] Rosen, *Courts and Commerce*, 40.



Macombe and Bogart's court in Albany, among those debt cases specifying the type of underlying debt, 110 cases (87%) were on book debts; 14 cases (11%) were on promissory notes, and the remaining two cases were on bills of exchange. In Frey's court in Tryon county, 185 cases (62%) were on book debts, 107 cases (36%) on promissory notes, and 8 cases (3%) were on combined debt from account books and promissory notes. As Table 2.3 shows, book debt cases were generally of smaller value than promissory notes in both justices' courts. Overall, then, the dominance of small book debt, and virtual absence of restrictive financial instruments such as conditional bonds, is immediately apparent from the two justices' records.

Details of debt cases available in Macombe and Bogart's receipt book shed further light on the character of these small credit exchanges based on account books. Innkeeper Benjamin Hilton's complaint against Isaac Wheeler in 1766 is typical of the book debt cases brought to the Albany justices. Wheeler owed Hilton a total of £1 3*d* on account of goods purchased on credit in twelve different occasions; for instance, "three half pints of wine," priced at 2*s*. 3*d*., or "three

papers of tobacco," for which one shilling was charged.[33] Other cases on book debt in Macombe and Bogart's receipt book seemingly cover the entire spectrum of consumption items exchanged among the shopkeepers, innkeepers, and artisans of Albany City and the small farmers and tenants in the surrounding rural communities—from grains, dairy products, meat, and other farm produce, to clothing, shoes, alcohol, rent and board, nails, locks, hinges, and bolts.

The receipt book also contains a considerable number of book debt cases regarding labor or services (23 out of the 89 book debt cases specifying the nature of the debt)—including farm labor such as mowing, thrashing, plowing, sowing, and pasturing, and a variety of services such as carpenter work, "schooling," working on a sloop, lending or keeping a horse, weaving, and making cloths.[34] Nathaniel Harns' complaint against Barnet Lewis, for example, was based on a "days and half moing [sic.] in thee year 1762 September 12th and for a days and half thrashing 6 shillings per day." The total charge, presented to Justice John Macombe in late 1763, came up to 18 shillings.[35] The receipt book does not indicate whether wages were decided based on prior agreement between the parties or on prevalent norms, but the several cases involving labor or services suggest a variety of ways in which wages were computed. Richard Ellen's account against David Gibson, for example, charges 2 pounds for "plowing harroing [sic.] and soing [sic.] one acker of land at Normans Kill."[36] In this case the compensation for farm work was computed based on the acreage covered, not the time spent on work, as in the case of Barnet Lewis against Nathaniel

[33] Benjamin Hilton v. Isaac Wheeler, Oct. 1766, *Henry Bogart Papers,* Folder 2. Hilton's occupation as innkeeper is noted in the aforementioned 1756 census of Albany's citizens made for Lord Loudoun. *Loudoun Papers: Americana, 1682-1780*.

[34] Reflecting a colonial statute allowing litigants to take lawsuits before any justice of the peace within the same county, litigants in the Albany justices' court were not restricted to city dwellers. Of the 110 litigants in the Albany court whose residential areas can be determined, only 27 lived in Albany City, with the rest travelling from the surrounding manors and rural villages. For identifying these residents I used the 1766-7 tax assessment on Albany County's freeholders. *Journal of the Legislative Council*, 1677; Christoph, *Upstate New York in the 1760s*, 1–146.

[35] Nathaniel Harns v. Barnet Lewis, Dec. 8, 1763, *Henry Bogart Papers*, Folder 2.

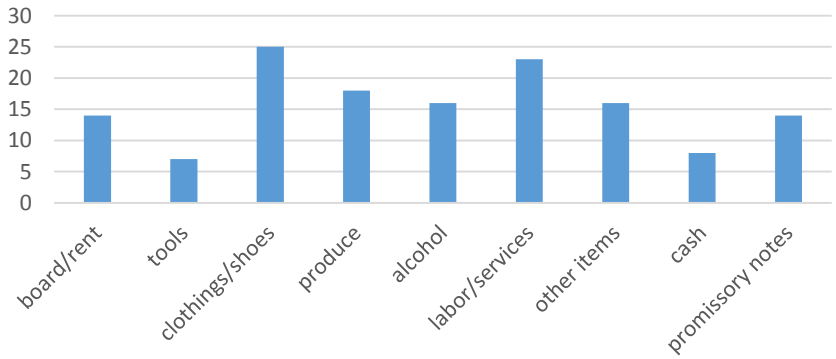
[36] Richard Ellen v. David Gibson, n.d., Ibid., Folder 3.

Harns. Peter Hilton's account against John Wendell from 1766, in contrast, does not bother to specify the amount of work, simply charging £1 8*s*. for "carpenter work at sundry times."[37] Although fragmentary, such cases point to the personal nature of short-term labor contracts, in which private agreements among the parties set the terms and compensation of labor.

Macombe and Bogart's receipt book suggests that cash was also used frequently along with such informal exchanges of goods and services. In some cases, cash was part of the book debt itself. For instance, Matthew Welch's debt of £4 7*s*. 3*d*. to John Mckenzie included 11s. for "cash lent," along with money owed for one pair of shoes, one shirt, and for boarding & liquor at "sundry" times.[38] Similarly, Peter Cranell's debt of £3 9*s*. to William Rogers included £1 borrowed in cash along with several sums owed for wheat and Indian corn on later dates. More frequently, cash payments appear in the receipt book as credit given to a debtor for partial repayment. Owing £3 19*s*. 2*d*. to John McKnight for numerous items consumed in 1763, for example, Nathaniel Davis paid £1 4*s*. to McNight in 1766 on account of the debt. McKnight, after waiting for another five

Table 2.4. Types of exchange underlying debt cases brought to the Albany Justices' Court, 1763-1769

Source: *Henry Bogart Papers*, Folders 1-6.



[37] Peter Hilton v. John Wendell, n.d., Ibid., Folder 3.
[38] John Mckenzie v. Matthew Welch, May 4, 1767, Ibid., Folder 5.

months, finally filed complaint before Alderman Henry Bogart for the balance of £2 15*s*. 2*d*. still owed him by Davis.[39]

Although less frequent, in some occasions labor is noted as credit toward an outstanding debt. While suing Rudolph Merkel for a debt he owed for "making a shute [sic.] of cloaths," valued at £1 6s., John Van Dyck acknowledged work performed for him later by Merkel, thus listing 14 shillings as credit in work, and ultimately demanding the balance of 12 shillings.[40] 22 of the 110 book debt cases in Macombe and Bogart's receipt book include acknowledgment of such partial repayment, either in cash or services, as credit toward a debt. In some cases, the accounting of net balance was what enabled the case to be brought to the single justice's court. Joseph Van Zant's debt to William Benson on numerous clothing items purchased on credit in 1763 came up to £7 8*s.* 2*d.*—exceeding the five pounds limit of the justices' jurisdiction. But taking into account Van Zant's subsequent payment of £3 in cash in 1764, the net balance owed to Benson came down to £4 8*s.* 2*d.*—hence Benson was able to present his case to the justice.[41]

The overall impression from such cases is that cash, in the context of these small credit economies, complemented, rather than replaced, book debt. For the most part, the same held for promissory notes. Only in a few exceptional cases were promissory notes used to mark transactions in which money-lending was the main purpose.[42] More typically, they were used to complement exchanges upon book debt. James Shaw's note to August Botswick, for example, was written when Shaw, after "settl[ing]" with Botswick one day in 1766, found himself indebted to Botswick by

[39] John McKnight v. Nathaniel Davis, Apr. 11, 1766, Ibid., Folder 3.
[40] John Van Dyck v. Rudolph Merkel, Jun. 27, 1763, Ibid., Folder 2.
[41] William Benson v. Joseph Van Zant, Jan. 28, 1768, Ibid., Folder 1. Such cases were made possible by a 1714 act that allowed consolidation of multiple instances of debt into a single litigation. The act also allowed defendants sued on debt to produce any offsetting credit against the litigant. "An Act for preventing the Multiplicity of Law Suits," Sep. 4, 1714, *N.Y. Col. Laws*, I: 827. Also see Moglen, "Settling the Law," 224-5 for a discussion of the act's significance.
[42] William Clark's note of hand to Joseph Simons, Jan. 9, 1765, *Henry Bogart Papers*, Folder 3.

the sum of £3 16*s.* (Shaw promised in the note to pay in six weeks, but this apparently did not happen, judging from the fact that Botswick filed a complaint to the court).[43]

The frequent use of cash and promissory notes, along with the routine pricing of goods and services in monetary value, suggest that the economic milieu surrounding late colonial New York's shopkeepers, artisans, and small farmers was a fairly commercialized and monetized one. But if the economy was commercialized, this does not necessarily mean that the social relations underlying credit transactions were of an impersonal nature, prioritizing uniform rules. The Albany and Tryon County justices' records show that numerous daily economic exchanges still took place based on verbal promises and tacit understandings supported only by the creditor's personal account book. The value of these exchanges may have been low, but judging from the types of items and services exchanged, they were probably significant to the common folk engaging in such exchanges, providing them with a means to obtain daily necessities such as food, clothing, and farming tools when money was short. In this sense, then, the justices' records suggest that late colonial New York's growing credit market and accompanying legal system did not supplant the informal exchange economy of ordinary New Yorkers, but were rather integrated into the latter.[44] To better comprehend how the justices' courts contributed to this informal exchange economy, we now turn to an analysis of the social and economic composition of those who frequented the

[43] August Botswick v. James Shaw, Aug. 9, 1766, Ibid., Folder 3. Similarly, Bruce Mann surmises that many of the cases on promissory notes found in Connecticut's county courts may have in fact originated from book debt. Mann, *Neighbors and Strangers*, 63.

[44] In a similar vein, historians such as Michael Merrill and James Henretta have argued that household modes of economy remained central to many early American peasants. As Christopher Clark emphasizes, Merrill's and Henretta's intent was not to argue that rural economies stayed "self-sufficient," exempt from commercializing forces, as has often been misconstrued, but to show how social values and relations often continued to dictate market exchanges amidst commercialization. Michael Merrill, "Cash Is Good to Eat: Self-sufficiency and Exchange in the Rural Economy of the United States," *Radical History Review* 1977, no. 13 (1977): 42–71; James A. Henretta, "Families and Farms: Mentalite in Pre-industrial America," *The William and Mary Quarterly*, 3rd Series, 35, no. 1 (1978): 3–32; Christopher Clark, *The Roots of Rural Capitalism: Western Massachusetts, 1780-1860* (Ithaca: Cornell University Press, 1990), 11–14.

justices' courts.

iii) social and economic status of litigants

As suggested earlier, judging from the types of daily necessities involved in the book debt cases brought to the Albany justices, we can be fairly certain that the litigants were predominantly small farmers, tenants, shopkeepers, artisans, and laborers. Direct information about the litigants' occupations is limited, but at least a handful could be verified from the receipt book or from other records. The occupations of the 22 people thus identified include bakers, tavern keepers, butchers, carpenters, hatters, a merchant, an innkeeper, a liquor seller, a blacksmith, a "joyner," a bricklayer, a weaver, a shoemaker, and a skipper.[45] Justice Frey's docket for Tryon County in the 1770s similarly includes innkeepers, shopkeepers, blacksmiths, cordwainers, and also numerous persons simply noted as "yeomen." Aside from the slight prominence of shopkeepers, tavern keepers, and innkeepers, then, the justices' courts were frequented mostly by a broad spectrum of middling and lower sorts both from urban and rural areas.

The supposition that the middle and lower stratum of colonial society were the main beneficiaries of the justice's services is further validated by comparing the tax assessments of litigants in the justice's court and inferior court of common pleas. For Tryon County, we have exceptionally full records of both courts for the same period, from 1772 to 1775, covering the same geographical jurisdiction.[46] Nearly half of the litigants who came before Justice Frey's court, and about the same proportion of litigants at the county court of common pleas, also appear in a tax assessment made in 1766 and 1767, allowing a cursory comparison of the plaintiffs and defendants

[45] A few of the litigants' and defendants' occupations are noted in the justices' records, and for additional information I relied on the 1756 Census of Albany City made for Lord Loudoun (See note 2 above). The limited scope of this census means that it does not include farmers or tenants.

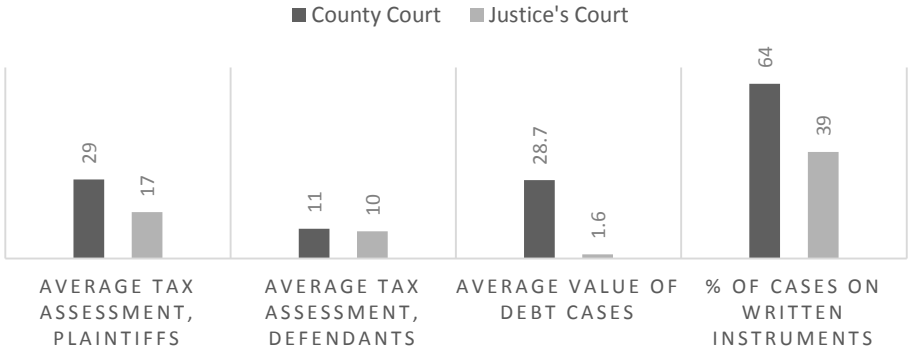
[46] *Tryon County Records, 1772-1784*, NYHS, Box 1.

appearing in the two courts.[47]

The average tax assessed to plaintiffs in the Tryon County justice's court was 17 pounds, and for defendants the average was 10 pounds. The average for plaintiffs in the Tryon County Court of Common Pleas was 29 pounds, and the average for defendants was 11 pounds. Turned into ratios, plaintiffs in the county court were assessed 164% wealthier than the defendants on average, while in the justice's court the average difference was 70%. Judging from the tax assessments, in both courts the plaintiffs were generally wealthier than the defendants, but the difference was much more pronounced among those who appeared at the county court. In Justice Bogart's court in Albany, the average tax assessed to plaintiffs was 10 pounds, and for defendants the average was 7 pounds—a relatively small difference as in the Tryon County justice's court.

Table 2.5. Comparisons between the Inferior Court of Common Pleas and the Court of a Single Justice of the Peace in Tryon County, 1772-1775

Sources: Samuel Ludlow Frey Papers, Box 3; Tryon County Court Records, Box 1; Christoph, Upstate New York in the 1760s



[47] Christoph, *Upstate New York in the 1760s*, 1-146. A common problem in identifying individuals from such lists is the lack of uniformity in how names were written, a problem further exacerbated in the case of German or Dutch names, which could be noted in their original form in one record, and in 'Anglicized' form in another. For example, the last name Kesseler may appear in one record as Kessler, and as Cassalier, or Casler, in another. I took a conservative stance in comparing the court records and the tax list, ruling out numerous similar names that may well be the same individual, but could not be ascertained as such. Thus the actual overlap of individuals between the court records and tax list is probably much higher.

Those who sued debtors in Tryon County's Court of Common Pleas included wealthy men such as Rynier Mynderse, who was assessed a 34 pound tax in 1767.[48] In 1774 he brought to the court two separate cases on bills obligatory, each of about 14 pounds value and with a deadline of two weeks; the following year Mynderse brought another case on a bill obligatory of about 17 pounds value and with a deadline of two months. For these short term loans, which he promptly brought to court when payment was not made by the deadline, the court awarded him about 4 pounds for damage in addition to the principal for each case.[49] William Seeber, a shopkeeper in the Canajoharie district, also appeared several times in the county court as creditor. Seeber's tax was assessed at 18 pounds—modest compared to Mynderse, but still considerably higher than the average tax (11 pounds) assessed to those who appeared as defendants at the county court.[50] Of the several cases on written instruments Seeber brought to court, one was against George Kratzinger on a bill obligatory of 16 pounds value.[51] Although we know little about Kratzinger other than that he was probably a farmer who migrated to Schoharie from Germany during the mid-eighteenth century,[52] his wealth was certainly not comparable to that of Seeber. Kratzinger's tax assessment in 1767 was at merely 2 pounds.[53] Kratzinger was evidently under financial distress during much of the 1770s. He was sued by two different creditors in the county court during this time, once on a bill obligatory of 16 pounds value, and then on a promissory note of 9 pounds

[48] Ibid., 116.
[49] Rynier Mynderse v. Hendrick Wemple Jr., Jun. 1774, Rynier Mynderse v. Karl Marinus, Jun. 17, 1774, Rynier Mynderse v. Safrinus Cough, Jun. 13, 1775, *Tryon County Records,* Box 1.
[50] William Seeber v. Peter Kramer, Dec. 9, 1772, Seeber v. Thomas Johnson, Dec. 9, 1772, Seeber v. Conrad Windecker, Dec. 1773, Seeber v. Thomas Winn, Mar. 1774, Ibid., Box 1.
[51] William Seeber v. George Kratzinger, Sep. 1774, Ibid., Box 1.
[52] Henry Z Jones, *More Palatine Families: Some Immigrants to the Middle Colonies 1717-1776 and Their European Origins, Plus New Discoveries on German Families Who Arrived in Colonial New York in 1710* (Universal City, Calif.: H.Z. Jones, 1991), 156–157.
[53] Christoph, *Upstate New York in the 1760s,* 124.

value.[54] He was also summoned to Justice Frey's court on two separate debt cases of five pounds or less value.[55] Similarly, Arent Bradt, whose 1767 tax assessment was at 4 pounds, appeared in one debt case in the county court and four debt cases in the justice's court during the 1770s.[56]

As such examples suggest, the same type of middling or lower sort persons could be summoned on debt claims to either court, but when they appeared in the two courts it was often in very different contexts, and against different types of creditors. In the justices' courts, they would likely encounter creditors with whom they had personal acquaintance, and whom they owed money from a string of ongoing exchanges of goods and services. In the county court, on the other hand, defendants more frequently faced creditors from a significantly higher income group, who had extended credit in an isolated instance of money lending. A simple statistic that further illustrates these points is that among the 487 people who appeared at least once as plaintiff in Justice Frey's docket, 43% were also summoned to the same court as defendant at a different time. For the Tryon County Court of Common Pleas, the portion of plaintiffs who also appeared as defendant was only 21%.

That plaintiffs bringing debt cases to the county court generally fell into a significantly wealthier subsection of the population is hardly surprising, when we consider the average value of those cases. The average value of debt cases in the Tryon County Court of Common Pleas was nearly 30 pounds, and the average amount of damage demanded by creditors on those cases was nearly 50 pounds. The average debt owed to creditors in Justice Frey's court in the same county, by contrast, was merely 1.6 pounds, and of course plaintiffs in the justice's court seldom if ever

[54] William Seeber v. George Kratzinger, Sep. 1774, Abraham Truax v. George Kratzinger, Mar. 1775, *Tryon County Records*, Box 1.
[55] Lewis Crane v. George Kratzinger, n.d., Robert Adams v. George Kratzinger, n.d., *Samuel Ludlow Frey Papers*, Box 3.
[56] Christoph, *Upstate New York in the 1760s*, 116, 122. Albert Van Der Werke v. Arent Bradt, Jun. 15, 1774 & Sep. 13, 1774, *Tryon County Records*, Box 1; Adam Gardineer v. Arent Bradt, Aug. 14, 1772, Peter Ehl v. Arent Bradt, n.d., Hardwick Arent v. Arent Bradt, n.d., John Sutard v. Arent Bradt, n.d., *Samuel Ludlow Frey Papers*, Box 3.

sued for a higher sum for damage. The contrast between the two courts can also be seen in the types of debt. Of the 91 cases specifying the type of underlying debt in the Tryon Court of Common Pleas records, more than a third (34 cases) were on restrictive financial instruments such as bills obligatory, bills of exchange, and conditional bonds, and about a quarter (25 cases) were on promissory notes—a much higher proportion of formal credit instruments compared to the single justices' courts, where the majority of cases were based on informal book debt.

To summarize, litigants appearing as creditors in the justices' court were typically only slightly wealthier than their debtors, and the debts were often incidental in the sense that they occurred in the process of ongoing exchanges of goods and services. Here, the exchange of daily necessities, not the loan itself, was the primary economic activity. Creditors who took cases on written instruments to the county court, in contrast, were often significantly wealthier than their debtors, and were more likely to have advanced the loan as a stand-alone transaction separate from other exchanges, with the prospect of gaining interest and penal sums a major part of the consideration. With this difference in the plaintiffs' economic backgrounds and types of credit extension in mind, we now compare how the justice's court and county court handled the debt cases brought by those plaintiffs.

iv) procedure and resolution

The procedures used for initiating debt litigation in eighteenth-century common law were *action of debt*, *action of detinue*, *action of covenant*, and lastly *action of assumpsit*. Actions of debt, detinue, and covenant were based on restrictive writs surviving from medieval English law, designed for claimants demanding the specific recovery of a debt or chattel, or performance of a covenant. With *actions of trespass on the case*, of which assumpsit was one particular type,

plaintiffs could demand compensation for a wide range of wrongdoings. Compared to writs of debt, detinue, and covenant, writs of trespass were less narrowly formulated, and since a main part of the writ consisted of the plaintiff's recital of the defendant's wrongdoing and the resultant damage, allowed for more flexible allegations particular to the given case. Assumpsit was essentially the several types of writs of trespass which began to be used frequently in the early modern period for suits on debt or contract, including in the American colonies. Plaintiffs (or rather their lawyers) found assumpsit useful mainly due to its broad applicability to various forms of debts and contracts. Actions of debt were also used with growing frequency, however, as they were better suited for quick, certain recovery of debt stemming from restrictive financial instruments.[57]

Facing either actions of debt or of assumpsit, defendants had several options. If disputing the plaintiff's claim, or presenting a counterclaim that would negate the obligation claimed by the plaintiff, defendants could either request a jury trial, agree with the plaintiff to have arbitrators (typically three) decide the case, or in cases of less than five pounds value, leave to the summary judgment of an individual justice of the peace. The defendant could also aim to have the plaintiff nonsuited by pointing out a technical flaw in the writ or procedure, hence rendering the action itself void or halting further process in the court (*demurrer* and *plea in abatement of the writ*). Defendants willing to admit the claim could confess judgment against themselves, or privately reach settlement with the plaintiff and have the plaintiff withdraw the action.[58] Lastly, some defendants, by not taking any action, let judgment be passed against themselves by default. In such

[57] A. W. B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975). See especially Chapters 1 & 2 of Part I, and Chapter 1 of Part II. For the case of colonial New York, see Simon Middleton, "Legal Change, Economic Culture, and Imperial Authority in New Amsterdam and Early New York City," *American Journal of Legal History* 53 (2013): 89–131; idem., "Private Credit in Eighteenth-Century New York City."

[58] Mann, *Neighbors and Strangers*, 81–83. Mann's discussion of the defendants' options, however, is focused on procedures in county courts or higher courts. I have thus changed the summary slightly to take into account defendants sued in justices' courts.

cases the defendant might subsequently fulfill the obligation and pay the court fees, or else suffer distraint or imprisonment.

Recent studies of early American law have outlined a broad transition from the earlier colonial periods when the informal judgments of juries and lay justices were central to civil law, to later decades when licensed lawyers and legally-trained judges began to dominate court procedure.[59] For the case of New York, Deborah Rosen found a noticeable decline of jury trial in all of the courts she examined—the Supreme Court of Judicature, New York City's Mayor's Court, and the Dutchess County Court of Common Pleas. The rate of jury trial in New York City's Mayor's Court, for example, hovered around 25% in the early eighteenth century, but declined to less than 5% by the 1750s. Similar to Bruce Mann's interpretation for the Connecticut case, Rosen attributed this decline of jury trials to the increased use of formal credit instruments and the formalization of law. Since one of the main reasons for using formal credit instruments was to make its terms strictly enforceable by law, such instruments, by design, invited an expanded role of lawyerly methods. And by securing more predictable outcomes to creditors, the increased use of credit instruments and the concomitant emphasis on formal aspects of common law also had the effect of discouraging debtors from disputing the creditor's claim, especially when taking into account the considerable costs of trials. Hence, reasoned Rosen, the decrease in costly jury trials, and the increase in confessions and defaults.[60]

If Rosen focused on trends in the types of resolution, Simon Middleton's recent study pays stronger attention to the types of action initiating debt cases. Middleton reexamined the New York City Mayor's Court records using a much larger dataset than Rosen's, looking at all of the initial

[59] Roeber, *Faithful Magistrates and Republican Lawyers*; Simon Middleton, *From Privileges to Rights: Work and Politics in Colonial New York City* (University of Pennsylvania Press, 2006), Ch. 5; Mann, "The Transformation of Law and Economy in Early America"; Henretta, "Magistrates, Common Law Lawyers, Legislators."
[60] Rosen, *Courts and Commerce*, 62–73.

complaints brought to the court including those that did not lead to a trial. Middleton found that actions on debt comprised only one-fifth of the complaints, while actions on assumpsit formed the vast majority.[61] Based on this finding, and the fact that the majority of such actions of assumpsit stemmed from book debt, Middleton concluded that book debt still composed a significant part of New York City's credit economy throughout much of the colonial period. Thus the decline of jury trial identified by Rosen was not necessarily a byproduct of an increase in formalized litigation based on credit instruments, or of a concomitant increase in out-of-court settlement between creditors and debtors. Instead, Middleton suggests, other factors such as increased social and economic pressure on debtors during the mid-eighteenth century, and growing disaffection with New York's civil courts and their procedures, contributed to the decline of jury trial despite the continued use of less restrictive actions such as assumpsit.[62]

The Albany and Tryon County court records, including the two justices' records and the records from the Tryon County Court of Common Pleas, provide an illuminating case study with results that partly support, and partly do not, the 'credit instrument—legal formalization' thesis. The most informative of these records regarding judicial process are the judgment rolls of the Tryon County Court of Common Pleas from 1772 to 1775, which faithfully note the actions, procedures, and decision for each case. Of the 91 debt cases containing such information, 24 cases

[61] Rosen, in fact, had also found that among cases brought to trial in the New York City's Mayor's Court from 1690 to 1760, only one-tenth were filed as actions on debt, covenant, or detinue, while the vast majority were actions on assumpsit. If the general trend of creditors was to loan with written instruments and pursue formal legal terms, one would expect such creditors to opt for more narrowly defined (and hence more easily enforceable) writs of debt, rather than assumpsit. Rosen explained this seeming contradiction by reasoning that the bulk of the original complaints were probably actions of debt, but since by the very nature of their design such actions discouraged defendants from prolonging court process, most of those cases initiated as action on debt were dropped before reaching trial, hence not appearing on the trial cases Rosen examined. What happened to such cases that did not proceed to trial, then, was out-of-court settlement. According to Rosen, the increased tendency to avoid resolution in court was in fact a sure sign that the law had become more formalized and predictable. Deborah A Rosen, "Courts and Commerce: The Formative Period of Legal Practice in New York, 1690-1760," *Ph.D. Diss.* (Columbia University, 1990), Chapters 2 & 3. What Middleton found was that contrary to Rosen's expectation, actions of debt still composed only a minority of those cases that were dropped before trial.

[62] Middleton, "Private Credit in Eighteenth-Century New York City."

(26%) were filed as actions of debt, and the rest were actions of assumpsit, noted either as actions on "trespass," or as "action[s] on the case." All of the actions of debt were on formal credit instruments (bills obligatory), and every single complaint regarding a bill obligatory was filed as an action of debt.[63] Cases on assumpsit, on the other hand, were mostly related either to the less formal promissory notes or to book debt. This confirms our expectation that formal credit instruments entailed more formalized legal procedure. Writs of debt, as aforementioned, were more restrictive than writs of assumpsit, leaving less room for the defendant to dispute the claim.

It is possible, as Rosen had surmised regarding New York City's Mayor's Court records, that the judgment rolls reflect only a fraction of the actual usage of credit instruments and the litigations regarding them. The minutes of the Tryon County Court of Common Pleas record a larger number of cases, many of which evidently did not reach judgment.[64] Some cases, for example, disappear from the records after being noted as "postponed," allowing us to surmise that the parties settled among themselves before the court's next session.[65] But regardless of whether the volume of cases on credit instruments are underrepresented in the records, the Tryon county court records clearly demonstrate that even in remote frontier areas of New York, credit instruments and the formal legal procedures surrounding them were well established by the late colonial period.

Further indicating such formalization, about half of the formal credit instruments presented in the Tryon County court included a warrant of attorney in the contract. A typical such bond ended

[63] In the way they were actually designed, these "bills obligatory" in the Tryon County Court of Common Pleas were in fact conditional bonds. They were sealed, and were written following the distinctive structure of conditional bonds in which a strict penalty is first specified as the main contract, to be imposed unless a certain condition is met. Why these bonds were referred to as "bills obligatory" or "writings obligatory" in these records is unclear, but this was evidently not just the convention of the clerk, since the rolls are often accompanied with copies of the original contract, in which invariably the same terminology is used. Numerous, *Tryon County Records,* Box 1.

[64] The minutes include 126 cases not found in judgment rolls.

[65] For example, Peter Whitmore v. Godliep Shaw, Dec. 14, 1774, *Tryon County Records,* Box 1.

with the following clause:

> If default of payment shall be made I do hereby impower any attorney of any court of record whatsoever to appear for me at the suit of the obligee or his representative receive a declaration for the debt, and confess the action or suffer judgment of any term, by nil dicit, or otherwise; and for so doing this shall be his sufficient warrant; and all errors in the proceedings, judgment and execution thereon against me or my estate, hereby release to the plaintiff in such suit.[66]

Such standardized clauses in credit instruments, by design, preemptively minimized the debtor's ability to dispute the creditor's claim. Hence, when brought to court, judgment was given swiftly for such cases, most of the time with the defendant absent, and an attorney confessing judgment in the defendant's stead.

Not all cases handled by the Tryon County Court were related to such formal instruments. Promissory notes (29% of the cases with judgment rolls) and book debt (34%) still composed a large proportion of the county court's case load, and there were also a number of cases (13%) related to various disputes over damage in property or chattel.[67] Although from a rather small sample, the large proportion of such cases in Tryon county's inferior court suggests that the usage of formal instruments and procedure did not necessarily push out litigation on less formal types of debt—mirroring what Simon Middleton has recently discovered regarding New York City's Mayor's Court.[68]

It should be noted, however, that the book debt cases handled by the county court of common pleas often differed in nature from the informal book debt cases brought to the justice's courts. Andrew Mitchell's suit against John Ernest Pier, John Helmer, and Nicholas Vroman in

[66] Lodewick Sneider's bond to Adam Klock, Sep. 11, 1772, Ibid., Box 1.
[67] For instance, Philip Bellinger sued Johannis Weaver for a mare Bellinger had lost on March 1, 1774, found by Weaver the next day, and used by the latter on the following day. Philip Bellinger v. Johannis Weaver, Jun. 1774, Ibid, Box 1.
[68] Middleton, "Private Credit in Eighteenth-Century New York City."

1775, for example, involved a single large volume transaction among merchants. The defendants had been delivered "thirteen barrels of rum and one three gallon keg of balls and host," valued at £187 18*d*., to be carried from Schenectady to Ontario, which they failed to perform as promised.[69] Some of the book debt cases were apparently brought to the county court simply because the account balance in question exceeded five pounds, and hence fell outside of the jurisdiction of the justice's court. But many of the book debt cases handled by the county court were similar in nature to Andrew Mitchell's suit—cases on single large volume transactions which took place in the context of commercial trade, rather than amidst ongoing daily exchanges of small value, as in the justices' courts. Roughly two thirds (18 of 31) of the book debt cases in the Tryon County court judgment rolls were on such high-value single transactions.[70]

More importantly, even for cases on informal book debt or promissory notes, formal procedures often played a large part in the county court's proceedings. A handful of licensed lawyers were fixtures of the Tryon County court during the 1770s, each representing a portion of the plaintiffs and defendants in every session.[71] In all of the 91 cases with judgment rolls, plaintiffs were represented by such lawyers, who drew up writs and brought forward motions in the formalized language of English common law. Defendants, in contrast, hired lawyers in only 24 (26%) of those cases. More than half of those cases were on the aforementioned types of bills obligatory with warrants of attorney attached to them. Excluding those cases, then, in only 11 cases did defendants decided it worthy to hire a lawyer. Such imbalance points to the low confidence of

[69] Andrew Mitchell v. John Ernest Pier, Jon Helmer, and Nicholas Vroman, Mar. 1775, *Tryon County Records,* Box 1.

[70] The average value of those book debt cases was 29 pounds, far exceeding the average value of book debt cases in the Tryon county justice's court, which was merely one and a half pounds.

[71] In its first full session held in September, 1772, the court quickly licensed a handful of lawyers to practice in the county. Thus Christopher P. Yates, Leonart Gansevoort, John Hansen, Dudley Davis, and Peter W. Yates were "admitted to practice" on producing a "license to practice as an attorney at law" in the colony. In subsequent sessions John Roorback, John Brown, Benjamin Hilton Jr., and Matthew Visscher were similarly acknowledged as attorneys practicing in the Tryon County courts. Numerous, Ibid, Box 1.

debtors to get a favorable decision when sued in the county court, especially by plaintiffs hiring lawyers. Of the 56 county court cases with full information of the final decision, 86% were decided in favor of the plaintiff.[72] It would be safe to conclude, then, that the prominence of lawyers and formal procedures in county courts rendered the results of most debt cases predictable, even when the debt was on less formal promissory notes or book debt.

If records of the Tryon County Court of Common Pleas largely confirm trends toward legal formalization shown in other studies, the courts of single justices of the peace present a very different picture. The Albany and Tryon County justices seldom specified types of action regarding the cases they handled. And when they recorded the resolution of a case, they simply noted it as "this settled," or "this paid." Specifying types of action or resolutions in Latinate common law terms was a requirement pertaining to courts of record with clerks commissioned for that purpose.[73] Free from such obligations, justices of the peace could be less concerned with formal procedure. It also helped that lawyers, the main purveyors of such formalization, seldom appeared in the justice's court.[74]

Colonial statute did stipulate uniform judicial processes to be followed by justices. For civil cases, the Five Pounds Act detailed the standard process of receiving complaints and summoning defendants, and also gave provisions for issuing warrants, adjourning a trial,

[72] Of the few cases in which the defendant won, only two were by judgment. The other instances were by nonsuit (4 cases) or by judgment being set aside (3 cases). Defending himself against Peter Whitmore on a debt case, for example, John Cough submitted evidence that one of the plaintiff's witnesses, John Smith, was partners with the plaintiff at the time the debt was contracted. Cough's council moved that the plaintiff be nonsuited, which the court granted. Peter Whitmore v. John Cough, Mar. 1774, Ibid, Box 1.

[73] See, for example, "The Duke of York's Laws, 1665-75," *N.Y. Col. Laws,* I: 8.

[74] None of the 1380 cases in the Tryon county justice's court note involvement of a lawyer. Attorneys appear in four cases brought before justices Bogart and Macombe of Albany. It is unclear, however, whether these two attorneys—Frances Burke and one Mr. "Van der Heyden"—were licensed lawyers. It was not uncommon for laymen to be authorized by powers of attorney to represent absent litigants. See, for instance, *The New-York Gazette*, Feb. 18, 1751.

summoning jurors and witnesses, and seizing property or imprisoning debtors when necessary.[75] Ultimately, however, no further requirement was placed on justices to formalize their procedures comparable to those of courts of record, and the justice retained the authority to dispense judgment "in such manner as shall appear to him agreeable to equity and justice." New York justices' summary jurisdiction over small debt cases was further bolstered by a stipulation discouraging parties from easily appealing to higher courts. To be granted a writ of certiorari or writ of error, the losing party was required to make an affidavit before a judge within one month of the justice's judgment, specifying the error or unfair practice of the justice.[76]

The Albany and Tryon justices' court procedure consisted mainly of examining the creditors' bills and account books, taking oaths regarding the veracity of those evidences, and summoning the debtor if the plaintiff's claim seemed valid. The most typical item in the Albany justices' receipt book is a copy of an account with the following type of note added below: "Appeared personally before me the above Benjamin Hilton who being duly sworn saith that this account is just fair and true. Sworn before me in Albany, October 1766 –John Macombe justice." There was little beyond the plaintiff's claim and personal papers to guide the justice's decision, but this was enough for the justice to decide that "it appeared to" him that the defendant "was justly indebted unto" the plaintiff.[77]

One of the greatest merits of this simple procedure, from the plaintiffs' point of view, was probably its flexible terms. Since county courts held session during only four fixed terms a year, plaintiffs had to wait for up to three months before bringing a suit. If the suit was postponed or prolonged, which was not infrequent in higher courts, another three months' delay was in order.

[75] *N.Y. Col. Laws*, V: 304-314.
[76] Ibid, V: 313-314.
[77] Benjamin Hilton v. Isaac Wheeler, Oct. 1766, *Henry Bogart Papers*, Folder 1.

Justices' courts, on the other hand, gave timely decisions by design. On receiving a complaint, the justice issued a summons, to be served by constables, requiring the defendant to appear on a certain date. The Five Pounds Act stipulated that the date should be no less than six, but no more than twelve days from the day the summons was issued. In case the date had to be adjusted, the justice could appoint a new date within six days of the original appointment. After the hearing, the justice was required to give judgment within twelve days (typically, however, a decision was given immediately after the hearing). Thus plaintiffs bringing their claims to a justice could usually expect resolution within a week or two, or in a month's time at most.[78]

Defendants disputing the plaintiffs' claims could demand to have their cases heard before juries. The actual rate of jury trial, however, was very low. Only 2% (34 cases) of the cases in the Tryon County justice's court, and not one in the Albany justice's court, proceeded to jury trial. Arbitration, another option, was not popular either. Only five cases in Tryon County, and one in Albany, were referred to arbitrators.[79] Instances of technical pleading such as *demurrer* or *plea in abatement of the writ*, not surprisingly, are nonexistent in the justices' records. The Tryon Justice's docket does have eleven cases wherein the plaintiff was nonsuited—probably occasions in which the defendant had in fact satisfied the debt claimed by the plaintiff, or in which the plaintiff turned out to be indebted to the defendant on another prior transaction.[80] In the Albany justices' court, there were only two such occasions. The vast majority of debt cases, then, were decided in the plaintiff's favor.[81] And in most cases the defendant quickly admitted the obligation on being summoned, thus either paying the debt immediately, promising to pay later, or reaching settlement

[78] *N.Y. Col. Laws*, IV: 296-301, V: 304-314.

[79] For the Dutch roots of arbitration in early New York, and the continued use of commercial arbitration under English rule, see Moglen, "Settling the Law," Ch. 5; Middleton, *From Privileges to Rights*, Ch. 5.

[80] For example, Arent Bradt was nonsuited in his case against John Sempson on a promissory note when the latter, on being summoned, appeared and "produc[ed] a receipt." Arent Bradt v. John Sempson, n.d., *Samuel Ludlow Frey Papers*, Box 3.

[81] Plaintiffs won in 97% of the cases in the Tryon County justice's court for which a decision is specified.

with the plaintiff out of court.

It is striking that so few defendants in the justice's court were willing to dispute the plaintiffs' claims, and that so few were successful. Court fees were obviously a major factor deterring defendants from prolonging a suit. But given how the plaintiffs' claims were typically backed only by oral or private evidence, it is somewhat contrary to expectation that those claims were not disputed more often. The likely reason for this lies in the nature of contracts underlying these lawsuits. As discussed earlier, the tenants, small farmers, artisans, and small traders who frequented the justices' courts inhabited an informal but fairly commercialized economy, in which credit transactions for various purposes had become routine. Book debt was informal, but within the context of a monetized economy, many of the exchanges were priced, and hence left little room for dispute. Thus when the net balance from a string of such transactions was presented to them, most debtors, after inspection of the evidence, could acknowledge the terms and prices therein as consonant with prior agreement.[82]

Handling such cases, justices of the peace had little occasion to inject personal discretion. If the procedure was informal, the overall operation and resolutions of the justices' courts were fairly predictable. Creditors would win cases on book debt or promissory notes unless there was an error, a fraud, or some countering obligation which the plaintiff had overlooked.[83] Debt litigation in late colonial New York's justices' courts, then, was used less to resolve actual disagreements between creditors and debtors, than as a means for creditors to cajole debtors, or to

[82] For the case of Massachusetts, Ronald Snell similarly found that defendants seldom disputed debt claims brought against them before an individual justice. Of the 165 cases of debt heard by Justice Nathaniel Harris during the early eighteenth century, for example, defendants appeared in only 25. Snell, "The County Magistracy in Eighteenth Century Massachusetts, 1692-1750," 96-97.

[83] These findings stand in contrast with what other historians have found about litigation on informal debt in early America. David Thomas Konig and Bruce Mann, for example, argued that litigation at local civil courts in early periods was often about parties resolving longstanding disputes by airing their grievances in a public forum. David Thomas Konig, *Law and Society in Puritan Massachusetts* (Chapel Hill: University of North Carolina Press, 1979), Ch. 5; Mann, *Republic of Debtors*, 17–27.

gain some degree of security that their debts would be paid at some point.[84]

Thus the familiar image of lay magistrates listening to the myriad circumstances and indirect evidences explained by the parties, and resolving the dispute after comprehensive consideration on the general issue, clearly does not hold here.[85] The role that the individual justice played in late colonial New York's local exchange economies can be more aptly described as that of a facilitator—providing a certain degree of security to the informal daily exchanges by giving public affirmation to book debts and informal notes, and by assisting debt collection with a show of public authority when necessary. If the justices' procedures were less formal, the courts' services were nonetheless often sufficient to confer informal credit transactions with a stronger sense of predictability and security. In this sense, single justices' courts complemented the judicial function of higher courts such as the inferior court of common pleas, where procedure was more formal and certain, and thus suitable for handling formal debt cases of higher value.

v) costs and services

Based on their findings of increased usage of formal credit instruments, the formalization of legal procedure, and the resultant increase in cases ending in default, Bruce Mann, Cornelia Hughes Dayton, and Deborah Rosen suggested that after the early-eighteenth century, colonial courts essentially became rational debt-recording institutions. In most cases related to credit instruments, there was little doubt that the creditor would recover the debt or win the penal sum. Hence, according to Mann, Dayton, and Rosen, the creditors' main purpose in debt litigation was

[84] One further factor spurring colonial New York's creditors to seek such security at court, as pointed out by Deborah Rosen, was a colonial statute requiring creditors to bring suit within six years of the due date of the obligation. *N.Y. Col. Laws*, I: 154-156; Rosen, "The Supreme Court of Judicature of Colonial New York," 233.

[85] Haskins, "Lay Judges: Magistrates and Justices in Early Massachusetts," 39–55; Konig, "Country Justice: The Rural Roots of Constitutionalism in Colonial Virginia," 63–82; John M. Murrin, "Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England," in David D. Hall, John M. Murrin, and Thad W. Tate, eds., Saints and Revolutionaries: Essays on Early American History (New York, 1984),152–206.

not to recover disputed debts, but to use the courts as devices to efficiently record and secure their credit advancements. In the long term, debtors would also find this system agreeable since such added security would enable better credit terms—lower interest rates, larger sums of loan, and later due dates.[86]

This interpretation was disputed by Claire Priest in her study of debt cases in eighteenth-century Massachusetts. Focusing on cases brought to the Plymouth County Court of Common Pleas from 1724 to1750 and from 1781 to 1795, Priest found that the judicial fees accompanying debt cases were generally very high compared to the underlying debt, and also that on average there was a considerable temporal gap between the points of credit extension and debt litigation. These results are incompatible with the "debt-recording interpretation," according to Priest, since the fees would have to be quite low for creditors and debtors to find such "debt-recording" worthy, and since if recording the debt was the reason for litigation, creditors would generally bring suit soon after advancing credit. Priest connected this refutation of the debt-recording interpretation with the Shays' Rebellion of 1786, arguing that the Shaysites' grievances against county courts reflected the overall inefficiency of colonial courts as debt-collecting institutions.[87]

For the purpose of this study, it is particularly interesting that Priest, acknowledging that expansion of the individual justices' jurisdiction was one of the Shaysites' key demands, briefly compares justices' courts with the county courts in terms of fee structure. Records of justices' courts, not surprisingly, were scant, however. Based on a sample of eighteen cases recorded by one justice, Priest concluded that although the fees in justices' courts were lower than in the county courts, they were still extremely high compared to the underlying debt value—close to half on

[86] Mann, *Neighbors and Strangers,* 39-40, 43; Rosen, "The Supreme Court of Judicature of Colonial New York," 213, 233-234; Cornelia Hughes Dayton, *Women before the Bar: Gender, Law, and Society in Connecticut, 1639-1789* (Chapel Hill: University of North Carolina Press, 1995), 91, 102.
[87] Priest, "Colonial Courts and Secured Credit."

average, thus rendering the justices' courts poor alternatives to the county courts.[88]

Priest's conclusion on the inefficiency of justices' courts may be justifiable for the case of early Massachusetts, but would be problematic in the context of colonial New York since the Albany and Tryon records show the justices handling a heavy volume of debt cases late into the colonial period. But to determine whether this heavy volume can in fact be attributed to the justices' efficacy in handling such business, we must examine the costs of litigation in New York's justices' courts. In the following analysis I partly adopt methods used by Priest and Rosen, but benefitting from the more informative records left by the Albany and Tryon county justices, also look at several additional aspects of the justices' operations which would better inform our appraisal of their overall efficacy in handling small debt litigation.

The speedy process of justices' courts, one might expect, would suit creditors intending to use the court to record debt immediately following a contract. The Albany justices' records, however, indicate that this was hardly the case. Of the 22 cases for which the dates of both underlying contract and litigation are available, in only 4 cases did litigation take place within four months of the underlying contract. The average time creditors took before litigation was no less than 25 months, many cases being brought to court years after the original debt obligation.[89] As Priest reasoned, it is very unlikely that creditors intending to use litigation as a debt-recording device would take so long to file their complaints. The not infrequent issuing of warrants also negates the possibility that justices' courts assumed debt-recording functions. Justices Bogart and Macombe issued 11 warrants during the 1760s, in 6% of the debt cases they handled, and in Justice Frey's court in Tryon County no less than 108 (8% of the cases) warrants were issued from 1772

[88] Ibid., 2428–2429.

[89] Peter Smith's debt to Joseph Simons on several purchases of linen, chick, rum, wine, hogshead, and gloves made in 1761, for example, was finally brought to court four years later in 1765—after, in fact, the creditor had deceased. The Estate of Joseph Simons v. Peter Smith, Nov. 1765, *Henry Bogart Papers,* Folder 3.

to 1775. Justices issued warrants on debt cases when the creditor provided reasons, upon oath, to believe that "he or she will be in danger of losing the debt."[90] Hence, requiring the justice to issue a warrant, which expressed distrust of the debtor's ability or intention to pay, and also incurred further cost (1*s*. 6*d*.), can hardly be expected from creditors using the court for debt-recording purposes.

Although New York's justices' courts did not function as rationalized debt-recording institutions, neither were they heavily engaged in resolving actual disputes over debt. Creditors on small book debt seldom took their claims to justices unless the debt remained unpaid for a considerable time, and the debtors, as shown earlier, usually admitted their indebtedness immediately when summoned by justices. This pattern had a significant bearing upon the overall costs involved in the justices' proceedings. The greatest incurrence of expenses at a justice's court was when a jury trial took place, and when witnesses were called. The average total court fees of cases that went to jury trial in the Tryon County justice's court was 18 shillings, three times the average total fees per case in the same court. It cannot be ascertained how significant a factor this higher cost was in deciding whether to proceed to jury trial, but as shown, the Albany and Tryon justices' records indicate that plaintiffs and defendants clearly avoided jury trial if possible. Similarly, witnesses were called in less than 2% of the cases in both the Tryon and Albany justices' courts.[91]

[90] *N.Y. Col. Laws*, IV: 296-301, V: 304-314. Justice Frey, for example, issued warrant after having the plaintiff swear that "if process was by sum[mon]s he was in danger of losing his debt." William Spencer v. Adam Davis, Nov. 26, 1773, *Samuel Ludlow Frey Papers*, Box 3.

[91] 26 cases, and 3 cases, respectively, in the Tryon County and Albany County justices' records.

Table 2.6. Court Fees as stipulated in the Five Pounds Act of 1759

Source: *The Colonial Laws of New-York,* VI: 372-77.

Justices' fees:

- a summons … 9*d.*
- warrant … 1*s.* 6*d.*
- judgment … 1*s.*
- administering every oath or attestation … 6*d.*
- summons for evidence … 6*s.*
- execution … 1*s.* 6*d.*
- issuing the venire facias to summon a jury … 1*s.*
- swearing the jury … 1*s.* 6*d.*
- evidences, attending on summons or otherwise … 2*s.* per day

Constables' fees:

- for serving every warrant or summons, for one mile's riding or under, 1*s.*; every mile more 6*d.*
- serving every execution, for each pound: 2*s.*
- summoning every jury: 3*s.*

Jurors' fees:

- for all causes tried, 1*s.* per man
- all causes when summoned and the cause not tried, 6*d.* per man

Many plaintiffs and defendants further reduced cost by also avoiding judgment and execution fees, which only left the justice's summons fees and the constable's fees.[92] The records do not detail the exact process that led to this evasion of fees, but it was likely due to many defendants quickly admitting the debt on being summoned, or reaching out-of-court settlements

[92] The Tryon County justice's record, which notes such fees for most of its cases, shows that judgment fees were avoided in 35% of the cases in which a summons was issued, and execution fees were avoided in 71% of the cases.

with plaintiffs.[93] Constable's fees could amount to a sizeable sum, but especially after the partition of Albany County in 1772 and the subsequent creation of three separate jurisdictions, most plaintiffs and defendants were not so distant from the justice's court as to incur exorbitant constable's fees. The average distance travelled by constables for the Albany justice's court before the 1772 partition was 9 miles, which amounted to an average of 5 shillings in constable's fees for serving a summons. The average constable's fee in the Tryon County justice's court from 1772 to 1775 was 3 shillings. Overall, plaintiffs or defendants were charged a total cost of 6 shillings per case in the Tryon County justice's court, for which such information is available. This amounted to less than one-fifth of the average debt claimed in those cases.[94]

Compared to the county court, plaintiffs and defendants also enjoyed the fact that the costly services of lawyers were seldom involved in the justice's court, whereas lawyers were consulted for almost every case brought to the county court.[95] Another reason it is unlikely that cost deterred creditors from suing debtors in justices' courts can be found in the nature of debt cases handled by late colonial justices. As discussed above, most creditors could feel fairly certain that the defendant would admit the debt, or that they would win judgment in a trial, even when the underlying contract was an informal book debt or promissory note. This means that most creditors would have been reasonably confident that any court fees incurred would be charged to the debtor, thus rendering court fees an even less significant factor in their decision of whether to bring a suit to the justice's court. All of these factors, then, together help explain why so much debt litigation took place in the Albany and Tryon county justices' courts, even for such small sums of debt. The speed, low

[93] 67 cases in the Tryon County justices' records are noted as settled between the parties.

[94] In contrast, the average total fees amounted to nearly half the value of the underlying debt in a Plymouth, Massachusetts justice's court analyzed by Claire Priest. Priest, "Colonial Courts and Secured Credit," 2428–29.

[95] According to Deborah Rosen, a typical bill for a suit in the New York Supreme Court in the 1750s, including both legal and court fees, ranged from 4 to 7 pounds. Rosen, "Courts and Commerce," 69–70.

cost, and substantial usage all indicate that late colonial New York's justices handled debt cases in an effective manner that met the litigants' needs.

Another notable aspect of the Albany and Tryon county justices' operations, relative to cost and efficacy, is the way debt was actually collected and paid out in these courts. After a summons was issued by the justice, sometimes both the plaintiff and defendant appeared on the appointed date and settled the debt in court. Far more frequently, however, either one of the parties was absent, or the defendant appeared but could not immediately pay the debt. What ensued, then, was a variety of situations. Excluding the infrequent cases in which the defendant disputed the claim, the problem to be resolved was how to collect the debt from the defendant and relay it to the plaintiff.

In the event that the plaintiff was absent but the defendant appeared, admitted the debt, and was ready to pay the debt and costs immediately, the justice received the sum, recorded it on his docket, then relayed the sum later when the plaintiff happened to be in town or when one of the constables had occasion to go down to the plaintiff's neighborhood. On being summoned by Justice Frey on June 16, 1774, for example, defendant Philip Wiemer appeared and paid the debt and costs on July 2. The plaintiff Wiliam Lobell was absent, however, so the sum was received by the justice, then subsequently "sent down by Christopher P. Yates" to the plaintiff. A later note confirmed that the sum was indeed paid to the plaintiff by the constable.[96] Further underlining the personal basis of such debt collection and payment routines, it was not infrequent for a brother or son of the plaintiff to receive the sum instead, presumably due to their having occasion to visit town.[97]

[96] William Lobell v. Philip Wiemer, Jun. 16, 1774, *Samuel Ludlow Frey Papers*, Box 3.

[97] Henry Kelly's debt to Gerret Walrath on book account, for example, was first collected by constable Lewis Crane, then submitted to the justice, and finally relayed to the creditor's brother, Johannis Walrath, apparently when Johannis had occasion to visit Johnstown. Gerret Walrath v. Henry Kelly, Sep. 14, 1772, Ibid, Box 3.

In some occasions, the parties bypassed actual transfer of cash by referring to a prior debt obligation involving a third party. Frederick Galin's suit against Jost Fox, for example, was settled when one Abraham Outhout, to whom the plaintiff Galin had been indebted on a separate obligation, received money from Fox and gave credit to Galin in that amount. The arrangement was apparently made soon after the summons was issued. Outhout wrote to the justice explaining how the debt was settled, which settlement the justice accepted and closed the case without a hearing.[98] In all, for at least 334 of the debt cases handled by the Tryon County justice between 1772 and 1775, a debt collected from the defendant went through the justice's or constables' hands before being relayed to the plaintiff.

Another frequent situation was when the defendant admitted the debt, but could not pay immediately. This seldom led to imprisonment or distraint, as long as the defendant promised to pay within a certain time.[99] Plaintiffs varied in how much security they demanded for an extension. Some were satisfied with a verbal promise, some required a promissory note, and some demanded that a third person stand bail for the debtor. But the majority were willing to grant extensions, and the justice complied with the plaintiffs' wishes.[100] In some such cases the defendant later paid the plaintiff directly and had the plaintiff report to the justice, but oftentimes such late payments were made to the justice or constable, in which case once again the justice would have to relay the sum to the plaintiff.[101]

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[98] Frederick Galin v. Jost Fox, n.d., Ibid, Box 3.

[99] There were four such cases in Justice Bogart's receipt book, while no cases of imprisonment or distraint were recorded in Justice Frey's docket.

[100] Sued by Hugh McConnell on a debt of £2 8*s.* 9*d.*, George Bass was discharged after Hendrick Feeling became his bail to pay in two months. Bass subsequently paid the sum, thus settling the case. Hugh McConnell v. George Bass, n.d., Ibid, Box 3. Other creditors such as Gerret Walrath were less strict about the terms of the extension, willing to "wait[] till winter" without any further conditions. Gerret Walrath v. Johannis Eigenbradt, n.d., Ibid, Box 3.

[101] Granted a one month extension on his debt to Adam Strohbeck, John Flagge subsequently paid the debt and court fees to constable Conrad Seeber, who on a later date handed the debt to the creditor Strohbeck. Adam Strohbeck v. John Flagge, Apr. 21, 1775, Ibid, Box 3.

There were evidently no additional fees, beyond perhaps the constable's fees for his travel, charged for these services. It was an informal practice beyond the strict judicial role of the justice's court, developed out of expediency to accommodate the court's many plaintiffs and defendants who were dispersed in remote towns and villages. It was also a practice made possible due to the justices' and constables' acknowledgment of the personal nature of local credit transactions. Take, for instance, the way Justice Frey handled two separate debt cases involving the same person: When Jacob Shultz, on being sued by Doctor Stewart on a debt of two pounds, appeared at court and paid the debt to the justice, the justice remembered a recent suit against Doctor Stewart in which Stewart was found to owe £2 8*s.* 2*d*. to Robert Adams. The justice, rather than relaying the two pounds he collected from Shultz to Doctor Stewart, retained the sum and credited it toward Stewart's debt to Robert Adams, noting on the docket that Stewart was "given credit" regarding Adam's claim against him.[102]

The manner in which the justice handled incoming and outgoing sums among plaintiffs and defendants and kept track of them was essentially identical to how personal book debt was contracted and handled by laypeople. The summary proceedings in the single justice's court hardly resembled the formal judicial procedures of higher courts. But nonetheless, or rather due to such informality, justices of the peace were able to support the small credit economies of late colonial New York's middling and lower sorts with speedy, predictable legal resolutions at low cost, and with flexible debt collection processes based on personal relationships.

* * *

These findings are admittedly based on a limited sample, especially in terms of

[102] Robert Adams v. Doctor Stewart, n.d., Doctor Stewart v. Jacob Shultz, n.d., Ibid, Box 3.

geographical extent. But the high volume of debt cases handled by the Albany and Tryon county justices, and the routine manner in which they were handled, strongly suggest that the historians' relative inattention to the civil function of individual justices of the peace has been mostly due to the dearth of sources, rather than because that role was actually negligible. Further, the fact that records of the inferior court of common pleas in the same geographical jurisdiction confirm most of the legal and economic transitions highlighted by recent scholarship (an increased usage of formal credit instruments and a concomitant shift toward formalized legal procedure), whereas such patterns are virtually absent in the justice's court of the same locale and for the same period, indicates that the distinctive legal practice and underlying economic exchanges revealed in the Albany and Tryon county justices' records were not simply a regional exception pertaining to the Upper Hudson and Mohawk Valleys. Although comparable studies on other parts of New York have yet to be done, it is noteworthy that recently Simon Middleton, based on his study of civil lawsuits brought to New York City's Mayor's Court, concluded that book debts and relatively flexible legal procedure (assumpsit) continued to form a major part of New York City's credit transactions and legal practice throughout the colonial era.[103]

Taken together with the county court records, then, available information from the justices' courts strongly suggests that although commercialization did engender increased use of credit instruments and formalization of civil law, not all sections of late colonial society were equally affected by such developments. Records from the county court and higher courts, which most historians have understandably focused on, categorically discount the viability of the informal exchange economy and its accompanying legal norms, which, although mostly revolving around myriad transactions of small value, nonetheless still formed a significant part of numerous ordinary

[103] Middleton, "Private Credit in Eighteenth-Century New York City," 150-77.

people's economic lives in late colonial New York.

This is not to say that the middling and lower sorts necessarily resisted commercialization, or denied the value of predictable legal processes. The heavy volume of small-debt litigation and the monetized transactions underlying those debts, in fact, point to the pervasive reach of commercialization and monetization extending even to the lower- and middling-stratums of late colonial society. What the justices' records suggest, however, is that responses to commercialization were not uniform. Ordinary New Yorkers, both in rural and urban communities, strove to adapt their informal exchange economy to a more commercialized context—trying to confer the increasingly voluminous credit transactions with a reasonable degree of security and predictability, while retaining the personal bases and flexibility of intra-communal exchanges. It was the effort to strike such a balance between localized economic culture and formalized legal procedure that found expression in the distinctive character of late colonial New York's justices, who handled small debt cases in a fairly routine and predictable manner, while simultaneously acknowledging the personal and informal aspects of the underlying debt relations.

CHAPTER 3

Squires and Tavern Keepers:

Justices of the Peace and the People

New York's justices of the peace handled small debt litigation in an effective manner that met the people's needs. Many justices also endeavored to reach equitable resolutions in thorny disputes surrounding property claims and deep-set ethnic and religious divisions. Regardless, the colony's leading lawyers and judges failed to see anything positive in the lay justices' performance. In the eyes of the legal elite, most New York justices were completely unqualified for the magisterial duties with which they were entrusted. Certainly, not only in terms of their understanding of the law, but in most cases also in terms of their social and economic standing, New York's lay justices compared poorly with the colony's legal professionals. But contrary to the legal elite's loud assertions, the lay justices' lack of education and lowly socio-economic standing did not necessarily render them unworthy magistrates.

The haphazard process of provincial commissions in late colonial New York, often dominated by politically-driven recommendations from powerful patrons and factions, enabled the emergence of numerous plebeian justices of the peace—men lacking in wealth, education, and status, and far removed from the traditional Anglo-American ideal of weighty local figures as magistrates. Spurred by the Five Pounds Act, these plebeian justices began to handle a large share especially of the colony's voluminous small debt cases. This turned out to be a blessing in disguise. Conscious of their unstable positions and economic standing, plebeian lay justices served myriad small debt cases with particular attentiveness to the people's legal needs.

Commissions of the Peace: Competitive Patronage and Its Consequences

To the colony's legal elite, the lax and arbitrary performance of lay justices was hardly surprising, in light of the type of "poor, mean, ignorant and unworthy persons" increasingly being commissioned as justices. The legal elite pointed to two factors behind New York's swelling number of unqualified justices. One was the Five Pounds Act. By burdening individual justices with a larger share of the colony's petty civil cases, the act, charged the legal elite, rendered the office extremely unattractive to the colony's "principal inhabitants," leaving lowly, ignorant persons to fill the void.[1] The second factor was political corruption. Ideally, the governor was to appoint justices of the peace based on a careful, disinterested assessment of each candidate's magisterial capabilities. But all too frequently, the legal elite decried, governors were pressed to blindly endorse the private recommendations of powerful local figures, among them representatives in the general assembly, letting those men effectively determine most of the colony's commissions of the peace. The sole criterion in the assemblymen's recommendations, Councillor William Smith, Sr. averred, was political allegiance. Incumbent justices who "did not vote for the sitting members [of the Assembly] in the last election, or would not promise to give their votes and interest for such candidates as happened to be chosen at the ensuing election" were ousted regardless of past performance. Filling their shoes were poor, ignorant, unscrupulous men who had nothing to boast of other than the willingness to serve their patron's political interest.[2]

There is ample evidence to suggest that powerful political figures indeed heavily influenced New York's commissions of the peace with their private recommendations. In 1748,

[1] *Journal of the Legislative Council of the Colony of New York - Began the Eighth Day of December, 1743; and Ended the 3Rd of April, 1775.* (New York Senate, 1861), II: 1677.

[2] Ibid., 1328-1330. In early modern England, the Lord Chancellor similarly solicited recommendations from various quarters in nominating justices of the peace. As in colonial New York, the process of recommendations and commissions was often heavily influenced by politics. Landau, *Justices of the Peace,* Ch. 4.

for example, Cadwallader Colden sent Governor George Clinton a list "for a new commission of the peace & common pleas for Orange County." Clinton promised to "pay a proper regard" to the list.[3] On some occasions, Colden relayed recommendations made to him by less prominent persons under his patronage. Such was the list of recommendations for Coldengham estate in Ulster County that Colden sent to Clinton in 1749. The inclosed "list for Judges & Justices" was in fact composed by one "Mr. Hausbrook," but Colden added that he had "no objection to any person named" in the list, and that Hausbrook's "past behavior" would incline Clinton "to oblige him."[4]

When Colden became lieutenant governor a decade later, it was his turn to receive "lists" from the colony's influential men. Colden "assure[d]" Sir William Johnson, for instance, that he "should be acquainted whenever there was a new commission of the peace to be made out" for the Mohawk Valley area in which Johnson resided.[5] When Colden accordingly solicited recommendations from Johnson in 1762, the latter eagerly complied. Johnson hoped that Colden would give "due weight" to his list of recommendations, as he was confident that the candidates he chose were "really the best qualified of any in these parts to serve as justices of the peace."[6] It was probably not the first time, and certainly not the last, that Johnson composed and sent such lists of recommendations. Using his increasing political clout as manorial lord and superintendent of Indian affairs, Johnson exerted considerable influence on commissions of the

[3] Governor George Clinton to Cadwallader Colden, Dec. 15, 1748, *The Letters and Papers of Cadwallader Colden*, 9 vols. (New York: AMS Press, 1973), IV: 82-83.
[4] Cadwallader Colden to Governor George Clinton, Feb. 19, 1749, Ibid., IV: 100-103.
[5] Sir William Johnson to Cadwallader Colden, Feb. 7, 1762, Ibid., VI: 116-117.
[6] Sir William Johnson to Cadwallader Colden, Feb. 6, 1762, Sir William Johnson, *The Papers of Sir William Johnson* (Albany: University of the State of New York, 1921-1965). III: 624-625.

peace especially in the Mohawk Valley and its vicinity throughout the last two decades of the colonial period.[7]

Direct correspondence with the governor was not the only channel through which Johnson could influence commissions of the peace. A few weeks earlier, Albany County's assemblymen had already favored Johnson with a similar solicitation. The assemblymen politely requested a "list of such persons as [Johnson] judge[d] most proper" to be named justices, especially among those "to the westward" of the county where Johnson was "thoroughly acquainted with the people." Affirming the legal elite's claim regarding the assemblymen's influence over commissions of the peace, the three Albany representatives informed Johnson that his recommendations would be taken into account in the "list" they were preparing to "transmitt to the Gov[ernor] for his approbration." The assemblymen, underlining the legitimacy and weight their list would carry, noted that sending such a list was "agreeable to ye conversation" they had conducted with the governor.[8] Johnson accordingly sent a list of nine candidates for the Mohawk Valley and vicinity.[9] All nine candidates would be included in the new commissions issued a few months later.[10]

Johnson also communicated his recommendations frequently to Goldsbrow Banyar, who held several of the colony's most important secretarial offices, including deputy secretary of the province and deputy clerk of the council. Holding those offices, Banyar probably had more intimate knowledge of the governor's and councillors' dealings than anyone else in the

[7] By the same token, Sir William Johnson also enjoyed great influence upon the nominations of representatives for Albany County, and upon all elections held in the Mohawk Valley. Carl Becker, "Nominations in Colonial New York," *The American Historical Review* 6: 2 (1901), 260–275; John C. Guzzardo, "Democracy along the Mohawk: An Election Return, 1773," *New York History* 57: 1 (1976), 30–52.

[8] Albany County Members to Sir William Johnson, Jan. 20, 1762, Sir William Johnson, *Papers of Sir William Johnson*, III: 608-609.

[9] Sir William Johnson to the Albany County Members, Feb. 6, 1762, Ibid., III: 621-622.

[10] "List of Justices of the Peace in the Several Counties within the Province of New York, 1763, *New York Miscellaneous Manuscripts*, NYHS, Box 8, no. 32.

province.[11] Weeks before either the assemblymen or governor contacted him about the commissions, Johnson had in fact asked Banyar whether there was a new commission of the peace to issue soon.[12] Banyar, a partner of Johnson in land speculations, faithfully complied with such requests, providing Johnson with timely intelligence throughout the intricate process of recommendations and commissions.[13] Aside from requesting such intelligence, Johnson also tried to make sure that Banyar himself would support Johnson's list of recommendations, probably sensing that Banyar, as a person close to the governor and the one who would pen the actual list to be issued, could personally influence the commissions.[14]

When corresponding with governors and assemblymen, Johnson modestly confined his recommendations to the Mohawk Valley and its vicinity, where he could claim firsthand knowledge of the area's inhabitants.[15] But in his private correspondence with Banyar, Johnson often sought to insert a few more recommendations outside of his acknowledged domain of power. Thus, in 1762 he recommended two men whom he had not included in the list he sent to the assemblymen. The two additional candidates, who would accordingly receive commissions, were from districts farther from the Mohawk Valley—Schenectady and Albany City.[16] In all likelihood, Johnson had intentionally left out the two candidates in his letter to the assemblymen. As they had indicated in a roundabout manner, the assemblymen considered the Mohawk Valley the bounds within which Johnson should exert influence upon the commissions. They probably

[11] Banyar's firsthand knowledge of the inner politics of the colony is evinced in his numerous correspondences with Sir William Johnson, and also in his large volume of correspondence with George Clarke, Jr., Secretary of the Province. Especially to Clarke, Banyar wrote frequent reports on the political situation of the province. *Goldsbrow Banyar Papers, 1746-1820,* NYHS, Box 1.

[12] Sir William Johnson to Goldsbrow Banyar, Jan. 7, 1762, *Papers of Sir William Johnson,* III: 604.

[13] Goldsbrow Banyar to Sir William Johnson, Feb. 1, 1762, Ibid., III: 617, 655, 659. On Banyar and Johnson's partnership in land speculation, see Alan Taylor, *The Divided Ground: Indians, Settlers and the Northern Borderland of the American Revolution* (New York: Alfred A. Knopf, 2006), 44.

[14] Sir William Johnson to Goldsbrow Banyar, Mar. 13, 1762, *Papers of Sir William Johnson*, III: 647-648; Sir William Johnson to Goldsbrow Banyar, Apr. 2, 1762, Ibid., III: 666.

[15] Sir William Johnson to Sir Henry Moore, Mar. 30, 1769, Ibid., VI: 672-673.

[16] Letter from Sir William Johnson to Cadwallader Colden, Mar. 20, 1762, Ibid., III: 653; Letter from Sir William Johnson to Goldsbrow Banyar, Apr. 2, 1762, Ibid., III: 666.

would have been less welcoming toward Johnson's meddling in commissions for other parts such as Albany City, which all three assemblymen viewed as their domain of influence.[17]

The next time new commissions of the peace were issued colony-wide was in 1770. It was under a different governor, Sir Henry Moore, but the process surrounding recommendations was much the same for Johnson as in 1762. Once again he wrote to the governor with his list of recommendations. Once again a flurry of correspondence ensued between Johnson and Banyar, and most of Johnson's recommendations would be appointed.[18] As was the case in 1762, there were limits to Johnson's influence with the commissions. Especially to men like Governor Moore, with whom Johnson was not closely acquainted, the acknowledged bounds of Johnson's influence were explicitly confined to "the Mohock River, and Settlements next to it."[19] Conscious of these geographical bounds to his power, in his letters to Moore, Johnson highlighted his firsthand knowledge of the area's inhabitants as the main justification for his recommendation of justices. Before his recommendations, Johnson pointed out, "there was not a Single Majestrate from Caghnawaga to Schenectady which is 25 Miles."[20] It was only Johnson, among men of due weight, who could point to the right persons who could serve as justices for those areas.

To a certain extent, however, the boundaries of the patrons' influence were malleable. Just as in 1762, Johnson managed to insert several men of his choice into the commissions for

[17] The three assemblymen were Jacob H. Ten Eyck, Volkert P. Douw, and Abraham Ten Broeck. All three were longtime residents of Albany City, and Douw and Ten Broeck were fixtures of the City Council, serving as alderman, assistant, and mayor at one time or another. Albany County Members to Sir William Johnson, Jan. 20, 1762, Ibid., III: 608-609; Joel Munsell, *Collections on the History of Albany: From Its Discovery to the Present Time ; with Notices of Its Public Institutions, and Biographical Sketches of Citizens Deceased.* (Albany, N.Y.: J. Munsell, 1865), I (numerous entries); Florence A. Christoph, *Upstate New York in the 1760s: Tax Lists and Selected Militia Rolls of Old Albany County, 1760-1768* (Camden, Me.: Picton Press, 1992), 4, 12, 17, 30.

[18] Sir William Johnson to Sir Henry Moore, Mar. 30, Apr. 14, May 11 & Jun. 8, 1769, *Papers of Sir William Johnson*, VI: 672-673, 692-693, 752, VII: 7. Of the twelve men Johnson recommended, two (Jacob Klock and Isaac Paris) were not included in the commissions. Sir William Johnson to Goldsbrow Banyar, Dec. 22, 1769 & Mar. 10, 1770, Ibid., XII: 766-769, 792-793.

[19] Sir William Johnson to Sir Henry Moore, Apr. 14, 1769, Ibid., VI: 692-693.

[20] Sir William Johnson to Sir Henry Moore, Mar. 30, 1769, Ibid., VI: 672-673.

districts outside of his immediate sphere of power. The records do not reveal us how many candidates Johnson recommended outside of the Mohawk Valley, but in 1770 he apparently made at least a few such recommendations for each district of Albany. In justifying his recommendations to Banyar, Johnson emphasized that he had confined himself "chiefly" to recommending persons with whom he was well acquainted. As proof, he reminded Banyar that he had not recommended anyone for the district of Cumberland, as he was less familiar with the inhabitants of that part.[21] Here Johnson was defining his sphere of influence more vaguely, and broadly, than in his letters to Governor Moore, and was freely suggesting that he was entitled to make recommendations for all parts of the county except for Cumberland.

Johnson was spurred on by political allies and men under his patronage to extend his influence beyond the Mohawk Valley. Following Cadwallader Colden's example, Johnson invited frequent recommendations, requests, and advice from several men under his patronage. Henry Van Schaick of Kinderhook, for example, wrote to Johnson in 1770 "beg[ging] leave to hint a few persons living in town that would gladly accept the office."[22] Van Schaick accordingly recommended three Kinderhook inhabitants as justices. Sybrant G. Van Schaick, also under Johnson's patronage, offered information about candidates from his area of abode, Coxsackie. Among the two candidates being considered (probably by the assemblymen), Van Schaick recommended one as a "good and well meaning man," but opined that the other, although "well-qualifyed," was often "drunk when he administers justice" and thus unworthy of Johnson's support.[23]

As the last example illustrates, what Johnson's allies sought in writing to him was not only to have certain men seated as justices, but also to exclude certain candidates from the

[21] Sir William Johnson to Goldsbrow Banyar, Mar. 10, 1770, Ibid., XII: 789-790.
[22] Henry Van Schaick to Sir William Johnson, May 6, 1770, Ibid., VII: 644.
[23] Sybrant G. Van Schaick to Sir William Johnson, Mar. 5, 1770, Ibid., VII: 467.

commissions. Henry Van Schaick, for instance, put far more effort into preventing two of his enemies—Isaac Goes and Peter Van Ness—from winning commissions, than into supporting the three candidates he recommended. Goes, according to Van Schaick, was a "dram shopkeeper" who was "generally disliked for his attachment to a family who aim at the ruin of the township."[24] The "family" Van Schaick referred to was the Van Rensselaers, who had become bitter rivals of Van Schaick and other proprietors of Kinderhook over competing land claims.[25] Van Schaick opposed the candidacy of Peter Van Ness for the same reasons. Van Ness was "openly in [the] interest" of the Van Rensselaer family, and the only reason his name was included in the proposed list of commissions, according to Van Schaick, was because he would willingly abuse the justice's authority in support of Rensselaer's "land schemes."[26]

Johnson lent full support to Van Schaick's political maneuvers. He immediately wrote to Banyar asking for the current list of candidates being considered by the governor, explaining that he was "well informed" that several of the candidates were "verry unfit for the office," having been recommended to the governor to "serve some dirty purposes," wherefore Johnson thought it his duty to interpose.[27] His interposition succeeded. Johnson had five of the candidates, including Peter Van Ness and Isaac Goes, removed from candidacy.[28] Putting full confidence in Van Schaick's report on the Kinderhook candidates, Johnson claimed he was "well assured" that those men were "common dram sellers" and "men of verry indifferent characters."[29]

While Johnson scored successes in eliminating some of his rivals' candidates, he also had a taste of his own medicine when one of the men he recommended, Isaac Mann of Halfmoon,

[24] Henry Van Schaack to Sir William Johnson, Jan. 28, 1770, Ibid., VII: 360-361.
[25] Sung Bok Kim, *Landlord and Tenant in Colonial New York: Manorial Society, 1664-1775* (Chapel Hill, N.C.: University of North Carolina Press, 1978), 348-350, 410-411.
[26] Henry Van Schaick to Sir William Johnson, May 6, 1770, *Papers of Sir William Johnson,* VII: 360-361.
[27] Sir William Johnson to Goldsbrow Banyar, Jan. 19, 1770, Ibid., XII: 771.
[28] Sir William Johnson to Goldsbrow Banyar, Mar. 10, 1770, Ibid., XII: 792-793.
[29] Sir William Johnson to Goldsbrow Banyar, Mar. 30, 1770, Ibid., XII: 809-810.

was removed. One of Johnson's political rivals had apparently alerted several councillors that Mann was guilty of some "irregularities" in local land transactions. Daniel Campbell of Schenectady, who had become a justice in 1762 upon Johnson's recommendation, advised Johnson to withdraw his support of a candidate whose name had been sullied.[30]

It was a well-established practice in late colonial New York, then, for the governor to receive recommendations from the province's elite in making commissions of the peace. The weight of these recommendations was considerable, as the governor, who was solely responsible for commissioning justices, often had few other motivations to appoint certain locals as justices than to appease their powerful patrons. Either by the express terms given in the governor's solicitations, or by the patrons' generally acknowledged spheres of power, each of those elite figures were effectively apportioned particular domains for which they would make recommendations (e.g., for Sir William Johnson, the Mohawk Valley; for the assemblymen, the county they represented). The boundaries between such acknowledged spheres of influence, however, were often as insecure as they were informal. Domains overlapped, and there were frequent attempts to encroach upon the domains of others—trying to have one or two candidates inserted here, or eliminated there. What drove provincial elites such as Johnson to so eagerly participate in this competition over recommendations is not always revealed in the records, but politics was certainly a main motivation. Even when a patron might not have a direct interest in the local politics of a district or town, he could still try to exert his influence supporting the interests of lesser figures (such as Henry Van Schaick) under his patronage.

[30] Sir William Johnson to Goldsbrow Banyar, Mar. 23, 1770, Ibid., XII: 795-796; Daniel Campbell to Sir William Johnson, Apr. 18, 1770, Ibid., VII: 569.

Such machinations were hardly new. An earlier example can be found in David Colden's letter to his father Cadwallader Colden in 1758, urging him to prevent several locals of Esopus, Ulster County from being newly appointed as justices of the peace.

> There is a new stir about a commission of the peace, which is drawing up at Esopus. I know sir you think it necessary to pay some attention to this affair; & I hope you will at present oppose such men being made justices in this part of the country, who are much fitter to break the peace than to keep it. Arch. McBride, John Neely, Andrew Graham, and Johanis Miller Sen-r are in the interest of the party above. Miller it is said is named for a justice; he is a very unfit man & will be extreemly partial; McBride is a high flyer, talks much of liberty & thinks every thing is arbitrary but what he does himself; you know the other two.[31]

Although several personal defects are elicited as reasons for deeming these men unsuitable for the position, David's main cause for opposing their commission was clearly political—to check the power of the opposing party (probably James DeLancey's faction, who were bitter enemies of the Coldens) in the area.[32]

John Ayscough, Governor George Clinton's secretary, was blunter in his letter to Cadwallader Colden in 1749. Having heard that the seat of Dutchess County's Clerk of the Peace had just become vacant, Ayscough urged Colden to find a suitable candidate for the position as soon as possible. The "damned opposing faction," Ayscough warned, was spreading its power against "his excellency's interest" using commissions of peace. They had recently been promoting one of their own candidates, for example, as "their tool to throw out Alderman Lawrence from his ward," so that they "may have the majority in the bench of Justices."[33]

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[31] David Colden to Cadwallader Colden, Mar. 2, 1758, *Letters and Papers of Cadwallader Colden*, V: 220.

[32] On Colden's rivalry with the DeLancey faction, see Leopold S. Launitz-Schürer, *Loyal Whigs and Revolutionaries: The Making of the Revolution in New York, 1765-1776* (New York: New York University Press, 1980), 8, 26–27; Alan Tully, *Forming American Politics: Ideals, Interests, and Institutions in Colonial New York and Pennsylvania* (Baltimore: Johns Hopkins University Press, 1994), 103.

[33] John Ayscough to Cadwallader Colden, Sep. 11, 1749, *Letters and Papers of Cadwallader Colden*., IV: 141. Ayscough's position as secretary to the governor is noted in New Jersey Historical Society, *Documents Relating to the Colonial, Revolutionary and Post-Revolutionary History of the State of New Jersey* (Newark, N.J., 1880), VIII:

In 1769, during the height of the factional strife between the "Livingston" and "DeLancey" parties, William Smith, Jr. noted an incident highlighting the intense political competition over commissions of the peace.[34] In a committee meeting to form a "proper list" of civil officers to be appointed for Dutchess County, Smith, as member of the council, strove to prevent the DeLancey party's recommendations from being adopted. Council members on the DeLancey side had already prepared and offered a "roll" a few months earlier, as had Judge Robert R. Livingston for the Livingston party. Along with his list of recommendations, Livingston of course did not forget to mention to the governor certain persons he strongly believed should not be "trust[ed] with authority"—probably men who were expected to be recommended by the DeLancey party.

Outnumbered in the council by DeLancey advocates such as Oliver DeLancey and John Watts, Smith proposed a compromise: The two parties, according to Smith's plan, would each be allowed to fill half of the commissions with their recommendations. To ensure that the best-qualified among the two parties' candidates would be appointed, both sides would order their candidates according to preference, then a composite list would be formed by "tak[ing] alternately from each" until a suitable number of commissions for the county was reached. As Smith observed in his memoir, this was "treating both as party lists," openly admitting that the recommendations were products of factional interest.[35]

So political calculations and intrigue, not surprisingly, could easily seep into the haphazard system of recommendations surrounding New York's commissions of the peace. How,

116. Ayscough also served as High Sheriff of New York during this time. E. B O'Callaghan, ed., *Calendar of New York Colonial Commissions, 1680-1770* (New York: New York historical Society, 1929), 29, 30.

[34] On New York's factional politics during the late 1760s, see Chapter 8.

[35] William Smith, *Historical Memoirs of William Smith, Historian of the Province of New York, Member of the Governor's Council and Last Chief Justice of That Province under the Crown, Chief Justice of Quebec* (New York, 1956), ed. William H. W. Sabine, 52.

then, did this impact the quality of the colony's justices of the peace? While the existence of multiple sources of recommendations could potentially lead to chaos and arbitrariness, the intense competition among patrons also meant that it would be difficult for any patron to push through a candidate with obvious deficiencies. Jealously searching for ways to discredit their competitors' recommendations, powerful patrons such as Sir William Johnson, often goaded by men under their patronage, were quick to pronounce any faults they found in candidates recommended by others. Thus they eagerly brought up, as we saw in several examples, the candidates' supposed alcoholism, involvement in "land schemes," maladministration during a previous term as magistrate, or occupation as a "common dram seller."[36]

Such intense scrutiny from competitors, in turn, induced patrons and factions to be more cautious in selecting their candidates. Patrons like Sir William Johnson did not take it lightly when one of his candidates was found lacking on any account. On finding that objections were raised against one of the men he recommended for the 1770 peace commissions, for example, Johnson took great pains to defend his own honor and reputation. The candidate in question was Isaac Mann of Half Moon, who, as noted above, was accused of fraudulent land transactions. On hearing that such accusations against Mann had been aired to the province's elite and would carry substantial weight, Johnson quickly turned his attention to exonerating his own conduct in the botched recommendation.[37]

Writing to Goldsbrow Banyar, Johnson insisted that his recommendation of Mann was solely based on consideration of the latter's "capacity"—Mann "really appeared" to Johnson as "possessed of more abilities than are easily met with in any part of his neighborhood." Johnson admitted, however, that his acquaintance with Mann was "verry slender," and that he did not

[36] Henry Van Schaick to Sir William Johnson, May 6, 1770, *Papers of Sir William Johnson*, VII: 360-361; Sybrant G. Van Schaick to Sir William Johnson, Mar. 5, 1770, Ibid., VII: 467.
[37] Daniel Campbell to Sir William Johnson, Apr. 18, 1770, Ibid., VII: 569.

have intimate knowledge of Mann's "present circumstances." Johnson went on to frankly state his main reasons for writing to Banyar about the affair:

> I thought it highly necessary to mention this circumstance to you, as it would give me concern to hear that any person who had my recommendation should be afterwards deemed unworthy of his station. For I had no interest inseparable from that of the Country in general which I thought him capable of serving, and tho there may be a verry few of the rest in so large a list, with whom my acquaintance is verry Small, yet that is not the case with the much greater part of them, and therefore I may venture to say that upon the whole, for the reasons given in my last, they are chosen with much more impartiality than they could have been by any other person in these parts.[38]

At stake was Johnson's reputation as someone who was exceptionally fair and impartial in his recommendation of civil officers. That reputation, as Johnson was keenly aware, would not only affect how his overall character was viewed by the governor and provincial elite, but could also impact the weight that his future recommendations would carry. Hence his constant emphases, when writing to the colony's governors with his recommendations, that he was motivated by "nothing but the publick good, and [the] desire to see justice more equally dispenced throughout the Country," and that he would always make recommendations "with that caution & prudence of choice necessary to merit the continuance of [the governor's] favor & approbation."[39]

Competition with other patrons and their recommendations only heightened the importance of maintaining a good reputation, as can be seen in another letter Johnson wrote to Banyar. Here, Johnson's motive was specifically to have his recommendations preferred over those put forth by others:

> I may safely venture to Say that those recommended by me are Men better qualified & in everry Sense most fitting for filling those Offices, being chosen for their Abilities

[38] Sir William Johnson to Goldsbrow Banyar, Mar. 23, 1770 & Mar. 30, 1770, Ibid., XII: 795-796, 809-810.
[39] Sir William Johnson to Cadwallader Colden, Feb. 6, 1762, Ibid., III: 624-625; Sir William Johnson to Sir Henry Moore, May 11, 1769, Ibid., VI: 752.

> uprightness and Impartiality, which was not altogether the case in the former list [proposed by others], neither can it ever be Expected from a Set of Men whose Connections are so extensive and who are Governed by Such Selfish Motives, Principles, of Which my Recommendation cannot be suspected, because it is well known that I am free of all such Connections.[40]

While a far cry from modern-day public screening processes such as the Congressional confirmation hearings on federal appointments, late colonial New York's informal system of commissions based on recommendations did include ad hoc screening: The competition among patrons and their conscious cultivation of their reputations lessened the possibility of unqualified men winning commissions as justices of the peace.

It was an obviously imperfect system, however. The balance of power among patrons was constantly shifting, sometimes allowing one or two patrons or factions to exert almost unencumbered influence upon the commissions. Such was the case in the abovementioned commission of civil officers for Dutchess County in 1769. Ignoring William Smith, Jr.'s objections and Judge Livingston's alternate list of recommendations, Governor Moore went on to make all of his appointments according to the DeLancey party's recommendations. Smith opined that the governor, in doing so, was clearly driven by his "fears of the DeLancey power in council & the new house."[41]

Ethnic rivalry could also lead to a candidate being pushed through despite opposition. When Governor Clinton asked Cadwallader Colden for advice regarding one Mr. Albertson, who was recommended as sheriff of Ulster County in 1752, Colden acknowledged that there was much local opposition against Albertson's appointment, partly due to his past conduct while serving as a justice of the peace for the county. Colden, nevertheless, urged Clinton to disregard such opposition, since the grumblings were mainly from the "Dutch of [the town of] Esopus,"

[40] Sir William Johnson to Goldsbrow Banyar, Mar. 10, 1770, Ibid., XII: 789-790.
[41] Smith, *Historical Memoirs*, 52.

who simply "want to have all offices among themselves" and have "sheriffs subservient to their purposes."[42]

Moreover, the 'screening' of candidates only worked when opponents could find glaring faults and deficiencies in the candidate in question. Initially, for instance, Isaac Mann's commission was opposed on the grounds of his "slender property," and those of Peter Van Ness and Isaac Goes were opposed on account of their being "common dram sellers."[43] Pointing to such general shortcomings, however, was apparently not enough to prevent their commissions. Their names were removed when the detractors were able to highlight more concrete problems that could not be easily ignored, such as fraudulent land transactions (Mann) or close affiliation with a landed interest inimical to the townspeople's (Van Ness and Goes).[44] If backed by a particularly powerful patron or faction, and assented to by the governor, then, there was little to prevent "poor, mean, ignorant and unworthy Persons" from gaining commissions as justices, as William Smith, Jr. and other elite lawyers claimed.[45]

But who were these "unworthy" justices, and how numerous were they? Were their performances as magistrates in fact so deplorable, as the legal elite claimed, as to "debase the Magistracy, incourage Oppression, Partiality and Perjury, and promote Idleness, Drunkenness and a general Dissolution of Manners"?[46] Part of the answer to these questions can be found in the available data on the social composition of local justices in late colonial New York.

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[42] Cadwallader Colden to George Clinton, Feb. 4, 1752, *Letters and Papers of Cadwallader Colden*, IV: 309.
[43] Sir William Johnson to Goldsbrow Banyar, Mar. 30, 1770, *Papers of Sir William Johnson*, XII: 809-810.
[44] Daniel Campbell to Sir William Johnson, Apr. 18, 1770, Ibid., VII: 569; Sir William Johnson to Goldsbrow Banyar, Mar. 23, 1770, Ibid., XII: 795-796; Henry Van Schaick to Sir William Johnson, Jan. 28, 1770, Ibid., VII: 360-361.
[45] *Journal of the Legislative Council*, II: 1677.
[46] Ibid., 1677.

The Socio-Economic Status of Late Colonial New York's Justices

The complete list of New York's colonial commissions, including those of justices of the peace, was lost in the 1911 New York State Capitol fire, leaving only a skeletal calendar of commissions compiled by historian E. B. O'Callaghan.[47] But for Albany County, we fortunately have full lists of justices of the peace for the years 1762 and 1770, thanks to Sir William Johnson's zealous involvement in the commissions.[48] Most of the names on those lists also appear in a tax assessment record for Albany County in 1766-7, enabling a rudimentary analysis of individual economic standings.[49]

Both in 1762 and 1770, the average tax assessed on Albany' justices was about 45 pounds. This was significantly higher than the average tax assessed on Albany's freeholders (just above 7 pounds), placing justices among the wealthiest inhabitants. It is notable that the average

Table 3.1. Tax Assessments of Albany County's Justices of the Peace (1762 and 1770 combined)

Sources: *The Papers of Sir William Johnson*, III: 750-1, XII: 792-3; Christoph, *Upstate New York in the 1760s, 1-146.*

[47] *Calendar of New York Colonial Commissions*. Only for the year 1763 do we have a complete list of the colony's justices of the peace. "List of Justices of the Peace, 1763," *New York Miscellaneous Manuscripts*.

[48] Goldsbrow Banyar to Sir William Johnson, May 31, 1762, *Papers of Sir William Johnson,* III: 750-751; Sir William Johnson to Goldsbrow Banyar, Mar. 10, 1770, Ibid., XII: 792-793.

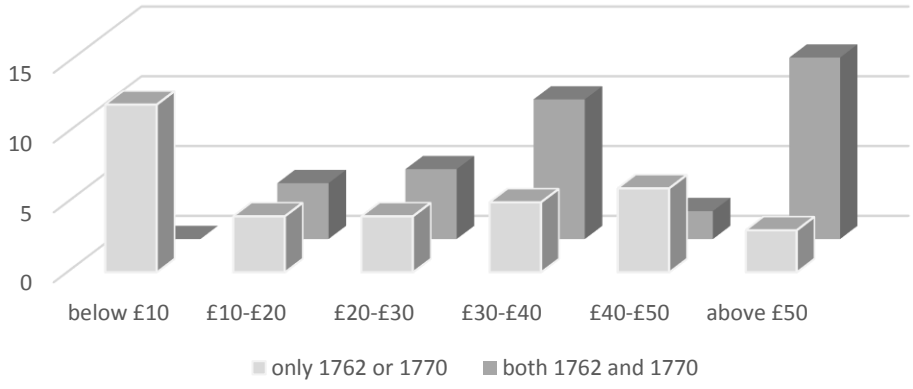
[49] Christoph, *Upstate New York in the 1760s,* 1-146.

wealth of the justices was virtually the same for 1762 and 1770, despite the nearly 40% increase in their numbers (from 55 in 1762, to 76 in 1770). This calls into question the legal elite's claims that the growing number of justices' commissions was leading to a steep "depreciation" in their quality. At least in terms of average wealth, the larger number of commissions did not occasion any noticeable change in the composition of justices.[50]

A closer look at the tax assessments of Albany's justices, however, partly vindicates the lawyers' charges. While the average wealth of Albany's justices was considerable, there was substantial variation within the group. Some of the justices were clearly the wealthiest men in the county, with tax assessments of well above 50 pounds. But about 12% of the justices, both in the 1762 and the 1770 list, were assessed with taxes below 10 pounds, suggesting that their wealth did not distinguish them from the county's common freeholders. Not one of these justices, notably, was commissioned in both 1762 and 1770. Half of them were commissioned in 1762 but

Table 3.2. Tax Assessments of Albany County's Justices of the Peace, by Number of Commissions

Sources: *The Papers of Sir William Johnson*, III: 750-1, XII: 792-3; Christoph, *Upstate New York in the 1760s*, 1-146.



[50] *Journal of the Legislative Council,* II: 1325.

lost their positions in 1770, and half were newly commissioned in 1770.

Overall, many of the wealthiest justices were commissioned in both 1762 and 1770, while the poorer justices seldom enjoyed such long tenure. The shorter terms of the poorer justices may have been due to their difficulty maintaining an unsalaried magisterial position, but was also likely due to the process of recommendations and commissions, in which competing patrons jealously sought pretexts—including lack of independent wealth—for having their rivals' candidates excluded from the commission.[51] These results suggest that there was a considerable, and probably widening, gap in late colonial New York separating those justices who enjoyed stable wealth and stable positions on the one hand, from those who lacked such stability both in terms of wealth and office holding on the other.

Among the former affluent group were prominent landlords like Rensselaer Nicoll. Nicoll owed his wealth to his uncle Killian Van Rensselaer, patroon of the Rensselaerwyck Manor. Although modest compared to his uncle's vast landholdings, the 1300-acre estate Nicoll inherited at a young age secured him a comfortable future.[52] Nicoll was assessed a tax of no less than 90 pounds in 1767, and was included in both the 1762 and 1770 commissions of the peace. Given the fact that he was nearly 60 years old in 1762, moreover, he likely had already been serving as a justice for some time.[53] Holding the office of justice of the peace probably bolstered his authority within his estate at Bethlehem, where he led a pastoral life surrounded only by his family, servants, slaves, and tenants.[54] According to family tradition, the lack of "any serious

[51] This does not take into account those justices who simply may have perished or retired of old age by 1770, and those who were too young in 1762 but were mature enough for the position by 1770. Hence, the data underestimates the average duration of the justices' terms.

[52] *The New York Genealogical and Biographical Record* (New York: New York Genealogical and Biographical Society), LVI: 65-6.

[53] Christoph, *Upstate New York in the 1760s*, 45; Goldsbrow Banyar to Sir William Johnson, May 31, 1762, *Papers of Sir William Johnson*, III: 750-751; Sir William Johnson To Goldsbrow Banyar, Mar. 10, 1770, Ibid., XII: 792-793.

[54] *New York Genealogical Record*, LVIII: 152.

worries" or occasions for mental exertion induced him to fall into a state of "second childhood" when he was about sixty—after which point, notably, he still held the office of justice of the peace, commissioned twice in 1762 and 1770.[55]

If Nicoll represents the classic image of a country squire as local magistrate, Volkert P. Douw of Albany City exemplifies a different type of local elite serving as justice of the peace. In addition to holding judicial positions as judge and justice of the county, Douw was also an active member of Albany City's Common Council, serving as alderman during most of the 1750s, and as mayor during most of the 1760s. He also represented the county as an assemblyman from 1757 to 1768.[56] Douw's prominent political position coincided with his financial success as merchant and landowner; in 1767, he was assessed a tax of 130 pounds, one of the highest assessments in the county tax list.[57]

In the northwestern frontier, prominent men such as Guy Johnson, Daniel Claus, and George Croghan were commissioned as justices of the peace through Sir William Johnson's recommendations.[58] These were some of Johnson's closest allies, and by no coincidence, were some of the wealthiest and most powerful men in the Mohawk Valley.[59] Johnson's main reason for having these men serve as justices was to reinforce their authority in settling the frequent disputes over land and trade among settlers, land speculators, traders, and Native Americans—all three men were deputies to the superintendent of Indian affairs, an office which Johnson held since 1756. Johnson had in fact petitioned several times for legislation investing all of the

[55] Ibid., LVI: 66.
[56] Munsell, *Collections on the History of Albany*, I: 81-276; Stefan Bielinski, "Volkert P. Douw," *The Colonial Albany Social History Project*, http://www.nysm.nysed.gov/albany/bios/d/vopdouw2234.html.
[57] Christoph, *Upstate New York in the 1760s*, 12.
[58] Goldsbrow Banyar to Sir William Johnson, May 31, 1762, *Papers of Sir William Johnson*, III: 750-751; Sir William Johnson To Goldsbrow Banyar, Mar. 10, 1770, Ibid., XII: 792-793.
[59] Robert W. Venables, "Tryon County, 1775-1783: A Frontier in Revolution" (Ph.D. Diss., Vanderbilt University, 1967), 21, 35, 50-52, 80.

colony's deputies in Indian affairs with the judicial powers of individual justices.[60] Johnson's wish was not granted, but he was nonetheless able to have most of his deputies enrobed as justices of the peace, using his clout over commissions for the Mohawk Valley.

Prominent locals like Nicoll, Douw, and Johnson's deputies, according to the colony's legal elite, were the type of men best suited to the "original nature" of the office of justice of the peace. With their stable wealth and social stature, these were the "men of weight" to whom the justice's duties of "conserv[ing] the peace," "preventing disorders," and "superintend[ing] the morals of the people" could be safely entrusted.[61] The legal elite's expectations were in keeping with the predominant English ideal of local magistracy. Sir William Blackstone, for example, wrote in the late eighteenth century that justices of the peace, as the "principal conservators of the peace," "ought to be of the best reputation, and most worthy men in the county, and must have in real property 100 pounds per annum clear of all deductions."[62] The problem with New York's commissions of the peace, to the legal elite, was that they were increasingly being given to men with little semblance to Nicoll or Douw. Instead, the arbitrary and corrupt process of recommendations was bringing numerous "men of mean occupations" into the office.[63]

Among such men were tavern keepers, whom the legal elite often singled out as best exemplifying the degraded state of the colony's commissions of the peace.[64] While it is impossible to ascertain the number of justices who were tavern keepers, the colony's legislature certainly perceived them as a real presence. The Five Pounds Act of 1758, for example, included a clause forbidding "justice[s] of the peace being a tavern keeper" from trying causes "at his own

[60] Sir William Johnson to the Lords of Trade, *Doc. Rel. N.Y.*, VIII: 662-663.
[61] *Journal of the Legislative Council*, II: 1677.
[62] William Blackstone, *The Commentaries of Sir William Blackstone, Knight, on the Laws and Constitution of England; Carefully Abridged*, ed. William Curry, 4 vols. (London: W. Clarke and Son, 1796), I: 79.
[63] *Journal of the Legislative Council*, II: 1324.
[64] Ibid., 1325

house."[65] When the act was renewed in 1772, the restriction was broadened to an outright prohibition of tavern-keeping justices' trying any causes under the act, regardless of the venue.[66] Several council members, further attesting to the significant presence of tavern-keeping justices in the colony, initially tried to oppose the amendment, averring that "there were 4 in West Chester & 4 in Dutchess of the best justices [...] who were tavern keepers."[67]

Ruling out tavern keepers was not enough to ensure that commissions of the peace would be reserved to the "principal inhabitants" of each county, as the legal elite desired.[68] Albany Justice John Macombe, whose active hand in the county's small claims jurisdiction was examined earlier, had little to boast in terms of wealth or stature.[69] Macombe was assessed a tax of 16 pounds in 1766-7, which was somewhat higher than the average tax assessed on Albany's freeholders, but far below the average for Albany's justices (45 pounds).[70] Moreover, during his tenure as justice of the peace, Macombe suffered serious setbacks in his personal business as merchant. Having been "very unhappy in trade of late years," and constantly hounded by his creditors during 1764 and 1765, Macombe lamented how "tired" he was of the "visicitudes" of financial trouble.[71] After unsuccessful bids to be appointed either Albany's High Sheriff or Collector of the Port, in late 1765 the desperate Macombe apparently considered taking the position of distributor of stamps under the unpopular Stamp Act. He changed his mind, however, after a mob visited his house and demanded an oath not to take the position.[72] Thus frustrated in

[65] *N.Y. Col. Laws*, IV: 300.
[66] Ibid., V: 311.
[67] Smith, *Historical Memoirs*, 52; *Journal of the Legislative Council*, II: 1830.
[68] Ibid., 1677.
[69] See Chapter 2, pp. 61-64.
[70] Christoph, *Upstate New York in the 1760s*, 3.
[71] John Macombe to Sir William Johnson, Mar. 12, 1764, Apr. 14, 1765, Feb. 23, 1765, *Papers of Sir William Johnson*, IV: 363, XI: 598-599, 690-691; James Phyn to Sir William Johnson, Feb. 18, 1765, Ibid., IV: 648; John Duncan to Sir William Johnson, Mar. 10, 1765, Ibid., IV: 668.
[72] John Macombe to Sir William Johnson, Apr. 14, 1765, Ibid., XI: 690-691; John Glen Junior to Sir William Johnson, Jan. 7, 1766, Ibid., V: 5.

business and in his attempts to hold other lucrative offices, Macombe relied on his position as justice of the peace for his main source of income. As he frankly confessed to Attorney General John Tabor Kempe in 1769, the fees he earned from the office, "as small as they are," were "of much use to [him] particularly since [his] misfortunes in trade."[73]

Henry Bogart, the Albany City alderman who handled numerous small civil cases in the 1760s alongside John Macombe, was no more a member of the local elite than Macombe was. A longtime resident of Albany City, Bogart made his living as a part time carpenter, surveyor, and skipper of a sloop.[74] Not surprisingly, Bogart did not owe his position in the City Council to an already prominent social stature. After serving for years as a constable for his ward, Bogart gradually worked his way up to assistant alderman, and finally to alderman in the 1760s.[75] Gaining a more prominent role in municipal government, however, did not translate into wealth. Bogart was assessed a mere 4 pounds of tax during this period, lower than the average charged to Albany's freeholders.[76] Bogart was in fact never formally commissioned as a justice of the peace, but was authorized to handle small civil cases by virtue of the enlarged Five Pounds Act of 1759, which extended the civil judicial authority of individual justices to the mayor, aldermen, and recorders of the cities of New York and Albany and the borough of Westchester.[77] (Hence, in discussing the small claims jurisdiction, contemporaries often referred to aldermen like Bogart as justices of the peace, a convention I follow here.)

This awkward coexistence of squires and tavern keepers in the colony's local magistracy—of wealthy, prominent men like Rensselaer Nicoll and Volkert P. Douw on the one

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[73] John Macombe to John Tabor Kempe, Aug. 10, 1769, *John Tabor Kempe Papers*, NYHS, Box 14, Folder 2.
[74] Bielinski, "Henry I. Bogert," *Colonial Albany Project*, http://www.nysm.nysed.gov/albany/bios/b/hebogert6097.html
[75] Munsell, *Collections on the History of Albany*, I: 126, 128, 130-131, 135, 138, 144.
[76] Christoph, *Upstate New York in the 1760s*, 5.
[77] "An Act to impower Justices of the Peace Mayors Recorders and aldermen to try Causes to the value of Five pounds and under," *N.Y. Col. Laws*, VI: 372-377.

hand, and lowly commoners like John Macombe and Henry Bogart on the other—holds the key to understanding the controversy over the Five Pounds Act and the commission of justices. The elite lawyers and judges might have exaggerated in claiming that the Five Pounds Act made the "principal inhabitants" shun the office of justice of the peace. But they were probably correct in observing that such men found the "innumerable litigations of a civil nature arising among the lower sort" too burdensome to deal with.[78] Country squires like Rensselaer Nicoll, comfortably ensconced in their landed wealth, would certainly have found the paltry fees accompanying small civil cases hardly worth the time and effort. Urban elites such as Volkert P. Douw, for their part, most likely preferred to devote their attention and efforts to the weightier commercial, legal, and political businesses in which they were deeply involved. Similarly, prominent justices in the northwestern frontier, by their patron Sir William Johnson's design, were primarily interested in weighty legal issues arising between the colonials and Native Americans.[79]

In 1762, shortly after the passing of the enlarged Five Pounds Act, the newly commissioned judges and assistant justices of Albany County's Inferior Court of Common Pleas (including Volkert P. Douw) tried to decline the usual accompanying commissions as justices of the peace.[80] The office of justice of the peace and its petty duties, now greatly enlarged due to the Five Pounds Act, was evidently beneath them. Hence, the handling of small civil lawsuits was increasingly left to the less prominent local figures serving as justices (or aldermen)—men like

[78] *Journal of the Legislative Council*, II: 1677.

[79] These justices, many of whom were also deputies in Indian Affairs, often presided over smaller conferences between colonials and Native Americans, in which important negotiations over land and trade were made. By having these deputies enrobed with the authority of magistrates, Sir William Johnson sought to confer these negotiations and agreements with greater solemnity and certainty. The frontier justices also served the important task of preliminary examination of murder cases, which often became a thorny diplomatic issue between the colonists and Native Americans. Taylor, *Divided Ground*, 28-32; Conrad Franck to Sir William Johnson, Jun. 17, 1761, *Papers of Sir William Johnson*, III: 407; "A Meeting with Canajoharies," Mar. 10, 1763, Ibid., IV: 50-51.

[80] Goldsbrow Banyar to Sir William Johnson, Mar. 29, 1762, Ibid., III: 659.

Bogart and Macombe, for whom the justice's fees accompanying small civil cases were well worth the trouble.

Plebeian Magistrates, the Small Claims Jurisdiction, and the People

To the opponents of the Five Pounds Act, the existence of plebeian magistrates like Macombe and Bogart and their disproportionate role in handling the colony's small civil lawsuits were precisely the "chief cause[s] of debasing the magistracy." They were appalled that some justices were "indigent even to necessity," and "subsist entirely by" the income from their offices.[81] Such men were typically "low, illiterate, mean persons," and their lack of both integrity and financial security rendered them particularly susceptible to the influence of "sordid attachments and corruption." The enlarged small claims jurisdiction of such unqualified justices, obviously, could lead to nothing but disaster. The colony's heavy reliance on lay justices in resolving its voluminous small debt cases, charged the legal elite, had predictably led to a rising chorus of complaints against those justices' lax, arbitrary, and ignorant proceedings.[82]

A handful of the recorded complaints against New York's justices, found in the extensive documents of the attorney general and of the governor's council, were indeed related to small debt litigation.[83] Two of those complaints, discussed earlier, were about the justices' abuse of warrants. Under the Five Pounds Act, justices could order a defendant to be arrested upon a debt claim, if the creditor swore that there were *strong reasons* to suspect that the debtor would abscond upon being served a summons.[84] Justice John Bailey of Dutchess County and Justice

[81] Allying with the lawyer-dominated Livingston faction, Governor Henry Moore joined their opposition to the Five Pounds Act. Governor Henry Moore to the Earl of Shelburne, Oct. 1, 1767, *Doc. Rel. N.Y.*, VII: 978. More on this in Chapter 8, pp. 436-437, 445-447.
[82] *Journal of the Legislative Council*, II: 1324.
[83] *Kempe Papers*, Box 1-4, 10-16; *Transcriptions of New York Council Minutes and Council Papers, 1683-1767*, NYSL, Vol. VI.
[84] *N.Y. Col. Laws*, III: 1011-1016, IV: 296-301, 372-377, 736-737, V: 304-314.

James McLaghry of Ulster County incurred complaints for having debtors arrested when there was little reason to suspect that they would try to escape from the law.[85]

Regarding the justices' summary judgment in small debt cases, all three complaints found in the records of the attornies general and governor's council concern the offsetting of credit between litigants. When two parties had multiple outstanding debt obligations between them, which was not infrequent, colonial statute encouraged the parties to settle the balance of all those debts in one lawsuit. Thus, if a defendant, sued on a debt, happened to have any offsetting credit against the plaintiff, the justice was required to take it into consideration, and give judgment upon the balance of all the outstanding obligations between the parties.[86] The three complaints were about justices failing to act according to this statute.

One of the complaints was from William Dudley, who was summoned before Alderman Brewerton in 1764 while conducting business in New York City. On being told that he was sued by one Elsworth on a debt of 5 pounds, Dudley remembered that Elsworth also owed him some money on a separate transaction. Dudley asked Brewerton to postpone the hearing until the next time he would be coming to town, so that he could bring his account against Elsworth. The request was granted, and about a week later Dudley came back to Brewerton with his account against Elsworth amounting to £3 16*s*. Brewerton, however, refused to acknowledge the account, and ordered Dudley to pay the full sum demanded by Elsworth. Tempers flared when Dudley insisted that he would pay no more than the "balance" after deducting the sum Elsworth owed him. Brewerton angrily rebuked Dudley, then ordered a constable to commit him to jail. "Terrified" at the prospect of being imprisoned, Dudley gave in and paid the 5 pounds. Dudley later recovered the £3 16*s* Elsworth owed him on a separate lawsuit before a different magistrate,

[85] See Chapter 2, pp. 23-24, 38-39
[86] "An Act for preventing the Multiplicity of Law Suits," Sep. 4, 1714, *N.Y. Col. Laws,* I: 827.

but was still bitter about the unnecessary "trouble and costs" he had to bear due to Brewerton's unjust treatment. Dudley pointed out that the other alderman to whom he took his claim "always thought it reasonable to allow a just account as an outset against another."[87]

William Davenport of Dutchess County was similarly disgruntled over a justice's having ignored his account in a debt case in 1770. A few years earlier, Jeremiah Springsteen, a boatman, had undertaken to transport and sell a load of Davenport's wood at New York City. According to the agreement, Springsteen, for his trouble, was to retain a fixed portion of the money earned from selling the wood, and return the rest to Davenport. The task was performed, but the parties found themselves in disagreement over Davenport's due. Springsteen paid Davenport £3. 2*s*. 6*d*. on returning from the city, but Davenport, based on what he was informed by others about the price the wood fetched, claimed that the rightful sum should have been £5 7*s*. 3*d*., and demanded that Springsteen accordingly pay the additional sum of £2 4*s*. 9*d*.

Sometime thereafter, Davenport hired Springsteen on some other work. Davenport considered Springsteen's labor on this occasion as compensation toward the sum he still owed Davenport from the earlier wood sale. Hence, instead of paying him the wage (which amounted to £1 13*s*. 3*d*.), Davenport "credited" the sum toward Springsteen's debt of £2 4*s*. 9*d*. from the wood sale. But Springsteen apparently did not share Davenport's understanding of the transaction. Denying that he owed any money from the wood sale, Springsteen viewed his later work for Davenport as a separate transaction, and sued the latter on the unpaid wage of £1 13*s*. 3*d*. The case was brought to Justice Mathew Brett, and (presumably upon Davenport's request) a jury was called. Davenport "pleaded in substance all the matters herein before set forth," including the remaining debt from the prior wood sale, but Justice Brett refused to take this into account. Further, Brett instructed the jury to strictly confine their attention to the unpaid wage

[87] William Dudley to John Tabor Kempe, Apr. 14, 1766, *Kempe Papers*, Box 11, Folder 8.

from Springsteen's recent work for Davenport. Not surprisingly, the jury found a verdict against Davenport for the £1 13*s*. 3*d*. and costs.[88]

Finally, we have one documented complaint about a justice's judgment and fees in a debt case, against none other than John Macombe. The complainant, John Mathies of Pownall in Albany, claimed that Macombe ordered distraint of his goods for recovery of an "unjust debt." Mathies further insinuated that there had been talks among the townspeople that Macombe frequently sought to profit from the lawsuits brought before him.[89] In response, Macombe offered to send Attorney General Kempe copies of his proceedings against Mathies, which would prove that the latter's complaints were groundless. Far from seeking to profit from confiscating Mathies's goods, Macombe, "out of lenien[cy]" toward Mathies, had in fact persuaded the plaintiff to postpone the execution on the case, allowing Mathies more time to satisfy the debt and try to avoid distraint of his property. Referring to Mathies's ungrateful complaints, Macombe bitterly noted that this was "how he rewards" him for showing leniency.

Regarding the accusation that he pursued undue pecuniary gains from his judicial powers, Macombe did not deny that some of the "people of Pownall," not just Mathies, had been accusing him of taking "exorbitant fees." He hotly denied the validity of those accusations, however, assuring that he always took care to charge fees "precisely as the act directs," as "governed [...] by the courts & officers above" him. Macombe instead blamed the general lawless attitude of the townspeople—a "set of Yanky rascals"—for their undue complaints. The only reason they complained against him, as Macombe saw it, was that he made them "pay

[88] William Davenport's Deposition, taken by Daniel Horsmanden, Feb. 22, 1770, Ibid., Box 11, Folder 7.
[89] John Matthies to John Macombe, Feb. 6, 1769, Ibid., Box 14, Folder 2.

obedience to the laws of the government."[90] In the end, no formal appeal or indictment was lodged against Macombe, but the complaints certainly scarred his reputation as magistrate.[91]

Just as with other areas of colonial adjudication, then, the justices' small claims jurisdiction could arouse complaints about a magistrate's ignorance, arbitrariness, or partiality. Comparatively speaking, however, the number of complaints was very small. Late colonial New York's inhabitants, as the voluminous case notes, petitions, and private letters recorded by the attornies general and clerk of the governor's council attest, needed very little encouragement to air their grievances against magistrates. The bulk of these complaints concerned criminal cases and civil disputes over property. Complaints about the handling of small debt cases by justices, in contrast, are only a small handful.[92] The relative paucity is striking, considering the large volume of debt cases New York's justices handled under the Five Pounds Act.

The often complex underlying causes of criminal cases and property-related civil cases explain why they drew a disproportionate number of complaints about the magistrates' judgments and proceedings. Criminal cases, even minor ones, involved a dizzying array of causes from assault and battery, larceny, arson, defamation, fraud, forgery, and perjury, to disturbances of the peace. Similarly, civil cases surrounding property involved a wide variety of alleged trespasses and damages, not to mention diverse underlying disagreements over land titles, boundaries, and lease terms. When brought before a justice out of sessions, such cases left ample

[90] John Macombe to John Tabor Kempe, Feb. 16, 1769, Ibid., Box 14, Folder 2.

[91] Sir William Johnson to Goldsbrow Banyar, Mar. 10, 1770, *Papers of Sir William Johnson*, XII: 792-793.

[92] See note 83. The records of the attorney general and of the governor's council, of course, do not take into account appeals against individual justices' proceedings that did not go through the attorney general's hands, or grievances which went unreported. But considering how writing to the attorney general or petitioning to the council was one of the least costly methods of presenting one's complaints, it would be safe to say that even the smallest complaints against justices are well represented in these records. For a helpful survey of cases recorded in the attorney general's manuscripts, see Julius Goebel and T Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* (Montclair, N.J.: Patterson Smith, 1970). One should bear in mind, however, that Goebel's survey mostly focuses on criminal cases, and also leaves out the numerous complaints appearing only in private letters sent to the attorney general, which are crucial for sampling the complaints upon petty cases.

room for summary discretion, easily inviting complaints of the justice's arbitrariness and partiality.

Most cases concerning small debts, by contrast, were very straightforward, hardly requiring any discretion on the magistrate's part. The most complex or ambiguous situations that could arise in small debt cases, as the aforementioned instances of complaint suggest, were over offsetting claims, and over the question of whether a warrant could justifiably be issued. Aside from that, the types of situations that could arise in small debt litigation were not varied, and the law was quite clear on how they should be handled in each situation.

The monetization of New York's local economies further reduced the possible ambiguities, and sources of controversy, that could arise in informal credit exchanges. By the late colonial period, even informal contracts over goods and services were routinely priced. Hence, even when there was a dispute over the debt claim, the monetary value attached to the contract was seldom the issue. To revisit the dispute between William Davenport and boatman Jeremiah Springsteen, for example, the contract itself was clearly specified in monetary terms, and was not disputed; of the money earned from selling Davenport's wood, Springsteen was to retain half the sum, plus an additional shilling per load that was sold (Springsteen succeeded in selling all of the wood, which amounted to 8¼ loads). The dispute was over the price at which Springsteen sold the wood in New York. Davenport suspected that Springsteen had lied about the price he fetched, in order to retain a larger part of the profit than he was entitled to. Hence, while Davenport directed his complaint against Justice Brett, for letting Springsteen collect his wage on a later service without having satisfied his debt from the wood sale, the underlying issue was not the justice's handling of a small debt case.[93] Davenport's claim that Springsteen still owed him a sum from the sale of his wood hinged upon his accusation that Springsteen had

[93] William Davenport's Deposition, taken by Daniel Horsmanden, Feb. 22, 1770, *Kempe Papers*, Box 11, Folder 7.

committed a fraud, a charge that placed the case, strictly speaking, outside the jurisdiction of an individual justice.

The possibility of fraud was always latent in the informal small credit exchanges, which were typically supported only by personal accounts, bills, ledgers, or even just by verbal agreements. Individual justices played some part in deterring fraudulent claims, by examining the evidence behind personal debt claims presented to them. Their most important role in this regard, however, was simply to obtain the plaintiff's oath verifying the evidence and claim as truthful. This laid the crucial groundwork, if the defendant later charged that the claim was fraudulent, for indicting the plaintiff for perjury at a higher court.

In a rather ingenious instance of perjury in Dutchess County in 1753, creditor Emanuel Myers denied that Jacob Lawrence, who owed him 3 pounds on a note of hand, had subsequently paid the sum. Lawrence produced a receipt signed by Myers acknowledging the payment, but Myers, "under oath," denied having received the money or having written the receipt, accusing Lawrence of forging it. To bolster his claim, Myers claimed that he "could neither write nor read English," whereas the receipt Lawrence produced was written in clear English. The jury at the county's court of common pleas accordingly gave verdict against Lawrence. Lawrence, however, was later able to find numerous witnesses who saw Myers "write a ledgable [sic.] hand in English." The grand jury at the county's general sessions of the peace, upon examining the witnesses, indicted Myers for perjury.[94]

With the higher courts undertaking cases on fraud and perjury, and with most underlying contracts having clear, monetized terms, the individual justice's handling of small debt claims involved few complications. Most creditors, in presenting their claims before individual justices,

[94] John Alsop's notes on The King v Emanuel Myers & Levy Marks at the Dutchess County General Sessions of the Peace, Nov. 16, 1756, Ibid., Box 10, Folder 2.

were not expecting the justices to resolve actual disputes. They merely sought the law's support in cajoling debtors, most of whom readily acknowledged the debt they owed. Hence, the small claims jurisdiction in late colonial New York hardly called for any legal expertise. As long as the justice was capable of comprehending the accounts, bills, notes, and receipts commonly used by the people, knew basic algebra, and paid attention to the fees and procedures stipulated in the Five Pounds Act, lack of formal legal training or even general education was not really an issue.

Neither was lack of wealth and social stature. That some justices were not men of independent wealth and relied on court fees as a major source of income may have in fact made them more sensitive to their reputations with inhabitants in their jurisdictions. Especially since colonial statute defined the justices' geographical jurisdictions quite broadly at the county level, allowing litigants to take lawsuits to any justice within the same county, justices competing to attract more litigants to their courts and earn fees would have had good reason to avoid notoriety as incompetent and unjust.[95] In William Dudley's aforementioned complaint against Alderman Brewerton for ignoring his offsetting credit against his plaintiff, for example, Dudley later took his case to another magistrate, Alderman Brinkerhoff. Dudley chose him because he knew that Brinkerhoff, unlike Brewerton, always took any offsetting credit duly into consideration.[96]

New York's inhabitants routinely formed and exchanged opinions about their local magistrates, as can be seen in numerous complaints against justices. Complainants often sought to strengthen their cases by referring to local opinion, claiming, for instance, that the justice in question already had a reputation for being "very arbitrary and unjust."[97] Testimonies regarding justices charged with maladministration further attest to the formation and exchange of such

[95] *Journal of the Legislative Council*, II: 1677.
[96] William Dudley to John Tabor Kempe, Apr. 14, 1766, *Kempe Papers*, Box 11, Folder 8.
[97] Fletcher Mathews to John Tabor Kempe, July 7, 1769, Ibid., Box 14, Folder 2.

local opinions. Take, for instance, the testimonies of Ulster County's inhabitants regarding Justice William Elsworth at the county's general sessions of the peace. While the complainants claimed that Elsworth's proceedings were frequently irregular and partial, many inhabitants called as witnesses testified otherwise. Jacobus Low opined that "Justice Elsworth bears a good character," and swore that he "never heard ill of him." Jacob Ten Broeck similarly claimed that he "never heard" anyone say that "Mr. Elsworth had a bad character." The testimonies of Abraham Low and Johannes Kater were more squarely about Elsworth's judicial performance: "Mr. Elsworth," according to Low, "always had a good character as a magistrate." Kater agreed that he "never heard but he was a good justice," and further detailed that Elsworth always "strived to reconcile differences."[98] The last quality was especially valued by litigants, as it meant that the justice helped resolve disputes without incurring unnecessary court fees.

Under scrutiny by the people in their jurisdiction, plebeian justices who hoped to maintain their offices and attract more litigants to their courts obviously had to heed popular opinion. This is why John Macombe, on hearing that the people of Pownall accused him of charging exorbitant fees, reacted immediately and vigorously, writing to the attorney general to defend himself against the charges. Macombe, by his own admission, was "very serious in this matter," and was willing to present, if necessary, records of his proceedings to the attorney general and governor, to clear his name.[99] Despite his efforts, Macombe nearly lost his position as justice a few months later. His name, as he found out, was not included in the list of recommendations for the upcoming new commissions. Given the fact that commissions were

[98] John Tabor Kempe's notes on the case of Johannis Freer v. Justice William Elsworth, n.d., Ibid., Box 10, Folder 8.
[99] Letter From John Macombe to John Tabor Kempe, Feb. 16, 1769, Ibid., Box 14, Folder 2.

usually renewed for incumbent justices in the colony, Macombe's negative reputation with the Pownall people was likely the primary cause behind his initial exclusion from the list.[100]

While Macombe ultimately won reappointment, apparently by appealing to Attorney General Kempe to intervene on his behalf, this does not mean that justices could easily secure their offices regardless of the local inhabitants' opinion as long as they had the support of a patron or faction. As shown earlier, the patrons and factions, as powerful as they may have been, frequently had to compete against each other over the commissions, and had to worry about their reputations as recommenders. Popular opinion could easily factor into this equation.

Justice Stephen Van Dyck of Coxsakie, for instance, failed to gain reappointment in 1770 when he lost Sir William Johnson's support.[101] What led Johnson to drop Van Dyck's name from his list of recommendations for the Mohawk Valley was the report from Coxsakie inhabitant Sybrant G. Van Schaick that Van Dyck was often "drunk when he administers justice" and was "[con]stantly complained of by the people."[102] Similarly, while otherwise readily adopting Cadwallader Colden's recommendations in appointing judges and justices for Orange County in 1748, Governor George Clinton pointed out that one of the candidates, Colonel Herring, had been complained of by a local in a "very gross manner." Clinton asked Colden to inquire into the complaint before he could direct "ye commission to be made out."[103]

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[100] Two-thirds of the justices commissioned in 1762 were reappointed in 1770. This statistic underestimates the proportion of incumbent justices who retained their commissions, as it does not take into account those who disappeared from the 1770 commission due to death, old age, or appointment in other offices. Justice Harkemer of Albany County, for example, desired to have his name removed from the commissions after serving about 40 years as a justice. He complained that his name had "always [been] put in the new commissions without [anyone] asking him," and that he would like to retire from the office as he was "old & culd not folow bisness." Rudolph Shoemaker to Sir William Johnson, Apr. 11, 1772, *Papers of Sir William Johnson,* VIII: 444-445; Sir William Johnson to Rudolph Shoemaker, May 8, 1772, Ibid., VIII: 468.

[101] Goldsbrow Banyar to Sir William Johnson, May 31, 1762, Ibid., III: 750-751; Sir William Johnson To Goldsbrow Banyar, Feb. 22 & Mar. 10, 1770, Ibid., XII: 782-785, 792-793.

[102] Sybrant G. Van Schaick to Sir William Johnson, Mar. 5, 1770, Ibid., VII: 467.

[103] George Clinton to Cadwallader Colden, Dec. 15, 1748, *Letters and Papers of Cadwallader Colden,* IV: 82-83.

There were limitations to the extent to which popular opinion could affect the commissions. What was presented as popular opinion was always mediated through the voices of patrons such as Sir William Johnson, and men like Henry Van Schaick under their patronage. Often driven by their own agendas concerning ethnic rivalry, factional divisions, and landed or financial interests, their reports of a particular justice's reputation were hardly straightforward reflections of the people's opinions. And if misrepresentation of public opinion did not work, there was always the possibility of a powerful patron, faction, or governor simply deciding to push through a commission regardless of popular sentiment.

The patrons and factions, however, were probably less eager to protect the candidacy of some men than others. While prominent locals like Volkert P. Douw were difficult to replace, those men who lacked wealth and status, and who enjoyed few financial, political, and familial ties with the provincial elite, were more easily expendable. Falling into the latter group in Albany during the 1760s (judging from their meager tax assessments) were justices and candidates such as Stephen Van Dyck, Isaac Mann, Peter Van Ness, and Isaac Goes.[104] These men, not coincidentally, were the ones who quickly lost their patron's support, and hence commissions, when it became apparent that they did not carry strong reputations in their communities.

While John Macombe fared better, ultimately gaining reappointment as justice of the peace in 1770, he also did not enjoy strong support from any patron. The man who recommended Macombe, in fact, did not bother to reveal his role in helping Macombe win his first appointment in 1762. Writing to Attorney General John Tabor Kempe seven years later, Macombe confessed

[104] In the 1766-7 Albany tax assessments, Stephen Van Dyck was assessed 5 pounds, Isaac Mann 6 pounds, Peter Van Ness 5 pounds, and Isaac Goes 4 pounds. This was lower than the average tax (about 7 pounds) assessed to the county's freeholders. Christoph, *Upstate New York in the 1760s,* 63, 69, 94, 105.

that "to this day," he "never kn[e]w who to thank for recommending" him.[105] The secret benefactor was Sir William Johnson. Johnson knew Macombe through business, having purchased merchandise from Albany City through Macombe several times.[106] Whatever his reasons were for recommending him, Johnson evidently did not value Macombe enough to bring him under his continued patronage. Thus when Macombe heard in 1769 that he would be excluded from the new commissions, he did not know to whom to turn. Desperately seeking reappointment, Macombe implored the attorney general to intervene on his behalf, claiming that he had always "endeavoured to act as uprightly in the execution of [his] office as [he] was capable."[107]

For patrons and factions, there was little reason to lend continued support to plebeian magistrates if they were disliked by inhabitants. An unpopular magistrate could be a liability to his patron, threatening to tarnish the latter's own reputation as a disinterested recommender. And if it was the case that justices were often recommended to secure votes for a particular faction, as the legal elite suggested, the patrons and factions would have had all the more reason to ensure that the men they recommended as justices had good standings with the people. Lewis Morris, Jr., a prominent landowner who received formal legal training, noted that the justices' political value lay in their ability to nudge people to vote for a certain candidate—an ability made possible by their "herd[ing] with the common people" and befriending them "over a mug of ale."[108] Hence, even though the commission of justices was determined by a few powerful men, plebeian justices such as John Macombe, who enjoyed little stability in office, had strong reason to

[105] John Macombe to John Tabor Kempe, Aug. 10, 1769, *Kempe Papers*, Box 14, Folder 2.
[106] John Macombe to Sir William Johnson, Jan. 31 & Mar. 26 1763, *Papers of Sir William Johnson,* IV: 37, 68; Sir William Johnston to Goldsbrow Banyar, Apr. 2, 1762, Ibid., III: 666.
[107] John Macombe to John Tabor Kempe, Aug. 10, 1769, *Kempe Papers*, Box 14, Folder 2.
[108] Lewis Morris, Jr., "Draft Essay on the Magistracy," n.d., *Lewis Morris Papers, 1735-1754*, NYHS. Quoted in Tully, *Forming American Politics*, 333. Morris's legal training is noted in Paul M. Hamlin, *Legal Education in Colonial New York* (New York: Da Capo Press, 1970), 150–152.

maintain a good reputation with the inhabitants in their jurisdictions. In the case of aldermen like Henry Bogart, the reason to curry popular favor was even clearer, as their positions depended on annual municipal elections.[109]

The vulnerability of plebeian justices and aldermen to popular opinion, as the legal elite correctly perceived, signaled a significant deviation from the traditional Anglo-American ideal of the magistrate's relationship with the people. According to that ideal, a magistrate should be able to stand above his subjects as a disinterested ruler. He should be a man of "rank, education and estates" whose social status commanded the deference of the people, and who could thus exercise his judicial and administrative powers with due authority.[110] This model of local magistracy seems to have been upheld in most of the British American colonies during the eighteenth century. In Virginia and South Carolina, the oligarchic control of wealthy planters extended to their dominance of the local magistracy.[111] New Jersey's landed elite similarly claimed most of the colony's commissions of the peace, ensuring that the local courts would support their land titles against the frequent challenges of yeomen and squatters.[112] Massachusetts' local justices were not as elevated in wealth and status, but invariably hailed from each community's small handful of prominent, well-established families.[113]

The situation in New York was not entirely different, with "men of weight" still forming the majority of the colony's justices. But in the last decades of the colonial era, a small but significant portion of the commissions were also being given to men like Macombe and Bogart,

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[109] Munsell, *Collections on the History of Albany*, I: 81-274.
[110] *Journal of the Legislative Council*, II: 1324, 1677.
[111] Anthony Gregg Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810* (Chapel Hill: University of North Carolina Press, 1981), 73–77; Aaron J. Palmer, "'All Matters and Things Shall Center There': A Study of Elite Political Power in South Carolina, 1763-1776" (Ph.D. Diss., Georgetown University, 2009), 116.
[112] Brendan McConville, *These Daring Disturbers of the Public Peace: The Struggle for Property and Power in Early New Jersey* (Ithaca, N.Y.: Cornell University Press, 1999), 117.
[113] Ronald K. Snell, "The County Magistracy in Eighteenth Century Massachusetts, 1692-1750" (Ph.D. Diss., Princeton University, 1970), 286–304, 327.

who hardly fit into the legal elite's idea of an ideal magistrate. These were men who were barely distinguishable from the ordinary inhabitants. They were plebeian magistrates who were readily approachable at local taverns or in their homes, and who were susceptible to the people's pressures and demands. The elite lawyers' 1758 petition against the Five Pounds Act, perhaps with some exaggeration, vividly portrays the popular nature of these lowly magistrates and their proceedings. Justices' proceedings held at taverns, which became very frequent with the passing of the Five Pounds Act, were often unruly, tumultuous affairs with "no solemnity" in the proceedings. "At some of these trials," the lawyers reported, "fifty men, either as Parties, Jurors, Witnesses or Spectators" surrounded the justice. The justice often "permit[ed] and join[ed] in intemperate drinking" during these trials, which, not surprisingly, often ended in "drunkenness, revels, games and horse races, tumults, quarrels, and breaches of the peace."[114]

To these plebeian magistrates, unstable in their offices and livelihood, and hence sensitive to popular opinion and demands, fell the bulk of the colony's small debt cases. This explains why these justices and aldermen bothered to provide services not written in the law, such as collecting, retaining, and delivering sums for litigants dispersed in remote towns. It explains their compliance with popular demands for speedy, low cost adjudication, supporting litigants' efforts to avoid unnecessary costs by reaching out-of-court settlements. Also explained is the rare occurrence of harsh methods such as distraint, and the generally lenient treatment of debtors. As many of the underlying credit transactions arose from ongoing exchanges between neighbors, creditors with small claims seldom desired forceful collection of the debt, which

[114] *Journal of the Legislative Council*, II: 1325, 1677. It was well known that colonial New York's taverns were a favorite venue for the laboring classes' rowdy socializing, as noted by contemporary observers such as Dr. Alexander Hamilton. Sharon V. Salinger, *Taverns and Drinking in Early America* (Baltimore: Johns Hopkins University Press, 2002), 132, 216-218, 227-230.

could antagonize not just the debtor but also other neighbors. Plebeian justices readily complied with such popular sentiment by routinely granting debtors extensions.

Even when disagreement arose between the plaintiff and defendant, some justices encouraged the parties to resolve their differences without incurring extra fees. Michael Herbert of Albany, for example, appeared before a justice in 1762 on being summoned on a debt claim made by one Mathews. Herbert initially disputed the amount claimed by Mathews, but "after some argument between them," the two were able to reach agreement "that the plaintiff was to swear to his account, and then the defendant would pay the money." The dispute over the debt, notably, was resolved by the litigants themselves. The justice presided, facilitating the discussion and lending weight to the resultant settlement, but did not pass a judgment.[115]

It is probably no coincidence that most of the recorded activities and mentions of such plebeian magistrates' handling of small debt cases are clustered in the last two decades of the colonial era, the years during which the Five Pounds Act was in effect. As the colony's legal elite quickly realized, the enlarged jurisdiction of justices, geared toward their enlarged hand in small claims jurisdiction, entailed the emergence of a new cadre of magistrates. These were the lowly justices and aldermen who were willing, if only for the paltry fees, to undertake the lower sort's countless small debt cases which the elite magistrates found too burdensome.[116] Indeed, lacking any other notable qualities to boast of, their willingness to serve small debt cases was likely the plebeian magistrates' main justification for obtaining and maintaining commissions.

By all appearances, the colony's reliance on such men to deal with its plethora of small debt claims was a success. This was because "rank, education, and weight," the cherished values

[115] Anonymous Albany justice to John Tabor Kempe, Apr. 26, 1762, *Kempe Papers,* Box 14, Folder 6.
[116] *Journal of the Legislative Council*, II: 1677.

of the legal elite, were less relevant to this particular judicial role.[117] The more important qualities of a justice in handling late colonial New York's small debt cases, as it turned out, were strong personal connections with locals, time to spend on the myriad lawsuits brought on a daily basis, a willingness to support informal agreements and understandings between creditors and debtors, and attentiveness to the locals' particular needs such as assistance in collecting and disbursing money. This is perhaps why, at least according to several council members in 1772, some of the colony's best justices happened to be tavern keepers.[118]

Since the colony's legal system gave justices within the same county overlapping geographical jurisdictions, a self-selective functional division could gradually emerge among the justices, corresponding to their socio-economic standings and predilections. The "weighty" justices, who still formed the majority, upheld the traditional Anglo-American ideal of country squire as magistrate, focusing on local administration and weightier criminal cases and civil disputes. Lowly plebeian magistrates like John Macombe, on the other hand, gravitated toward the small claims jurisdiction, carving out, essentially, a new model of local magistracy in early America—a magistrate specializing in a particular area of legal and civil service, and hinging his efficacy as magistrate less upon the expected deference of his subjects, than upon his own responsiveness to the people's needs and demands.

* * *

The success of the Five Pounds Act was not due to the exceptional qualifications of New York's justices. The arbitrary and politically charged process of commissions of the peace brought numerous unqualified men, at least in the eyes of the colony's legal elite, into local

[117] Ibid., 1324, 1677.
[118] Smith, *Historical Memoirs*, 119.

magistracy. The frequent complaints lodged against the justices' proceedings, at first sight, seem to confirm the lawyers' claims that the decline in the justices' qualities had led to a predictable decline in their performance. But one of the greatest strengths of New York's justices, paradoxically, lay in their most glaring weakness. That some justices lacked social stature and independent wealth, and hence could not expect much deference from the people, may have indeed contributed to their inefficacy in handling weighty criminal cases and civil disputes. Those very deficiencies, however, induced them to focus on small debt claims, which they had especially good reason to serve with attentiveness and sensitivity to the people's needs.

The reliance on plebeian justices worked because what most creditors with small claims needed from the law was not resolution of actual disputes or forceful debt collection. Most simply desired the law to lend some degree of assurance to their claims, by helping them settle the balance of a string of credit exchanges, and cajole their debtors when necessary. The colony's plebeian justices fulfilled this need with speedy, predictable, and low-cost resolutions. This service, in all likelihood, was ultimately beneficial to the debtors too. The justices' efficient support of small debt claims enhanced the creditors' confidence in their ability to recover debts, hence encouraging them to extend credit more easily. For the debtors it also helped that the overall costs in a lawsuit were much lower than in other courts, and that the justices frequently granted extensions when the debtor needed more time to raise the sum.

The small claims jurisdiction was not a marginal area of the law to late colonial New York's common people, many of whom relied daily on myriad small credit exchanges with neighboring farmers, tenants, shopkeepers, tavern keepers, and artisans. That the law, through the hands of its seemingly least-qualified magistrates, supported these crucial economic activities at low cost and in a way responsive to their needs, could not have gone unnoticed by the people.

And as legal professionalization began to reach far and wide into the colony's local legal practices, the starkly contrasting popular character of the plebeian justices and their proceedings became further apparent, ultimately emerging as a lightning rod for the colony's intensifying contentions over the law.

CHAPTER 4

"Licensed to Practice Law"

The Advent of Legal Professionals

The local justices' enlarged role in small debt litigation was an important development showing the legal system's responsiveness to popular legal needs, but in light of late colonial New York's overall direction of legal change, it was an exception rather than the rule. In other areas of the law, the ascendance of formal procedures and legal professionals was apparent at least since the early-eighteenth century. The thrust of legal professionalization gained further momentum in mid-century, as provincial lawyers began to define and control the perimeters of their professional community, and collectively promoted their vision of provincial legal development.

English common law and its formalized writs, which would ultimately lay the foundation of legal professionalization in New York, were introduced along with the English conquest of 1664. Three barristers from England—Matthias Nicolls, John Rider, and John Sharpe—practically embodied this incipient importation of the English legal system.[1] In the early years of the English colony, the reach of formal law seems to have been strictly confined to the handful of lawsuits treated by these English lawyers. Otherwise, New York's courts remained the domain of lay judges, jurors, and arbitrators who often ignored or were ignorant of formal procedure and common law doctrines. As late as 1698, the governor of the province could be heard complaining that even the chief justice of the provincial supreme court was "no sort of lawyer,"

[1] Paul M. Hamlin, *Legal Education in Colonial New York* (New York: Da Capo Press, 1970), 73–74; Eben Moglen, "Settling the Law: Legal Development in New York, 1664-1776" (Ph.D. Diss., Yale University, 1993), 67–69.

and all the "men that call themselves lawyers here and practise at the bar" did little more than render "our noble English laws [...] miserably mangled and prophaned."[2]

While Governor Bellomont's complaints were probably well-founded, New York's legal system had in fact just begun to take important steps toward change in the late-seventeenth century. Following the turmoil of Leisler's Rebellion, New York's English authorities made a concerted effort to curb the legal autonomy of Dutch and Puritan communities in the Hudson Valley and Long Island. A culmination of such political concerns, the Judiciary Act of 1691 fundamentally reformed New York's legal system, establishing common law courts throughout the colony.[3] Although such top-down reform did not trigger an overnight transition to a full-fledged English legal system, it did pave the road for legal professionals to gradually increase their influence in New York's courts, in the process bringing provincial legal practice closer to the standards of the mother country. New York's pattern of legal development in the ensuing years would correspond with that of most other British American colonies, where provincial legal professionalization was built upon English common law.

When, and to what extent, the American colonies received English common law is a question that has long perplexed legal historians.[4] On the one hand, the legal profession clearly played a leading role in the "Anglicization" of the American colonies during the eighteenth century. As John Murrin persuasively argued for the case of prerevolutionary Massachusetts, colonial lawyers sought to professionalize provincial legal culture by emulating the English bar

[2] Earl of Bellomont to the Lords of Trade, Dec. 15, 1698, *Doc. Rel. N.Y.*, IV: 441-442.
[3] Julius Goebel and T Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* (Montclair, N.J.: Patterson Smith, 1970), 23–29; Moglen, "Settling the Law," 53–62.
[4] For an overview of this literature, see: William Edward Nelson, *The Common Law in Colonial America, Volume I: The Chesapeake and New England 1607-1660* (Oxford [u.a.]: Oxford Univ. Press, 2008), Introduction.

as closely as possible, to the point of wearing wigs and robes.[5] The picture becomes less clear cut, however, when we look more closely into the specific legal doctrines and procedures used by these "Anglicized" lawyers. Even as they claimed to be strictly adhering to English law, legitimizing their pleas and decisions upon that supposed adherence, colonial lawyers and judges in fact frequently diverged from English law. Citing numerous such instances in early Massachusetts' courts, historian William Nelson highlighted the selectiveness and flexibility of the way in which English common law was used in the colonies. Especially in the context of common law systems, where on-the-ground applications of law are hardly separable from the body of rules composing the law, the lawyers' and judges' liberal interpretation of English doctrines was often tantamount to creating new law.[6]

Colonial legal professionals and legislators had a conceptual tool to legitimate such de-facto innovations in the law. They argued that the colonial courts' occasional divergence from specific aspects of English law was admissible as long as it was not "repugnant" to the core principles of common law. There were no clear criteria, however, of what constituted those central principles, and which parts of English law could be modified within the bounds of admissible divergence. Further muddying the issue, English common law itself was constantly evolving, and old and new parts of it often coexisted within the colonies. These inherent ambiguities in the relationship between the law of the mother country and its provinces allowed colonial legal professionals and legislators to assume broad de-facto powers of shaping provincial law as they saw fit. As historian Mary Sarah Bilder put it, colonial legal professionals

[5] John M. Murrin, "The Legal Transformation, The Bench and Bar of Eighteenth-Century Massachusetts" in Stanley N. Katz and John M. Murrin, ed., *Colonial America: Essays in Politics and Social Development.* (New York: Knopf, 1983), 540-571.

[6] William Edward Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, Mass.: Harvard University Press, 1975).

effectively began writing their own "transatlantic constitution," all the while claiming that they were simply applying English law and constitution to the colonial context.[7]

For lawyers and judges operating in provincial courtrooms, in most cases it was probably not even necessary to invoke the principle of repugnancy and divergence. Unless anyone challenged them, they could easily claim to be upholding English common law even while making provincial innovations. Still, in order to support that claim, a provincial legal professional needed to be well versed in English law. The ability to justify a plea or motion by drawing from a wide pool of English statutes, maxims, principles, and cases certainly made a difference in contested lawsuits. Although seldom strictly applied, common law became increasingly relevant to colonial adjudication in the eighteenth century, thanks in large part to the lawyers' growing sophistication in using English law as a framework and point of reference in colonial courts. It is in this qualified sense, then, that we can speak of the reception of common law in late colonial New York, and the Anglicization of the colony's legal practice.

There had been signs of Anglicization in New York's law as early as in the 1670s, with several practitioners citing English law books and common law precedents in the provincial courts.[8] By the early eighteenth century, this became a common practice among lawyers regularly appearing in the Supreme Court of Judicature of the province and the Mayor's Court of New York City.[9] As these courts became "repositories of common law technicality," to borrow William Nelson's terms, an increasing number of cases were determined by narrow issues of the law rather than particular factual details surrounding the case.[10] Mirroring signs of legal change

[7] Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass.: Harvard University Press, 2004).
[8] Hamlin, *Legal Education in Colonial New York*, 74.
[9] Ibid., 88.
[10] William Edward Nelson, *The Common Law in Colonial America, Volume II: The Middle Colonies and the Carolinas, 1660-1730* (New York, N.Y.: Oxford University Press, 2013), 57–59.

that began to appear in several neighboring colonies in the eighteenth century, New York's higher courts saw a relative decline in plaintiffs pleading the "general issue." Replacing them were the pleas "in bar," which forced the court to recognize cases strictly in the context of existing common law writs, and which could sometimes, through demurrers and pleas in abatement of a writ, remove a case entirely from an open hearing to be determined by judges and lawyers upon technical issues.[11]

Lawyers were central to this transformation. After the first quarter of the eighteenth century, a handful of native-born lawyers trained in English common law, including James Alexander, William Smith, Sr., John Chambers, and Joseph Murray, emerged as the nucleus of New York's legal professionalization. Most of these first-generation provincial lawyers would later serve as judges in the colony's major tribunals, providing a stable core of professionalized legal practice in New York's courts.[12] In the mid-eighteenth century, a second generation of native-born provincial lawyers, many of whom had attended provincial colleges and studied in the offices of the first-generation lawyers, ensured that professionalized law would be a staying force in the colony, as they pursued further sophistication in their comprehension and application of the law.[13]

Some of these lawyers, those who practiced regularly in the higher courts in New York City, have been well known both to contemporaries and to historians. Less known are the

[11] Ibid., 59–60; James A. Henretta, "Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America," in Michael Grossberg et al. ed., *The Cambridge History of Law in America*, 3 vols. (Cambridge: Cambridge University Press, 2008), I: 573–574.

[12] Hamlin, *Legal Education in Colonial New York,* 206–208.

[13] The best studies on the rise of New York's legal profession are: Moglen, "Settling the Law," 65–108; Gregory Afinogenov, "Lawyers and Politics in Eighteenth-Century New York," *New York History* 89 (2008): 143–62; Milton M Klein, *The American Whig: William Livingston of New York* (New York: Garland Pub., 1993); idem, "The Rise of the New York Bar: The Legal Career of William Livingston," *The William and Mary Quarterly,* 3rd Ser., 15 (1958), 334–58; idem, "From Community to Status: The Development of the Legal Profession in Colonial New York," *New York History* 60, no. 2 (1979), 133–56; Herbert Alan Johnson, *John Jay, Colonial Lawyer* (New York: Garland Pub., 1989).

activities and impact of the trained local attorneys who practiced mainly in county courts. Both groups, however, played important roles in shaping late colonial New York's professionalized legal culture. As self-conscious leaders of the provincial bar, New York City's "gentlemen of the law" set the standard of provincial legal practice and pushed for further legal professionalization. Local attorneys were instrumental in extending the reach of professionalized law down to each local court, where ordinary New Yorkers more frequently engaged with the law. The growing network among lawyers throughout the colony enabled them to gain the collective power to produce, circulate, and promote their own brand of professionalized legal knowledge, and to shape the direction of the colony's legal development.

Becoming Gentlemen of the Law; Driving Legal Professionalization

By the last decades of the colonial period, a small cadre of trained lawyers and judges had earned wide acknowledgment as New York's legal elite. Even Lieutenant-Governor Cadwallader Colden, one of the foremost critics of New York's legal profession, referred to the provincial bench and bar in 1765 as the "gentlemen of the law" who enjoyed "the most distinguished rank in the policy of the province," and ranked their status in New York society as next only to the large landowners.[14] The respect these lawyers enjoyed attested to their growing ability to use professionalized law to produce satisfactory results for clients and consultees. The elevated respectability and efficacy of professionalized law, in turn, owed much to the legal elite's own efforts—conscious efforts directed not only toward enhancing their personal knowledge and skills as lawyers and judges, but also toward controlling the colony's legal practice and changing its legal culture. A key area of that control was about deciding who was qualified to practice the law.

[14] Cadwallader Colden, *The Colden Letter Books* (New York: Printed for the Society, 1877), II: 68, 70-71.

Permission to practice in the colony's various courts was granted by the governor. As in other areas of colonial commission, however, the governor typically gave attorney's licenses pursuant to the provincial elite's recommendations. In the 1720s, New York's first generation of native-born lawyers made a concerted attempt to wrest control over the recommendation and licensing of new attorneys. Agreeing that most of the recent attorney's licenses had been given out unscrupulously to ignorant, unqualified practitioners who use "low and undue methods for acquiring business to themselves," six leading lawyers decided in 1729 that those practitioners should somehow be forced out of business. Lacking any institutional means to enforce this resolution, the six lawyers instead resorted to indirect pressure—anyone who employed one of those practitioners would be refused service by the leading lawyers. Not only would the lawyers refuse to undertake any cause for such clients in the future, but they would also refuse basic services such as providing copies of procedural motions (which the leading lawyers apparently had nearly exclusive access to).[15]

A younger generation of leading lawyers, most of whom were trained by the older generation, made a renewed and more direct effort to control the licensing of new attorneys in the colony. In their 1756 agreement, a dozen or so of New York City's leading lawyers resolved not to recommend anyone to the bar unless the candidate had satisfied a set of specific requirements. The requirements included four years' education at a college (reduced in 1764 to two years), seven years of apprenticeship in one of the attorneys' offices (later reduced to five years), and a 200 pound lump sum payment to the master at the commencement of apprenticeship.[16] The older generation of lawyers, now sitting in the bench of the Supreme Court,

[15] Hamlin, *Legal Education in Colonial New York*, 158–159.

[16] Ibid., 160–164. The rationale behind the large lump sum payment, unfortunately, is not specified in the agreement. Compensating the masters' efforts and expenses in training apprentices must have been one of the justifications. Another major reason probably had to do with status. Late colonial New York's leading lawyers hailed from

made a few modifications (essentially making college education optional), but largely upheld the lawyers' plan of regulating admission to the bar.[17]

The legal elite's bid to control new admissions to the bar was evidently successful. In the last decades of the colonial period, the approbation of elite judges and lawyers was deemed indispensable for gaining an attorney's license, and the requirements stipulated in the bar agreements were taken seriously. Preparing to apply for a license in early 1769, for example, Peter Van Schaack noted that he had fulfilled most of the "necessary requisites": He already had a "diploma as an evidence of [his] liberal education," was 21 years of age, and had been "living with an attorney of the supreme court." The only defect was that his apprenticeship with the attorney was a few months short of the required five years. Eyeing to profit on imminent lawsuits his friends in Albany were eager to bring to him, Van Schaack made a push to gain admission by the next term of the Supreme Court despite his shortcomings.[18] To be granted an exception to the "standing rule," he needed strong support from both the bench and bar.[19] Counting on the "influence of [his] friends" among the legal elite, Van Schaack was confident that "7/8th" of the leading lawyers would not object to his motion, and expected the "unanimous consent" of the judges of the Supreme Court. Among Van Schaack's most important supporters was his mentor William Smith, Jr.[20] Writing to Judge Robert R. Livingston on Van Schaack's behalf, Smith assured that Van Schaack's "conduct and qualifications" were sufficient to merit

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prominent families and generally held elitist social views, which influenced their ideas about what type of persons were suitable for the esteemed legal profession. A main impulse that drove the restrictive bar agreements, in fact, was to keep "ignorant quacks and pretenders" out of the profession, and ensure that only men with better social and educational backgrounds would be admitted to practice. William Livingston et al., *The Independent Reflector, Or, Weekly Essays on Sundry Important Subjects, More Particularly Adapted to the Province of New-York* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1963), ed. Milton M. Klein, 299–305; Klein, "From Community to Status."

[17] Hamlin, *Legal Education in Colonial New York*, 39–40.

[18] Peter Van Schaack to Peter Silvester, Aug. 1, 1768, *Van Schaack Family Papers*, CUL, Correspondence: Van Schaack, P.—End.

[19] William Smith, Jr. to Robert R. Livingston, Jan. 6, 1769, *Robert R. Livingston Papers*, NYHS, microfilm, Reel 1.

[20] Peter Van Schaack to Peter Silvester, Aug. 1, 1768, *Van Schaack Family Papers*, Van Schaack, P.—End.

recommendation to the bar.[21] The support of Smith and other members of the legal elite succeeded; Van Schaack won admission to the bar in 1769.[22]

The requirement of a lengthy apprenticeship was nothing unusual in light of longstanding practice in England, where young lawyers were typically trained in one of the Inns of Court or nearby lawyer's houses.[23] As historian Eben Moglen stressed, however, it was not without significance that New York's bar began to claim its own law offices, rather than those in London, as sufficient training grounds for new lawyers, hence turning itself into a self-regenerating body of provincial legal practice and education.[24] The domestication of legal training helped ensure that new lawyers would be bred into a legal vocabulary and culture shared by New York's bench and bar. While some lawyers tended to exploit their apprentices' labor for the "servile drudgery" of copying documents and running errands, some took their responsibility as mentor seriously, offering study guidelines, and encouraging use of their law libraries.[25] In a further effort to provide proper legal education to their students, in 1764 the leading lawyers pledged to hire scriveners for copying documents, thus freeing law students from the mundane task.[26]

Studying English common law doctrines and precedents formed the centerpiece of a young lawyer's training in late colonial New York. By the mid-eighteenth century, many established lawyers had accumulated sizeable libraries with a wide selection of law books, which they opened up to their apprentices.[27] Some lawyers further provided a curriculum of legal study with detailed lists of suggested readings. The course of study outlined by William Smith, Sr.

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[21] William Smith, Jr. to Robert R. Livingston, Jan. 6, 1769, *Robert R. Livingston Papers*, Reel 1.
[22] Henry C. van der Schaack, *The Life of Peter van Schaack: Embracing Selections from His Correspondence and Other Writings during the American Revolution and His Exile in England* (New York: Appleton, 1842), 6.
[23] David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford [England]; New York: Oxford University Press, 2000), 113–130.
[24] Moglen, "Settling the Law," 85–86.
[25] Hamlin, *Legal Education in Colonial New York*, 167–170; Klein, *The American Whig*, 200–201; Schaack, *The Life of Peter van Schaack*, 5–6.
[26] Hamlin, *Legal Education in Colonial New York*, 163–164.
[27] Hamlin, *Legal Education in Colonial New York*, 74-83, 91-93; Klein, *The American Whig*, 79–80.

recommended that the student gain a "general view of the Common Law" by reading major English treatises such as Matthew Hale's *History of the Common Law* and Thomas Wood's *Institutes of the Common Law*. Having done this, Smith advised, the student should go on to read Matthew Bacon's *Abridgement of the Law*, which would help "fill up and enlarge your ideas." While reading this volume, it was best to have Wood's *Institutes of the Common Law* at one's fingertips, "constantly refer[ing] from the Abridgement to Wood and from Wood to the Abridgement," as the two treatises should form "the basis or foundation of all your studies."[28] In training students in English law, however, the ultimate goal was to make their legal knowledge applicable in New York's courts. Law apprentices were given plenty of opportunity to study provincial statutes and precedents and the particular rules of each court, as they perused case notes prepared by senior lawyers, copied useful forms and precedents, and accompanied their masters to New York's various courts.[29]

The New York law students' course of studying provincialized common law can be glimpsed in the commonplace books some of them kept.[30] William Livingston's *Book of Precedents* was one such book—an ongoing compilation of various legal documents, forms, case notes, and statutes, annotated with useful tips and references. The book opens with a general discussion of the concept and usage of writs, organized into several main points each based on a passage from an English treatise. For instance, Wood's *Institutes* is referenced for the general

[28] Milton Klein opines that Paul Hamlin misidentified the author of this study guide as William Smith, Jr. His father, William Smith, Sr., was likely the one who originally composed it. Hamlin, *Legal Education in Colonial New York*, 61–62; Klein, *The American Whig*, 201. The study guide also appears in the commonplace book of William Livingston, who studied in William Smith, Sr.'s office alongside Smith, Jr. William Livingston, *Lawyer's Book of Precedents* (Ms. NYSL), 139.

[29] Klein, *The American Whig*, 80.

[30] Livingston, *Book of Precedents.* Commonplace books were used by other colonial lawyers including Thomas Jefferson and John Adams. Frank L Dewey, *Thomas Jefferson, Lawyer* (Charlottesville, VA: University Press of Virginia, 1986), 16, 94-95; Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977), 169. In New York, other known lawyers' commonplace books include those kept by William Smith, Jr., John Jay, Joseph Murray, John Chambers, and Benjamin Hilton, Jr. Hamlin, *Legal Education in Colonial New York*, 58–60; Johnson, *John Jay, Colonial Lawyer*, 24; Benjamin Hilton, Jr., *His Book of Entries both for the Student and Practicer of the Law*, Ms. NYSL.

definition of writs and some of its major types; for an exegesis of the general purpose of writs, Livingston relied on Henry de Bracton's *The Laws and Customs of England*.[31]

In discussing the specific process of having a writ issued and served on various actions and following this up with concomitant motions, however, Livingston's book narrows its focus to the particular rules and customs of New York's courts. Regarding the Mayor's Court of New York City, for example, the book details how a plaintiff's attorney should first determine whether the defendant is a freeman or nonresident, then have the appropriate writ issued by the city clerk, and deliver the writ to the sheriff, to serve on the defendant. If the defendant appears according to the summons, the book instructs the plaintiff's lawyer to "move that the defendant plead three days before next court or judgment." If the defendant does fails to appear, the attorney should "desire the court he may be called[,] which is done by the cryer three times with a loud voice." If the defendant still "makes default in appearing," the attorney could then "move for a capias" and "go to the [clerk's] office for it being granted of course."

While such rules might have been typical of many common law courts, the specific instructions copied in Livingston's commonplace book no doubt gave young lawyers valuable information on the particular routines of each New York court, and helped them understand how to operate in them accordingly. If the sheriff reports that he has arrested the defendant, for example, the book goes on to instruct that the plaintiff's attorney should "move that the defendant put in special bail on or before the Tuesday following which is eight days, or that the bail bond be assigned and after bail put in that the defendant plead three days before next court or judgment." In order to have a bail filed in the court records, the attorney is told to go to the sheriff and have him assign the bail bond "pursuant to the statute," then go to the clerk's office

[31] Livingston, *Book of Precedents*, 1-2.

and obtain a court process against both "principal and bail," which only requires an appearance, and "is *usually* indorsed on the process which the defendant signs."[32]

The detailed instructions on court procedures are supplemented by standard writ forms for various occasions—trespass, detinue, trover, covenant, assumption, and so forth. The rest of the volume is mainly composed of a large selection of documents and case notes pertaining mostly to provincial precedents. The selections include cases handled in all of New York's major tribunals, from the Supreme Court, Chancery, Vice-Admiralty Court, and Mayor's Courts of New York City and Albany City, to the inferior courts of common pleas and general sessions of the peace of several counties. The briefs and documents on each case are densely annotated with a combination of relevant English legal authorities, provincial statutes, and rules of courts. Taken together, then, Smith's recommended course of study and Livingston's commonplace book suggest that late colonial New York's lawyers pushed their students to pursue a sophisticated combination of both metropolitan and provincial elements—to gain a firm command of English common law doctrines, while also learning how to apply this knowledge in particular New York courts.

By ensuring that only candidates with such training gained admission, the New York bar could build and maintain its reputation as a small, distinguished group of specialists in a particular type of legal knowledge—English common law with a provincial inflection. For the lawyers to fully benefit from this distinction, however, their particular brand of legal knowledge had to be acknowledged as the primary language of the provincial courts. The infusion of the colony's key judicial positions with lawyers ensured that this would be the case. In 1701, a trained lawyer was named the chief justice of New York's Supreme Court, a precedent that

[32] Ibid., 24-25.

would be followed largely uninterrupted throughout the remaining colonial period.[33] From 1734 onward, the Supreme Court's bench was entirely composed of lawyers who had either practiced or been trained in New York.[34] Trained lawyers also began to preside over the Vice-Admiralty Court from 1721 onward.[35] The bench of New York City's Mayor's Court was also dominated by former and active practitioners during most of the eighteenth century.[36] With these trained legal professionals sitting on the bench, hearing pleas and motions, dispensing judgments, instructing jurors and witnesses, and setting the courts' procedural rules,[37] the younger generation of lawyers could expect their hard-earned expertise—including their ability to cite any combination of English legal treatises, provincial statutes, and precedents from both the metropole and province—to pay its dividends.

Off the bench, the attorney general's role was particularly important in fostering New York's professionalized legal culture. At least since the appointment of Thomas Rudyard in 1684, New York's attorneys general were trained lawyers committed to the cause of centralizing legal authority along the lines of provincialized English law.[38] William Kempe and his son John Tabor Kempe, whose combined tenure as attorney general covered the last two and a half decades of the colony's existence, were especially active promoters of professionalized legal practice.[39] William and John Tabor Kempe provided expert legal advice to high-ranking officials, took on important test cases involving the legal interpretation of sensitive issues such as provincial land titles, and also monitored and supervised the administration and adjudication of legal officials in

[33] Hamlin, *Legal Education in Colonial New York*, 110.
[34] Moglen, "Settling the Law," 91; Johnson, *John Jay, Colonial Lawyer*, 60–61.
[35] Klein, *The American Whig*, 166–167.
[36] Richard B. Morris ed., *Select Cases of the Mayor's Court of New York City: 1674-1784* (Washington, D.C.: American Historical Association, 1935), 50–51.
[37] Deborah A. Rosen, "The Supreme Court of Judicature of Colonial New York: Civil Practice in Transition, 1691-1760," *Law and History Review* 5, no. 1 (1987): 216.
[38] Goebel and Naughton, *Law Enforcement in Colonial New York*, 401–420.
[39] Moglen, "Settling the Law," 92.

every quarter of the province. John Tabor Kempe also built an active private business that involved interactions with numerous local clients and attorneys. Both in his public and private capacities, he had a strong hand in infusing professional standards into the province's legal practice.[40]

Clerkships were also increasingly the domain of trained lawyers in the late colonial period. It was quite typical, in fact, for the leading lawyers to supplement their private practice with one or more clerkships, which they often held for long periods.[41] From 1739 to 1753, for instance, John Chambers was the Clerk of the City of New York, Clerk of New York City's Common Council, and Clerk of the Peace for the City and County of New York. His nephew Augustus Van Cortlandt, who was groomed as a lawyer by Chambers, inherited most of the same clerkship positions in 1753 and kept them for the remainder of the colonial era.[42] Similarly, William Smith, Jr. served as the Clerk of Chancery and Clerk of the Peace for Queens County for extended periods.[43] From the mid-eighteenth century onward, not just in the Supreme Court and Mayor's Court in New York City, but also in many of the county courts of common pleas and general sessions, clerkships were generally held by young lawyers.[44]

As an integral part of routine court procedure, these trained clerks helped New York's courts operate as common law jurisdictions. Beginning in the eighteenth century, for example, the Mayor's Court of New York City made all summons and declarations go through its clerk, who would keep his office open to the public for that purpose. The clerk was given the crucial role of informing the judges what actions were to be tried during each session, and keeping

[40] On William and John Tabor Kempe's careers, see: Ibid., 92–97; Catherine Snell Crary, "The American Dream: John Tabor Kempe's Rise from Poverty to Riches," *The William and Mary Quarterly* 14, no. 2 (1957): 176–95.
[41] Hamlin, *Legal Education in Colonial New York*, 9.
[42] Ibid., 83, 102.
[43] Klein, *The American Whig*, 196.
[44] *Journal of the Legislative Council of the Colony of New York - Began the Eighth Day of December, 1743; and Ended the 3Rd of April, 1775.* (New York Senate, 1861), II: 1325.

minutes of those actions that were tried in court.[45] In 1752, the clerk's role was further enlarged as the Mayor's Court refined its formal procedures. In requiring that plaintiffs provide bail before the court would recognize any cause, the clerk was entrusted with examining the proposed security and deciding whether to let the cause proceed to court.[46] With the clerks ensuring that all causes and actions were properly categorized and presented with apposite writs, and recording the court's processes in Latinate common law terms, New York's courts became solidly grounded in formal procedure.

The influence of trained clerks was also felt in the province's primary equity tribunal, the Court of Chancery. Following the English system, New York's Chancery was intended to supplement the courts of law by providing equitable remedies, and was thus typically presided over by a lay governor rather than a trained judge. In the late colonial era, however, the Chancery increasingly became another battleground of elite lawyers employing professional legal knowledge to advance their arguments.[47] Facing the prospect of a lawsuit in the Chancery against eminent lawyer John Morin Scott, for instance, Henry Guert feared that Scott would all but ensure himself a victory by using his "sophistry in chancery."[48] The lawyers' active practice in the Chancery was bolstered by their domination of the court's clerkship. From the mid-eighteenth century onward, leading practitioners of New York City, including William Smith, Jr., James Duane, and John McKesson, took turns serving as the clerk of Chancery. As these trained clerks managed the court's processes and influenced how a given cause would be formulated and

[45] Morris ed., *Select Cases of the Mayor's Court of New York City*, 75–76.
[46] Ibid., 77–79.
[47] Johnson, *John Jay, Colonial Lawyer*, 88–90.
[48] Henry Guert to John Tabor Kempe, Apr. 10, 1769, *John Tabor Kempe Papers*, NYHS, Box 13, Folder 7.

presented to the chancellor, professional expertise could find an easy opening into the Chancery.[49]

With like-minded judges, clerks, and royal officials undergirding professionalized legal practice, New York's lawyers could feel increasingly confident about the efficacy of their legal expertise in the provincial courts. Aside from giving prospective lawyers a good reason to faithfully undergo provincialized legal training, the lawyers' control of key judicial positions also gave them the power to influence every part of the legal process—from the formulation of lawsuits and submission of motions and writs, to the actual trials in court and the enforcement of judicial decisions. In the elite lawyers, judges, trained clerks, and attorney general, professionalized law had gained powerful advocates in late colonial New York.

The legal elite's active hand in building New York's professionalized legal culture extended outside of the courts. The task of assembling provincial statutes into a printed volume, thus providing an important reference point for uniform provincial legal practice, was entrusted in 1752 to William Smith, Jr. and William Livingston, two of the colony's most prominent lawyers.[50] The task of updating and revising the collection of statutes in 1773 was assigned to Peter Van Schaack, a younger lawyer trained by Smith.[51] Not only that, elite lawyers and judges began to take part in provincial legislation, with several trained lawyers sitting in the provincial council and assembly, and some lawyers, including Livingston and Smith, frequently drafting bills at the request of assemblymen.[52]

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[49] Hamlin, *Legal Education in Colonial New York*, 111.

[50] Moglen, "Settling the Law," 86. Printed by James Parker, the volume sold numerous copies. Klein, *The American Whig*, 188–190.

[51] Schaack, *The Life of Peter van Schaack*, 15.

[52] Alan Tully, *Forming American Politics: Ideals, Interests, and Institutions in Colonial New York and Pennsylvania* (Baltimore: Johns Hopkins University Press, 1994), 166–167; Klein, *The American Whig*, 186; idem., "New York Lawyers and the Coming of the American Revolution," *New York History*, LV (1974), 401-408; Cynthia A. Kierner, *Traders and Gentlefolk: The Livingstons of New York, 1675-1790* (Ithaca: Cornell University Press, 1992), 181.

Livingston and Smith also led the effort to form lawyers' associations. In 1748, they formed the "Society for the Promotion of Useful Knowledge," which eventually attracted other senior and junior lawyers such as James Alexander, William Smith, Sr., Robert R. Livingston, John Morin Scott, and Thomas Jones into its membership.[53] Such formal and informal associations encouraged lawyers to exchange their ideas about the law and the future of the profession, ultimately laying the ground for concrete collective actions such as the mid-century bar agreements.[54] In 1770, New York City's leading lawyers formed the "moot," a scholarly debating club in which lawyers regularly met to pose and discuss exceptionally challenging questions of law.[55] Although short-lived, the moot's activities attest to the New York lawyers' commitment to refining their shared understanding of provincialized common law. Lawyers in the moot took their queries and collective conclusions seriously. According to Peter Van Schaack, when a matter was "settled" in the moot after a long debate, it "almost [carried] the authority of a court of the last resort."[56]

A major consequence of the lawyer-led legal professionalization, not surprisingly, was an increasing reliance on trained lawyers for all sorts of legal matters. In the last two decades of the colonial era, a successful lawyer such as Benjamin Kissam could have as much as fifty cases awaiting trial at a time—in the New York City Mayor's Court alone.[57] During the mid-1760s, John Morin Scott and William Smith, Jr. handled nearly two hundred cases per year in the Supreme Court. William Livingston and James Duane's caseload in the same court was smaller,

[53] Klein, *The American Whig*, 117–118.
[54] Ibid., 204–207.
[55] *Moot Club Minutes*, NYHS; Hamlin, *Legal Education in Colonial New York*, 96-97, 104; Johnson, *John Jay, Colonial Lawyer*, 16-118, 122; Klein, *The American Whig*, 208–209.
[56] Schaack, *The Life of Peter van Schaack*, 14.
[57] Johnson, *John Jay, Colonial Lawyer*, 18-19, 20–21.

but still well over a hundred cases per year.[58] There were doubtless other factors that swelled the New York lawyers' caseload, such as commercialization and the escalation of both intra- and inter-communal disputes, and the increase in debt litigation caused by the fluctuating availability of currency.[59] But without the refinement of provincial legal training, the lawyers' increasing public presence as legal experts, and the overall professionalization of the courts' operations, it is doubtful that litigants would have felt so much need to seek the costly services of lawyers.[60]

By the mid-eighteenth century, New York's major tribunals were clearly operating with the assumption that attorneys would be involved in most causes. This was partly, but not solely, the result of litigants' heightened expectations that lawyers could produce a favorable decision in trial. As formal procedures began to dominate provincial courts, the specific measures and proper forms of writs required in each step of the legal process became difficult, if not impossible, for most laypeople to handle. Without the help of an attorney, a litigant could easily lose a case on technical issues before ever obtaining a hearing. Even outside of New York City, where the professionalization of courts was far from complete, some local attorneys had become proficient in technical pleading by the last decades of the colonial period.

Late in 1767, the judges of the Mayor's Court of Albany City heard the joint complaint of Thomas Shipboy and Robert Henry against Jothum Bemus on a plea of debt. Deciding that the claim was valid, the court found Bemus indebted to Shipboy and Henry in the amount of 46 pounds 17 shillings and 6 pence (39 pounds 16 shillings and 6 pence for the debt, plus court fees). Prior to the hearing, Bemus had already signed a recognizance pledging that if the court decided

[58] Klein, *The American Whig*, 192–193.

[59] Deborah A. Rosen, *Courts and Commerce: Gender, Law, and the Market Economy in Colonial New York* (Columbus, OH: Ohio State University Press, 1997), 82–85; Moglen, "Settling the Law," 230-232, 239–248; Roger Champagne, "Family Politics versus Constitutional Principles: The New York Assembly Elections of 1768 and 1769," *The William and Mary Quarterly*, 3d ser., 20: 1 (1963), 63.

[60] On the high expense of hiring attorneys in late colonial New York's courts, see Chapter 6, pp. 286-300.

against him, he would make immediate satisfaction to his creditors for the debt and costs. As was usually the case when large sums of money were involved, Bemus was required to offer some form of security. John Roff, a skipper, was kind enough to offer himself as bail. Bemus, however, not only failed to pay the sum according to the court's judgment, but also managed to evade enforcement, keeping himself out of debtor's prison. This being the case, Shipboy and Henry turned to Roff to recover the money due to them. When Roff refused to comply, Shipboy and Henry sued him for the amount of 46 pounds 17 shillings and 6 pence.

The two plaintiffs probably had a solid case, since Roff, according to the terms of the special bail, was explicitly held accountable to Bemus's creditors in case of his default. Unfortunately for Shipboy and Henry, however, the attorney they hired turned out to be either inexperienced or sloppy. At first sight, John McRae's declaration seems competently drawn, stating his clients' case in the usual long-winded phrases typical of common law writs. But not in the eyes of Peter W. Yates, who was hired to defend Roff.[61] Below his copy of McRae's declaration, Yates noted that it was "a very bad declaration in many instances."[62] Yates followed up the claim in his subsequent demurrer against McRae's motion, pointing out no less than seventeen deficiencies in the declaration.

All of Yates's criticisms regarded formal issues, rather than any substantive points of law or disputed facts. Missing in the declaration, Yates pointed out, were numerous details of the judgment, processes, and recognizance in question. Since McRae was hired to sue Roff after his clients had already obtained judgment against the principal Jothum Bemus, he may have deemed it redundant to specify details of the initial judgment against Bemus, which would have already

[61] Not much is known about the educational background and legal practices of John McRae and Peter W. Yates. Both obtained licenses to practice in the Albany Courts during the mid-1760s. E. B. O'Callaghan et al., *Calendar of New York Colonial Commissions, 1680-1770* (New York: New York historical Society, 1929), 66, 69.
[62] Hilton, *Book of Entries*, 9.

been entered into record by the court's clerk anyway. To Yates, however, the omission was inexcusable. Without the date and contents of that judgment specified, the declaration could have no force before the law. Similarly, it did not matter to Yates that Bemus had obviously been served a capias after his creditors obtained judgment against him. McRae's declaration clearly implied this, stating that Bemus had been "convicted" on the charge, and nevertheless failed to pay the debt or "render his body to the custody of the goaler." These facts, however, had to be explicitly mentioned in the declaration.

Also missing, according to Yates, were details about the recognizance in which Bemus had placed Roff as his bail. McRae did mention the recognizance in his declaration, but he failed to note several smaller details such as the date on which the recognizance was signed, the court in which the recognizance was waiting, and whether the recognizance was still fully in force. One could imagine McRae's clients protesting in disbelief that the recognizance was obviously still in force, as it had been entered just a few months before, and that the full details of it were already recorded by the court's clerk. But all of this, Yates insisted, must be spelled out in the declaration. It was not even sufficient to note, as McRae did, that the recognizance was taken before the Recorder of the Mayor's Court. According to Yates, McRae should have explicitly stated that the recognizance was subsequently delivered "by the Recorders own hands to be filed [at the Mayor's Court]," hence specifying that the cause fell within the jurisdiction of the Albany Mayor's Court. "Nothing shall be intended to be within the jurisdiction of an inferior court," stressed Yates, other than "what is expressly alledged to be so."

The overall effect, concluded Yates, was that the declaration was "incertain and wants form," and hence was "not sufficient in law."[63] The records do not reveal how the case was resolved, but judging from the fact that Yates's demurrer and notes on the case were included in

[63] Ibid., 135

a younger lawyer's commonplace book as an example to be studied, one could safely assume that technical pleadings of this sort were fully effective in late colonial New York. By the mid-eighteenth century, New York's licensed attorneys could boast, probably with good reason, of their irreplaceable value to prospective clients. Any layperson with a complaint, the lawyers conceded, had the "right to apply to the clerk for a writ, and sign it himself, at his own suit." But once the writ was returned, professional legal assistance was indispensable for the ensuing process. Otherwise, the plaintiff would face steep disadvantages against a defendant who hired an attorney. The attorney would swiftly move to have the plaintiff nonsuited for want of a declaration, and for "not filing an incipitur" (the formal commencement of an entry in the court's records). Hence, in late colonial New York's legal milieu, the folly of initiating a lawsuit without employing an attorney could only be attributed to "negligence or ignorance."[64]

With formal procedures and legal doctrines gaining importance in the courts, the foremost practitioners of New York's provincialized common law could solidify their status as the colony's acknowledged legal elite. The moniker "gentlemen of the law" seemed increasingly apt to these men, as numerous New Yorkers, including powerful landowners, merchants, and high-ranking officials, eagerly, and respectfully, sought the legal elite's services and advice.[65]

The growing respect for New York's legal elite was evident even across the Atlantic. Although residing in England, George Clarke, Jr., as Secretary of the Province and son of a former governor of the colony, had strong financial and landed interests in New York.[66] In Goldsbrow Banyar, Clarke already had an able deputy and agent who (aside from performing

[64] Ibid., 362; Livingston, *Book of Precedents*, 29.

[65] Similarly to New York lawyers, English barristers and Massachusetts lawyers also gained social respectability and status through control of their profession. Lemmings, *Professors of the Law*; Murrin, "The Legal Transformation, The Bench and Bar of Eighteenth-Century Massachusetts."

[66] Colin D. Campbell and Rosemary G. Campbell, "Early Land Leases in the Cherry Valley Patent, 1743-1851," *New York History* 90, no. 1/2 (2009): 59–77.

Clarke's public duties) handled most of his private businesses in New York. When it came to more complex legal matters, however, Clarke always turned to John Chambers, one of New York's most accomplished lawyers. In solidifying titles to the vast landholdings he inherited from his father, and in selling subdivided tracts or leasing them out to tenants, Clarke made sure that Banyar, his agent, would take no steps "without previously takeing Mr. Chambers advice & directions."[67] At the same time, Clarke was careful not to "giv[e] Mr. Chambers too much trouble," instructing Banyar to consult with him on more important matters, but to "take all you can off his hands" on matters demanding less legal expertise.[68]

So valuable did Clarke find Chambers' expertise, that he hardly took any offense even when the latter constantly neglected his business. When Chambers failed to take any action on one of his affairs, Clarke simply "fanc[ied] it has slipt his memory," and asked his agent to gently remind Chambers of the affair and solicit his directions.[69] When Chambers failed to write to him for some time, Clarke anxiously asked Banyar to find out if Chambers might be "disgusted or unwilling to do [Clarke's] business."[70] Notwithstanding Chambers' tardiness, Clarke repeatedly asked Banyar to send his "affectionate compliments to Mr. Chambers & his family" whenever he might have a chance.[71] In late colonial New York, evidently, receiving the legal elite's services was a favor to be coveted.

New York's professionalized legal system, as in the other British American colonies, was built upon English common law.[72] Legal professionalization in New York, however, was hardly a process of straightforward importation from English sources. As a small cadre of trained

[67] George Clark, Jr. to Goldsbrow Banyar, May 16, 1752, *Goldsbrow Banyar Papers, 1746-1820*, NYHS, Box 1.
[68] George Clark, Jr. to Goldsbrow Banyar, Mar. 9, 1755, Ibid., Box 1.
[69] George Clark, Jr. to Goldsbrow Banyar, Apr. 6, 1754, Ibid., Box 1.
[70] George Clark, Jr. to Goldsbrow Banyar, Apr. 16, 1760, Ibid., Box 1.
[71] George Clark, Jr. to Goldsbrow Banyar, Nov. 20, 1760, Ibid., Box 1.
[72] Nelson, *Americanization of the Common Law*, 1-64; idem., *The Common Law in Colonial America*, Vol. 1.

lawyers, judges, and officials led the task of adapting formal English law to the daily operations of New York's courts, they began to build a home-grown professional legal culture combining both metropolitan and provincial elements. And as they melded common law doctrines with provincial statutes, precedents, and procedural customs, elite legal professionals increasingly monopolized the role of producing and passing on provincial legal knowledge. By the mid-eighteenth century, New York's gentlemen of the law had clearly succeeded in shaping the colony's legal profession as a self-contained, self-regenerating, and influential body with its own set of standards and norms. The legal elite decided whom it would accept to the profession, what type of legal knowledge the newcomers should imbibe, and to a large extent, how the law would be practiced in New York's major courts.[73] Outside of those tribunals in New York City, however, the domination of elite lawyers was less complete. If legal professionalization were to gain traction in the outlying local courts, another group of lawyers would have to be counted on for the task.

Local Attorneys and the Proliferation of Professionalized Law

Born into a large family of an Albany blacksmith, Abraham Yates, Jr. was initially groomed to become a shoemaker. At some point, however, he began studying law—a decision which would allow him to escape his humble social background. Yates was an apprentice in Albany lawyer Peter Silvester's office during some part of the 1750s, and in 1759 won license to

[73] Eben Moglen correctly points out that John Murrin's "Anglicization thesis" does not fully apply to the case of New York—according to Moglen, the growth of New York's bar, if anything, could more aptly be described as a process of "Americanization." However, the importance of the common law as the cornerstone of New York's legal professionalization, and the provincial lawyers' active role in incorporating common law doctrines and procedures into New York's courts, should not be discounted either. In this sense, Murrin's thesis still offers a crucial insight about the nature of lawyer-led legal transformation not just in colonial New England, but also in New York. Murrin, "The Legal Transformation, The Bench and Bar of Eighteenth-Century Massachusetts"; Moglen, "Settling the Law," 105, 297–298; Henretta, "Magistrates, Common Law Lawyers, Legislators," 577–581.

practice in Albany's courts.[74] While studying law, Yates also built a career in civil service. Beginning as a constable, Yates eventually earned a seat in Albany City's council, and in 1754, was named the High Sheriff of Albany.[75] By the end of the decade, he had successfully established himself both as a municipal official and lawyer in Albany. During most of the remainder of the colonial period, Yates served as an alderman in the city council while continuing an active local business as a notable attorney.[76] In the summer of 1761, for example, he was busy trying to recover debts for two substantial groups of creditors—the heirs of John Beekman and the executors of Rutger Bleecker.[77] A decade later, he was still active in the Albany courts, winning judgment, for example, for a debt of about 32 pounds owed by Volkert A. Douw to Yates's client Dirck Swart.[78] In the following year, Yates began working alongside Attorney General John Tabor Kempe in a complex land-related lawsuit which, as shall be shown below, occasioned a fine demonstration of Yates's proficiency as a lawyer.[79]

Yates's position in the city council also contributed to his business as a lawyer. In 1766, the council hired Yates to sue the executors of Mayor Volkert P. Douw in the Albany Court of Common Pleas, regarding a bond that Douw had given the council.[80] Five years later, the council hired Yates to represent its rights on a seemingly minor but nonetheless sensitive judicial issue. Many of Albany's aldermen also held positions as justices of the peace for the county—positions which traditionally gave them seats, among other places, in the oyer and terminer courts held in

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[74] Stefan Bielinski, *Abraham Yates, Jr., and the New Political Order in Revolutionary New York* (Albany: New York State American Revolution Bicentennial Commission, 1975); *Calendar of New York Colonial Commissions*, 53.
[75] *Calendar of New York Colonial Commissions*, 43; Joel Munsell, *The Annals of Albany* (Albany, N.Y.: J. Munsell, 1850), X: 120-121; idem, *Collections on the History of Albany: From Its Discovery to the Present Time; with Notices of Its Public Institutions, and Biographical Sketches of Citizens Deceased* (Albany, N.Y.: J. Munsell, 1865), I: 85-113.
[76] Munsell, *Collections on the History of Albany*, I: 146-149, 151, 160, 170-171, 178, 193, 207-208, 218, 231, 240.
[77] *John Brees Papers*, NYSL, Box 1, Folder 7.
[78] *Fonda Family Papers*, AIHA, Box 1, Folder 1.
[79] Abraham Yates, Jr. to John Tabor Kempe, Aug. 23, 1771, *John Tabor Kempe Papers*, Box 14, Folder 9
[80] Munsell, *Collections on the History of Albany*, I: 169.

Albany. Hence, the council was dismayed to find their aldermen's names missing from the new commissions of justices for the court in 1770.[81] Alarmed at this unwelcome change, the council resolved to reclaim their traditional judicial positions. Yates was entrusted with the task of researching relevant legal grounds and precedents that would bolster the council's claim, and to solicit support from New York City's legal and political elite.[82] The project dragged on for years without yielding any clear results, apparently, but the responsibility bestowed upon Yates bespeaks the esteem he had earned as a capable lawyer.[83]

Yates was perhaps exceptionally successful, but he was one of many local attorneys who led similar careers in New York's various locales during the late colonial period. They rarely had occasion to appear in the higher tribunals in New York City, but after winning admission to practice in their counties, could find substantial business handling debt cases, land disputes, and occasional criminal lawsuits for local clients. They formed the bottom rung of the legal profession, and sometimes had to supplement their business with other sources of income, but their growing presence all across the province was an important factor that transformed New York's legal milieu.

"Local attorney" was not an official distinction, but there was little question about who belonged to the small clique of elite lawyers practicing in New York City's highest courts, and who did not. Moreover, many local attorneys rooted their business in their neighborhoods because they were not allowed to practice outside of their counties. Throughout the late colonial period, county courts of common pleas and general sessions effectively held the power to admit individuals to practice as attorneys in their court.[84] Some of these attorneys would go on to obtain

[81] Ibid., I: 214, 216-217.
[82] Ibid., I: 231, 238-239.
[83] Ibid., I: 246.
[84] Johnson, *John Jay, Colonial Lawyer*, 91.

licenses from the governor to practice "in the several Courts of Record in the Province," but many more failed to do so, or at least had to wait for years until they were finally licensed to practice outside of their respective counties.[85] For those practitioners, then, the distinction *local* attorney was certainly befitting. The distinction was less clear cut for lawyers such as Albany's William Corry and Peter Van Schaack, who chose to focus their business in their county despite being authorized to practice throughout the province.[86] For the purpose of our discussion, it would be apt to include them among those local attorneys who were a major part of professionalized legal practice outside of New York City's higher courts.

The qualifications of most local attorneys in New York left much to be desired, according to prominent lawyers such as William Livingston and William Smith, Jr. In the *Independent Reflector*, Livingston complained that many of the active practitioners outside of New York City were but "pettifoggers," known by everyone in their counties as "unable, illiterate, and dishonest" men hardly capable of practicing law. Regardless, these men were allowed to practice in county courts due to the colony's lax system of licensing local attorneys. Livingston's distrust of the licensing process followed from his contempt for local judges and justices: The judges of county courts, on whose recommendations the governor typically granted attorney licenses, were themselves ignorant men who often indiscriminately supported ill-qualified locals as attorneys.[87] The governors were also to blame for this laxity, added Smith, as they seldom bothered to question the qualifications of candidates "how indifferently soever [they were] recommended."[88]

[85] For example, William Mouat initially earned a county attorney's license in 1756, but two years later won admission to practice throughout the province. *Calendar of New York Colonial Commissions*, 47, 50.
[86] Hamlin, *Legal Education in Colonial New York*, 20, 33.
[87] Klein, ed., *The Independent Reflector*, 299–304.
[88] William Smith, Jr., *The History of the Province of New-York*, 2 vols. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1972), ed. Michael G. Kammen, I: 267.

Indeed, the elite lawyers' bar agreement (along with its strict conditions required for earning an attorney's license) did not seem to extend outside of New York City, making it much easier for prospective lawyers to obtain a license to practice in a county. Bryan Lefferty, for example, was admitted to Tryon County's bar immediately upon arriving from New Jersey in 1773.[89] Lacking any ties with New York's legal elite, and without having undergone training in one of their law offices, Lefferty probably knew he had no chance of being admitted to New York's highest courts. But the recommendation of William Alexander (Lord Stirling) and the endorsement of Sir William Johnson was sufficient to earn Lefferty a place in Tryon County's courts, where he began to practice late in 1773.[90] Despite his condemnation of the lax licensing of local attorneys, William Smith, Jr. also could not (or did not) prevent one of his mentees from circumventing the New York bar agreement. George Clinton, after studying only three years in Smith's office (two years less than what was required in the 1764 agreement), was admitted to practice in Albany's courts in 1764.[91]

Lefferty and Clinton were hardly incompetent, ignorant "pettifoggers," however. Clinton might have applied for an attorney's license prematurely in the eyes of the legal elite, but he was earnest about building a career in law. In 1768, four years after being licensed to practice in Albany, Clinton won admission to enlarge his practice to the entire province.[92] Lefferty was never admitted to practice outside of Tryon County, but he quickly established himself as a

[89] Bryan Lefferty to Sir William Johnson, Dec. 10, 1772, Sir William Johnson, *The Papers of Sir William Johnson* (Albnay: University of the State of New York, 1921-1965), VIII: 658-659.
[90] Sir William Johnson to the Earl of Stirling, Mar. 23, 1773, Ibid., VIII: 742-743.
[91] E. Wilder Spaulding, *His Excellency George Clinton, Critic of the Constitution*, (New York: The Macmillan Company, 1938), 19; *Calendar of New York Colonial Commissions, 1680-1770*, 64. The bar agreement was passed in January, and Clinton obtained his license in September. It is quite likely that from the outset, most signatories of the bar agreement perceived it as applying only to new members of the provincial bar (i.e. attorneys licensed to practice in all of the colony's courts). Hence, Smith, Jr. would have seen no contradiction in letting his mentee gain license on much easier terms barely a few months after the creation of the bar agreement, as long as it was a license limited to practicing only at a county level.
[92] Spaulding, *His Excellency George Clinton*, 22.

leading lawyer in the newly found county. Lefferty's services were much in demand in Tryon County's Court of Common Pleas, and according to some accounts, he was soon hired by Sir William Johnson as his trusted private secretary and family lawyer.[93] Shortly after his arrival in New York, Lefferty was also named Surrogate of Tryon County, upon the recommendation of his predecessor John Blagge.[94]

Although their practices were confined to much smaller jurisdictions than those of New York City's elite lawyers, many local attorneys in late colonial New York were nonetheless accomplished legal professionals in their own right. In a legal profession built around formal English common law, a key criterion of competence was the ability to cite apposite English authorities and precedents. By this measure, local attorneys such as Abraham Yates, Jr., Peter Silvester, and Peter Van Schaack would have had no trouble proving their qualifications as professional lawyers.

In 1772, Yates was sued in the Supreme Court by Albany City Clerk Stephen DeLancey for a debt of 350 pounds, on account of clerical work and services that DeLancey and his servants had performed for Yates in the Albany courts.[95] Yates asked John Tabor Kempe, with whom he was already collaborating on another lawsuit, to defend him in the Supreme Court. This arrangement was necessary since Yates was only licensed to practice in Albany.[96] Although he was formally Yates's attorney in the case, Kempe, the province's attorney general, in fact relied on Yates to help prepare an important part of the defense—finding relevant passages from English legal treatises. Surmising that "you have doubtless made some notes of authorities on

[93] Kerby A Miller, *Irish Immigrants in the Land of Canaan: Letters and Memoirs from Colonial and Revolutionary America, 1675-1815* (Oxford: Oxford university press, 2003), 470; Jeptha Root Simms, *The Frontiersmen of New York: Showing Customs of the Indians, Vicissitudes of the Pioneer White Settlers, and Border Strife in Two Wars* (Albany, N.Y.: G.C. Riggs, 1882), 251.
[94] Will of Sir William Johnson, Jan. 27, 1774, *Papers of Sir William Johnson*, XII: 1076; John Blagge to Sir William Johnson, Nov. 15, 1773, Dec. 22, 1773, Jan. 18, 1774, Ibid., VIII: 918, 969, 1001.
[95] Stephen DeLancey v. Abraham Yates, Jr., *Kempe Papers*, Box 3, Folder 4.
[96] Abraham Yates, Jr. to John Tabor Kempe, Aug. 23, 1771 & Oct. 14, 1772, Ibid., Box 14, Folder 9.

which you principally rely for supporting the plea," Kempe asked Yates to "favor me with your notes on the subject."[97] Kempe's assumption of Yates's familiarity with English treatises bespeaks the professional standards expected of leading local attorneys in late colonial New York.

The correspondence between Albany lawyers Peter Silvester and Peter Van Schaack also indicates that at least among some local attorneys, a shared familiarity with English precedents and legal treatises could be assumed. A well-established lawyer in Albany City with clients all over the county, Silvester asked Van Schaack, a recently licensed young lawyer and former mentee of his, to work as his local agent from Kinderhook, Albany where the latter was based.[98] When Silvester solicited his legal opinion on several outstanding cases, it was a perfect occasion for Van Schaack to demonstrate his newly acquired expertise to his former mentor.[99] Regarding a demurrer entered by Silvester's opposing attorney in a debt case, for instance, Van Schaack opined that it would "no doubt [...] be overruled, upon the authority of the case of Wallis v. Lewis in 2 Ld. Raym. 1215." Van Schaack quickly added that he was aware of the differences between the English case and the one at hand in Albany; the former had been "upon motion in arrest of judgment," whereas the latter was "upon special demurrer." Nonetheless, Van Schaack averred that the English precedent would be applicable, as "the reasoning is in point." Regarding another case, in which Silvester suspected that a key witness's testimony on which his plea hinged might be "defective," Van Schaack prudently refrained from immediately offering an opinion; only after seeing a copy of the witness's deposition, and "inform[ing] [him]self fully about" the case to "know the point upon which the cause depends," could he "assist [Silvester]

[97] John Tabor Kempe to Abraham Yates, Jr., Feb. 7, 1774, Ibid., Box 15, Folder 6.
[98] Hamlin, *Legal Education in Colonial New York*, 43.
[99] Schaack, *The Life of Peter van Schaack*, 5.

with authorities."[100] Clearly, both Silvester and Van Schaack had strong confidence in the latter's ability to cite the most pertinent legal authorities, based on a precise understanding of both English common law and the particular provincial case at hand.

The erudition of local attorneys such as Yates, Silvester, and Van Schaack, unsurprisingly, resulted from years of training. For one thing, at least a handful of young local attorneys licensed after the mid-eighteenth century had spent a few years in a New York City law office.[101] Such was the case of Van Schaack, who first studied with Silvester in Albany, then completed his legal education in William Smith, Jr.'s office in New York City.[102] Also important was that several senior lawyers such as Silvester kept law offices outside of New York City, in which the clerks presumably received some form of legal training.

Benjamin Hilton, Jr.'s commonplace book offers a glimpse into the training that late colonial New York's local attorneys went through. Hilton probably began studying law in Albany sometime during the 1760s, and possibly began practicing there.[103] What we know for certain is that he obtained a license to practice in Tryon County's Court of Common Pleas and General Sessions soon after their creation in 1772, and handled several cases during the courts' short existence.[104] Both in structure and content, Hilton's commonplace book shared broad similarities with William Livingston's. It was an ongoing compilation of noteworthy provincial statutes and court rules, useful definitions and arguments taken from English legal treatises, and a wide selection of both English and provincial precedents. There are also notable differences,

[100] Peter Van Schaack to Peter Silvester, May 17, 1773, *Van Schaack Family Papers*, Van Schaack, P.—End.
[101] Hamlin, *Legal Education in Colonial New York,* 106.
[102] Schaack, *The Life of Peter van Schaack*, 5–6.
[103] Hilton is listed as the attorney in two cases in the Albany Court of Common Pleas, one from 1770 and another from 1773, in his commonplace book. Hilton, *Book of Entries,* 171, 174.
[104] *Tryon County Records, 1772-1784*, NYHS, Box 1.

however, reflecting Hilton's priorities as a young local attorney. Livingston's approach to studying law, as evinced in his commonplace book, was more systematic—beginning with a firm grounding in the core principles of English common law and widely applicable English precedents, then gradually shifting focus to the peculiarities pertaining to practicing law in New York. Hilton's book, in contrast, shows a more pragmatic approach, jumping straight into the provincial setting. English precedents and legal authorities are cited strictly for their applicability to New York's courts, added as notes on the margins of legal documents pertaining to provincial cases.

The majority of documents copied in the early part of Hilton's book feature Albany lawyer Peter W. Yates as an attorney either on the plaintiff's or defendant's side, suggesting that Hilton may have begun his studies in Albany under Yates's tutelage. In any event, Hilton clearly began studying law with the goal of winning admission to Albany's bar. With this concrete objective in mind, Hilton focused from the outset on studying specific local precedents and customs, copying numerous forms and rules pertaining to Albany's civil and criminal county courts and Albany City's Mayor's Court. Reflecting Hilton's move to Tryon County around 1773, his nearly 600-page long commonplace book ends with a copy of the rules of the newly created Tryon County Common Pleas.[105] By this time, evidently, Hilton considered his legal education as a local attorney complete.

The minutes and judgment rolls of Tryon County's Court of Common Pleas suggest that Hilton's type of legal education had in fact become necessary for practicing in late colonial New York's county courts. During its first session in September, 1772, the Tryon County Court

[105] Hilton, *Book of Entries.*

quickly admitted five lawyers to practice in the county, and in later sessions added four more.[106] Most of these lawyers stayed active throughout the court's three and a half year existence, ensuring that there would usually be somewhere between eight and ten licensed lawyers available for Tryon County's litigants in each term. And the records indicate that these lawyers were much in demand. Of the 223 cases documented in the minutes and judgment rolls, plaintiffs hired attorneys in nearly 70% of the cases, and defendants in about 30% of the cases.[107]

Some of the lawyers were clearly more sought after than others. More than two thirds of both plaintiffs and defendants who hired an attorney retained either Bryan Lefferty, Christopher Yates, or Walter Butler.[108] There must have been multiple factors that made litigants prefer the three lawyers, but professional experience was definitely one of them. Lefferty had been a lawyer in New Jersey, and was quickly embraced by Tryon County's governing elite as a capable legal professional. In a small county composed of a few thousand souls at most, locals must have quickly learned of the credibility that Lefferty reputedly carried as a lawyer. Similarly, Yates and Butler were experienced lawyers who had already been practicing in Albany County before its partition in 1772.[109] Even in the county courts of late colonial New York's frontier regions, legal expertise mattered.

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[106] Two of the lawyers, Peter W. Yates and Dudley Davis, already possessed licenses to practice throughout the province. The others did not, and thus had to obtain new licenses to practice in Tryon County. The records do not reveal the specific process in which these lawyers were recommended to the governor, but in all probability, it was the judges of the county (perhaps along with Sir William Johnson) who enabled their admission to the bar. During the court's first session, "in consideration of the present situation" of the newly found county, the judges decided to give three unlicensed attorneys—John Hansen, Christopher P. Yates, and Leonard Gansevoort—special admission to practice immediately, on condition that they obtain and present licenses to practice in Tryon County by the next session. Clearly, the judges were confident that the three men they approved of as local attorneys (and were about to recommend to the county's bar) would be licensed accordingly by the governor. Hansen, Yates, and Gansevoort were indeed licensed soon thereafter as expected. *Tryon County Records*, Box 1; *Calendar of New York Colonial Commissions*, 69.

[107] While the form of the judgment rolls required that the attorneys' names were always recorded, the minutes noted the attorney's involvement in a case only when he made a certain motion. Hence these statistics underrepresent the proportion of cases in which plaintiffs and defendants hired an attorney. *Tryon County Records*, Box 1.

[108] Ibid., Box 1.

[109] *Doc. Hist. N.Y.*, IV: 741-742.

Hilton, who was probably much less experienced than Lefferty, Yates, and Butler, did not fare as well during his three-year tenure on Tryon County's bar. He only attracted nine clients during those years, whereas Lefferty, Yates, and Butler each handled about fifty cases before the Revolutionary War ground the courts' operations to a halt.[110] Five of the nine cases Hilton handled were rather straightforward affairs, in which Hilton simply confessed judgment on behalf of a debtor, or sued a debtor on account of a conditional bond. The other four cases, which also seem to have involved debt, likewise did not entail much complication. The defendant defaulted in three of the cases where Hilton brought forth an action on behalf of a creditor, and on one occasion, Hilton, this time on the defendant's side, had the plaintiff nonsuited for want of a declaration.[111]

Still, handling these cases called for some degree of legal expertise, as the attorney had to present appropriate motions in accordance with common law procedures and the court's specific rules, accompanied by writs drawn in particular forms and incorporating specific pieces of required information. For instance, both Gilbert Drake's and Robert Picken's complaints were simple enough, as they were pleading for recovery of debt on conditional bonds explicitly stating the due dates, interests, and penalties. For their complaints to be recognized by the court, however, a formal plea of debt had to be drawn out, complete with the long-winding, partially fictive narrative of when, where, and how the original debt was incurred, when and where the debtor acknowledged it, and when and where the plaintiff demanded the debt to be paid. Then, finally, could the plaintiff formally complain that the defendant, "altho often required," had not

[110] The other attorneys were John H. Wendell, John Hansen, John Roorbach, Leonard Gansevoort, Matthew Visscher, Peter Silvester, Peter W. Yates, Robert Yates, and Dudley Davis. Few of them fared better than Hilton; their average caseload was less than six for the entire duration of the Tryon County civil court's existence. Some of these lawyers (Silvester, Davis, and the two Yates's) had active practices in Albany, and may have appeared in the Tryon County court only when some of their Albany clients' businesses brought them there. *Tryon County Records*, Box 1.

[111] Ibid., Box 1.

paid the debt, and that legal enforcement was called for within the bounds of the court's jurisdiction.[112]

Appropriate form and narration were just as important in a plea of trespass. Even if the plaintiff was simply demanding due compensation for work he had performed for the defendant, the plea had to state that the work had been done at the defendant's "special instance" within the court's jurisdiction, that the defendant "faithfully promised" to give due compensation, and that the plaintiff "often afterwards thereunto requested" the sum that he "reasonably deserved to have."[113] In preparing these writs and presenting them to the court, Hilton obviously benefited from having studied corresponding forms and precedents in his commonplace book.

With trained attorneys such as Hilton competing for local clients each term, professionalized law became an increasingly regular aspect of late colonial New York's county courts. The Tryon County Court of Common Pleas' detailed procedural rules and orders of 1772, for example, assumes the involvement of attorneys in almost every step of the legal process. The rules stipulate that all processes issued out of the court must be signed by the clerk and "have an attornies name thereon indorsed"—otherwise the process would be "quashed." When a litigant had to be notified of something (e.g., that a special bail was filed, or that an exception was entered against it), the court's rules matter-of-factly instruct that the "notice in writing shall be given to the [plaintiff's or defendant's] attorney." For a plaintiff to obtain a hearing, her or his attorney should first "draw the declaration and deliver the same to the defendants attorney." If the plaintiff fails to declare by the end of the ensuing term (which, Hilton's commonplace book

[112] Gilbert Drake's Plea of Debt against Daniel Ferguson, Dec. 1775, Robert Picken's Plea of Debt against Thomas Barry and Jacob Berstade, Dec. 1775, Ibid., Box 1.
[113] John S. Glen v. Abraham, John & Jacobus Flipses, Dec. 1775, Ibid., Box 1.

warns, could easily happen to plaintiffs not hiring an attorney), the defendant, "by his attorney," could move to nonsuit the plaintiff.[114]

By the late colonial period, county courts could no longer be said to lay outside the growing sphere of New York's professionalized legal culture. Formal procedures, technical pleadings, and common law doctrines were clearly making significant inroads into local legal practice. Local attorneys played a major role in this process not only by expanding their own professional practices, but also by building strong connections with New York City's gentlemen of the law.

The Lawyers' Network: An Extended Professional Community

From the early 1760s to the eve of the Revolution, Albany lawyer Peter Silvester and Attorney General John Tabor Kempe collaborated on at least a dozen different cases, some of which went on for years, generating a steady stream of correspondence between the two lawyers. In many occasions, Silvester was acting as a de facto agent for Kempe, sometimes assisting the latter in his public duties as attorney general of the colony.[115] When Kempe needed information about an Albany resident charged with assaulting a neighbor, for example, Silvester examined the local court minutes to check if the person had any criminal record, or if there were outstanding charges against him in any of the local courts.[116] When Kempe wanted to ensure that the sheriff of Albany would serve a warrant upon a public offender known for evading justice, Silvester took it upon himself to personally "put [the writ] into the hands of the sheriff."

[114] Hilton, *Book of Entries*, 535-538.

[115] New York's attorneys general, including Kempe, appointed deputies in several counties. Goebel, *Law Enforcement in Colonial New York*, 193, 319; Vincent Matthews to William Kempe, July 13, 1757, *Kempe Papers*, Box 15, Folder 10. It is possible that Silvester was also a deputy, but it is unclear whether he was ever formally deputized.

[116] Peter Silvester to John Tabor Kempe, Oct. 11, 1764, Ibid., Box 14, Folder 5.

As a local attorney familiar with the inhabitants of Albany, Silvester could provide simple but valuable information about locals; for instance, that one of the men listed in a writ sent by Kempe was in fact a local judge and hence should be given the "title of esq[uire]," and that another should be specified as "Van Schaick of the manner of Renselaer" (probably to distinguish him from the many other Van Schaacks residing in Albany). Or that one of the litigants involved in an ongoing case had recently moved to New York, while the other was still in Albany.[117] Kempe's collection of fees from clients could also hinge upon Silvester's timely intelligence about locals. Remembering a client of Kempe's whose payment of fees was long overdue, Silvester alerted Kempe that the client had just been subpoenaed as a witness in a cause to be tried at the next Supreme Court session in New York City. If Kempe was not already impressed by Silvester's helpfulness, he certainly must have been when Silvester further offered to write to the client to ensure that he "prov[ides] himself with the cash before he goes down."[118]

Silvester's collaborations with Kempe, however, were not limited to serving as the latter's agent in his public and private businesses. When John Van Alen of Albany sought to sue the late sheriff Harmanus Schuyler for having unjustly arrested and detained him, he decided to retain both Silvester and Kempe as his attorneys. Van Alen especially wanted Kempe's services, but was unwilling to bear the hefty cost of having him travel to Albany. The solution was to hire Silvester, who was already "concerned for" Van Alen, to work as Kempe's proxy—he would represent Van Alen in the Circuit Court at Albany where the cause would be tried, but closely in accordance with "directions" given by Kempe.[119] It was not just anyone who could fulfill that role, however. Silvester's experience as a local attorney mattered, as evidenced in the way the

[117] Peter Silvester to John Tabor Kempe, Feb. 25, 1763, Ibid., Box 14, Folder 5.
[118] Peter Silvester to John Tabor Kempe, Apr. 2, 1764, Ibid., Box 14, Folder 5.
[119] John Van Alen to John Tabor Kempe, May 14, 1772, Ibid., Box 14, Folder 8; John Tabor Kempe to John Van Alen, May 8, 1772, Ibid., Box 15, Folder 6.

dispute was resolved. After several meetings between the plaintiff and defendant arranged by Silvester, Van Alen agreed to discontinue the lawsuit if Schuyler would pay all the costs. Schuyler was agreeable to the proposition, but he first wanted an assessment of the costs, which Silvester provided—the total costs including court fees and attorneys' fees would be somewhere between 15 and 20 pounds, according to his "ruff calculation." Schuyler finding the sum payable, Van Alen withdrew his charge, and a costly trial was avoided.

Silvester's role was essential in making the settlement possible. Not only was he well acquainted with both parties thanks to his years of practice in Albany, his experience in the local courts also enabled him to give a reasonable estimate of the court fees that would be assessed. Since Van Alen's complaint had already been submitted to the clerk's office, fees were charged even though a settlement had been reached before the court's session.[120] Also important was the fact that Silvester was capable of securing Kempe's fees. Kempe's involvement may well have been a factor that induced Schuyler to accept the settlement and pay the substantial costs. Perhaps due to such considerations, Kempe expected to receive his usual "council fee" even if the dispute did not proceed to a trial.[121] If no one had informed the parties of this, not to mention give an estimate of Kempe's fees and ultimately collect the money on his behalf, the settlement could have easily gone astray, with Kempe later demanding his fees and neither party ready to pay. As a seasoned attorney, Silvester knew how to ensure that this would not become a problem. Soon afterwards he settled Kempe's bill, as he had already explained to the parties as part of their agreement.[122]

Silvester was not the only local attorney with whom Kempe collaborated. Abraham Yates, Jr. also had an ongoing relationship with Kempe while working on several cases during the

[120] Peter Silvester to John Tabor Kempe, Jul. 14, 1773, Ibid., Box 14, Folder 5.
[121] John Tabor Kempe to John Van Alen, May 8, 1752, Ibid., Box 15, Folder 6.
[122] John Tabor Kempe to Peter Silvester, Sept. 18, 1772, Ibid., Box 15, Folder 5.

1760s and 1770s. The ejectment suit of Philip Philipse against the heirs of Cornelius Smith called for particularly close collaboration between the two lawyers over a span of nearly four years. The lawsuit stemmed from a disputed land title. The late Cornelius Smith had sold 100 acres of land, which, after going through several owners, had most recently been purchased by Philipse. Part of Smith's title, however, turned out to have been defective; shortly after his purchase, Philipse was ejected by another claim on the land, and a verdict was found against him for "about thirty acres of his best lands." Philipse accordingly sued the heirs of Smith, demanding that they compensate him for the loss he sustained due to their father's faulty, if not fraudulent, land title. As the value of the tract had risen precipitously over the years (from twelve pounds to nearly four hundred), the three heirs of Smith (Arent, Cornelius, and Harmanus) decided to find the best legal counsel available, mainly in order to minimize the amount of compensation owed to Philipse. The three heirs retained Yates as their main attorney and also hired Kempe to provide counsel, much like the arrangement between Silvester and Kempe in the suit of John Van Alen against Harmanus Schuyler.[123]

Throughout the collaboration, Yates prepared most of the groundwork for the defense. It was Yates who conducted research on the complex history of land transactions underlying the lawsuit, interviewing the defendants and other witnesses, and searching for relevant documents in the county clerk's and secretary's offices.[124] It was also Yates's responsibility to communicate the clients' demands to Kempe, and relay Kempe's instructions to them. The clients desired, for example, to "avoid the spring court" as it would be "very inconvenient" for them to travel during that season.[125] Kempe, in turn, offered expert legal counsel and directed the strategies for defense. As Yates and his clients awaited the first hearing, for example, Kempe predicted that the

[123] Abraham Yates, Jr. to John Tabor Kempe, Aug. 23, 1771, Ibid., Box 14, Folder 9.
[124] Abraham Yates, Jr. to John Tabor Kempe, Aug. 23, 1771 & Nov. 26, 1772, Ibid., Box 14, Folder 9.
[125] Abraham Yates, Jr. to John Tabor Kempe, Apr. 21, 1774 & Jan. 24, 1775, Ibid., Box 14, Folder 9.

opponent's lawyer would "bring the old writ of warrantia chartae" if the plaintiff decided to demand compensation in lands, and bring an "action of covenant" if his client instead chose to demand satisfaction in money. In either case, the opposing attorney would try to assess the amount of compensation based on the current value of the land in question. Citing an English precedent, Kempe opined that Yates could well obstruct this, arguing that the amount should instead be determined by the value of the lands "at the time of the sale"—a scenario that would greatly reduce their clients' amount of compensation.[126]

While Yates deferred to Kempe's superior judgment regarding complex points of law, his own expertise was also an important asset in the joint defense. It required a trained lawyer's keen eye to perform his part successfully, piecing together the key facts and evidences into a coherent narrative, and identifying the central points of law that Kempe should focus on. The question about which criteria would be applied in assessing the land's value and thus the amount of compensation, in fact, was raised by Yates.[127] After perusing details of the relevant land purchases and court decisions, Yates realized that Philipse's demand for compensation from the Smiths brought a "point of law" into question—whether the value of the land should be "regulated by the consideration in the original deed (which was at the rate of 20 [shillings] an acre) or whether it must be valued and damages allowed for the land as they now stand."[128]

Upon examining the will of Cornelius Smith, Yates also discovered that his clients, Smith's three sons, were in fact not specified as the executors of Smith. Writing to Kempe, Yates wondered if this did not destroy Philipse's entire cause, as it hinged upon the assumption that the three sons were legally responsible for the original defective land title and sale by their father—a

[126] John Tabor Kempe to Abraham Yates, Jr., Aug. 29, 1771, Ibid., Box 15, Folder 6.
[127] Abraham Yates, Jr. to John Tabor Kempe, Aug. 23, 1771, Ibid., Box 14, Folder 9.
[128] Abraham Yates, Jr. to John Tabor Kempe, Jul. 26, 1774, Ibid., Box 14, Folder 9.

liability which formally required the sons having been designated as the executors.[129] The court evidently did not find Yates's argument persuasive. This was probably due to the consideration that although the Smiths were not named as executors, they had so much "intermeddled [in their father's land transactions] to make themselves liable to be charged as executors." The case went on to trial, and the parties ultimately negotiated the sum that should be paid to Philipse. Still, Yates had raised a valid point with which Kempe, at least, initially agreed to be sufficient grounds to plead that the defendants were "never executors" in the first place, and hence exempt from any liability.[130] Clearly, Yates collaborated with Kempe as a legal professional in his own right.

As his collaborations with Silvester and Yates illustrate, when Kempe was hired by a litigant with a lawsuit pending in a county court, his role was typically to counsel the local attorney who would be standing in the court room. It was not infrequent for the roles to be reversed, however. In the suit of Philip Philipse against the heirs of Cornelius Smith, for example, Kempe later became the attorney designated to conduct the trial, once the case was projected to be removed from the county court to the Supreme Court. This was ultimately avoided, as the opponent's attorney, Peter Van Schaack, proposed keeping the case in the county court, thus sparing both parties an expensive trial at the higher court.[131] Still, Kempe had already obtained a warrant of attorney from his clients by this time, and began acting as their main lawyer, discussing the terms of a possible settlement directly with Van Schaack, the opposing attorney.[132] Regardless of their switched roles, Yates continued to work on the case alongside Kempe,

[129] Abraham Yates, Jr. to John Tabor Kempe, Feb. 4, 1774, Ibid., Box 14, Folder 9.
[130] Peter Van Schaack to John Tabor Kempe, Mar. 21, 1775, Ibid., Box 14, Folder 8; John Tabor Kempe to Abraham Yates, Jr., Feb. 17, 1774, Ibid., Box 15, Folder 6.
[131] Peter Van Schaack to John Tabor Kempe, Mar. 20, 1775, Ibid., Box 14, Folder 8.
[132] Abraham Yates, Jr. to John Tabor Kempe, Oct. 14, 1772, Ibid., Box 14, Folder 9; Arent Smith, Cornelius Smith, & Harmanus Smith to John Tabor Kempe, May 8, 1774, Ibid., Box 14, Folder 6.

supplying him with relevant documents and information collected in Albany, acting as a liaison between Kempe and the clients, and finally, helping Kempe collect his fees from them.[133]

A similar but slightly different type of arrangement between Kempe and a local attorney can be seen in his collaboration with Albany lawyer Rutger Bleecker on the ejectment suit of Ryer Schermerhorn against Simon Van Pelten. Initially Schermerhorn had only retained Bleecker, but when the opponent's attorney managed to remove the case from Albany County's Court of Common Pleas to the Supreme Court in New York City, Schermerhorn needed another attorney to represent him there. Kempe took the job, and eventually won judgment for Schermerhorn. Bleecker never left the case, however, arguably playing an equally important role as Kempe. It was upon Bleecker's recommendation, in fact, that Schermerhorn had applied to Kempe in the first place.[134] Once Kempe agreed to represent his client, Bleecker promptly supplied him with the relevant documents and the names of witnesses to be subpoenaed.[135]

As in his collaborations with Silvester and Yates, Kempe gave Bleecker instructions on what to prepare before the trial—for instance, that Bleecker should check whether all the relevant "title deeds are recorded at Albany," and have the missing ones immediately "proved and recorded," or at least prepare witnesses who could prove Schermerhorn's title at the trial. But Kempe also relied heavily on Bleecker's knowledge of the case as the local attorney, asking him for a detailed explanation of the "points in dispute."[136] Bleecker faithfully complied, laying out the historical and documentary bases of Schermerhorn's land claims, and also explaining some of the thorny legal issues underlying the dispute.[137]

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[133] Abraham Yates, Jr. to John Tabor Kempe, Nov. 26, 1772, Feb. 4, 1774 & Apr. 21, 1774, Ibid., Box 14, Folder 9.
[134] Rutger Bleecker to John Tabor Kempe, Jan. 26, 1771, Ibid., Box 13, Folder 2.
[135] Rutger Bleecker to John Tabor Kempe, Apr. 3, 1772, Ibid., Box 13, Folder 2.
[136] John Tabor Kempe to Rutger Bleecker, May 8, 1772, Ibid., Box 14, Folder 11.
[137] Schermerhorn's ancestor had purchased the land in question in 1684 from two fellow trustees of the town corporation of Schenectady. Van Pelten argued that the resultant title which Schermerhorn inherited was void,

Kempe was perhaps an especially frequent collaborator with local attorneys. His position as attorney general must have brought prestige and authority to any courtroom, and his vast connections with local officials and legal professionals throughout the province were probably a valuable asset in many lawsuits.[138] Kempe was not the only New York City lawyer who occasionally partnered with local attorneys, however. In the above case of Schermerhorn against Van Pelten, for example, what prompted Schermerhorn and Bleecker to reach out to Kempe was the discovery that their opponent's local attorney had already hired Whitehead Hicks, a New York City lawyer, to represent his client in the Supreme Court.[139] Also worth noting is that when Kempe was unable to attend a court session due to his public duties, he had James Duane, another noted lawyer, represent Schermerhorn in his stead.[140]

Duane was no stranger to collaborating with local attorneys. Defending a land patent of "New York proprietors" against New Hampshire claimants, he cooperated with one "Mr. Ten Broeck." The proprietors hired Ten Broeck as the local agent for managing their suit, a test case to establish their title, in the county court. Duane guided him on singling out a tract for the test case and preparing necessary documents and information, but also entrusted him with the important task of "fixing the form for which the ejectment is to be sued."[141] Benjamin Kissam, another active practitioner in New York City during the late colonial period, was frequently hired by clients in Queens County in Long Island, although he seldom personally appeared in the county court. It is likely that he was usually retained to work with a local attorney, providing

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since a deed among members of a body corporate was "irregular and contrary to the rules of law." Rutger Bleecker to John Tabor Kempe, May 16, 1772, Ibid., Box 13, Folder 2.

[138] Early in his career, Kempe was "seldom or never employed in any private suit," according to Lieutenant Governor Colden. Toward the eve of the Revolution, however, Kempe was "held in high reputation as a professional man" according to Thomas Jones, and had built a thriving private practice alongside his public career. Crary, "The American Dream," 184.

[139] Rutger Bleecker to John Tabor Kempe, Jan. 26, 1771, *Kempe Papers*, Box 13, Folder 2.

[140] John Tabor Kempe to Rutger Bleecker, Jun. 4, 1772, Ibid., Box 14, Folder 11; Rutger Bleecker to John Tabor Kempe, Nov. 24, 1772, Ibid., Box 13, Folder 2.

[141] James Duane to Col. Ten Broeck, Jun. 25, 1769, *Ten Broeck Family Papers*, AIHA, Box 1, Folder 14.

counsel through correspondence as Kempe often did.[142] Such collaborations were not unknown to the earlier generation of lawyers either. Soon after being admitted to the provincial bar in 1733, John Alsop began working with Ulster County lawyer Gilbert Livingston on several debt and trespass cases, exchanging information about clients and the status of their lawsuits in the county and New York City courts, and supplying each other with relevant documents, forms, and writs.[143]

To those clients who could afford it, pairing a local and elite lawyer made great sense. New York City's elite lawyers were widely considered as commanding superior legal expertise, but it was costly, if not sometimes impossible, to have them travel all the way to county courts. Especially since many lawsuits dragged on for several sessions, the burden of funding and coordinating a New York City lawyer's commute must have been practically insurmountable to many clients.[144] Local attorneys did not pose this problem, but they might not instill as much confidence in their clients, especially if the case at hand involved high stakes. By pairing the two, then, a client could benefit both from the elite lawyer's superior expertise, and from the local attorney's proximity to the client and local courts—that is, assuming that the lawsuit remained in the local court. The equation changed if the lawsuit moved to a different tribunal—for instance, from a county court of common pleas to the Chancery or Supreme Court of the province. Then it made more sense to have the New York City lawyer work as the main trial attorney. A local attorney could still be very useful in these situations, nonetheless, especially if he had already been representing the client in the local court. He could facilitate communication between the

[142] Johnson, *John Jay, Colonial Lawyer*, 16.
[143] John Alsop to Gilbert Livingston, Nov. 19, 1733, Apr. 10, 1734 & Feb. 19, 1735, *John Alsop Papers*, NYHS, Folder 1.
[144] See Chapter 6, pp. 288-289.

client and the New York City lawyer, and could also supply the latter with relevant documents and information culled from local sources.

In a legal system with multiple overlapping jurisdictions, there was always a possibility that a lawsuit could be tossed from a local to a higher tribunal. Hence a team of two lawyers, each specializing in a different geographical jurisdiction, added valuable versatility to any lawsuit or defense. This became an especially important asset in late colonial New York's legal milieu, as moving a case from one court to another emerged as a key legal strategy.[145] The ability to handle a trial in either court, and to position the trial in whichever court would be advantageous greatly enhanced the client's chances of success in a legal battle, as New York's lawyers and clients came to recognize. When Peter Silvester and John Tabor Kempe tried to move their client's lawsuit from the Mayor's Court of Albany City to a higher tribunal in New York City, for example, the opponent's attorney sought to obstruct the switch, evidently judging that the Albany Mayor's Court was the more advantageous battleground for his client. When the court nonetheless allowed Silvester's plea to move the case to New York City, the opponent's attorney began looking for a New York City lawyer who could appear in the higher court and "remove the cause back" to Albany.[146] To duel with a pair of local and elite lawyers, one had to counter with a similarly equipped team.

The specific arrangement between the attorneys, then, could take on various forms depending on the client's preferences and the exigencies of the particular case. The local attorney's role in a case might be as the elite lawyer's local agent, as a proxy to stand in trial in place of the elite lawyer, as a liaison between the client and the elite lawyer, or as someone who could assist the elite lawyer with an in-depth knowledge of local practice and local affairs.

[145] See Chapter 5, pp. 200-201, Chapter 6, pp. 281, 284-285.
[146] John H. Wendell to John Tabor Kempe, July 12, 1774, *Kempe Papers*, Box 14, Folder 9.

Usually it was some combination of all four roles, with the expected site of the trial often determining the relative, and sometimes shifting, weights placed on the local and elite lawyers' participation. For any of these arrangements to work successfully, it was essential that the local attorney have a solid understanding of formal procedures and legal doctrines. Without a shared base of knowledge among lawyers, it would have been impossible, say, for a local attorney to know what John Tabor Kempe meant by "the old writ of warrantia chartae."[147]

The lawyers' collaborations were already predicated upon the assumption that a certain level of professional expertise could be expected from a local attorney in New York. Working closely with an elite lawyer, however, no doubt deepened the local attorneys' understanding of, and commitment to, professionalized law. In this sense, these collaborations were one of the several facets that drew late colonial New York's elite and local lawyers closer into an extended professional community based on a shared knowledge of provincialized common law.[148]

With this shared knowledge, lawyers throughout the province were not only able to collaborate with each other directly, but could also easily exchange any variety of legal records, notes, and opinions. Lawyers' briefs—case notes which typically laid out the key facts, points of law, relevant English authorities and precedents, and court processes pertaining to a case in a systematic fashion—emerged as an especially important foundation for shared knowledge among late colonial New York's trained lawyers. Preparing for a lawsuit in 1774, for example, Peter Van Schaack asked James Duane for the "papers [he] made" regarding a similar lawsuit ten

[147] John Tabor Kempe to Abraham Yates, Jr., Aug. 29, 1771, Ibid., Box 15, Folder 6.

[148] In a similar vein, Richard Brown showed how colonial Massachusetts' lawyers gained political power and influence by utilizing their extensive communication networks throughout the province. Richard D Brown, *Knowledge Is Power: The Diffusion of Information in Early America, 1700-1865* (New York: Oxford University Press, 1991), 82-109.

years earlier, as "they might help [Van Schaack] in formeing a brief."[149] Certain briefs were considered particularly useful, and were copied, circulated, and referenced among New York's lawyers, as Peter W. Yates's quest for Joseph Murray's "old brief" illustrates. The brief, which regarded several trials involving the Rensselaer family's vast land titles, was known to "contain[] the substance of all the evidence" and would thus "be of great service to [Yates] in framing [his] brief." Yates expected William Livingston to have a copy of the brief, but finding that this was not the case, asked John Tabor Kempe to procure a copy from Judge David Jones, who reportedly possessed "Mr. Murray's papers" including the brief.[150]

Not only briefs, but also the formal declarations, pleas, and other writs prepared for provincial lawsuits were copied and shared among lawyers. The earliest generation of native-born lawyers built their expertise partly by carefully copying and preserving such documents prepared by the English barristers who practiced in New York in the late seventeenth and early eighteenth century.[151] The provincial law offices which began to spring up in the eighteenth century continued this tradition. A major task of the law apprentices was to compose, copy, and preserve countless forms composed or dictated by their mentors. It is not hard to imagine that some of the more studious apprentices not only perused and learned from these documents, but also set aside copies of the ones they deemed useful for their own future practice. The commonplace books of William Livingston and Benjamin Hilton, Jr. were the culmination of this mode of compiling and passing on legal knowledge. What composes the bulk of these dense,

[149] Peter Van Schaack to James Duane, 1774, *Van Schaack Family Papers*, Van Schaack, P.—End.
[150] Peter W. Yates to John Tabor Kempe, May 18, 1774, *Kempe Papers*, Box 14, Folder 9.
[151] Julius Goebel, "The Courts and the Law in Colonial New York" in David H. Flaherty, ed., *Essays in the History of Early American Law* (Chapel Hill: University of North Carolina Press, 1969), 245-280.

lengthy volumes are copies of hundreds of legal documents prepared by provincial lawyers for various lawsuits in late colonial New York's courts.[152]

Since the provincial legal system hardly mandated courts to leave any official records aside from the compact minutes kept by clerks, lawyers' notes and records on provincial precedents became the main ingredients upon which the legal history of the province was written, understood, and passed on (and many of the clerks and judges who composed the minutes and judgment rolls, for that matter, were also former or practicing lawyers). Given the centrality of precedents in common law systems, such control over the interpretation of provincial legal history gave the lawyers a powerful means to shape New York's provincialized common law. Provincial statutes, another important element of provincialized common law, were also influenced by lawyers. As noted earlier, assemblymen often requested prominent lawyers to draft new or revised statutes. The task of compiling the statutes was also entrusted to lawyers. Through various formal and informal associations, moreover, lawyers refined their collective interpretations of how provincial statutes and precedents should be applied in the courts.

New York lawyers' shared understanding of provincialized common law, in turn, firmly undergirded their growing networks of communication, education, collaboration, and association. The lawyers' active networking boosted their sense of solidarity, pride, and mutual respect as members of a professional community. Peter Van Schaack illustrated this well while relaying information between his former and current mentors, Albany's Peter Silvester and New York City's William Smith, Jr., respectively. In 1768, Smith was retained to defend Indian trader George Klock against accusations that he had fraudulently purchased a large tract of land from

[152] Livingston, *Book of Precedents*; Hilton, *Book of Entries.*

the Mohawks.[153] Evidently interested in Klock's behalf, Silvester desired that his information supporting Klock's land claim would be admitted to the court as evidence. Reporting how Smith handled Silvester's request, Van Schaack wrote:

> I asked Mr Smith to make the necessary motions, at the same time observing that if it were any way troublesome, he wod tell me that I might apply to some of the younger brethren. He readily took the trouble on himself & tho I did not hear him move in your causes [...] I am well assured he has transacted the affair. He always seems ready to serve you. Your letter to him about Klock's affair was read in court & is on record. Mr Smith read it & Klock swore to the truth of the facts.[154]

Van Schaack's immense respect for Smith is evident in the way he characterizes the latter's services for Silvester. A simple task such as presenting a motion was beneath an eminent lawyer of Smith's stature. If he nonetheless "took the trouble" himself, it was a favor worth noting. And if there was some truth in Van Schaack's glowing account of his mentor's conduct, Smith does seem to have treated Silvester with some degree of personal fondness and respect.

A few years earlier, Silvester happened to be the object of express respect from another prominent lawyer. In 1762, John Tabor Kempe was asked by one Mr. Leake in Albany to issue two writs against William Chace, whom Leake intended to sue in the Supreme Court for damages sustained by assault and battery. Kempe was reluctant to comply, however, when he discovered that Leake had already retained Silvester as his attorney. Although Kempe ultimately did issue the writs, it was not before he wrote an apologetic letter to Silvester, emphasizing that

[153] John Tabor Kempe's Notice to William Smith, Jr. on The King v. George Klock, Apr. 29, 1769, *Kempe Papers,* Box 1, Folder 6.
[154] Peter Van Schaack to Peter Silvester, Aug. 1, 1768, *Van Schaack Family Papers*, Van Schaack, P.—End.

he was "unwilling to do what might in the least give you any reason to think I acted ungenteely," and that he had to comply with the client's demands only because he was "very pressing." At pains to demonstrate that he had "no intent to injure" Silvester by cutting into his local clientele, Kempe assured that he was "very content" to have Silvester remain "the attorney on record" on the case. It was probably no coincidence that following this respectful correspondence, the two lawyers became frequent collaborators throughout the remainder of the colonial period.[155]

Representing adversaries in a lawsuit did not prevent lawyers from treating each other with respect. Working on opposite sides of a lawsuit, in fact, often called for a great deal of cooperation, as both attorneys tried to avoid unnecessary delays and costs for their clients, and ensure that they would both recover their fees from the clients. Take, for instance, the interaction between lawyers Thomas Smith and John Tabor Kempe as adversaries in a debt case. In 1775, Robert Sinclair hired Smith to sue Thomas Swords on a bond. Swords hired Kempe for his defense. Upon receiving notice that Kempe would be the defending attorney, Smith sent him the declarations he drew up for Sinclair. This gave Kempe time to write to his client Swords and ask for "instructions for his defence." Kempe, however, feared that "the severity of the season, and the few opportunities at this time of the year of conveying letters" might prevent his client from responding in time for the upcoming court session. Thus being unprepared to present a plea, Kempe begged Smith not to enter judgment during that session, as Kempe would then have to move the court to set the case aside until the next session, which would "answer no end but an increase of expence." Kempe assured Smith that he did "not mean to [purposefully] affect a delay."[156] Evidently trusting Kempe's word, Smith complied with his request.

[155] John Tabor Kempe to Peter Silvester, Mar. 19, 1762, *Kempe Papers*, Box 15, Folder 5.
[156] John Tabor Kempe to Thomas Smith, Jan. 13, 1775, Ibid., Box 15, Folder 5.

As the next session approached, however, plaintiff Sinclair grew restive. Fearing that his debt was "in danger," he cajoled Smith to ensure that the lawsuit would not be further postponed. Smith accordingly wrote to Kempe, explaining, apologetically, that his client was "very pressing," and requesting Kempe to put in his pleas by the following week, so that Smith could make due preparations for a trial in the upcoming session.[157] Their clients' interests might have been at odds with each other, but this did not keep Kempe and Smith from politely exchanging requests, and trying to reach a mutual understanding about the proceedings.

All of this show of solidarity and mutual respect among lawyers could have only boosted the elite lawyers' pride and confidence as leaders of a tight-knit, influential, and arguably respectable professional community. As William Livingston saw it, in general there was "not a more amiable or refulgent character than that of a lawyer of capacity and honour: He is a kind of star in the firmament of the common wealth, and his house as it were an oracle to the whole country around him."[158] Lawyers should not take such veneration for granted, however; since a lawyer's reputation, "like a woman's," as Peter Van Schaack put it, "is often lost by one error."[159] Indeed, one of the neighboring colonies seemed to demonstrate this point perfectly. According to Lewis Morris, a legal professional who had served as New York's chief justice, Connecticut's legal practice was characterized by "low craft and cunning." Lest anyone doubt the depth of his contempt, in his will Morris stated his "express will" that his son should never be sent to Connecticut for any part of his legal education.[160]

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[157] Thomas Smith to John Tabor Kempe, Mar. 11, 1775, Ibid., Box 14, Folder 6.
[158] Klein, ed., *The Independent Reflector,* 299.
[159] Schaack, *The Life of Peter van Schaack*, 14.
[160] New York, *Abstracts of Wills on File in the Surrogate's Office, City of New York,* Vol. VI (New York, NY, 1898), 174. Although not specifically targeting lawyers, William Livingston expressed similar contempt toward Connecticut's legal culture—there was "little dependance there [...] on the matter of words & promises" of their people, and they "never [pay] without legal compulsion." Nov. 25, 1760 & July 18, 1763, *William Livingston Papers*, Massachusetts Historical Society, Boston, Letterbook, 1754-1770.

New York's leading lawyers took it upon themselves to prevent the reputation of their legal community from descending to similar levels. Hence, despite feeling certain that he had been wronged by a fellow lawyer regarding the collection of his fees, John Tabor Kempe nonetheless proposed that they settle the dispute quietly through an arbitration by other lawyers. More than anything, Kempe explained, this was "for the credit of the profession."[161] Constantly worrying that unqualified practitioners were pulling down the public's esteem for the province's lawyers, William Smith, Jr. and William Livingston strenuously argued for a more restrictive educational and licensing system controlled by elite judges and lawyers.[162] Enough leading lawyers agreed with Smith and Livingston to enable the bar agreements of 1756 and 1764, which, as discussed earlier, imposed strict conditions upon new admissions to the provincial bar.[163] Not only did New York's legal community comply with these agreements, but sometimes they also actively sought to push out transgressors who tried to practice in defiance of the boundaries set by the community.

A lawyer without the support of New York's legal community was unwelcome to practice anywhere in the province, as English attorney John C. Knapp found out in 1764. Knapp had practiced for several years in the King's Bench at Westminster, but after being indicted for defrauding several clients, decided to make a fresh start at the outskirts of the empire.[164] Although his reputation had been tarnished by the indictment, Knapp expected that obtaining a New York attorney's license would be "no more than a mere matter of form." An attorney who had been duly admitted to the King's Bench, the "high court which presides over all others,"

[161] John Tabor Kempe to John Alsop, Feb. 19, 1761, *Kempe Papers*, Box 14, Folder 11.
[162] Klein, ed., *The Independent Reflector*, 303–304; idem, *The American Whig*, 155–157, 204-207.
[163] Hamlin, *Legal Education in Colonial New York*, 160–164.
[164] *New-York Mercury*, Feb. 4, 1765; Johnson, *John Jay, Colonial Lawyer*, 32–33.

surely had the right, he reasoned, to "act[] in any part of his majesty's dominions."[165] New York's bar, however, proved far less welcoming than Knapp imagined. Knapp's solicitation of Attorney General John Tabor Kempe's support apparently yielded little result. Neither could he secure a meeting with William Smith to ask for his support.[166]

With John Morin Scott, another leading member of the bar, Knapp did have a meeting, but hardly the sort he had desired. Scott, representing a silversmith to whom Knapp owed about thirty pounds, had had Knapp arrested upon a writ issued out of the Supreme Court. Knapp subsequently went to Scott's office, partly to pay the debt, and partly to protest the "ill usage" he had unduly received. There was "no foundation" to have him arrested on the small debt rather than simply serve him notice, Knapp complained, especially when he owned a house in the city and there were no "signs of his running away." Scott curtly retorted that Knapp's "character was not sufficient," suggesting that he could not be trusted to appear in court or settle the debt if served a summons. Knapp's offering 35 pounds to cover the debt and costs only escalated the tension, as Scott staunchly refused to lift the charge against Knapp. When Knapp protested the "uncommon usage" he was being subjected to, and pointedly remarked that such treatment was not the "behaviour of a gentleman," Scott "changed colour"; angrily calling Knapp a "scoundrel," he struck him a "severe blow above his right breast." As Knapp gathered himself and tried to fight back, two other lawyers who had been in the office (John McKesson and Gilbert Burger) held him down. Having given Knapp a sound beating, Scott, with "great wrath," ordered McKesson and Burger to "throw the dog, throw the scoundrel rascal out of doors." The two men

[165] John Coghill Knapp to John Tabor Kempe, Aug. 2, 1764, *Kempe Papers*, Box 13, Folder 9.

[166] John Coghill Knapp to John Tabor Kempe, Apr. 30, 1764, Ibid., Box 13, Folder 9. Knapp's letter does not indicate which Smith (father or son) he had tried to meet with; it would have made sense for Knapp to try soliciting support from either, as both were influential members of the legal elite.

complied, thrusting Knapp into the street "with as much force as he believes they were able [to]."[167]

The bizarrely violent episode may not typify the way in which New York's lawyers treated outsiders, but it nonetheless demonstrates the legal community's collective resolve to control legal practice in the colony. As Scott was surely aware of, Knapp had opened a scrivener's office soon after arriving in New York City.[168] Not allowed to practice in the provincial courts (but still hoping to win permission eventually), Knapp had nonetheless decided to put his expertise to use by providing all sorts of legal services that could be performed without entering a courtroom—preparing legal documents, offering advice on legal matters, taking and extending loans, and mediating the sale of land and slaves.[169] In the barrage of advertisements he put out in two of the province's major newspapers, he pronounced himself a "Gentleman from London, who received his education at the University of Oxford, was regularly bred to the Profession of the Law, and has for many Years been on Record one of the Attornies of his Majesty's high and honourable Court of King's Bench at Westminster."[170]

As Knapp and Scott both probably knew, this was a direct challenge to New York's recently reinforced bar agreement. Here was a lawyer practicing in the heart of the province, albeit strictly out of court, by openly circumventing the restrictions on legal practice agreed upon by the provincial lawyers.[171] Further, he did so while publicly advertising his credentials as a

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[167] John Coghill Knapp's complaint against John Morin Scott, John McKesson and Gilbert Burger, n.d., Ibid., Box 11, Folder 2.

[168] Advertisement, "The Office of a Scrivener and Register," *New-York Gazette,* Jun. 25, 1764; *New-York Mercury*, Jul. 9, 1764.

[169] *New-York Gazette*, Jun. 4, 1764; *New-York Mercury*, Jul. 23, 1764.

[170] *New -ork Gazette*, Jun. 4, 1764.

[171] Herbert Alan Johnson also makes a similar point about the New York lawyers' reaction against John C. Knapp's bid to practice in the province. By doing so, according to Johnson, Knapp "raised the ire of the legal fraternity." Johnson further conjectures that when New York's Sons of Liberty reputedly put up "placards to hunt as with Hounds John Coghill Knap a lawyer interloped amongst them in 1765," they may have done so due to the prodding of provincial lawyers. Johnson, *John Jay, Colonial Lawyer*, 31–33.

barrister from England, implying that the greater authority of Westminster courts superseded whatever restrictions were imposed by a provincial bar. Given this context, it would not be unreasonable to surmise that Scott's excessive animosity toward Knapp reflected the provincial legal elite's jealous control over legal practice in New York. Knapp might have been a "gentleman" of the law in London, but that did not entitle him to question the authority of New York's gentlemen of the law. He was merely a "scoundrel" who did not belong in any New York law office; if he had to be shown this by being physically thrown out of a law office, then so be it. The two younger lawyers' compliance with Scott's orders and their willing participation in the violent treatment of Knapp, in turn, demonstrate the legal community's solidarity with elite lawyers as the acknowledged leaders. As Knapp learned the hard way, New York's legal community had become a collective force to be reckoned with.

* * *

In their 1757 petition against the continuation of the Five Pounds Act, fifteen leading lawyers of the colony laid out a long list of objections against the enlarged civil jurisdiction of justices of the peace. One of them was that the justices' enlarged jurisdiction would severely diminish the number of cases brought to the county courts of common pleas. In explaining why this would be detrimental to the colony's entire legal system, the lawyers presented what was perhaps the clearest articulation of their underlying vision of provincial legal development.

> The Law is a Science which by its particularity, is become so vastly extensive, that a long and various Train of Practice, is necessary to qualify a man to appear in it, with Honour to himself, or Safety to his Clyent. The County Courts have been the common School, in which young Gentlemen have made their first Essays, and prepared themselves for Business of greater Importance in the Superior Courts. If the Publick therefore is concerned in the Abilities of the Professors of the Law, and the County Courts tend to encourage the Young Practisers, and perfect them for Management of Causes of Moment in the Supream Court,

> we assure ourselves that this House, will not consent to a Bill, which by abridging the Business of the Common Pleas, opens a door for the Introduction of Ignorant Pretenders, into the most important and supreme Judicatories, to the Disgrace of the Profession and the publick Detriment.[172]

As self-conscious leaders of the provincial legal community, the "professors of the law" held themselves responsible for preventing a "disgrace of the profession." More was at stake than just reputation, however. By the mid-eighteenth century, the legal elite had become well aware that young, aspiring local attorneys were an important pillar of the legal community—their activities helped extend the reach of professionalized law throughout the province, and thereby also contributed to the collective authority and influence of the legal profession. By reducing their business in the county courts, the Five Pounds Act threatened to stymie the growth of local attorneys, and hence undermine the overall strength of the legal community.

Also amply expressed in the passage was the legal elite's idea of provincial legal education. The lawyers made a significant statement, especially following their premise that "law is a science" requiring long and careful training, in claiming that the provincial county courts were a key site of legal training. The days when the Inns of Court were the golden standard of Anglo-American legal education were long gone. Not only was training in the metropole unnecessary, but perhaps even no longer sufficient for a prospective provincial lawyer. New York's legal community had built its own language of provincialized common law, and its own system and rules for training new lawyers in that language. Only those who had gone through such training in the provincial courts and law offices, and had been duly admitted by the provincial legal community, were ready to practice in New York.

[172] *Journal of the Legislative Council*, II: 1325-1326.

By the late colonial period, the community of New York's lawyers was firmly buttressed by sprawling networks extending throughout the province, and a shared outlook on the direction of provincial legal development—they wanted uniform, formal procedures and doctrines based in English common law, but with New York's lawyers directing how those procedures and doctrines are realized in the provincial context. The reception of that vision outside of the legal community was a different matter, however. While many of the county-level courts seemed to embrace the thrust of professionalized law, New York's lawyers were also discovering just how many local judges, justices, and ordinary inhabitants were not ready to, or simply unwilling to, partake in the lawyers' vision of provincial legal development.

CHAPTER 5

"I am not a Judge of the Law"

Local Courts and Legal Professionalization

Recent literature on early American law has emphasized the decline of communal modes of dispute resolution during the colonial period. Departing from earlier studies highlighting legal changes that took place in the early United States, Bruce Mann, Deborah Rosen and others have argued that jury trials, arbitration, and justices' summary proceedings either diminished in significance or lost their communal aspects in the early-eighteenth century.[1] Colonial New York was no exception, according to Rosen's close analysis of available court records. Formal court records, however, tell very little about how legal change affected society, or how people responded to the change. Although inconclusive in nature, less systematic records such as letters of complaint, petitions, and informal case notes nonetheless provide valuable information about how legal changes were experienced on the ground. Taken together, they strongly suggest that the shift in New York's local legal practice was far from a simple "rationalization of the legal system" spurred by commercialization.[2] Legal change in New York's local communities, on the contrary, was a contentious process fraught with confusion, dissension, and conflict.

With the exception of a few areas of adjudication such as small debt litigation, late colonial New York's local courts were under mounting pressure from royal officials, appellate

[1] Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987); Deborah A. Rosen, *Courts and Commerce: Gender, Law, and the Market Economy in Colonial New York* (Columbus, OH: Ohio State University Press, 1997); Cornelia Hughes Dayton, *Women before the Bar: Gender, Law, and Society in Connecticut, 1639-1789* (Chapel Hill: University of North Carolina Press, 1995); James A. Henretta, "Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America," in Michael Grossberg et al. ed., *The Cambridge History of Law in America*, 3 vols. (Cambridge: Cambridge University Press, 2008), I: 555–92.

[2] The quote is from Rosen, *Courts and Commerce*, 62.

judges, and lawyers to conform to the formal rules and procedures of the colony's higher courts. The pressure of legal professionalization impacted all of the local communities' traditional means of resolving disputes, from the justices' summary proceedings and jury trials to arbitration and communal regulations. The repercussions of this impact was much more complex than a straightforward adjustment to uniform professional standards, however, both because the legal professionals' influence was multi-faceted, and because the responses of local inhabitants and legal authorities were varied.

Local Justices, Professionalized Law, and Legal Authority

Local justices often had difficulty resolving disputes stemming from competing property claims and deep-set ethnic and religious rivalries. Another important factor that gave late colonial New York's justices increasing difficulty was the rise of professionalized law. Most of the individual justices' proceedings in late colonial New York still took place without the presence of a lawyer, and with minimal reference to formal procedures and doctrines. Lawyers, however, could nonetheless profoundly affect justices' courts without stepping into them, by enabling more litigants to circumvent local adjudication or overturn justices' decisions. For cases concerning values of 20 pounds or more, New York's legal system allowed litigants to either directly initiate a lawsuit in the Supreme Court of the province, or appeal from a lower court to the Supreme Court through a writ of error, certiorari, or habeas corpus.[3] Lawyers helped clients take their causes to the Supreme Court in numerous ways, including by preparing the appropriate writs for them. Albany lawyer Benjamin Hilton, for example, carefully studied the forms and

[3] In 1769, the minimum value of a case to be tried in New York's Supreme Court of Judicature was raised from 20 pounds to 50 pounds. The statute was repealed in the following year, however, pulling the lower limit down to 20 pounds again. An Act for preventing Suits being brought in the Supreme Court of this Colony for any Sums not exceeding Fifty Pounds, May 20, 1769, *N.Y. Col. Laws*, IV: 1088-1090; Herbert Alan Johnson, "Civil Procedure in John Jay's New York," *The American Journal of Legal History* 11, no. 1 (1967): 70, 77.

provincial precedents of all three types of appeals from local courts to the Supreme Court. Hilton's commonplace book includes appeals from each type of local court—a writ of error directed to the Albany Court of Common Pleas, a habeas corpus presented to the Albany City Mayor's Court, a certiorari served to an Albany justice of the peace, and so on.[4]

The networks between local attorneys and New York City lawyers also greatly facilitated the litigations and appeals of local clients to higher courts in New York City. When the judgment he had obtained for his client in the Mayor's Court of Albany City was appealed by the opposing attorney, Peter W. Yates asked John Jay to represent his client in the Supreme Court. The two closely cooperated on the matter, with Yates supplying the facts of the case, and Jay focusing on the relevant points of law. Yates and Jay failed to sustain the judgment for their client, however, as the Supreme Court overturned it—the opposing lawyers had evidently done a better job for their client.[5]

The prospect of losing judgment in an expensive trial in the Supreme Court, as the client of Yates and Jay did, certainly would have deterred litigants from easily appealing against lower court decisions. Lawyers played an important role in helping potential appellants overcome this trepidation by assessing their chances of success in different courts. John Tabor Kempe, for example, advised a client against removing his cause from the Albany County court to the Supreme Court, as a different outcome was unlikely, and hence a certiorari would lead to no other end "but that of more expence."[6] Because lawyers were capable of providing such informed assessments, litigants could appeal to higher courts with fair confidence when their lawyers told them it would be worth the extra cost and trouble.

[4] Benjamin Hilton, *Book of Entries*, NYSL, 166, 171, 190, 487, 532-533.
[5] Herbert Alan Johnson, *John Jay, Colonial Lawyer* (New York: Garland Pub., 1989), 103–104.
[6] John Tabor Kempe to Lieutenant Colonel Bradstreet, Jan. 10, 1763, *John Tabor Kempe Papers*, NYHS, Box 14, Folder 11.

Those assessments enabled the strategic usage of appeals. Litigants in late colonial New York did not appeal to higher courts simply because they felt aggrieved by a lower court's judgment and expected justice to be served in the appellate court. If many ordinary New Yorkers were ignorant of formal law, by the late colonial period they were at least well aware that formal procedures and doctrines played a much larger part in the higher courts' decisions than in the lower courts. This is why they could expect a different decision by appealing to a higher court. But to make this a well-calculated legal strategy, they needed the guidance of lawyers conversant with the professionalized legal language of higher courts. A skilled lawyer met this demand by assessing the chances of a lawsuit's success in different courts, and accordingly help the client move a lawsuit to a different court, or conversely, prevent the opponent from moving the case out of the local court.

As the positioning of trials in different courts became a key legal strategy, lawyers spared no effort in ensuring that cases were tried in the courts most advantageous to their clients.[7] When judgment went against his client in the Mayor's Court of New York City, for example, William Livingston promptly moved for a habeas corpus up to the Supreme Court. When the jury in the Supreme Court trial also found a verdict against his client, Livingston brought a writ of error now seeking to appeal the case to the governor's council. Demonstrating the unique advantages a well-connected elite lawyer could offer, Livingston, in the meantime, already began to secure the support of several members of the council for his client. The opposing party's attorney objected to the motion, however, eliciting a royal instruction limiting appeals from the Supreme Court to

[7] See, for example, the case discussed earlier where the defendant's local attorney tried to obstruct the plaintiff's attorney from moving the lawsuit from the Albany Mayor's Court to the Supreme Court, and when that failed, hired a New York City lawyer to remove the case back to the Albany Court. See Chapter 4, p 184. See also Chapter 6, pp. 281, 284-285.

the council to cases of at least 300 pounds sterling value.[8] Still not giving up, Livingston argued that the instruction lacked legal force as it had yet to be enacted by Parliament or the provincial legislature. His efforts ultimately failed, as the council decided not to grant the writ of error.[9] But Livingston's series of motions shows the importance New York's lawyers attached to moving causes between different courts, and how much legal expertise they applied to doing so.

Appealing to the Supreme Court was the most common, but not only, way to circumvent a local court's decision. With the help of lawyers, litigants expecting an unfavorable outcome in the local court could have their cause tried in another court from the outset, as did Henry Chase of Fishkill, Dutchess County. Distrusting his ability to get a sufficient number of witnesses to strengthen his cause in the local court, and fearing that his well-connected opponents would bring in "as many men as they please" as witnesses and jurors, Chase wrote to his lawyer John Tabor Kempe that he would prefer to "put [the case] into Chancery."[10]

Litigants without legal representation were helpless against opponents who hired attorneys to move cases to higher courts. David Lyon had sued Joseph Brandige, Jr. in the Westchester County Court of Common Pleas, regarding a disagreement over the purchase of a farm (Brandige changed his mind after signing the deed, according to Lyon, and refused to cede the farm). To Lyon's dismay, however, Brandige moved the case to the Supreme Court by habeas corpus.[11] "Wholy ignorant of law suits," Lyon was at a loss about how to proceed. Should he file a declaration in Westchester or in New York? And if a special bail was required, should it

[8] *New York Colonial Manuscripts, 1638-1800*, NYSL, Box 4, Folder 2.
[9] Milton M. Klein, *The American Whig: William Livingston of New York* (New York: Garland Pub., 1993), 178–180.
[10] Henry Chase to John Tabor Kempe, May 21, 1772, *Kempe Papers*, Box 13, Folder 3.
[11] New York lawyers evidently used the writ of habeas corpus for a wide range of appeals, including even for civil cases. William Livingston, for instance, studied habeas corpus mainly in the context of appeals against judgments in civil courts. The exemplary writ of habeas corpus Livingston copied in his commonplace book was used for moving a debt case from a county court of common pleas to the Supreme Court. The writ mentioned that the appellant had been detained and imprisoned by the lower court, but this was likely no more than a legal fiction to justify using habeas corpus as an all-encompassing means to move a cause to a higher tribunal. William Livingston, *Book of Precedents*, NYSL, 34.

be given before one of the Westchester county judges or before a Supreme Court justice? In the end, Lyon had no other recourse than to look for a lawyer.[12]

Even when convinced of the need for legal representation in moving a case to a higher court or preventing such removal, it was not always easy for litigants to retain a competent lawyer. Elisabeth Clarke of Fishkill, for example, felt betrayed when the local attorney she had initially tried to employ turned his back on her after her opponents "jointly gave him a vastly considerable greater sum than I offered him." Once retained by Clarke's opponents, the attorney immediately "undert[ook] to clear them at New York [City]" rather than in the local court. Being a poor widow, Clarke could only rely on her witnesses' good will to have them appear at the trial—a request which few would be ready to comply with if it entailed travelling all the way to New York City. Having them summoned by the court would have forced their compliance, but obtaining subpoenas called for an attorney's help. To make things even tougher for Clarke, the opponent's attorney was targeting the January session, during which the deep snow would further discourage Clarke's witnesses from making the burdensome trip.[13]

Local justices were just as helpless against litigants who hired lawyers to remove their cases to higher courts. Justices John Duncan and Daniel Campbell of Schenectady, for instance, complained to the attorney general in 1763 that a delinquent person indicted in a local court for beating and abusing a woman had employed an attorney and was preparing to move his case to the Supreme Court in New York, knowing that the woman would not be able to defend her suit there. The justices lamented their lack of any "immediate remedy," other than to beg the attorney general's interposition against what was a clear contrivance "in order to escape justice."[14]

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[12] "The Case stated between David Lyon & Joseph Brandige Jn[r]," *John Chambers Papers*, NYSL, Box 6.
[13] Elisabeth Clarke to John Tabor Kempe, Dec. 29, 1764, *Kempe Papers*, Box 13, Folder 3.
[14] John Duncan and Daniel Campbell to John Tabor Kempe, March 14, 1763, *Kempe Papers*, Box 13, Folder 6.

If appealing to higher courts gave litigants a means to circumvent local courts, and thereby weaken the justices' sway over local disputes, professionalized law also encouraged direct challenges against the authority of local justices. In 1765, the provincial legislature passed an act to restrict appeals against local justices' rulings, by requiring appellants to submit an affidavit formally declaring the error or unfair practice of the justice in question.[15] The statute might have discouraged some litigants from trying to reverse a justice's decision, but for those willing to go through the trouble of making a sworn statement, the requirement induced appellants to more directly criticize the justice's practices. While trying to obtain a certiorari against Justice Jacobus Ter Boss Jr.'s judgment on a small claim, for example, Fishkill's John Cooper wrote to Attorney General John Tabor Kempe asserting that the justice was known for acting "maliciously [and] arbitrarily," thus "indanger[ing] the publick peace."[16]

The intended audiences of those appeals and complaints against justices, as in Cooper's letter, were elite legal professionals—the judges of the Supreme Court, the attorney general, the clerk of the Chancery, and members of the council (many of whom were trained in law). By the late colonial period, elite lawyers in such key positions had made professionalized law the dominant language of New York's major tribunals, inducing many litigants to believe that their complaints highlighting a local justice's irregular, unprofessional practices would find sympathetic ears in the higher courts. In most instances, litigants were right to believe so.

Committed to their task of settling uniform practice throughout the colony, New York's attorneys general frequently admonished and prosecuted local justices for what they saw as lax, arbitrary proceedings.[17] While lacking the attorney general's power to prosecute, prominent

[15] "An Act to restrain the bringing of Writs of Certiorari and Writs of Error for removal of Judgments given before Justices of the Peace within this Colony," *N.Y. Col. Laws*, IV: 861, V: 313–314.
[16] John Cooper to John Tabor Kempe, Oct. 11, 1770, *Kempe Papers*, Box 13, Folder 4.
[17] See Chapter 1.

lawyers such as William Smith, Jr. and William Livingston did not hide their equally pejorative views of the colony's justices of the peace, criticizing in numerous public writings their supposed lack of integrity and legal knowledge.[18] Judges of county courts, who were generally presumed to be the more experienced and knowledgeable among each county's justices, were not exempted from the legal elite's criticisms either. Livingston derided the county judges for understanding "as little of the law as any yeoman in their jurisdiction."[19] Robert R. Livingston, Jr. agreed with his distant uncle. Typically "chosen from the more reputable farmers," county judges were generally not "acquainted either with rules of law or the practice of courts," rendering their proceedings "wavering & inconsistent." To remedy this problem, Livingston proposed that a well-trained lawyer be seated as itinerant chief justice for three or four counties, alternately presiding over their sessions and thus mitigating the ignorance of the lay county judges. For a fee of three shillings for every writ issued in those courts, Livingston offered to serve as chief justice for the counties of Albany, Ulster, and Dutchess, and recommended John Jay to cover Westchester and Orange Counties.[20] The plan never materialized, but it showed the extent to which New York's legal elite disdained local judges and justices for their supposed ignorance and ineptness.[21]

Local attorneys also contributed to the legal professionals' assault on the authority of local justices. Writing to the attorney general on behalf of a local client, for example, Albany lawyer William Corry imparted his opinion about several local justices: "Ranselar, Funda, and

[18] See Chapter 1, pp. 20, 52-53, Chapter 8, pp. 402-406.

[19] William Livingston et al., *The Independent Reflector, Or, Weekly Essays on Sundry Important Subjects, More Particularly Adapted to the Province of New-York* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1963), ed. Milton M. Klein, 303.

[20] Robert R. Livingston, Jr. to Governor William Tryon, 1773, *Robert R. Livingston Papers*, NYHS, microfilm, reel 1.

[21] Livingston and Jay later expanded the proposition to cover all of the province's counties, including Tryon County and Richmond County. William Smith, *Historical Memoirs of William Smith, Historian of the Province of New York, Member of the Governor's Council and Last Chief Justice of That Province under the Crown, Chief Justice of Quebec* (New York, 1956), ed. William H. W. Sabine, 129–132. Johnson, *John Jay, Colonial Lawyer*, 148–149.

one Van Aelstyn all justices of Kinderhook and Claverack do more irregular and unwarrantable actions than all the justices in ye county of Albany."[22] Peter Silvester complained to the attorney general about a local justice's unjust proceeding against his client—the justice ordered his client to jail, ignoring the bail offered for her discharge.[23] Bartholomew Crannell of Dutchess County similarly reported a local justices' irregular use of a warrant against his client.[24]

With legal professionals in various positions casting a critical eye on them, and litigants, often encouraged by lawyers, ready to appeal or complain about their proceedings, late colonial New York's justices frequently found themselves under intense scrutiny. When served a writ of appeal, justices had to detail their proceedings for the case in question—something they normally never had to do. Since these "returns" were written for the eyes of the Supreme Court judges (and typically also for an attorney representing the appellant), the justice had to narrate his proceedings in the language of professionalized law—complete with the usual long-winded phrases conventional in common law pleading, and with frequent references to statutes, evidences, and other facts specifically proving the legality of each step of the proceedings.[25] Even after submitting a properly drafted "copy" of the proceedings, a justice could still be questioned by the appellant or opposing attorney as to whether he truthfully reported the proceedings as they had taken place.[26] Not surprisingly, some justices opted to employ a lawyer when they had to defend their proceedings before an appellate court.[27]

Lay justices were understandably apprehensive about having to defend their conduct in front of legal professionals. Some litigants even tried to use this apprehension to their own

[22] William Corry to William Kempe, Jul. 24, 1755, *Kempe Papers*, Box 15, Folder 8.
[23] Peter Silvester to John Tabor Kempe, Sep. 3, 1771, Ibid., Box 14, Folder 5.
[24] Bartholomew Crannell to John Tabor Kempe, 1761, Ibid., Box 11, Folder 10. See also Chapter 1, pp. 22-23.
[25] "Return of a Justice to a Certiorari, to the Supreme Court in an Action of Trespass," Hilton, *Book of Entries*, 187.
[26] William Davenport to John Tabor Kempe, Dec. 10, 1770, *Kempe Papers*, Box 13, Folder 6.
[27] The King v. Moses Owen, Ibid., Box 2, Folder 2.

advantage. After obtaining judgment against his debtor Peter De Witt in the Dutchess County Court of Common Pleas, Timothy Shaw brought the resultant execution to a local justice, Clear Everit (presumably because he lived near De Witt). Everit accordingly attempted to recover the debt from De Witt. Finding him unable to pay the sum, Everit was about to commit De Witt to jail, before Shaw intervened. Perhaps hoping that De Witt might be able to raise the sum if given time, Shaw asked Everit not to imprison the debtor. When De Witt ultimately failed to pay the debt, however, Shaw blamed the justice for letting the debtor "at large," and demanded that Everit compensate for the judicial oversight by paying the debt out of his pocket. When Everit refused the demand, Shaw sued him in the county court of common pleas. Upon hearing later that a favorable judgment was unlikely in the county court, Shaw presented his complaint to the governor's council. Shaw, Everit claimed, had presented the petition in order to "frighten me into a complyance with his unreasonable demand." If that was indeed Shaw's plan, it worked to some extent. Fearful of being called to council to defend himself, Everit wrote a lengthy letter to the attorney general vindicating his actions.[28]

As litigants challenged and circumvented local courts, some justices (such as Everit) grew pensive. Others got frustrated. Censured by the attorney general following a local's complaint against his procedure in a small debt case (the summons did not give the defendant enough time before appearance), Martin Hoffman, a justice in Dutchess County, pointed out that the complainant was a well-known troublemaker. Hoffman complained to the attorney general that he had "acted to the best of [his] knowledge," and that it was "impossible to be a justice" if he had to be constantly "troubled so much by such a fell[ow]" who appealed to higher legal authorities "for the least errors, fault or no faultiness" in the justice's proceedings.[29] Peter

[28] Clear Everit to William Kempe, Dec. 5, 1756, Ibid., Box 15, Folder 9.
[29] Matin Hoffman to William Kempe, Oct. 30, 1753, Ibid., Box 15, Folder 9.

Monfort, also a justice in Dutchess County, was similarly perplexed by locals who, "with mouths full of falshood, deceit & malice," unscrupulously "post away" to the attorney general on trifling complaints in order to "make authority submit to their terms." Local justices could not maintain their authority, Monfort argued, if they "must expected to be traduced before your honour, for every three & six penny case he tries."[30]

Justice William Humfrey was even more defiant when a local complained about his proceedings. Responding to Attorney General William Kempe's inquiry upon the complaint, Humfrey discredited the complainant as "well known to be one of the worst and most scandlous men in the contrey and generally known by the name lyeing Tom." Not satisfied with defending his actions, Humfrey turned the tables on Kempe. The recently appointed attorney general, according to Humfrey, was "a stranger to the ways of this contrey," and hence should "be carefull to know something of the informers before [he would] prosceed on informations." Otherwise, Humfrey warned, he "will meet with plague and confution."[31]

Three months later, when he had to defend himself against another complaint, Humfrey's tone was noticeably different. Regarding the earlier complaint, Humfrey did not bother to provide Kempe with any details about his proceedings. He simply informed the attorney general that he had "made strict enquiry into [his own] prosceedings," and found no fault in his conduct. Regarding the new complaint, however, Humfrey gave Kempe a lengthy account of his proceedings on the case. Having laid his side of the story before Kempe, Humfrey once again advised the attorney general to look askance at the complainants' claims: "When parties go with complaints they seldom fail to make a plain storey on their own side thinking now I will get you [the justice] in the kings attorneys hands I will make you smart and I shall be no more called in

[30] Peter Monfort to William Kempe, Jun. 20, 1754, Ibid., Box 15, Folder 10.
[31] William Humfrey to William Kempe, Jun. 9, 1753, Ibid., Box 15, Folder 9.

question." This time, however, Humfrey was much more modest, and even submissive, in defending his actions: "I am all ways willing to submitt to better judgment well knowing I am not a judge of the law, but I act as near as I can and as much as posable for the peace of his majestys peaceable subjects."[32]

The repeated complaints, and the pressure of defending his actions before a higher legal authority, had evidently worn down Humfrey's defiance. Whereas earlier he had demanded his autonomy as a local magistrate, asking Kempe to "pardon my freedom in this [local affair],"[33] three months later he was underlining his willingness to "submitt to better judgment." Humfrey's change of tune epitomizes the impact of legal professionalization on local legal authority in late colonial New York. As Humfrey saw it, he deserved credit and autonomy as an experienced magistrate familiar with local inhabitants and local customs ("the ways of this contrey"). With the mounting pressure of local complaints that led to the intervention of higher legal authorities, however, now he had to acknowledge that he was "not a judge of the law." At least regarding questions of law, local knowledge and experience carried less weight than professional legal knowledge, even in local courts.

Local courts in late colonial New York, especially the out-of-session courts presided over by one or two justices, still did not always conform to formal procedures and doctrines. By the mid-eighteenth century, however, the tide had clearly begun to change, largely due to the growing influence of legal professionals. The provincial legal system had long made it clear that the authority of higher courts and central legal officials superseded that of local justices, but the actual daily operations of justices' courts were mostly left untouched by central authorities. That situation began to change as New York City's lawyers, appellate judges, and royal officials

[32] William Humfrey to William Kempe, Sep, 12, 1754, Ibid., Box 15, Folder 9.
[33] William Humfrey to William Kempe, Jun. 9, 1753, Ibid., Box 15, Folder 9.

expanded their influence in local affairs throughout the colony. By publicly denouncing lay justices' practices, prosecuting them for maladministration, and most importantly, by ensuring that litigants could expect a different outcome based on formal doctrines in higher courts, the legal elite laid the ground for locals to circumvent or challenge justices' rulings. Local lawyers also played an important part, connecting litigants to New York City lawyers and helping their complaints and appeals reach higher courts. With their proceedings and decisions increasingly subject to scrutiny, local justices understandably began to sense that their authority on legal matters was being significantly undermined.

The lay justices' diminishing authority in face of lawyers and higher courts, as Justice Humfrey experienced, was intertwined with a broader trend in late colonial New York's legal culture—the increasing vulnerability of customary practices to the incursion of professionalized law. That was certainly how Justice John Nicoll of New Windsor, Orange County saw it when he was made to defend his conduct before the attorney general in 1770. Nicoll had fined a local who cursed a constable—a penalty which he thought was "strictly" according to the "acts for the prevention of immorality." When the offender complained to the attorney general about the fine, however, Nicoll was no longer sure that he had applied the act correctly. If he had "erred in [his] construction of it," he apologetically explained to the attorney general, that was only because he had "fallen into the common error of this and the adjacent counties where it has been always customary to punish for breech of Sabbath swearing or the neglect of duty on the roads on complaint of the constable and road master or afidavid of any [other] person, without a formal trial."[34] Nicoll's proceedings were informed by local custom. But that was a weakness against

[34] John Nicoll to John Tabor Kempe, Sep. 22, 1770, Ibid., Box 14, Folder 4.

inhabitants who challenged the justices' authority through the support of legal professionals and the strict terms of written law.

Justice Henry Ter Boss of Fishkills, Dutchess County also found himself caught in a fissure between customary local practices and formal procedure. Early in 1757, Ter Boss heard the complaint of one Chase against Samuel Shearman in an action of trespass. Perhaps sensing that the dispute would not be easily resolved to both parties' satisfaction, Ter Boss suggested that they demand a jury. When neither party took his suggestion, Ter Boss asked another justice (Justice Baily) to assist him in the trial. While sparing money on jurors, the parties in dispute had called in numerous witnesses—four for the plaintiff and seven for the defendant. After hearing the pleas and testimonies, Ter Boss gave judgment for the plaintiff, in the sum of thirty shillings damages with costs of suit. Assessing the costs was not easy, however, especially as numerous witnesses had been subpoenaed. The costs for the subpoenas, the constables' fees, the witnesses' fees for attendance, and the justice's fees, some of which depended on the constables' and witnesses' distance of travel, had to be calculated. Ter Boss once again turned to others to help reach a decision. Justice Lott, who was present as one of the defendant's witnesses, was asked to help assess the costs together with Ter Boss and Justice Baily. The three justices agreed upon the costs as amounting to 2 pounds and 7 shillings, which was accordingly charged to the defendant.

Shearman paid the sum, but later complained to the attorney general. As Justice Ter Boss found out after consulting local attorney Bartholomew Crannell on the matter, he should not have included the fees for subpoenaing the defendant's witnesses.[35] The law did not authorize justices to collect those fees, letting the defendants, at their own cost, personally request their

[35] Henry Ter Boss to William Kempe, Apr. 9, 1757, Ibid., Box 15, Folder 11.

witnesses to appear at the trial.[36] On discovering his error, Ter Boss wrote to Attorney General William Kempe to defend his actions:

> It has been always the custom heretofore in this county for all the witnesses and constables to give their subpoenas and process to the Justice who tries and gives judgment in a cause, and by the returns on them the costs have been made up, and judgment and execution granted for them, and the witnesses and constables always have lookt to such justices for their fees. And in this action I have conducted myself agreeable to that custom, imagining I was right in so doing.

Ter Boss's proceedings indeed evince a strong inclination to adhere to customary practice and communal consensus. When faced with a thorny dispute or legal issue, his immediate impulse was to rely on a jury or on fellow justices, rather than consult a law book or an attorney. After finding that the fees for subpoenaing the defendant's witnesses should not have been charged to Shearman, Ter Boss in fact offered to return the sum to Shearman. To determine the just amount of compensation, Ter Boss proposed leaving it to the arbitration of three other local justices (an offer which the embittered Shearman flatly refused). As Ter Boss found out, however, communal modes of dispute resolution—justices' summary proceedings, jury trials, and arbitration—were ineffectual against the strictures of formal law. Just as Humfrey and Nicoll had done, when placed under the scrutiny of higher legal authorities, Ter Boss had to bow to the authority of professionalized law. The claims that they had only "acted agreeable to custom always before used" were offered less as a protest than as an apology, as they were forced to admit that the justices' customary practices were prone to errors due to their "ignorance" of the law.[37]

[36] "An Act to impower Justices of the Peace to Try Causes from forty Shillings to Five Pounds," *N.Y. Col. Laws*, III: 1011-1016.
[37] Henry Ter Boss to William Kempe, Apr. 9, 1757, *Kempe Papers*, Box 15, Folder 11.

Jurors, Arbitrators, and Legal Professionalization

Historians have long debated the relevance of communal modes of dispute resolution in early American society, and the question of when (and whether) they began to decline in significance. Jury trials, and to a less extent arbitration, have received considerable attention from historians in this regard. While some argue that jury trials and arbitration decreased in importance along with the decline of tight-knit local communities,[38] others have highlighted the lasting relevance of juries as proof of the strong legal and political autonomy of colonial local communities.[39] In New York, the right to jury trial was upheld as an essential part of the legal system, despite repeated challenges from governors seeking to establish their prerogative over provincial judicature.[40] Adherence to jury trials as a matter of principle, however, did not necessarily translate into its frequent usage. Deborah Rosen's analysis shows that the actual use of jury trials in the Supreme Court of Judicature, New York City Mayor's Court, and the Dutchess County Court of Common Pleas declined precipitously during the first half of the eighteenth century. Rosen attributes the decline to the rise of formal commercial litigation—a sure sign, according to her, that commercial growth was weakening communal cohesiveness.[41]

While the frequency of jury trials is an important indicator of their continuing or declining relevance, numbers only tell part of the story. Even if it is true that only a few lawsuits

[38] Mann, *Neighbors and Strangers*, 67–136; Rosen, *Courts and Commerce*, 59–92; Henretta, "Magistrates, Common Law Lawyers, Legislators," 562–563.

[39] William Edward Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, Mass.: Harvard University Press, 1975), 20–30; J. R. Pole, "Reflections on American Law and the American Revolution," *William and Mary Quarterly*, 3rd. Ser., Vol. 50, No 1 (Jan., 1993), 126-41; Richard Lyman Bushman, "Farmers in Court: Orange County, North Carolina, 1750-1776," in Christopher L. Tomlins and Bruce H. Mann, ed., "The Many Legalities of Early America" (Williamsburg, Virginia: U. of North Carolina Press, 2001), 388-413; Barbara Clark Smith, "Beyond the Vote: The Limits of Deference in Colonial Politics," *Early American Studies* 3: 2 (Fall 2005), 341-362; Robert Mark Savage, "Where Subjects Were Citizens: The Emergence of a Republican Language and Polity in Colonial American Law Court Culture, 1750-1776" (Ph.D. diss., Columbia University, 2011).

[40] William Edward Nelson, "Legal Turmoil in a Factious Colony: New York, 1664–1776," *Hofstra Law Review* 69 (2009), 129–31. See Chapter 8, pp. 394-397.

[41] Deborah A. Rosen, "The Supreme Court of Judicature of Colonial New York: Civil Practice in Transition, 1691-1760," *Law and History Review* 5, no. 1 (1987): 228–235; idem, *Courts and Commerce*, pp. 59-92.

in late colonial New York's courts involved jurors, this does not preclude the possibility that jury trials nonetheless functioned as a community's way of resolving particularly deep-set disputes among its inhabitants. The difficulty here is that juries seldom if ever recorded the rationale behind their decisions, making it impossible to ascertain whether communal norms or consensus played any role in their deliberations. In the absence of such direct evidence, historians have gauged the community orientation of jury trials by looking at several other indicators—the composition of juries, the types of pleading brought before them, and the juries' relative autonomy from judges. Historians have viewed jury trials as conducive to community-based dispute resolutions if juries were composed of the litigants' neighbors, considered causes comprehensively upon the general issue, and passed verdict with little guidance or interference from the bench. On the other hand, if juries were drawn from strangers, were confined to finding facts related to narrow questions, and were closely supervised by judges, we can say that there was little room for communal norms or consensus to affect jury verdicts.[42]

By these criteria, community-oriented jury trials were still an important part of late colonial New York's legal system, at least in its lowest level courts. Under the Five Pounds Act, any litigant had the right to demand a jury trial before a justice of the peace on small civil matters. Upon either the plaintiff's or defendant's demand, the justice was required to fix a date for the trial, order one of the constables to bring six "good and lawful" freeholders in the county, and administer to each of them an oath that they will give a "true verdict" according to evidence. The jurors would then hear the "several proofs and allegations of the parties, which shall be delivered publick in their presence," and form a verdict. Once a verdict was agreed upon, the

[42] Nelson, *Americanization of the Common Law*, 20–30, 165-171; idem, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825* (Chapel Hill: University of North Carolina Press, 1981), 24–26, 36-37, 150-151; Mann, *Neighbors and Strangers*, 69–81; Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977), 28–29, 141-143. Rosen, *Courts and Commerce*, 66–68; Savage, "Where Subjects Were Citizens," 17-18, 84-86.

justice was strictly required to give judgment accordingly, and award execution for the winning party.[43] In sum, juries were at liberty to consider each case comprehensively and reach decisions in almost any way they saw fit. They were given very little guidance other than that they should heed the evidence, while their verdict was protected from being set aside by the justice.[44] Also noteworthy is the fact that the constable assigned with the role of empanelling the jury was to be of the "town, manor or precinct" where the trial would be held. Although the jurisdiction of each justice extended to the entire county, the Five Pounds Act clearly assumed that jurors would be chosen from among the litigants' neighbors. It would be safe to conclude, then, that jury trials in late colonial New York's justices' courts were designed to let local communities resolve small internal disputes through the deliberation of their own inhabitants.

Available records indicate that only a very small proportion of cases in justices' courts, in fact, proceeded to jury trials. In Justice Frey's court in Tryon County, for example, the percentage was about 2%. Even a small portion of the voluminous civil causes brought before late colonial New York's justices, however, could still amount to a sizeable number. There were 34 jury trials in Justice Frey's court over a period of less than four years—a rate of more than eight jury trials per year.[45] At that rate, plenty of inhabitants would have had the chance to be involved in neighbors' trials at one time or another as jurors, witnesses, or bystanders. Jury trial,

[43] *N.Y. Col. Laws*, IV: 372-377, 736-737.

[44] The Ten Pounds Act of 1769, which expanded upon the Five Pounds Act, added a few more instructions about the jury trial process. Perhaps signaling a trend toward formalization, the statute now mandated a struck jury (the constable was directed to empanel between twelve and eighteen freeholders or freemen of the county, out of which six jurors would be randomly chosen, with the parties given the opportunity to challenge selections). The provision was made to ensure that jurors would be "fair and indifferent," likely a reaction to the frequent accusations of biased juries (See Chapter 1, pp. 44-47). While a struck jury did not preclude jurors from still being drawn from within the community, it can be read as part of a growing tendency to rely on uniform rules to reduce sources of dispute (in this case, accusations of biased jurors), rather than let the communities resolve them. For an example of a struck jury process in an actual trial before a justice of the peace, see Hilton, *Book of Entries*, 190-191. The Ten Pounds Act also explicitly barred the juries' acknowledgment of any ex parte affidavit. After the Ten Pounds Act was repealed, the two clauses were retained as part of the Five Pounds Act of 1772. *N.Y. Col. Laws*, IV: 1079-1087, V: 304-314.

[45] See Chapter 2, p. 87.

in other words, was still a familiar feature of local adjudication in late colonial New York's communities.

The juries' autonomy and informal decision-making processes are well illustrated in John Merrill's account of his experience in two justices' courts. Richard Wood had been boarding in Merrill's house, incurring a cumulative debt of about one pound. When Merrill demanded payment, however, Wood countered with a claim of his own. Some time ago he had lost a pair of silver knee buckles in Merrill's house, which now mysteriously appeared on Merrill's knees. Merrill told Wood he was mistaken—the buckles were his own, which he had bought before Wood began boarding with him. Not persuaded, Wood took his claim to a local justice, where it was tried by a jury. Merrill brought in several other men who had been boarding at his house, who "declared on oath" that they never saw or heard Wood having any silver buckles. Wood's witnesses were his two brothers, who testified that the buckles "looked like" their father's, although they "could not be certain." Despite the vague memory of Wood's supporting "evidences," and despite the fact that they were his own brothers, the jury, "from those sircomstances," decided that the buckles were indeed Wood's, and gave a verdict in his favor to the amount of £2 3*s*. 9*d*.

The dispute over Merrill's silver buckles was not over. After the trial, Merrill fortuitously ran across a man who had owned the buckles before selling them to Abraham Speer, who in turn sold them to Merrill. He assured that "he would know" the buckles if he saw them, as would a friend of his. Having found this "positive evedence," Merrill went to another justice and complained that he had unjustly sustained damage by Wood in the previous trial. This was essentially an appeal against the earlier trial, which should have been taken to an appellate court, but neither the justice nor the jurors summoned by him seemed to be bothered by that fact. After

hearing Merrill's two witnesses positively identify the buckles as the ones they had owned long before Wood had claimed to have acquired them, they awarded Merrill a verdict to recover the £2 3*s*. 9*d* he had lost in the previous trial.[46] These were striking demonstrations of informality in legal resolution. A formal appeal to a higher court was deemed unnecessary if the community, through its jurors, could rectify a wrong judgment and ultimately find the right resolution. In both trials, the juries' decisions rested entirely upon their comprehensive evaluations of orally narrated personal recollections. Rather than confine their role to finding facts pertaining to narrow legal questions, the jury gave verdict on the general issue, without clearly distinguishing firm evidence from broad "sircomstances."

Jury trials held in higher tribunals such as the county courts, circuit courts, and the Supreme Court were a different story. There, the juries' autonomy and community-orientation were not as strongly encouraged as in the justices' courts. Jurors were not required to be empanelled from the litigants' immediate neighborhood, and only inhabitants holding a certain amount of real property (either a freehold, tenement for life, or personal estate of at least sixty pounds' value) qualified as jurors. During trials, juries' deliberations were guided by the arguments and instructions of the bench and bar, and judges held the power to set aside jury verdicts.[47]

In practice, jury trials in higher tribunals could still retain autonomous and communal aspects. At least in some instances, jurors were brought in from a particular town or precinct

[46] "John Merrill's case stated between him & Richard Wood," n.d., *Kempe Papers*, Box 11, Folder 5.

[47] "An Act for the Returning of Able & Sufficient Jurors, and for the better Regulation of Juries," Nov. 27, 1741, *N.Y. Col. Laws,* III: 185-192. The act was renewed in 1746 and remained in force throughout the remaining colonial period. Ibid., III: 599. The property qualification for jurors applied to all of the colony's tribunals except for single justices' courts. For trials in justices' courts, any freeman or freeholder within the county qualified as a juror under the provisions of the Five Pounds Act. Ibid, IV: 374, V: 307.

rather than from an entire county.[48] Especially in criminal lawsuits, courts frequently upheld the idea that the jurors' personal familiarity with local inhabitants and local affairs should factor into their verdicts.[49] The judges' supervision was also stronger in theory than in practice. Their instructions to juries, at least judging from the drafts they left behind, mostly pertained to reminding jurors of their general duties.[50] If some judges intervened more directly in the jurors' assessment of evidence and gave them detailed instructions regarding points of law, they left those instances unrecorded. New York's judges also seldom set aside a jury's verdict, perhaps, as one historian suggested, in acknowledgment of the colonists' strong devotion to the ideal of an independent jury.[51] The autonomy of juries and their informal deliberations in county courts prompted John Tabor Kempe to grumble that jurors often acted "on principles, discoverable to none but themselves."[52]

Legal professionalization did begin to affect jury trials, however. The pattern of change was irregular because it was the bar, rather than the bench, that made a stronger impact on jury trials in late colonial New York. The composition and autonomy of juries were sharply circumscribed only when litigants hired lawyers for that purpose.

Lawyers affected jury trials in several ways, not the least by altering the composition of juries. "Foreign juries" were frequently called in during the late colonial period, especially in

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[48] See, for instance: "The Pannel for the Jurors to try the Cause depending between the Hon-ble Oliver DeLancey Esq-r and John Jaycocks," May 16, 1774, *Kempe Papers*, Box 3, Folder 4. Also, regarding the trial of James Jackson ex dem Abraham C. Cuyler and others v. Benjamin Westervelt: "A Pannel of Jurors returned in this Cause Pursuant to the annexed Rule of Court," n.d., & "Notes on Trial at the circuit in Dutchess County," Jun. 12, 1771, Ibid., Box 3, Folder 2.

[49] Following English tradition, it seems to have been especially common in criminal lawsuits to have jurors empanelled from among the defendant's neighbors. Julius Goebel and T Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* (Montclair, N.J.: Patterson Smith, 1970), 603–605.

[50] "Justice Honeywell's Speech to a Grand Jury of Westchester," 1733, *John Chambers Papers*, Box 1; "Judge Robert R. Livingston's Charge to a Grand Jury," July 1768 & Nov. 1773, *Robert R. Livingston Papers*, reel 1. Goebel, *Law Enforcement in Colonial New York*, 336, 345–347, 667-668.

[51] Ibid., 669-679. For an example of county court judges setting aside a verdict, chastising it as "idle incertain irregular and void in law," see Hilton, *Book of Entries*, 176-183.

[52] John Tabor Kempe to Abraham Yates, Jr., Aug. 29, 1771, *Kempe Papers*, Box 15, Folder 6.

land-related cases where it was deemed difficult to find a sufficient number of disinterested jurors in the litigants' county. For example, for an ejectment suit in the Supreme Court regarding a large tract of land lying in the boundary between the counties of Ulster and Albany, jurors were brought in from Queens County to ensure a fair trial.[53] As it required a motion for a special rule in empanelling the jury, the request for a foreign jury was typically, if not always, made by attorneys. John Tabor Kempe's case notes and correspondence show numerous instances in which he or his opposing attorney requested a foreign jury on a client's behalf.[54] To obtain foreign juries for their clients, lawyers presented arguments to the court averring that an impartial trial would be impossible with jurors from the vicinity. They sometimes supplemented their claims with affidavits of litigants and witnesses.[55] Lawyers also helped litigants decide whether a foreign jury would be desirable, and whether it would be worth the additional trouble and costs.[56]

Lawyers competed to secure a jury they expected to be more favorable toward their client, much as they strove to position the trial in the most advantageous court. Preparing for a trial in Albany County, for example, James Duane endeavored to obstruct the opposing attorney's "violent struggle" to have the jury called in from Dutchess County. Duane was not against having a foreign jury, but would rather have the jurors drawn from Ulster County, which he believed would be more favorable to his client. In the end, the lawyers settled for a foreign jury from Westchester County as a compromise.[57]

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[53] John Tabor Kempe to Robert Yates, Sep. 16, 1771, Ibid., Box 15, Folder 6.

[54] See, for example: John Tabor Kempe to Lieutenant Thomas Swords, Aug. 13, 1770, Ibid., Box 15, Folder 5; John Tabor Kempe to anon., Sep. 14, 1771, Ibid., Box 15, Folder 4; "The King against Dirck Swart, Copy of Information," January Term, 1768, Ibid., Box 2, Folder 3.

[55] For an example of such use of affidavits, see: Barnard Lagrange to John Tabor Kempe, Feb. 21, 1774, Ibid., Box 13, Folder 10.

[56] John Tabor Kempe to Lieutenant Thomas Swords, Oct. 3, 1769, Ibid., Box 15, Folder 5.

[57] James Duane to Abraham Ten Broeck, May 9, 1768, *Ten Broeck Family Papers*, AIHA, Box 1, Folder 13

Another way to alter jury composition was by requesting a special, or "struck" jury.[58] The typical process of a struck jury was for the sheriff to submit a list of the freeholders and freemen qualified as jurors within the county, out of which the clerk of the court would single out 48 persons. The parties in the lawsuit would then each strike out 12 names from the panel, leaving 24 jurors to be summoned by the sheriff (24 were summoned to ensure that at least 12 would be present at the trial).[59] Just as with foreign juries, a motion for a special rule with accompanying rationale had to be submitted to request a struck jury. This task, not surprisingly, was often left to attorneys. William Livingston and Benjamin Hilton's commonplace books show that New York's lawyers closely studied the process of moving for, and preparing for, struck juries.[60]

The objective of having a struck jury or foreign jury, ostensibly, was to ensure an impartial trial.[61] Depending on the skill or "chicanery" of the attorneys, however, such specially composed juries could lead to the opposite outcome. In the trial of Peter Clows against John McNeal in Ulster County, for example, a struck jury was formed out of a "foreign" panel brought in from Dutchess County. The plaintiff's attorney had obtained a foreign jury under the pretext that some land that would be affected by the lawsuit was mortgaged in the loan office of Ulster County. According to an anonymous observer at the trial, the plaintiff thereby gained a significant hidden advantage, as many of the jurors from Dutchess County had "connections with the party of the plaintiff." The defendant and his attorney, however, were unaware of this fact, as they were "entire strangers" to the jurors. The plaintiff's attorney introduced another scheme to

[58] A 1741 statute guaranteed litigants the right to request a special jury on any lawsuit in the Supreme Court. "An Act for the Returning of Able & Sufficient Jurors, and for the better Regulation of Juries," *N.Y. Col. Laws,* III: 185-192. Not surprisingly, a comparison of the Supreme Court's minutes for the 1690s and 1750s show a marked increase in the frequency of struck juries. Rosen, "The Supreme Court of Judicature of Colonial New York," 218–219. Even before the statute, struck juries had already been used occasionally upon the judges' discretion. Goebel, *Law Enforcement in Colonial New York*, 168, 619–620.

[59] "Rule for Struck Jury in the suit of Thomas Cheesman v. Francish Welch," William Livingston, *Book of Precedents,* 231.

[60] Ibid., 231; Hilton, *Book of Entries,* 190-191.

[61] Barnard Lagrange to John Tabor Kempe, Feb. 21, 1774, *Kempe Papers,* Box 13, Folder 10.

ensure that the jurors' connections to his client would not be discovered in the process of forming the struck jury. He moved the court to make it a rule that the parties, in trying to decide which of the potential jurors to strike from the list, ask them no other question except whether they were related to the plaintiff or defendant. The plaintiff's attorney got away with these manipulations, the observer commented, because neither the defendant's inept counsel nor the "bystanders unacquainted with the chicanery of the law" could see through the attorney's schemes.[62]

Even when not employed to create advantages for one of the parties, foreign juries and struck juries tended to diminish the communal aspect of jury trials. In a trial by a foreign jury, there was obviously little room for the jurors' application of local knowledge, shared values, and familiarity with litigants and witnesses. The effect of struck juries was less obvious, but they were often composed in ways that eradicated any possibility of their representing communal values. The primary rationale for struck juries in late colonial New York was to obtain an impartial jury by screening out interested persons—an idea which already presumed that the community was too fractured by conflicting interests to resolve disputes by its shared values.[63] Take, for instance, George Spencer, who instructed his lawyer to "strike out or object against every merchant & every mariner" from the jury panel.[64] It may have been a reasonable move on Spencer's part to screen out those locals who could be predisposed against him, but the resulting struck jury could hardly be considered as a rough cross-section of the community.[65]

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[62] "Observations on the late tryal between Peter Clows plaintiff and John McNeal deffendant," Ibid., Box 11, Folder 3.

[63] See note 44 above.

[64] George Spencer to John Tabor Kempe, Oct. 27, 1760, *Kempe Papers*, Box 14, Folder 6.

[65] According to James Oldham, English legislators and legal scholars of the seventeenth and eighteenth centuries vaguely construed the purpose of struck juries as sorting out "gentlemen of better rank," and did not see it as necessarily conflicting with the ancient ideal of composing the jury as a "reasonable cross-section" of the community. James Oldham, "The History of the Special (Struck) Jury in the United States and Its Relation to Voir

Jury composition was the primary, but not only, area in which jury trials were qualitatively impacted by lawyers and legal professionalization. Lawyers, as seen earlier, played a key role in helping litigants appeal against local court decisions. This could include appeals against judgments based on jury verdicts. After a jury in an Albany court gave verdict against his client, for example, Whitehead Hicks appealed to the Supreme Court, arguing that the "verdict was contrary to the evidence."[66] Accordingly, among the provincial precedents of appeals studied by Benjamin Hilton in his commonplace book were writs of error against jury verdicts in local courts.[67]

During trials, lawyers could also influence how the jurors understood the evidence and their import. At least James Alexander believed this to be the case, as evinced in his advice to newly appointed attorney general John Tabor Kempe on how to prepare a speech to a jury. In the letter, Alexander cautioned that "every part of [the speech] ought to be connected with the evidence by reference to such a deed, which says so and so—such a writing, so and so—such a witness declared so and so." Otherwise "the opposite side will drop all your material arguments well supported, and insist on those not supported, and refer the jury to those as specimens of your arguments." The lawyer should also be wary of "lengthening a cause by a multiplicity of evidence not necessary" since this "puts those things necessary out of the remembrance of the jury, and brings things into darkness and obscurity."[68] Underlying Alexander's advice was the perception that lawyers could easily influence the jurors' evaluation of, and attention to, particular pieces of evidence.

Dire Practices, the Reasonable Cross-Section Requirment, and Peremptory Challenges," *William & Mary Bill of Rights Journal* 6: 3 (1998): 623-632.

[66] John Tabor Kempe to anon., 1772, *Kempe Papers*, Box 15, Folder 5.

[67] Hilton, *Book of Entries*, 166, 171-172, 176-183.

[68] Theodore Sedgwick, *A Memoir of the Life of William Livingston, Member of Congress in 1774, 1775, and 1776; Delegate to the Federal Convention in 1787, and Governor of the State of New-Jersey from 1776 to 1790* (New-York: J. & J. Harper, 1838), 49–50.

That was certainly the case in the aforementioned trial of Peter Clows against John McNeal in Ulster County, according to its anonymous observer. Despite compelling evidence to the contrary, the jury upheld the claims of "Mr. Smith," the plaintiff's attorney. "There was no accounting for the verdict of the jurry," the observer complained, except that "throo the tediousness of the tryal (in which there was no pains spared to confound and mislead them) they had forgot the express words of the evidences as deliver'd." In the end, the jurors "trusted intirely to Mr. Smiths interpretation of [the evidences] who in the close of his argument most basely perverted and set to nought the evidence for the defendant, and on the other hand boldly asserted they had clearly proven things which had not so much as been heard of."[69]

The tendency of legal professionalization was both to increase the lawyers' influence on the interpretation of evidence, and also to narrow the scope of the juries' own interpretations. In a broad sense, technical pleadings such as demurrers accomplished this by removing a cause entirely from the jury's consideration. If the lawyers and judges agreed that the proposed evidence was insufficient to constitute a legal cause, a case could be dropped before the jurors ever had a chance to weigh in on it. Although done less frequently, lawyers and judges could also limit the jury's interpretation of evidences during and after a trial.

In the prosecution of John Henry Lydius for intrusion on Crown lands, the jury convened at the Albany Circuit Court in 1763 submitted a special verdict after hearing the pleas and evidences.[70] The jury could agree upon a long list of actions perpetrated by Lydius on the lands

[69] "Observations on the late tryal between Peter Clows plaintiff and John McNeal deffendant," *Kempe Papers*, Box 11, Folder 3.

[70] According to Julius Goebel, special verdicts were not infrequent, although it was considered the jury's privilege to decide whether it was necessary in any particular case. Goebel, *Law Enforcement in Colonial New York*, 213-214, 676-678.

in question, but they were unsure whether those actions constituted an illegal intrusion.[71] The defendant's counsel, David Ogden, argued that the verdict obligated the court to give judgment for the defendant. Ogden premised his argument upon the doctrine that "judges will not adjudge of any matter of fact but that which the jury declare to be true of their own finding." Since the jurors could establish neither the king's possession of the lands in question nor Lydius's illegal intrusion upon it, the judges simply did not have enough "facts" in their hands to prove the defendant guilty.[72]

In his lengthy rebuttal of the defense, Attorney General John Tabor Kempe directly refuted Ogden's doctrinal interpretation of the juries' and judges' relative roles in reaching judgments. While agreeing in principle that judges should only consider the facts found by the jury, Kempe argued that "this holds as to meer facts only." The judges, Kempe asserted, "must take notice of divers facts and things tho not mentioned in pleading" which pertain to the "operation of the law" or involve "legal considerations." Following this doctrine, the judges had sufficient cause to find the defendant guilty based on the jury's special verdict. In forming their judgment, judges were required not only to consider the facts found by the jury, but also to "judicially take notice" of the "policy of our constitution," which "vests the original property of all lands in the crown." The king's possession, Kempe emphasized, was "by the operation of law" and hence "need not be found." In other words, it was "a matter of law" which was "improper to be found by the jury."[73]

Whereas Ogden sought to limit the judges' role in forming a judgment, Kempe, by using a narrow definition of "facts" and an expansive definition of "matter[s] of law," instead sought to

[71] "Postea in the suit of the King against John Henry Lydius," *Kempe Papers*, Box 1, Folder 8. Lydius's scheme for establishing title of land, which was what brought forth this prosecution, is examined in further detail in Chapter 7, pp. 349-350.
[72] "Answer to the argument of the attorney general," Apr. 7, 1764, Ibid., Box 1, Folder 8.
[73] "Argument for the king on special verdict on information for intrusion into two tracts of land belonging to the crown," n.d., Ibid., Box 1, Folder 8.

confine the jury's role to establishing factual details. That the jury had given a special verdict on the case was entirely apt to Kempe, as it was not their role in the first place to interpret the legal implications of evidences. That was a task best left to the lawyers and judges who knew better about the law. Such sharp distinction between fact-finding and law-finding capacities, and the strict confinement of juries to the former, was probably still the exception rather than the rule in the eighteenth century.[74] But neither were they entirely out of place in late colonial New York's courts, as legal professionals such as Kempe constantly pushed for jury trials circumscribed by professionalized law.

Arbitration, too, was potentially a community-based mode of dispute resolution. It was a cheap, efficient means of resolving disputes, so long as there was a strong communal consensus that the parties should abide by the arbitrators' decision. In informal arbitrations, there was always a danger that the losing party might simply ignore the payment or duties prescribed by the arbitrators. What prevented the parties from repudiating arbitrators' decisions, even when they were not legally enforceable, was the community's disapproval of such behavior.[75]

Unlike jury trials, arbitration continued to be used very frequently in New York throughout the eighteenth century.[76] The nature of arbitrations, however, had already begun to

[74] On the early American courts' shifting emphases on the jury's fact-finding and law-finding abilities, see: Horwitz, *The Transformation of American Law*, 141–143; Nelson, *Americanization of the Common Law*, 28–30. Mann agrees with Nelson and Horwitz that juries in colonial America generally retained the power to find laws (or that the boundary between law and fact was seldom sharply delineated in a given case). In contrast to Nelson and Horwitz, Mann underlines as important signs of change the declining usage of jury trial throughout the eighteenth century, and the jurors' increased resort to special verdicts. Mann, *Neighbors and Strangers*, 73–81. Along the same vein, Rosen sees the use of special verdicts in mid-eighteenth century New York as "evidence of pre-revolutionary separation of matters of law and matters of fact, with the jury permitted to decide only the latter." Rosen, "The Supreme Court of Judicature of Colonial New York," 245.

[75] Henretta, "Magistrates, Common Law Lawyers, Legislators," 562; Mann, *Neighbors and Strangers*, 108–109; Simon Middleton, *From Privileges to Rights: Work and Politics in Colonial New York City* (University of Pennsylvania Press, 2006), 171.

[76] Eben Moglen, "Settling the Law: Legal Development in New York, 1664-1776" (Ph.D. diss., Yale University, 1993), 227-228, 246–254.

change early in the century. While arbitration was not pushed out by common law procedures, it was increasingly subsumed under the province's formal legal system.[77] A telling development was the increased use of arbitration bonds, which relied on legal enforcement, rather than communal sanction, to bind the parties to the arbitrators' decisions. In the 1730s, scriveners in New York City printed standardized forms of arbitration bonds, attesting to their frequent usage.[78] At least by the 1750s, arbitration bonds were also being used beyond the city. After agreeing to leave their dispute over a "piece of meadow" in Bushwick, Kings County to arbitration, for example, the parties signed an arbitration bond. The bond was recorded by the county clerk, ensuring that the court would enforce the arbitrators' decision if the losing party failed to comply with its terms. Furthering the formalization of arbitrations, in 1768 the provincial legislature empowered the Supreme Court to refer commercial lawsuits to arbitration "with or without the consent of parties." Communal relationships no longer had any room in these type of arbitrations, as the court appointed the referees, oversaw the process, and ensured that the decision would be legally binding.[79]

Lawyers, as could be expected, played a major part in absorbing arbitration into New York's professionalized legal system. For those who trusted the "superior judgment" of lawyers, hiring one was just as worthwhile in an arbitration as in a trial. Greatly valuing John Tabor Kempe's expertise in arbitration, for example, a client promised to make him "ample satisfaction"

[77] On the early-eighteenth century shift in New York from Dutch communal arbitrations to formal dispute resolutions under the English common law system, see Middleton, *From Privileges to Rights*, 176, 181.
[78] Moglen, "Settling the Law," 248–249.
[79] "An Act for the better Determination of personal Actions depending upon Accounts," *N.Y. Col. Laws*, IV: 1040-1042. A similar provision was made for the New York City Mayor's Court in 1772. Moglen, "Settling the Law," 252–253. In practice, the judges seem to have been somewhat flexible regarding the appointment of referees, letting each party nominate one referee, and the court only appointing the third referee. See, for instance, Nicholas Stagg v. James Jauncey, Apr. 18, 1769, *Minutes of the Supreme Court of Judicature of the Province of New York*, Hall of Records, New York, N.Y., microfilm, reel 5.

for his trouble regardless of how the "affair will end."[80] Lawyers could be effective counsel in arbitrations especially since they could discourage the opposing party from taking the dispute to court, or conversely, because they could threaten a lawsuit upon the opponent. Writing to a debtor of his client, for instance, Kempe cajoled the debtor either to satisfy the debt or settle the account through arbitration. "Farther proceedings" would be unnecessary if he gave Kempe a prompt and "definitive answer," but otherwise a lawsuit would be swiftly "commenced upon" him.[81]

In a lawsuit in which Kempe and William Smith, Jr. each represented one of the parties, a trial was avoided at the last minute with the parties agreeing to leave the matter to arbitration. The lawyers accordingly drew up the "bonds of submission" (arbitration bonds), but Kempe' client hesitated to sign it, pointing out that it did not specify which party had given orders to commence the suit. Writing to Kempe, Smith expressed disbelief that Kempe's client would risk "defeat[ing] the settlement" upon such an "immaterial" quibble, and pointedly remarked that his client would be greatly dissatisfied if the arbitration dragged on to January, as he would then miss the opportunity to take the dispute to trial until the court's April session. It was a thinly veiled threat reminding Kempe and his client that they would have to face a costly trial unless they quickly agreed to have the matter settled by the arbitrators.[82]

Lawyers also acted as arbitrators themselves, sometimes formally appointed for the role by the court or by the parties in dispute,[83] and sometimes becoming de facto arbitrators by engineering out of court settlements for clients in a lawsuit. Lawyers were especially effective in

[80] Alexander McDonald to John Tabor Kempe, Mar. 2, 1770, *Kempe Papers*, Box 14, Folder 2.
[81] John Tabor Kempe to Jacobus Van Zandt, Jul. 9, 1773, Ibid., Box 15, Folder 6.
[82] William Smith, Jr. to John Tabor Kempe, Sep. 20, 1771, *Thomas Addis Emmet Collection, 1483-1876*, NYPL, Series VII. Accessed from the New York Public Library Digital Collections, http://digitalcollections.nypl.org/items/bac0a75c-262f-b981-e040-e00a18067fd9
[83] See, for example: John Wetherhead to John Tabor Kempe, n.d., *Kempe Papers*, Box 14, Folder 9; John Tabor Kempe to John Alsop, Feb. 19, 1761, Ibid., Box 14, Folder 11. Milton Klein also notes that New York's lawyers frequently served as court-appointed referees. Klein, *The American Whig*, 163.

producing out of court settlements for creditors, as their involvement quickly discouraged debtors from challenging the creditor's claims in court.[84] Hence, when they helped clients reach out of court settlements instead of going through costly and time-consuming trials, lawyers considered it part of their professional service. Accordingly, they demanded fees commensurate with what they would have charged for a trial.[85] John Kelly, after negotiating an out of court settlement, even tried to collect fees from his client's opponent. Reminding Henry Rensselaer that his client had a very just cause against Rensselaer which would have "run [him] to much charges" if tried in the Supreme Court," Kelly claimed his right to collect his attorney's fees from him. As he bluntly put it, "in gratitude you ought to be handsom [i.e., generous] in return for my civility, for I could [have] easier sent a supream court writt than so many letters."[86]

When negotiating an arbitration, a lawyer thought in terms of the projected outcome if the dispute were taken to court for a formal trial. Based on that projection, the lawyer might advise his client to accept the terms of arbitration rather than risk losing in a trial, or conversely persuade the opposing party that refusing arbitration would only lead to his or her defeat in a costly trial. Hence even though taking place out of court, settlements negotiated by lawyers tended to be shaped primarily by formal legal doctrines, rather than communal norms. Just as with jury trial, then, legal professionalization was eroding the capacity of arbitration to serve as a communal mode of dispute resolution. The picture changes somewhat if one includes the informal settlements mediated by local justices, as these settlements still tended to be informed

[84] This happened frequently enough for Deborah Rosen to point to the increase of out of court settlements as the clearest indicator of commercialization-induced legal formalization in eighteenth-century New York. Rosen, "The Supreme Court of Judicature of Colonial New York," 246.

[85] See, for instance: Jacob Freese to John Tabor Kempe, Jan. 2, 1766, *Kempe Papers*, Box 13, Folder 7; John Tabor Kempe to John Van Alen, May 8, 1752, Ibid., Box 15, Folder 6.

[86] John Kelly to Henry Rensselaer, Jul. 11, 1747 & Aug. 4, 1747, *Van Rensselaer-Fort papers*, NYPL, Box 1, Folder 1746-1747.

more by communal customs and sentiment than by professionalized law.[87] But overall, the increasing tension between formal and informal ways of resolving disputes was evident in late colonial New York's local courts and communities, and whenever the two clashed, it was the former which seemed to have the upper hand. The weakening of community-based modes of resolution was immediately reflected, among other areas, in the local communities' ability to regulate their inhabitants' economic activities and to protect communal resources.

Corporations, Community, and the Law

New York's society as a whole was notoriously fractious, but not necessarily at the level of local communities. The Dutch and French Huguenot communities in the Hudson Valley and vicinities of New York City, the Puritan towns in Long Island, and the handful of German villages in frontier regions all maintained strong internal cohesiveness throughout the eighteenth century. Although the British Empire had successfully implanted the English county system in the colony, beneath the counties were many towns and villages still operating as distinct communities. The inhabitants annually elected town officers and occasionally formed committees to serve various communal purposes—maintaining highways and roads, constructing churches, schools, and court houses, assessing taxes and poor rates, and in the case of incorporated towns, regulating and managing common land and resources.[88]

[87] See Chapter 3, pp. 137-138.

[88] Jessica Kross, *The Evolution of an American Town: Newtown, New York, 1642-1775* (Philadelphia: Temple University Press, 1983); Thomas S. Wermuth, *Rip Van Winkle's Neighbors: The Transformation of Rural Society in the Hudson River Valley, 1720-1850* (Albany: State University of New York Press, 2001); A. G. Roeber, *Palatines, Liberty, and Property: German Lutherans in Colonial British America* (Baltimore: Johns Hopkins University Press, 1993); William Willis Reese and Helen Wilkinson Reynolds, *Eighteenth Century Records of the Portion of Dutchess County, New York, That Was Included in Rombout Precinct and the Original Town of Fishkill, Presenting Historical Source Material Regarding Land and People* (Albany: J.B. Lyon Co., Printers, 1938); Eugene R. Fingerhut and Joseph S. Tiedemann, *The Other New York: The American Revolution beyond New York City, 1763-1787* (Albany: State University of New York Press, 2005).

With demographic and economic growth, the collective management of land and resources became an increasingly difficult task. As the value of land rose, New York's townships were under mounting pressure to parcel out their common lands into private leaseholds or freeholds. Townships nonetheless sought to keep their lands occupied only by permanent members of the community. They tried, albeit not always successfully, to regulate the terms of land sales and leases, inserting provisions designed to prevent speculators and absentee landlords from acquiring land.[89] Managing common resources such as clams, fish, meadows, and timber was no easy task either. Late colonial New York's townships struggled to protect resources not only from "strangers and foreigners," but also from inhabitants who selfishly depleted resources. Overseers were appointed to regulate indiscriminate grazing of cows and horses upon the town's common meadows, and to fine inhabitants who cut timber "in commonadge" for private usage.[90]

Communal sanctions agreed upon in town meetings, however, often proved inadequate for regulating the self-interested economic behavior of inhabitants and outsiders. For stricter enforcement of the regulations, some town corporations began to rely on legal authority. As inhabitants already invested with that authority, justices of the peace were natural candidates to assume the role of enforcing communal agreements and regulations.[91] In Gravesend, Long Island,

[89] See, for example, the conditions of land sale stipulated by the township of Flatbush in western Long Island. Minutes of a Town Meeting, May 4, 1719, *Flatbush Town Records*, Hall of Records (Municipal Archives), New York, N.Y., microfilm, reel 127.

[90] Minutes of a Town Meeting, 1720 & 1752, *Gravesend Town Records*, Hall of Records (Municipal Archives), New York. N.Y., Book 7, microfilm, reel 145; Minutes of a Town Meeting, Aug. 7, 1753 & Aug. 16, 1753, *Flatbush Town Records*, reel 127.

[91] While New York City and Albany had similar corporations, their vast judicial and administrative powers placed them in a different category from the smaller town corporations of New York. With renewed charters protecting the rights of their city councils, and many of the elective council members doubling as judges in the mayor's courts and county courts, the New York City and Albany corporations could much more effectively regulate their economy and control their common lands and resources than the smaller towns. Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Chapel Hill: University of North Carolina Press, 1983); Middleton, *From Privileges to Rights*; Joel Munsell, *The Annals of Albany* (Albany: J. Munsell, 1850); idem, *Collections on the History of Albany: From Its Discovery to the Present Time; with Notices of Its Public Institutions, and Biographical Sketches of Citizens Deceased* (Albany: J. Munsell, 1865); Arthur Everett Peterson, *New York as an Eighteenth Century Municipality, prior to 1731* (New York: AMS

the clerk typically opened his record of a town meeting by noting the presence of justices. For example: "In a publick town meeting and in the presence of Samuel Gerritsen & Coert Voorhees Esqrs two of his majesties justices of the peace for kings county..."[92] In all likelihood, this was because the presence of justices was seen to lend credence to the town's decisions. The justices' involvement in communal decisions did not end with attendance in town meetings. In the mid-eighteenth century, Gravesend's township began to rely more directly on the justices' authority for enforcing its regulations. Any violation of the town's regulations against cutting timber or wood, or letting livestock loose on the commons, would now be punished with a fine levied and collected by a local justice.[93]

Reliance on the local justices' authority, however, also created an easy opening for legal professionals to intervene in communal affairs, as demonstrated in a controversy in Brookhaven, Long Island in 1768 regarding the town corporation's right to regulate the catching of oysters. For some time leading up to late 1768, the corporation had been in dispute with one "Col. Floyd" who claimed a tract of land in the town where most of the oysters were caught. Insisting on his right to the land, Floyd not only began to catch oysters on his own, but also authorized others to do so. After trying in vain to put a stop to Floyd's intrusion, the corporation turned to the authority of local justices. In November 1768, the trustees of the township passed a bylaw "for the better preservation of the oysters & clams in the South Bay within the township of Brookhaven." According to the bylaw, anyone who caught oysters in the area without the corporation's permission would be brought before a justice of the peace on account of the violation, and charged a penalty if found guilty.

Press, 1968); George W Edwards, *New York as an Eighteenth Century Municipality, 1731-1776*, (New York: Columbia University Press, 1917).

[92] Minutes of a Town Meeting, May 19, 1731, *Gravesend Town Records*, Book 7, microfilm, reel 145.

[93] Minutes of a Town Meeting, 1752 & 1756, Ibid., Book 7, microfilm, reel 145.

Barely ten days had passed before the town found the first transgressor upon which to test its new bylaw. Benajah Strong spotted George Deren, an inhabitant of the town, catching oysters "contrary to the act." Strong reported this to a local justice, who promptly summoned the violator. Deren appeared but made no defense, upon which the justice charged him 20 shillings for his violation of the bylaw, in addition to 12 shillings and 3 pence for costs of the suit. Perhaps finding the fine and costs much higher than he expected, Deren decided to appeal against the justice's decision. Attorney General John Tabor Kempe was brought in to "quash" the justice's proceedings in the case.[94]

Kempe brought his full expertise to the cause, attacking both the justice's proceedings and the corporation's bylaw. The bylaw, according to Kempe, was both against "natural justice" and the common law. Catching oysters was a common and natural right, Kempe argued, which the trustees could not abridge. By creating and imposing a bylaw restricting that right, the trustees were essentially "monopoliz[ing] the oysters." Further, by making the violators' fines go to the town corporation, the bylaw let the town "benefit of the penalty." Hence, the town was acting "both [as] legislators and parties" in imposing the bylaw. Kempe's argument partly rested upon a technical point regarding the trustees' status as representatives of the town corporation. "It is not set forth," Kempe pointed out, "that the elections of trustees had been regularly made by the freeholders and freemen." Not that Kempe had actually found any irregularities in the elections. It was merely that the town's records failed to "shew that the corporation was still in being" at "the time of the election," and that the "election set forth [was] made with proper authority." Perhaps realizing that these would be seen by most as mere technicalities, Kempe later struck out this part from his draft. But nonetheless, he held on to the view that the trustees

[94] "Notes for arguments to quash proceedings in the suit of The Trustees of Brookhaven v. George Deren," n.d., *Kempe Papers*, Box 3, Folder 4.

were merely an interested party, rather than the representative body of the town. It was a crucial distinction, based on a hidden technical point, which enabled Kempe to portray the corporation's bylaw as unjustly benefiting one segment of the town rather than promoting the common good of the community.

The bylaw was not only against natural law, but also "repugnant to common law," as Kempe set out to prove. Even if the town had a right to protect itself from the trespass of strangers, this had to be done within the bounds of the province's common law system. Imposing a new penalty upon trespassers, or charging costs for prosecution, could only be done by "force of a statute." In other words, "nothing but a statute can change the common law." A bylaw "shall affect in no case any but its own members, unless where it is intended to suppress fraud, or a general mischief." As it was not part of the common law, it could not be used to punish strangers. Taken together, the larger import of Kempe's doctrinal objections (one based on natural law, another on common law) against the Brookhaven corporation's bylaw was clear. A town's ability to regulate the use of its resources, under Kempe's vision, was strictly confined to what could be accomplished through the uniform laws of the province. Contrary to what the Brookhaven townspeople had expected from legal authority, the law essentially laid down a step towards divorcing the community from autonomous control of its resources.

Closely interconnected with Kempe's criticism of the bylaw was his long list of objections against the justice's "irregular" proceedings in fining George Deren. Most of them pertained to technical points of procedure. That the justice did not have "any authority to try this cause" followed from Kempe's invalidation of the bylaw. The immediate problem, however, was that the justice did "not set forth by what authority he tried this cause, whereas "all inferior jurisdictions must set forth their authority." Further procedural problems included the fact that

Benajah Strong, who reported Deren's violation of the bylaw, seemed to be the complainant. This made the "charge or declaration bad," since the corporation, as the allegedly aggrieved party, should have directly sued Deren, or at least formally authorized Strong to sue him on their behalf.[95] Kempe also found it problematic, although without supplying further reasons in his notes, that the suit was "by a corporation with[ou]t attorney." Even if the charge had been appropriately made and the justice had established the authority to try the cause, he should not have done so, since the defendant "never pleaded." What the justice should have done instead, Kempe insisted, was to give "judgment by default for want of a plea." Kempe's remaining points were even more technical. The charge should have specified "how many oysters were caught." It should have also specified that the oysters were caught "within the limits of the town," as the bylaw only applied within the town's limits.[96]

The Brookhaven justice's informal proceedings on the case were fairly typical of the local justices' practices in late colonial New York. In resolving disputes, justices seldom went beyond noting that judgment was given against one of the parties, or that an out of court settlement had been reached.[97] Finer legal distinctions such as default for want of plea were usually bypassed when it seemed clear which party should be made to owe the damages and costs in question. When there was a violation against the agreements of the community, there was no need to sharply distinguish between the actual aggrieved party and the inhabitant who reported the violation. If it was an offense against the community, it hardly mattered who was the

[95] Benajah Strong had been a justice of the peace since at least 1763, and as may be recalled, was one of the three justices reprimanded in 1769 by Kempe for abusing the Less than Grand Larceny Act. This took place a few months following the dispute over the Brookhaven bylaw, showing that Strong had been a justice throughout the whole time. Strong's role in bringing the violator to court illustrates the strong commitment of some local justices to communal causes, actively supporting the community's agreements even outside of their official capacity. "List of Justices of the Peace in the Several Counties within the Province of New York," 1763, *New York Miscellaneous Manuscripts*, NYHS, Box 8, no. 32; John Tabor Kempe to Richard Woodhull, Benajah Strong & Silas Strong, Mar. 3, 1769 & June 9, 1769, *Kempe Papers*, Box 15, Folder 5. See also Chapter 1, p. 30.

[96] "Summary of the Exceptions to be taken to the return of Certiorari," n.d., Ibid., Box 3, Folder 4

[97] See Chapter 2, p. 85.

formal complainant behind the lawsuit. Neither was a sharp specification of the community's lands and resources necessary, as the justices operated within a shared communal understanding about which resources and rights customarily belonged to the community. Such informal, localized practices, as the attorney general sought to make clear in his vigorous condemnation of the Brookhaven justice's proceedings, would no longer meet the approval of the province's higher legal authorities. Kempe was effectively reminding local justices that their legal authority derived not from their community, but from the province's uniform legal rules.

Several months after the incident in Brookhaven, a similar controversy arose in Kingston, Ulster County. In Kingston, it was a bylaw protecting the town's commons from livestock that was brought into the spotlight. According to the bylaw, any inhabitant who let his or her hogs "run at large" would be charged a penalty of twelve shillings by the corporation. Just as the inhabitants of Gravesend and Brookhaven had done, the Kingston Corporation relied on its local justices for enforcement of the bylaw. Violators of the bylaw would be sued before a justice, and would be made to pay the penalty and court fees. Perhaps having heard about the attorney general's condemnation of the Brookhaven proceedings against violators, the Kingston Corporation added a procedural bylaw to supplement all of its regulatory bylaws. When a violation against any of its bylaws was discovered, Anthony Hoffman, in his capacity as "president of the trustees of the freeholders and comonalty of the town of Kingston," would assume the role of suing the violator before a local justice.[98]

If there had already been inhabitants penalized under these bylaws, Jacob Ten Broeck was unwilling to become one of them. In April 1769, Ten Broeck was summoned before Justice Louis Bevier upon the complaint of Hoffman. Casting it as a debt litigation, Hoffman demanded

[98] "Certiorari against the judgment in the suit of Anthony Hoffman v. Jacob Ten Broeck," n.d. *Kempe Papers*, Box 11, Folder 4.

twelve shillings from Ten Broeck on account of his violation of the bylaw against letting hogs into the commons.[99] Ten Broeck did not deny the fact, but he was unwilling to pay the fine. Both parties appeared before Bevier on May 4th, but the hearing was postponed to the following day, as Hoffman demanded a jury trial, and Ten Broeck wanted attorney John Dumond, who would be returning home from a trip, to "speak for him and manage the defence" on his behalf.[100]

On the following day, six jurors, along with a witness (presumably the person who saw Ten Broeck set his hogs in the commons), appeared at the house of local Johannis Maston for the trial. Constable Ezekiel Masten had empanelled the jury according to Justice Bevier's instructions to find six men who were not "related by any affinity (or interested)" either with the plaintiff or defendant.[101] Also present were two local attorneys—Johannes Sleght for the plaintiff, and John Dumond for the defendant.[102] Dumond immediately raised two "exceptions" against having the cause tried by a local justice and jury. First, the summons was not issued according to the Five Pounds Act (Dumond was perhaps alluding to the fact that the lawsuit, while presented as a debt litigation under the Five Pounds Act, was essentially a prosecution on a petty offense). Secondly, Dumond denied that Hoffman had any right "by law" to bring an action against his client. The corporation's bylaw authorizing Hoffman to collect penalties, Dumond flatly stated, was "illegal."[103] It was against the "directions of the Stat: 19. H. 7. cap. 7," a Parliamentary statute "for making of statutes by Bodies incorporate" created in the early sixteenth century. The

[99] Summons issued by Justice Louis Bevier, Apr. 27, 1769, Ibid., Box 11, Folder 4.

[100] Ten Broeck also raised a rather odd objection against Bevier's trying the case, on account of his "being a second couzin by marriage" to Ten Broeck, but this seems to have been quickly ignored. "The Defendant's Exceptions in the trial of Anthony Hoffman as president of the trustees of the freeholders and comonalty of the town of Kingston against Jacob Ten Broeck," n.d., Ibid., Box 11, Folder 4; Deposition of Justice Louis Bevier, n.d., Ibid., Box 11, Folder 4.

[101] Warrant issued by Justice Louis Bevier, May 5, 1769, Ibid., Box 11, Folder 4; "Bill of cost of the action between Anthoni Hofman as presedent of the trustees of the commonality of the corporation of Kingston plantiff and Jacob ten Brouck defendant," n.d., Ibid., Box 11, Folder 4.

[102] Deposition of Justice Louis Bevier, n.d., Ibid., Box 11, Folder 4.

[103] "Certiorari against the judgment in the suit of Anthony Hoffman v. Jacob Ten Broeck," Ibid., Box 11, Folder 4.

English statute stated that corporations could not exact money by an unlawful or unwarranted bylaw, not examined and approved by the Chancellor or Chief Justice.[104] Whether and how the statute could apply in the colonial context was unclear, but the import of Dumond's argument was clear: A bylaw was subject to the approval of higher legal authorities, and could not be enforced upon anyone simply by the enactment of a community. Also made clear during the trial was the communal sentiment against such strict constructions of legal hierarchy. Overruling Dumond's objections, Justice Bevier proceeded to try the cause before the jury, who gave verdict against Ten Broeck. Bevier gave judgment accordingly, charging 12 shillings for damage along with 16 shillings and 3 pence for costs of the suit to Ten Broeck.[105]

Both in Brookhaven and in Kingston, the corporations sought to control the inhabitants' self-interested usage of communal resources by tying the town's collective regulations to the legal authority of local justices. That authority, however, was already increasingly under attack in the late colonial period. The justices' diminishing authority, as the Brookhaven and Kingston disputes illustrate, was part of a broader change sweeping late colonial New York's local courts and communities. Everywhere from Long Island to the Hudson Valley, communal modes of dispute resolution, whether the justices' summary proceedings, jury trials, or arbitration, were being circumvented, challenged, and transformed by legal professionals.

In Kingston, the trustees, local justice, and jurors were immediately successful in repudiating local attorney John Dumond's attempt to let professionalized law determine local matters. Dumond's client apparently appealed the local court's decision, however. Two months following the trial, a certiorari against Justice Bevier's judgment was lodged and obtained in the

[104] *The Statutes at Large: From the First Year of King Edward the Fourth to the End of the Reign of Queen Elizabeth: To Which Is Prefixed, A Table of the Titles of All the Publick [sic] and Private Statutes during That Time* (London, 1770), 99.
[105] Deposition of Justice Louis Bevier, n.d., *Kempe Papers*, Box 11, Folder 4.

Supreme Court by Attorney General Kempe.[106] There is no record of a subsequent hearing in the Supreme Court, likely because Bevier and the trustees of Kingston opted to make reparations to Ten Broeck rather than face a trial in New York City with the attorney general on the other side. If a local attorney failed to impose formal legal rules in a local court, Kingston's inhabitants learned, he could always apply to higher legal authorities who would generally be more sympathetic toward the attorney's appeal to uniform professionalized law than toward the local court's informal practices.

Kingston's inhabitants would have surely noted Dumond's use of formal legal knowledge to challenge the corporation's bylaw, and his role in subjecting the local court's decision to the review of a higher legal authority. It was probably no coincidence, then, that Dumond would be squarely at the center of another round of controversy in Kingston surrounding professionalized law and localized practice. Taking place about one year after the dispute over the corporation's bylaws, the controversy would further illuminate the deep tensions wrought by legal professionalization in local courts and communities.

"He would Shew him a Point of Law": Law and Equity in an Ulster County Justice's Court

Sometime in August 1770, six jurors in Kingston, Ulster County appeared before Justice William Elsworth to hear John Houghtaling's complaint against Cornelius Brink. Brink appeared for the trial, but Houghtaling did not. The trial proceeded nonetheless, as local attorney John Dumond appeared on Houghtaling's behalf. Speaking for his client, Dumond demanded about six pounds from Brink on an unpaid promissory note and a "mare" which Brink had borrowed

[106] "Certiorari against the judgment in the suit of Anthony Hoffman v. Jacob Ten Broeck," Ibid., Box 11, Folder 4.

and allegedly never returned.[107] Brink denied the demands as "unjust." He had good evidence, all of them "sworn and heard," he claimed, proving that he owed Houghtaling "no part of the demand." Dumond had come prepared for this. He immediately disputed the validity of Brink's evidences on the grounds that they "differed very much from the oath which the plaintiff had taken some days before." Houghtaling, as Justice Elsworth interceded and explained to the jury, had come to his house sometime before with Dumond, and made a sworn affidavit supposedly proving Brink's obligation. Not only had Elsworth taken Houghtaling's affidavit, but he had also kept it himself and brought it to court. Pulling it "out of his pocket," he went on to read it out to the jury as evidence on the plaintiff's side. Some of the jurors, however, were doubtful whether they should consider the affidavit in forming their decision. Sensing this misgiving, Dumond "insist[ed] hard that it should be admitted of as lawfull evidence." It was to no avail. After some discussion, the jury decided that Houghtaling's affidavit was "exparte evidence and contrary to law." Accordingly, they "took no notice of it," and gave their verdict in favor of Brink, the defendant.[108]

The defeat apparently had little effect on Dumond. Only a few days later, he was once again urging the validity of his client's ex parte evidence in a different case, again before Justice Elsworth, but this time without any jurors around. The client was Johannes Freer, who sued neighbor Elijah Arnold for damages of 30 shillings on account of the latter having impounded his hogs. Initially, Dumond only offered Freer some advice on assessing the damage, and did not attend the trial held before Justice Elsworth, as he and Freer could not reach an agreement over Dumond's fees. Dumond had demanded 20 shillings; when Freer said he could only offer a

[107] "Notes on the Hearing of Justice V. Sleyck & Others v. Justice Elsworth & Mr. Dumond before the Governor & Council," Apr. 3, 1771, Ibid., Box 10, Folder 9.

[108] Deposition of Frantz P. Roggen and Evart Bogardus, Dec. 31, 1770, Ibid., Box 10, Folder 9; Deposition of Cornelis Brink, Dec. 21, 1770, Ibid., Box 10, Folder 9.

dollar, Dumond scoffed that he "would rather do it for nothing." So Freer went on to the trial by himself, in which Elsworth heard his complaint but deferred judgment until ten days later. On the day judgment was to be given, Freer paid another visit to Dumond, evidently assuming that he would have heard something about the case from Elsworth. Freer's hunch was right. Dumond had spoken with Elsworth, and was "afraid the cause would go against [Freer]."

What prompted Dumond to change his mind about helping Freer can only be speculated upon (if Freer paid him, he failed to mention it in his subsequent deposition), but this time he offered to "see what he could do." Taking a "law book" with him, Dumond went to Elsworth and told him that Freer had sustained damages and could "safely swear to it." Elsworth, however, was unsure "wheather it was proper to take his oath." Understandably so, as a few days earlier in the trial of Houghtaling against Brink, his attempt to have an ex parte evidence admitted for judgment had been rebuked by the jury as unlawful. Undaunted, Dumond offered to "shew him a point of law that he had a right to take [Freer's] oath." Dumond proceeded to "read some law" to Elsworth, after which they briefly went "into another room" for further discussion. When they returned, Elsworth had somehow been fully persuaded. He took Freer's sworn statements regarding the damages he sustained, and "a few minutes thereafter" gave judgment in his favor for ten shillings' damages and cost of suit.[109]

It would have been interesting to know what law book Dumond cited, and how, since the Five Pounds Act (or "Ten Pounds Act," as it was called during the period when the justices' civil jurisdiction was briefly enlarged from five to ten pounds) included a provision that clearly disagrees with Dumond's stance on ex parte evidence: "No Oath or Affirmation of the Parties, or Exparte Affidavit of any other person shall be allowed or given in Evidence in any Suit to be

[109] Deposition of Johannes Freer, Dec. 22, 1770, Ibid., Box 10, Folder 9; "Notes on the Hearing of Justice V. Sleyck & Others v. Justice Elsworth & Mr. Dumond before the Governor & Council," Apr. 3, 1771, Ibid., Box 10, Folder 9.

brought by Virtue of this Act, unless the Parties agree to admit of such Evidence"[110] The jurors in the trial of Houghtaling against Brink, in a remarkable demonstration of their legal knowledge, had gotten it right. Elsworth, despite being a magistrate, was clearly not as informed about the law. Dumond was either equally ignorant of the provincial statutes, or was perhaps knowingly trying to dupe Elsworth and the jury into handing favorable decisions to his clients. Or even worse, Elsworth and Dumond were in some sort of collusion, distorting the legal process and judgments for their mutual benefit. That was what a handful of inhabitants insinuated about Elsworth and Dumond, when they complained against the two in early 1771.

Dumond always seemed to be involved when Elsworth handled a case, unduly influencing the latter's proceedings, according to the complainants. Dumond was the defendant's attorney when Johannes G. Hardenbergh and his cousin Cornelius Hardenbergh brought Justice Elsworth their debt claims against Isaac Rosa. Dumond only acknowledged a sum of 4 shillings owed by his client to Cornelius—a much smaller amount than the 2 pounds and 15 shillings demanded by the latter, and entirely denied Johannes's claim of 3 pounds. Both Cornelius and Johannes countered that they had "good and undeniable evidences to prove" their demands as "just and true." Elsworth, however, "absolutely refused to swear or hear" their statements. He swiftly proceeded to give judgment against Johannes for cost of suit, and gave judgment for Cornelius, but only for 4 shillings—precisely the outcome that Dumond had desired.[111]

Aggrieved by what he perceived as Elsworth's unjust proceedings, Johannes remembered his mother's experience at Elsworth's court two years earlier, which all seemed to make sense now. Summoned by Elsworth to defend herself against Johannes Suylant and Petrus Crispel Jr.,

[110] "An Act to impower Justices of the Peace, Mayors, Recorders and Aldermen to try Causes to the value of Ten Pounds and under for suspending an Act therein mentioned," *N.Y. Col. Laws*, IV: 1079-1087.
[111] Deposition of Cornelius Hardenbergh, Dec. 12, 1770, *Kempe Papers*, Box 10, Folder 9; Deposition of Johannes P. Hardenbergh, Dec. 11, 1770, Ibid., Box 10, Folder 9.

Hardenbergh's mother applied to John Dumond to "support her cause." Dumond accepted, but when the day of the trial arrived, said he could not attend. When Hardenbergh and his brother insisted that Dumond should represent their mother in the trial as promised, he responded that "you need not be affraid of your cause for I have spoke to Elsworth and if I speak to Elsworth before the day of tryal you need not be affraid of the action." Dumond, at the Hardenberghs' insistence, did attend the trial after all, and won judgment for their mother. But not before uttering words, which, if he truly said it, amounted to a confession that he had been unduly influencing Elsworth, or colluding with him, to assure favorable outcomes for Dumond's clients.[112]

Dumond and Elsworth's close relationship went back further. In 1765, Jero, a "negro man belonging to" Franz P. Roggen, was charged with physically assaulting Edward Schoonmaker, and was subsequently apprehended and committed to jail upon Elsworth's order.[113] Finding Jero guilty of the crime, Elsworth sentenced him to the "publick whipping post [to receive] sixty lashes on his bare back." Elsworth then sent him back to jail, only to have him brought back the following day for 25 more lashes. The cruel punishment continued for ten days, according to Roggen. On the tenth day, Roggen was told that his slave was finally to be released, and that he must pay the fees incurred from arresting, imprisoning, trying, and punishing Jero. But upon paying the fees, he found out that Jero's ordeal was far from over. Elsworth had just issued a new warrant commanding Jero back to jail, unless he could provide "sufficient sureties" ensuring his personal appearance at the next General Quarter Sessions of the Peace for Ulster. Roggen offered himself as surety, but Elsworth demanded two sureties besides Roggen in the sum of £300. This stringent requirement of surety, according to Roggen, was made upon John Dumond's

[112] Deposition of Johannes P. Hardenbergh, Dec. 11, 1770, Ibid., Box 10, Folder 9.
[113] Deposition of Abraham Heermanse, Dec. 16, 1765, Ibid., Box 11, Folder 9

suggestion, who seemed to be acting as Elsworth's advisor.[114] This was before Dumond had even been licensed as an attorney.[115]

The complainants' stories, presented as written depositions taken by Justices Johannis Sleght and Dirck Wynkoop, were compelling enough for the governor's council to grant them a hearing.[116] Sleght and the other complainants were represented by one "Livingston" in the Council.[117] This might have been Gilbert Livingston, Jr., a lawyer who practiced in Ulster County.[118] Or judging from the fact that John Tabor Kempe simply noted him by his last name in his papers, it was perhaps a better known lawyer such as William Livingston. At any rate, "Livingston" was clearly a trained lawyer retained by the complainants to press charges against Elsworth and Dumond. Focusing on three of the cases related in the depositions—the trials of John Houghtaling against Cornelius Brink, Johannes Freer against Elijah Arnold, and Johannes G. Hardenbergh against Isaac Rosa, Livingston set out to prove that Elsworth's proceedings and Dumond's involvement in each case were both "against law" and "against equity."

On the day of the hearing, Freer, Hardenbergh, and Frantz Roggen appeared to recount their stories to the councillors. Freer and Hardenbergh had a few more details to add to their earlier depositions. Sometime after Freer won judgment against Arnold in Elsworth's court, Arnold in turn sued him in Justice Sleght's court, apparently in retaliation. If Freer could claim damages he sustained due to Arnold's impounding his hogs, Arnold could demand compensation

[114] Deposition of Frantz P. Roggen against John Dumond and William Elseworth, Jan. 4, 1771, Ibid., Box 10, Folder 9

[115] "Notes on the Hearing of Justice V. Sleyck & Others v. Justice Elsworth & Mr. Dumond before the Governor & Council," Apr. 3, 1771, Ibid., Box 10, Folder 9.

[116] Jan. 22, 1771, New York (State) et al., *Calendar of Council Minutes, 1668-1783* (Albany: University of the State of New York, 1902), 484.

[117] "Notes on the Hearing of Justice V. Sleyck & Others v. Justice Elsworth & Mr. Dumond before the Governor & Council," Apr. 3, 1771, *Kempe Papers*, Box 10, Folder 9.

[118] Paul M. Hamlin, *Legal Education in Colonial New York*, (New York: Da Capo Press, 1970), 106.

for the damages Freer's hogs had been inflicting on his property (which was what prompted him to impound the hogs in the first place). When Sleght gave judgment for Arnold, Freer went back to Dumond, who had earlier helped him win judgment in Elsworth's court. Dumond, according to Freer, urged him to disregard Sleght's judgment, "for they could not make him" pay anything. When he could not influence decisions as he did with Elsworth, Dumond encouraged his clients, it would seem, to evade the enforcement of unfavorable judicial decisions.

Hardenbergh also had a few more things to testify. In his trial against Isaac Rosa, Justice Johannis Sleght was in fact present as his attorney. Sleght hardly had much opportunity to plead his client's case, however, as Dumond "spoke so much" on behalf of Rosa that he simply "could not say any thing." When Sleght finally did manage to say he had witnesses to prove Hardenbergh's demand, Dumond quickly denounced the motion, saying that Hardenbergh and Sleght "should have no witnesses sworn, nor action, nor get a penny of money." The rest of the story had already been told in Hardenbergh's deposition. Elsworth would not allow Hardenbergh to bring in his witnesses, and gave judgment against him.

Roggen had made two depositions against Elsworth and Dumond. One was about the prosecution of his slave Jero in 1765. The other was about the trial of Houghtaling against Brink, in which Roggen sat as one of the jurors. Roggen and another juror, Evart Bogardus, were the ones who made the deposition about Elsworth and Dumond's attempt to have the jury admit ex parte evidence during that trial. Roggen did not have much to add to his already detailed depositions, but two other men summoned as witnesses did. Christian Freese and Adam Wolf both testified that Brink, sometime before the trial, had in fact approached Dumond to hire him as his attorney. After speaking with Houghtaling, however, Dumond became strongly

predisposed against Brink. Calling Brink a "rogue," not only did he refuse to represent him, but he subsequently took Houghtaling to Elsworth to make the controversial ex parte affidavit.

Taken together, the import of these testimonies was clear. Dumond, not Elsworth, was acting like a magistrate. It was his decision that mattered; once Dumond made up his mind about a case, Elsworth went along with it. Elsworth's proceedings were "against law," as he, at Dumond's prodding, ignored provincial statute barring the justice's admission of any "ex parte oath of a party." More importantly, they were "against equity," as he gave Dumond's clients undue advantage in his proceedings and judgments.[119]

There was more to the story, however, as John Tabor Kempe set out to show in his defense of Dumond and Elsworth. Kempe first brought in a slew of witnesses to establish the good characters of Elsworth and Dumond. Jacobus Low, Abraham Low, Coenradt C. Elmendorph, Johannes Kater, and Jacob Ten Broeck all agreed that Elsworth's character was "fair" and "good." Ten Broeck, as may be recalled, had been represented by Dumond in his defense against the Kingston Corporation in the earlier dispute over bylaws. Three of the witnesses also spoke highly of Dumond: He was a "fair character" against whom they could say nothing. He always "would endeavor to do justice to his clients," and was never known to "encourage law suits." To the contrary, he was known for frequently "compar[ing] differences" (helping litigants settle disputes without a trial). Some of them also offered their opinions about the opposing witnesses. Jacobus Low claimed to have known Johannes Freer "ever since he was a little boy," and averred that he was always a "bad character a liar," and a "very loose man" who would "offer[] to swear false." Similarly, Ten Broeck had "never heard any good of [Adam]

[119] "Notes on the Hearing of Justice V. Sleyck & Others v. Justice Elsworth & Mr. Dumond before the Governor & Council," Apr. 3, 1771, *Kempe Papers*, Box 10, Folder 9.

Wolf," and heard that "he will swear any thing." Abraham Low agreed that Wolf was a "bad character."

Two of Kempe's witnesses, Elmendorph and Kater, had been present at the trial of Hardenbergh against Rosa. Hardenbergh's counsel Johannes Sleght opened the trial, as they both remembered, by demanding 3 pounds from Rosa on behalf of Hardenbergh. So much they could agree with Hardenbergh's testimony, but the ensuing proceedings they remembered differently. Upon hearing Sleght's charge, "Dumond desired to know what the demand was for, that he might defend it." But Sleght simply claimed that "he could prove it," according to Elmendorph, without offering any further explanation or evidences. It was an account that differed substantially from Hardenbergh's, in which Sleght had been trying hard to offer his evidences but was obstructed from doing so by Dumond. Elsworth's subsequent decision was also remembered in a different light. Whereas Hardenbergh claimed that Elsworth willfully ignored his evidences and proceeded to give judgment against him, Elsworth in fact did not give any judgment at all, according to Kater's memory. After examining the "award and bond" presented as evidence by Dumond, Elsworth "said the action did not lay before him, because it was too large a sum."

The "award and bond" Kater referred to was a debt that arose from an arbitration on an earlier dispute. Rosa had been one of the parties in the dispute, and Cornelius and Johannes Hardenbergh had been two of the four arbitrators. According to the terms of the arbitration, the losing party was to pay a sum of 12 pounds to the arbitrators for their "expences" and "further allowances &c." When the arbitrators awarded a decision for the opposing party, Rosa failed to pay the sum according to the agreement, which prompted the Hardenberghs to press charges on him.

In his defense of Dumond's and Elsworth's conduct in the trial of Hardenbergh against Rosa, Kempe brought attention to this underlying obligation. It was a lawful obligation, but not one to be validated and enforced by a justice of the peace. For one thing, the four arbitrators were joint creditors in a claim against Rosa that arose from the same cause. Hence they should have jointly sued Rosa upon the "whole account" of 12 pounds. But in a contrivance to make the cause fall within the justices' jurisdiction under the Ten Pounds Act, the Hardenberghs had split it into four separate claims each of about 3 pounds' value. Not just the amount of the debt, but also the nature of the obligation placed the cause out of a justice's jurisdiction. Arbitrators, Kempe pointed out, "could not by their award make one of the parties a debtor to themselves," and certainly should not try to recover their costs through a regular debt litigation. The only lawful way for the arbitrators to demand the sum was in a "suit on the arbitration bond," over which an individual justice had no jurisdiction. Hence, Kempe concluded, Dumond was entirely correct in arguing that the Hardenberghs' cause was "out of the justices jurisdiction," and Elsworth was also right to find the underlying debt claim too large in value for it to "lay before him."

Regarding the other cases, Kempe defended his clients' conduct by disputing certain factual details in the complainants' depositions, denying that his clients had any ill intentions, and arguing that there was no cause of complaint since the complainant personally did not have any cause for grievance. For instance, Kempe flatly denied any claims that Dumond promised clients a favorable judgment in Elsworth's court, or that he instructed Elsworth on a point of law during a trial. It was the complainants' words against Dumond's and Elsworth's. This was what Kempe had brought in so many witnesses for—he reminded his audience how Dumond and Elsworth were both "good" characters, according to those witnesses, while several of the

complainants such as Freer were known as "bad" characters and hence could not be trusted. Of course Kempe could not go on to deny all of the complainants' statements. He assented to the more innocuous parts of their depositions, such as that Elsworth did take an extended time to consider Freer's complaint against Arnold, or that he was unsure if he could take Freer's affidavit as evidence in the case. These were facts which, if suggesting Elsworth's ineptness or ignorance, did not show any "criminal intention" on his part. Further, since Elsworth gave him judgment in the cause, Freer had no reason to complain—in other words, "this complain[t] could not have originated with him." Same went with the trial of Houghtaling against Brink. Perhaps Elsworth was wrong to take Houghtaling's ex parte affidavit, but it was an innocent mistake. More importantly, the jury gave verdict against Houghtaling after all, and Elsworth accordingly gave judgment for Brink, so neither Brink nor any of the jurors had a valid cause of complaint.[120]

By the time the lengthy hearing was over, the council had found Kempe's arguments more convincing than Livingston's. Or at least they could not find sufficient cause to censure Elsworth or Dumond. They did find enough reason to admonish one of the complainants, however. As was revealed during the hearing, Johannes Sleght, while being a justice of the peace himself, had appeared as an attorney before Justice Elsworth in the trial of Hardenbergh against Rosa. This revelation proved costly for Sleght, as the council officially reprimanded him "for soliciting causes before other justices."[121] It was an unequivocal victory for Kempe and his clients.

The complaints against Justice William Elsworth and local attorney John Dumond, the subsequent testimonies, and the resolution in Council exemplify some of the complex issues that

[120] Ibid.
[121] *Calendar of Council Minutes*, 484–485.

began to arise as local legal practice intersected with professionalized law in late colonial New York. By 1770, if not earlier, professionalized law had clearly become a significant presence in Justice Elsworth's court in Ulster County. In this microcosm of late colonial New York's legal milieu, Dumond represented the two mutually reinforcing trends outlined in the previous chapter—the growing body of formal doctrines, rules, statutes, and precedents comprising provincialized common law, and the increasingly wide-reaching activities of legal professionals throughout the province. Whereas the local attorneys discussed earlier were mostly active in county courts of common pleas and of general sessions, Dumond's case shows that some of them were reaching further down even to the single justices' courts.

Even in his summary proceedings, Elsworth relied heavily on Dumond for advice on specific points of law. Despite being an experienced justice of the peace,[122] he was often unsure about how to proceed in accordance with the law—whether he could take an ex parte affidavit and treat it as valid legal evidence, how much surety he should demand in binding a slave to appear at the county court, and whether he could enforce the arbitrators' recovery of their fees from one of the parties in a dispute. Elsworth's frequent consultation with Dumond on such issues demonstrates both the lay justices' ignorance of the finer aspects of formal law, and the growing pressure upon them to conform to uniform procedures and doctrines. For Elsworth, the best recourse was to turn to a local attorney—the man with law books.

The effect of professionalized law was felt not just in the justices' summary proceedings, but also in jury trials and arbitration. In refusing to acknowledge ex parte evidence, the jurors in the trial of Houghtaling against Brink evinced an uneasiness with informal modes of adjudication. Instead of forming a verdict based on a comprehensive consideration of all available evidence

[122] Elsworth's name appears in a 1763 list of Ulster County's justices, hence he had been a justice for at least seven years by 1770. "List of Justices of the Peace, 1763," *New York Miscellaneous Manuscripts*, Box 8, no. 32.

upon the general issue, the jurors desired to ensure that only those evidences that were duly submitted would be taken into their consideration. In other words, they refrained from assuming full power to find the law in the case. At least regarding the question of admitting ex parte evidence, they wanted to leave the determination of legality to formal procedural rules, and confine their role as jurors to finding the facts presented to them within the bounds of law.

Arbitration within communities could ultimately lead to a resolution based on professionalized law too, as the trial of the Hardenberghs against Rosa illustrates. The underlying arbitration itself might have worked, but the resolution remained incomplete as the arbitrators could not recover their substantial fees. When the Hardenberghs tried to do that by suing Rosa in a justice's court, they found themselves pulled into the realm of professionalized law. While the Hardenberghs evidently expected a quick, low cost recovery awarded by Justice Elsworth, they did not account for the intervention of Dumond. Armed with a knowledge of formal legal doctrines, Dumond successfully argued that a justice of the peace did not have jurisdiction in such a case. The Hardenberghs should take their cause to a higher court, and obtain judgment upon the merits of a formal arbitration bond. In Justice Elsworth's court in 1770, jury trials and arbitrations were no longer vehicles of informal intra-communal dispute resolutions. They were seen as subject to uniform procedural laws, and entailed determinations based on formal law, rather than communal norms and values.

If the incursion of professionalized law was evident, the behavior of the locals surrounding Elsworth's court shows an ambivalence, at best, toward legal professionalization. Except for the jurors who pointed out the illegality of ex parte evidence, most of the inhabitants, including Elsworth himself, were quite ignorant of formal law. Johannes Freer was just as clueless as Elsworth whether his ex parte affidavit could be used as evidence. The Hardenberghs

had no idea that they could not recover their arbitrators' fees in a simple debt litigation. Even after Elsworth decided he had no jurisdiction over the cause, they understood it as Elsworth having willfully ignored their evidences and having given judgment against them. Despite being both a justice of the peace and an attorney, Johannes Sleght seems to have similarly misunderstood the case, judging from the fact that he was Hardenbergh's attorney in the debt litigation, and that he later helped Hardenbergh present his complaint against Elsworth to the provincial council.

Frantz Roggen was one of the jurors in the Houghtaling-Brink trial in which the jury judiciously invalidated an ex parte evidence. But five years earlier when his slave Jero was prosecuted by Elsworth, Roggen reacted angrily against formal procedure. He bitterly protested Elsworth's demand of two sureties, each guaranteeing a sizeable sum, for discharge of his slave. If Elsworth's exorbitant demand was cruel, however, that was because the law itself was cruel. Edward Schoonmaker, who had allegedly been "violently" assaulted by Jero, had sworn the peace against Jero. Schoonmaker claimed that Jero was a "disorderly & dangerous fellow," and that he was afraid for his life unless Jero was bound to appear at the county court of general sessions and kept imprisoned until his appearance.[123] Especially since the law did not acknowledge the testimonies of slaves against white people,[124] Elsworth was bound by law to take Schoonmaker's charges seriously. It made sense, then, to require a prohibitively high surety effectively ensuring that Jero would stay in prison. As Kempe later opined, it was a prudent decision he reached after consulting with Dumond regarding the law on this issue.[125] Roggen, however, either could not, or would not, understand any of this. It was unjust to have his slave

[123] "Notes on the Hearing of Justice V. Sleyck & Others v. Justice Elsworth & Mr. Dumond before the Governor & Council," Apr. 3, 1771, *Kempe Papers*, Box 10, Folder 9.
[124] "An act for the more effectual preventing and punishing the conspiracy and insurrection of negro and other slaves; for the better regulating them...," *N.Y. Col. Laws*, II: 684.
[125] "Notes on the Hearing of Justice V. Sleyck & Others v. Justice Elsworth & Mr. Dumond before the Governor & Council," Apr. 3, 1771, *Kempe Papers*, Box 10, Folder 9.

imprisoned for so long, especially upon the charges of one individual. Earlier, he had in fact violently resisted the constable and deputies who came to arrest Jero upon a warrant issued by Elsworth. Hiding Jero in the house, Rogen refused to open the door, and when the constable tried to find his way in, threatened to "strike with a club about four or five foot long."[126] Five years later, he was still bitter about Elsworth's proceedings, and eagerly contributed his depositions about what he perceived as the justice's misdeeds.

Despite the clear signs of legal professionalization, then, the litigants, witnesses, justices, and lawyers surrounding Elsworth's court in 1770 did not share a common understanding of the law. Legal professionalization, in fact, contributed to their widely disparate understandings of lawful procedure and resolution. As the colony's legal elite liked to remind the public, New York's provincialized common law had become too extensive and complex for lay people to comprehend all of its intricacies. Hence some locals, such as lawyers Dumond and Sleght, knew more about formal law than others. Their knowledge, however, was also imperfect. It is unclear, indeed, if either of them had received any formal legal training. On some occasions, one of them understood a point of law incorrectly, while the other had it right. Or sometimes a layperson sitting as a juror, perhaps because he happened to have perused a provincial statute more closely, knew better about a particular clause than the lawyers. If legal professionalization was expected to engender uniform practice throughout the province, that was hardly its actual effect in Justice Elsworth's court in Ulster County.

Further, the different understandings of law were not simply perceived as a result of varying degrees of professional legal knowledge. The complainants against Elsworth and Dumond were certain that they were on the right side of the law even in instances where

[126] Deposition of Tobras Swart, Dec. 16, 1765, Deposition of Abraham Heermanse, Dec. 16, 1765, Deposition of Egbert Dumond, Dec. 16, 1765, Ibid., Box 11, Folder 9.

Dumond's practices and Elsworth's proceedings turned out to be legally sound (which, according to Kempe, was the case except regarding the issue of ex parte evidence). Roggen, Brink, Freer, and the Hardenberghs, despite their apparent lack of understanding of formal law, were convinced that certain parts of Elsworth's proceedings were unlawful. This conviction was grounded less in the law as written and practiced by legal professionals, than in the locals' own expectations of what the law should be. A major part of that expectation, as evinced in the complaints, was equitable justice.

When a magistrate refused to acknowledge the evidences of one party while seemingly privileging the claims of another, the locals felt that those proceedings were inequitable, and thus against the law. It did not matter that the magistrate was following the advice of a lawyer who, although occasionally mistaken, usually gave sound reasons why certain evidences should not be admitted, or why a judgment should be deferred. That those advices were consonant with formal procedures and doctrines mattered less than the fact that they always seemed to give the lawyer's clients undue advantage. The combination of a magistrate and lawyer like Elsworth and Dumond, in this respect, was seen as a special threat. Equitable justice could not be expected when a magistrate was excessively susceptible to the persuasions of a lawyer, and the lawyer was ready to abuse his proficiency in law to manipulate the magistrate's proceedings.

What magnified the suspicion toward lawyers such as Dumond was the uncertainty permeating the local courts in late colonial New York—an uncertainty which owed partly to the dissipation of shared communal norms, but also to the incursion of professionalized law. As an increasing number of legal disputes and claims were determined by formal points of law which they poorly understood, ordinary New Yorkers such as Roggen, Freer, and the Hardenberghs looked with anxious suspicion at lawyers who held a virtual monopoly over formal legal

knowledge in the local court, and neighbors who sought to benefit from the service of those lawyers. Earlier, Dumond had helped his client resist the town corporation's bylaws and overturn a justice and jury's decision. Now he seemed to have gained unbounded influence over one of the justices. If even the local justice had to rely on such lawyers regarding points of law, who could stop the lawyer from distorting the law to serve his clients' private gains?

This is why the complainants decided to turn to a higher legal authority in early 1771. Legal professionalization had heightened the sense of uncertainty and suspicion surrounding local legal practice, while also rendering the locals helpless against a lawyer versed in the language of professionalized law. If they wanted redress, they had to look outside the community. The complainants were able to secure a hearing in the council, and have a professional lawyer represent them. The council, however, did not deliver the complainants the justice they sought. Attorney General Kempe, one of the highest legal authorities in the province, sided against them, skillfully employing his deeper knowledge of formal law to discredit their testimonies and destroy their arguments.

The records do not show how the complainants reacted to Kempe's defense and the council's decision, but it is difficult not to imagine their dismay as Kempe knowingly denied key facts on which the charges hinged, and discredited the accusations by raising technical issues: Was the complainant the party directly aggrieved by the alleged injustice? Did the justice merely act out of ignorance or show a clear criminal intention? Did the arbitrators try to recover their fees using the proper form of debt litigation? If anything, it must have been a sobering experience to the Ulster County complainants—professionalized law, whether in lower or higher tribunals, did not necessarily align with their sense of lawfulness and equitable justice, and legal professionals could hold a powerful sway over any court in the province. Following the council

hearing, Elsworth disappeared from the list of trustees of the corporation of Kingston, while Sleght went on to be reelected annually as a trustee until 1773.[127] In light of the provincial council's upholding of Elsworth's proceedings and rebuke of Sleght, which must have been well publicized, the Kingston Corporation's election results suggest that the local inhabitants were not persuaded by the higher legal authority's decision, instead adhering to their notions of equitable justice.

From the local inhabitants' perspective, then, resorting to higher legal authorities was not always an ideal recourse for finding justice or equitable resolutions either. If they found a local lawyer's practices disagreeable, it was not necessarily due to the unscrupulousness of that particular lawyer, but rather due to the gap between the formal rules of professionalized law and what they expected from the law. Relying on higher legal authorities for legal redress was problematic also because of the costs. Although the records do not show the costs involved in the 1771 council hearing of the Ulster County complainants, they must have been considerable. In addition to the usual lawyers' fees and court fees, the losing party would have had to pay for the costs of travel for the numerous witnesses summoned to the hearing. This, no doubt, is why the council required the complainants to "give bonds for costs" before granting them a hearing.[128] The Ulster County complainants could afford the costs because they were acting collectively. For an aggrieved individual, the costs of hiring a lawyer and securing a hearing in a higher tribunal could very well be insurmountable. Johannes Freer, for example, was initially unable to hire

[127] Elsworth had been a trustee from 1759 to 1766, and after a three year hiatus, was reelected to the position in 1769. That would be the last time he served as a trustee until 1776. Sleght held the position continuously from 1757 to 1773. Nathaniel Bartlett Sylvester, *History of Ulster County, New York: With Illustrations and Biographical Sketches of Its Prominent Men and Pioneers* (Philadelphia: Everts & Peck, 1880), 189–190.

[128] Feb. 9, 1771, *Calendar of Council Minutes*, 484.

Dumond as attorney because he could not afford the fee of 20 shillings. The expertise of legal professionals, whether in a local or higher tribunal, was clearly not accessible to everyone.[129]

The growing influence of formal procedures and doctrines, the perceived gap between professionalized and communal legal norms, and the overall sense of uncertainty and suspicion surrounding legal practice, put local justices in a difficult position. As formal legal rules emerged as the ultimate determinant in legal matters, the communal basis of the justices' summary proceedings, jury trials, and arbitrations was increasingly incapable of yielding satisfactory and stable resolution of disputes. Justice Elsworth's reaction to legal professionalization was to rely heavily upon a lawyer, but this hardly led to equitable resolutions in the eyes of the community. Justices Louis Bevier and Johannes Sleght, conversely, adhered to communal norms rather than adjust their proceedings according to formal law. Bevier actively helped enforce the town's bylaws, and overruled Dumond's objections against them. Sleght doubled as an attorney, but he took the community's side both in the dispute over the bylaws, and in protesting Dumond's inequitable use of legal expertise. Neither of them, however, could challenge the higher legal authority of the attorney general, Supreme Court, and council. If the two justices' proceedings and decisions upheld communal norms, legal professionalization and centralization significantly constrained their ability to enforce those decisions.

The centralization of provincial legal authority, the expanding reach of legal professionalization, and the concomitant decline in authority of communal modes of dispute resolution, put ordinary New Yorkers increasingly at the mercy of the province's uniform law. The problem with professionalized law, as the complainants against Elsworth and Dumond would have suggested, was that it always seemed to privilege those who could hire a lawyer.

[129] The prohibitive costs of hiring lawyers in late colonial New York is discussed in further detail in Chapter 6, pp. 286-300.

That inequity was nowhere more strongly felt than in the major area of the lawyers' business—representing New York's wealthy landowners and creditors.

CHAPTER 6

"The Surest Support of their Enormous and Iniquitous Claims"

Lawyers and Economic Privilege

The maturation of New York's legal profession hardly impressed Cadwallader Colden, a staunch royalist and long-time critic of the provincial legal elite. In the lawyers' increasing control of provincial courts, Colden saw a major threat both against the crown's authority and his subjects' prosperity in the province. New York's lawyers, according to Colden, were largely responsible for "promoting contention, prolonging suits & increasing the expence of obtaining Justice." Under their influence, Colden lamented, "every artifice and chickanery in the law has been so much connived at or rather encouraged, that honest men who are not of affluent fortunes are deterred from defending their rights or seeking justice." What made the lawyers especially dangerous was their strong ties to the colony's landed elite. "The gentlemen of the law, both the judges and the principal practitioners at the bar," Colden pointed out, "are either owners, heirs or strongly connected in family Interest with the proprietors."[1] Lawyers were valued by the "proprietors of the great tracts of land" as the "surest support of their enormous & iniquitous claims."[2] It was no surprise, then, that New York's "planters or farmers" had difficulty obtaining justice in the courts, as they "severely felt the effects of the domination of the great proprietors, and of the lawyers."[3]

[1] Lieutenant-Governor Colden to Secretary Conway, Dec. 13, 1765, "Mr. Colden's Account of the State of the Province of New-York," E. B O'Callaghan et al., *Documents Relative to the Colonial History of the State of New-York: Procured in Holland, England, and France* (Albany, 1853)., VII: 796.
[2] Lieutenant-Governor Colden to the Earl of Halifax, 1765, Ibid., VII: 705.
[3] Lieutenant-Governor Colden to the Lords of Trade, Feb. 22, 1765, Ibid., VII: 707.

Colden's hyperbolic invectives against New York's legal profession were no doubt colored by personal factors—his abiding concern for prerogative power, a personal enmity toward several leading lawyers, and the motive to vindicate several of his controversial policies as the colony's lieutenant-governor. [4] Still, his criticism was well founded. By controlling access to professionalized law, lawyers did play a significant role in entrenching economic inequality in New York's society. Legal professionalization fundamentally altered the rules governing the use and allocation of credit and land. The uniformity and predictability of professionalized law were conducive to profitable uses of land and capital. These benefits, however, were limited to those who could afford the services of trained lawyers. As New York's small coterie of professional lawyers grew increasingly efficient in supporting commercial enterprises, they became indispensable to the landed and mercantile elite for their privileged pursuits of profit.

Creditors and Legal Professionalization

Although Colden focused his criticism primarily on the lawyers' hands in real estate, credit was perhaps an equally important area of economic life deeply affected by legal change and the rise of professional lawyers. Informal debt relations among neighbors persisted well into the eve of the Revolution, but in large value credit advancements, the domination of formal legal arrangements was evident by the mid-eighteenth century. For wealthy merchants and landowners, credit advancement was potentially an easy way of turning economic surplus into further profit. By charging interest and penalties, and also by acquiring mortgaged property, creditors profited from the economic activities of others—those who needed capital for land development, commercial ventures, or simply for subsistence. To secure those financial gains, not to mention

[4] See Chapter 8, pp. 396-397.

the principal of their loans, creditors needed firm support from the law. New York's courts and lawyers gave them what they needed.

Formal credit instruments such as conditional bonds were predicated upon a professionalized legal culture. When creditors brought claims upon such bonds to court, they invariably hired lawyers to draw up formal writs (actions of debt). While the debtors were also frequently represented by lawyers, in most cases this was simply due to a warrant of attorney included in the bond. These warrants were designed to rationalize the legal procedure, by authorizing any attorney of the designated court to immediately confess the debt on the defendant's behalf, and thereby secure the creditor a quick judgment.[5] Most likely it was creditors, with the support of lawyers, who insisted on including such warrants. James Duane informed the debtor of his client, for example, that the latter "absolutely insists on having the warrant to confess judgment" as a condition for extending credit.[6] The smooth operation of such warrants was made possible thanks to the availability of attorneys regularly practicing in each court. A warrant of attorney included in a 1752 bond in Albany, for example, authorized any attorney "of his majesties court of common pleas att Albany" to confess judgment against the debtor if the latter failed to pay the principal with interest within six months. The warrant named four Albany lawyers as the debtor's preferred attorneys, underlining the fact that such warrants (and formal instruments in general) were predicated upon the routinized operation of late colonial New York's county courts and attorneys.[7]

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[5] On the increased use of conditional bonds and restrictive actions of debt in New York's county courts, see Chapter 2, pp. 80-85. On a related note, Herbert Alan Johnson noted that John Jay's caseload in the Dutchess County Court of Common Pleas consisted primarily of litigations on bills obligatory. Herbert Alan Johnson, *John Jay, Colonial Lawyer* (New York: Garland Pub., 1989), 141. For an example of a bond with warrant of attorney presented in the Albany County Court of Common Pleas in 1770, see: Benjamin Hilton, Jr., *His Book of Entries both for the Sutdent and Practicer of the Law*, NYSL, 234.

[6] James Duane to John Duncan, Mar. 25, 1768, *Van Vechten Family Papers*, NYSL, Box 11, Folder 52.

[7] Hendrick Bries's Bond to Nickolas Cuyler, Apr. 25, 1752, *John Brees Papers*, NYSL, Box 1, Folder 19.

Although formal instruments gave creditors considerable security, lawyers were still indispensable if legal action became necessary. In addition to drawing up proper writs, lawyers also knew how to move the court to issue special bails binding debtors (or their attorneys) to appear at the court's next session. This secured creditors against unnecessary delays and the risk of the debtors absconding.[8] Debtors, for their part, could counter by filing exceptions against the special bails, which, needless to say, were also handled by lawyers.[9] Even for the simple task of bringing a debtor to court, legal expertise mattered.

Use of restrictive instruments was not the only area of New York's credit economy impacted by legal professionalization. The increased availability of legal counsel throughout the colony brought a wider range of credit relations within the purview of formal legal procedures. Promissory notes, as seen earlier, were widely used among neighbors to supplement their informal daily exchanges of goods, labors, and services.[10] Legal professionalization, however, allowed promissory notes also to be used in a more formalized, impersonal context, especially for large-sum transactions. While not as formal as conditional bonds, promissory notes of this sort differed from the simpler notes of hand, in that they mandated interest payment and strict due dates, and usually named one or more witnesses. Their relatively formal terms reflected the anticipated legal process in debt recovery. Since their high value placed them outside the jurisdiction of individual justices of the peace, litigations on such promissory notes were taken to the county court of common pleas, typically handled by one of the attorneys regularly practicing in the court. Construing it as an action of trespass, the lawyer usually claimed the interest accrued as damages on top of the principal. Depending on how much time had elapsed beyond the due date, it was not

[8] Hilton, *Book of Entries*, 535-538; William Livingston, *Lawyer's Book of Precedents*, NYSL, 24-25.
[9] See, for example: John Tabor Kempe to Benjamin Kissam, Aug. 11, 1770, *John Tabor Kempe Papers*, NYHS, Box 2, Folder 7.
[10] See Chapter 2, pp. 72-73.

unusual for a lawyer to claim nearly double the amount of the principal.[11] The very first writ Albany lawyer Benjamin Hilton copied in his commonplace book was for a formal litigation based on a promissory note, suggesting that this had become a routine part of the local attorneys' business in late colonial New York.[12]

The formality of large-value promissory notes made them suitable for impersonal credit transactions. Dutch tradition, English statutes, and provincial statutes all supported the assignability of bonds and promissory notes, but the practical usage of assignments would have been difficult to achieve without the wide availability of lawyers accustomed to recovering debt on assigned instruments.[13] Hilton familiarized himself with the form and process of such debt litigation early in his career. As an example of an assignee's litigation upon a promissory note, he studied the writ in the complaint of David Wiles against John Scott in the Albany Court of Common Pleas. Initially issued by Scott for a debt of about 7 pounds he incurred to a neighbor early in 1770, the promissory note in question passed through several hands before landing in Wiles' several months later. After keeping the note for about a year, Wiles decided to sue Scott claiming damages of 12 pounds. While following the usual structure of actions on trespass, the writ included a narration of the promissory note's history, noting that whenever it was assigned to a new creditor, Scott, the original debtor, "had notice," and that he "undertook and then and there faithfully promised" to pay the debt to his new creditor.[14] Although likely no more than legal fictions, these were nonetheless necessary formalities in common law pleading, an area which late colonial New York's attorneys thrived in.

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[11] For instance, Albany lawyer John McRae claimed a damage of 50 pounds for his creditor upon a promissory note issued a few months earlier with a face value of 30 pounds. Jonathan Willard's action of trespass against Josiah Willard at the Albany Court of Common Pleas, 1768, *Gansevoort-Lansing Collection*, NYPL, Box 296, Folder 3.

[12] Hilton, *Book of Entries,* 1.

[13] Herbert Alan Johnson, *The Law Merchant and Negotiable Instruments in Colonial New York, 1664 to 1730* (Chicago, Ill.: Loyola University Press, 1963), 29–35.

[14] "Narr. in case, by a second indorsee against the drawer, of a note," Hilton, *Book of Entries,* 25

With the support of New York's courts and lawyers, an assignee of a promissory note could recover a debt across extended time and space—it hardly mattered that the note might have travelled through multiple assignments to the hands of a stranger in a remote town, years after the original debt had been contracted (by which time, in some instances, the original debtor was already deceased).[15] The increased use of written instruments and the law's efficient support of debt recovery on formal terms signaled a shift in New York's legal and economic culture. In credit transactions involving large-value instruments, impersonal relations secured by strict legal obligations, rather than personal relationships grounded in a community, were increasingly the norm.

For a creditor seeking security in his or her loan, a written instrument was a good solution, but not a perfect one. Even when the debt was secured with a restrictive bond, there was still a risk that the debtor might abscond, defraud the creditor, or simply default on the debt. In a colony with widely dispersed populations and open borders with neighboring provinces, disappearances were not infrequent. Benjamin Bristoll's creditors in Albany, for example, sought redress from the court when they grew certain that Bristoll "either departed this colony or conceals himself in [Saratoga]."[16] To protect creditors from such risks, in 1752, the Mayor's Court of New York City ordered that for all debt claims of five pounds or more, the defendant should be served a warrant (capias) by the sheriff, rather than a simple summons. Even for smaller debt claims, a warrant could be served if the creditor made an affidavit before a magistrate, declaring upon oath that the

[15] Hilton's commonplace book includes one such case. Originally issued in Schenectady in 1760, the note, through several assignments over six years, had passed into the hands of a creditor in Albany. The original debtor having deceased by that time, the assignee sued the deceased's executors upon the note. "Narr. in case by a second indorsee ag^{t} the executive of the drawer the last assignment being made after the testators death," Ibid., 26.

[16] Deposition of Benjamin Bristoll's creditors taken by Jacob C. Ten Eyck, Oct. 29, 1768, *Gansevoort-Lansing Collection*, Box 296, Folder 3.

debtor "is about to depart out of the jurisdiction of this court," or "hath removed and liveth out of the same."[17]

Some creditors also worried that their debtors might try to forge or destroy documents. George Sullivan, for example, was accused of "cut[ting] a name with a knife" out of a bond, in order to erase his debt.[18] Alexander Boyd, after finding that he was "in danger to be arrested for a sum due" to Wouster Barheyt, resorted to a similarly drastic measure; he "tore the account" proving his indebtedness.[19]

Even when debtors did not try to evade or defraud them, creditors had to worry about competing against other creditors. With so much business in the colony being conducted upon credit, it was hardly unusual for one individual to incur debt from several creditors. When that debtor went bankrupt, or was rumored to be nearly bankrupt, the creditors began to scramble, knowing that they should act quickly to collect the debt before other creditors ran the debtors' assets dry. If they could not receive payment immediately, they at least wanted the court to acknowledge their claims prior to those of other creditors. Upon hearing that his debtor was being sued by other creditors, for example, a creditor in London was anxious to "secure my priority on his estate & effects." He immediately wrote to his lawyers in New York instructing them to sue the debtor and "obtain payment or at least to obtain judgment" for the claim.[20]

To avoid a hectic competition among creditors, sometimes lawyers arranged a settlement among the multiple creditors and debtors. When it became evident that Henry Lane and Isaac Lattouch would not be able to satisfy their considerable debt to a large number of creditors, for

[17] Rules of the New York Mayors Court, Mar. 3, 1752, Richard B Morris et al., *Select Cases of the Mayor's Court of New York City: 1674-1784* (Washington, D.C.: American Historical Association, 1935), 78.; Hilton, *Book of Entries*, 249-250.
[18] George Sullivan to John Tabor Kempe, Oct. 23, 1772, *Kempe Papers*, Box 14, Folder 6.
[19] Johannes Van der Heyden to William Kempe, Jul. 3, 1754, Ibid., Box 16, Folder 1.
[20] A[ ] Forrest to John Tabor Kempe, Sep. 10, 1765, *Kempe Papers*, NYHS, Box 13, Folder 7.

example, the creditors' attorneys agreed upon a plan to help their clients salvage at least part of the debt owed them. Lane and Lattouch would "deliver all their estates, goods, chattles, rights, and credits, to some person or persons in trust, to and for the use and benefit of all their creditors, to be equally distributed and dividing among them." Several of the creditors, perhaps feeling entitled to prior recovery before others, rejected the lawyers' proposition. The other creditors were nonetheless able to push through their attorneys' agreement, by petitioning the Assembly to intervene on their behalf, forcing the recalcitrant creditors to comply.[21]

While lawyers could sometimes find ways to offset the damage, the possibility of a debtor absconding, defrauding, or defaulting still posed a significant risk to creditors. To eliminate such risks, creditors sought firmer security in the form of bail or mortgage. As a creditor with an especially deep knowledge of the law, John Tabor Kempe illustrated this propensity as well as anyone else. Kempe was "dissatisfied with the security" when Robert Ogden of Elizabethtown, New Jersey, requested an extension upon his 500 pounds' debt by giving Kempe a bond with one Mr. Wade as surety. The provision of bail gave Kempe some degree of added security, as Wade would have been made liable for the full debt in the event of Ogden's default. But evidently worried that Wade may also prove unable to raise the sum, Kempe demanded a stronger assurance of full debt recovery, in the form of "land security."[22] Even after Ogden complied, offering a mortgage of about 200 acres of land, Kempe was not fully satisfied, as he "kn[e]w not whether the lands are a sufficient security" for the sum.[23]

[21] Apr. 30, 1755, Jun. 18, Jul. 26, 1755, New York (State) and General Assembly, *Journal of the Votes and Proceedings of the General Assembly of the Colony of New-York. Began the 8th Day of November, 1743; and Ended the 23rd of December, 1765. Vol. II.* (New York, 1766).442, 449, 450.
[22] Unidentified writer to John Tabor Kempe, May 5, 1773, *Kempe Papers*, Box 14, Folder 4.
[23] John Tabor Kempe to unidentified recipient, Aug. 27, 1774, Ibid., Box 14, Folder 11.

For discerning creditors such as Kempe, lawyers were indispensable not only for obtaining judgment against defaulting debtors, but also for procuring better security prior to any legal action. Take the services of lawyer John Kelly for Kempe. In 1770, Kelly went up to Cumberland County near New York's northern border to investigate the financial status of Oliver Willard, who owed a substantial sum to Kempe, and to recommend "the most effectual method of securing [his] debt." Upon concluding his research, Kelly sent his client alarming news: Willard, Kelly reported, "had not cash to pay" the debt. Further, Willard's mills and nearby lands had just been mortgaged to two other creditors in New York City. Kelly also found out, however, that Willard owned a farm which was "an extraordinary good one worth double the sum he owes" to Kempe and the other creditors. Hence, Kelly suggested, the best course of action would be for Kempe to get a mortgage upon the farm, perhaps in coordination with Willard's other creditors. Buttressing this suggestion, Kelly opined that Willard seemed "disposed to pay his debt." These were valuable observations. For one thing, Kelly's report revealed the substantial risk Kempe was exposed to. At the same time, by giving reasons to believe it was unlikely that the debtor would abscond, Kelly could assure his client that immediate legal action would be unnecessary. Given Willard's financial status and his debt to other creditors, an immediate lawsuit would have very well led to nothing more than a protracted and partial recovery of the debt. Kelly's recommended course of action, on the other hand, would secure the debt with a mortgage upon a valuable piece of farmland, Willard's most valuable asset.[24] Similarly, Peter W. Yates advised a client not to pursue immediate legal action against a debtor. Having looked into the debtor's financial situation, Yates advised that it would

[24] John Kelly to John Tabor Kempe, Sep. 22, 1770, Ibid., Box 13, Folder 9.

be "safe in giving him some longer time," on the condition that his client demand from him a "mortgage of his personal estate" and also have him "assign over some bonds and notes he has."[25]

Legal professionalization in late colonial New York greatly enhanced the creditors' prospects of secure, profitable credit advancement. From the creditors' perspective, the courts' firm support of long-distance, impersonal credit obligations significantly enlarged the scope of possible credit recipients. This allowed creditors to be more discerning about to whom they advanced credit, and also made it easier to demand securities or written instruments entailing interest payment and penal sums. To take advantage of any of these opportunities, however, creditors needed expert advice about financial and legal matters. New York's lawyers were ideal as advisers and agents. They were the only ones who knew how to draw up proper instruments and writs and make apposite legal actions for recovering debts. They also provided astute evaluations about the security of any piece of property or credit instrument. Assessing the value of credit instruments or mortgaged property did not require legal expertise, but evaluating their security did, as that security hinged upon the creditors' ability to recover the debts or mortgaged property in the courts.

Lawyers and Secure Landownership

The impact of legal professionalization on the possession and use of land closely paralleled the changes regarding credit. By the eighteenth century, English common law contained numerous doctrines on the classification, conveyance, and inheritance of landholding, along with an array of complex procedures for establishing titles, enforcing lease terms, punishing trespassers, and resolving proprietary disputes. The task of applying these complex doctrines and procedures to

[25] Peter W. Yates to Peter Van Schaack, Aug. 17, 1774, *Van Schaack Family Papers*, CUL, More Correspondence, 1775-.

New York was further complicated by conflicting land grants, dubious Indian purchases, disputed borders, and rebellious tenants and squatters. To offset these sources of uncertainty, those who pursued secure landholding increasingly relied on professionalized law to document their land titles with indisputable legal terms.

The increased reliance on formal documents and legal definitions in landholding was perhaps nowhere more starkly reflected than in the use of preemptive clauses. Take, for instance, the "bond of performance" accompanying Gysbert Fonda's land purchase from Barent Ten Eyck in 1751. Knowing that part of the Albany land he was about to purchase was "supposed to lay in dispute," Fonda had Ten Eyck sign a bond promising that he would "defend and recover" Fonda's title against any encroachments or challenges. If Ten Eyck failed to do so, he would be charged a penalty of 300 pounds.[26] John McKesson obtained a similar but even better security while purchasing a property lying near the border between New York and New Hampshire. Through a special bond accompanying the land transaction, the land sellers were bound to fully compensate McKesson in the event that the land was later decided to fall under the colony of New Hampshire.[27] Legal documents were central to the secure possession of these new landowners. The strictly enforceable terms of the documents safeguarded them from uncertainties such as border disputes, by binding the former landowners to either lend full support in protecting the possession, or bear the financial losses in case of eviction.

While some landowners were thus able to benefit from the security of legal documents, the overall transition toward document-based legal certainty was a gradual process that touched different parts of society in different degrees, often entailing confusion, discord, and discontent.

[26] A bond of performance, Barent Ten Eyck to Gysbert Fonda, Dec. 6, 1751, *Fonda Family Papers*, AIHA, Box 1, Folder 1.

[27] Bond with a special condition relative to lands in the township of Addison, Benjamin Underhill & Jesse Hallock to John McKesson, *Mckesson Papers*, NYHS, Box 1, Folder 1.

Illustrating this well is the controversy over John Van Alstyne's missing land deed in Albany. The deed was originally made for Peter Vorburgh, who purchased a parcel of land from original patentees Dirk Wessels and Gerrit Teunis. Sometime in the early eighteenth century, Vorburgh sold the land to a neighbor, Abraham Van Alstyne, who kept it during his lifetime and bequeathed it to his son John.[28] All was well until 1770, when a small boundary dispute arose between John Van Alstyne and his neighbor Teunis Van Slyck. Believing that the neighbor was encroaching upon his property, Van Alstyne hired Rutger Bleecker, a local attorney, to prepare an ejectment suit against Van Slyck. Bleecker, as any good lawyer would, soon began to piece together the documented history of the land, upon which he realized that one particular piece was missing; the deed from Wessels and Teunis to Vorburgh, which laid out the boundaries of the land in question, and proved that Vorburgh had gained rightful ownership before selling the land to the Van Alstynes.[29]

The deed, as Bleecker found out, had been through a history of its own separate from that of the land. When Peter Vorburgh conveyed the land to Abraham Van Alstyne, as Bleecker later inferred, he neglected to deliver the deed. The piece of paper thus remained in the Vorburgh family well after Peter's death, until Abraham, Peter's eldest son, found it while going through his father's papers. Sometime in the 1740s, Peter sold the deed to Teunis Van Slyck "for a calf."[30] Van Slyck later explained that he had purchased the deed without "any sinister purpose," only "imagining it might affect his own estate." When John Van Alstyne, having inheriting the land from his father, demanded that Van Slyck hand over the deed, he refused. This was not for any ulterior reason, Van Slyck claimed, but simply because he felt he was entitled to a compensation commensurate

[28] John Tabor Kempe to Rutger Bleecker, Dec. 20, 1770 & Jun. 9, 1773, *Kempe Papers*, Box 14, Folder 11.
[29] Rutger Bleecker to John Tabor Kempe, Jul. 14, 1770, Ibid., Box 13, Folder 2.
[30] Rutger Bleecker to John Tabor Kempe, Nov. 27, 1770 & May 9, 1771, Ibid., Box 13, Folder 2.

with what he had paid (a calf) to obtain the deed.[31] Van Alstyne and Bleecker, his lawyer, strongly suspected that the boundaries laid out in the deed in fact proved that the disputed tract of land belonged to Van Alstyne, not to Van Slyck. John Tabor Kempe, who was brought in as counsel upon Bleecker's solicitation, agreed that the deed was central to the dispute. Judging that a hearing in the Chancery would give Van Alstyne the best chance of success, Kempe prepared a motion for the "discovery of the deed and its contents."[32] All of this was ultimately to no avail, however. Brought to court, Van Slyck claimed that he had "found [the deed] did not affect his estate"—a claim which was impossible to verify or refute, as he had quite conveniently lost the deed sometime before the trial. Van Alstyne and his lawyers had no choice but to give up.[33]

The saga of Van Alstyne's missing deed epitomizes the growing importance of documentation in landholding in late colonial New York. During the early eighteenth century, neither Peter Vorburgh nor Abraham Van Alstyne seemed to attach much significance to the original patentee's deed. Most likely, this was because Vorburgh and Van Alstyne had a clear local knowledge about the boundaries of the land in question, and saw their shared personal memories of the land sale as sufficiently establishing Van Alstyne's landownership. Lending support to this supposition is the fact that Van Alstyne, despite lacking the deed proving his title, kept possession of the land throughout his lifetime without any problem. Things began to change in the mid-century, however. Abraham Vorburgh was hardly interested in honoring his father's land sale to the Van Alstynes; if he could profit from selling the deed he happened to have found, so be it. More importantly, both he and Teunis Van Slyck saw a land document as having its own value, separate from the personal agreement it was originally supposed to support. Van Slyck's gambit to gain a

[31] John Tabor Kempe to Rutger Bleecker, Jun. 9, 1773, Ibid., Box 14, Folder 11.
[32] Rutger Bleecker to John Tabor Kempe, Jul. 14, 1770, Nov. 13, 1771 & Dec. 23, 1771, Ibid., Box 13, Folder 2; John Tabor Kempe to Rutger Bleecker, Aug. 13, 1770, Ibid., Box 14, Folder 11.
[33] John Tabor Kempe to Rutger Bleecker, Jun. 9, 1773, Ibid., Box 14, Folder 11.

disputed tract of land by procuring (and withholding) documentary evidence paid off, because as he correctly foresaw, formal documents, rather than any personal agreements or understandings, were the acknowledged grounds of landownership in late colonial New York's courts.

Shifting attitudes toward legal documents and landholding were also evident in the complaint of Abraham Brinkerhoff against James Dooty, also taken to the Chancery. The origins of this dispute was a botched land transaction in 1730 between Daniel Brinkerhoff and Arthur Kirck. Brinkerhoff agreed to convey a 156-acre tract in Oyster Bay, Queens County, to Kirck for the consideration of 300 pounds. The amount was more than what Kirck could pay at the moment, but the parties agreed that Kirck would pay the sum in three annual installments. To secure the transaction, Kirck signed on three corresponding conditional bonds each binding him to an annual payment of 100 pounds, in addition to an indenture that returned the land to Brinkerhoff in case Kirck failed to fulfill the payments by 1733. The arrangement essentially secured the land transaction by letting the purchaser immediately take a mortgage upon his newly acquired land. The carefully designed transaction is a striking demonstration of the increasingly sophisticated use of formal documents as a means to facilitate and secure both credit and property relations.

Even more illuminating is what happened to the land and documents in the following years. Kirck's business as carpenter evidently did not give him as much of a cash flow as he had expected. Kirck managed to make the first payment due in 1731, but failed to make the subsequent ones. "Being in low circumstances and not able to pay his debts," Kirck left the province, leaving behind the land and his unfulfilled financial obligations. This in turn spelled trouble for Brinkerhoff, who, cash-strapped himself, had been depending on Kirck's punctual payment. "Having great occasion for money," Brinkerhoff decided to use the bonds and mortgage deed in his possession to raise quick cash. He was able to borrow 100 pounds from Major Thomas Jones of Oyster Bay, by

assigning him one of the bonds (the second of the three) and giving him the mortgage deed upon the land as additional security. The transfer of the deed, apparently, was not meant to entitle Jones to the mortgaged property. Once Brinkerhoff paid the 100 pound debt with interest, Jones was to return him the bond and mortgage deed. As it happened, Brinkerhoff subsequently moved to Philadelphia and died in 1744, without ever paying back the debt. In the meantime, Jones had also passed away, but not before selling the bond and mortgage deed to yet another person, James Dooty. By obtaining these documents, and also by paying Arthur Kirck "some small consideration" for his claim upon the land, Dooty claimed that he had acquired full title to the land. When Abraham Brinkerhoff, executor of the late Daniel Brinkerhoff, found out about the land in 1746, he sought to recover the land and documents from Dooty. Brinkerhoff's offer of 214 pounds for the unpaid 100 pound debt and the interest accrued over the years, however, fell on deaf ears. With Dooty showing absolutely no intention to give up the land or documents, Brinkerhoff finally resorted to litigation.

The dispute points to the shifting norms regarding the role of documents in property relations. When the bonds and deed were initially signed by Daniel Brinkerhoff and Arthur Kirck, the underlying intent was clear—to let Brinkerhoff recover the land if Kirck failed to fulfill the promised payments. As the documents travelled through several hands, however, their meanings began to change. Not only the bonds, but also the mortgage deed began to be treated as an assignable financial instrument. By the time they reached Dooty's hands, the documents had recovered part of their original meaning—documents defining the ownership of a particular tract of land. Dooty, however, ignored the original intent of the documents, which was to support a personal transaction between Brinkerhoff and Kirck. For Dooty, only the formal, impersonal

aspects of the documents mattered. Regardless of the past history of the land and documents, once he owned the documents, he insisted he was entitled to the land.

What Abraham Brinkerhoff attempted, in contrast, was to read back the underlying intent of the personal transactions that led to Dooty's acquisition of the documents. From Arthur Kirck to Daniel Brinkerhoff, to Thomas Jones, the documents had been transferred not as a means to transfer landownership, but only as a means to secure financial transactions. Hence they hardly entitled Dooty to the land in question. All he was entitled to, according to Brinkerhoff, was the money he had paid for the documents, along with the accrued interests. Exploiting the fact that the interpersonal understandings behind the transactions were unwritten, however, Dooty had obtained a valuable piece of land by merely paying for the face value of a 100 pound bond, and by persuading Jones to hand over the accompanying mortgage deed. For Jones, the bond and deed together only had 100 pound value since they were only meant as securities toward recovering the money he had lent. Dooty had gained a windfall essentially by purchasing the documents as financial instruments, and then treating them as land documents. The problem for Brinkerhoff, however, was that the underlying intentions and interpersonal understandings on which his claim rested were never recorded. Hence, all he could argue was that Dooty's actions were "contrary to equity and good conscience." In a legal culture in which the formal wordings of documents increasingly took precedence over any informal agreements, little could be done against someone like Dooty who held on to the key documents and took "the full and strict advantage thereof in law."[34]

New York's government supported the documentation of private property relations with a centralized system for registering land grants and conveyances. Under the system, all land titles

[34] Draft of a Bill in Chancery, Abraham Brinkerhoff, executor of Daniel Brinkerhoff v. James Dooty, amended on Nov. 15, 1746, *John Chambers Papers*, NYSL, Box 1.

and transactions had to be recorded in the register of the county where the land belonged, and those county records were annually reported to New York City's central land records maintained by the secretary of the province.[35] Reflecting the increased use of mortgages in the province, in 1753 the legislature added detailed rules for documenting mortgages. Under the new rules, prior registration would give a mortgagee unequivocal priority when there was more than one mortgagee upon a piece of land.[36] Having one's land claims documented and registered in an official repository certainly enhanced the security of landholding. County clerks, many of whom were lawyers, played an important role in conferring legal security upon private land documents by managing, inspecting, and certifying them as public records.[37]

Although clerks were mandated to make their register of land documents available to the public (at the fee of one shilling per search), laypeople probably had less ease accessing the records than did seasoned professionals. Lawyers were not only more knowledgeable about what types of documents to look for and where, but also generally enjoyed close ties with the clerk of the county in which they practiced. Working for a client in a land dispute in Ulster County, for example, William Cockburn searched for relevant land documents dating all the way back to the Dutch colonial period. Cockburn was not only capable of obtaining certified copies of these documents from the county clerk, but could also ask the clerk to attend a trial to lend further credibility to the documents and land title.[38] Similarly, John Tabor Kempe requested secretary of the province Goldsbrow Banyar to personally appear at a trial and certify several land documents in question to

[35] "An act to prevent ffrauds in conveyancing of lands," Nov. 3, 1683, *N.Y. Col. Laws*, I: 141-142; Eben Moglen, "Settling the Law: Legal Development in New York, 1664-1776" (Ph.D. Diss., Yale University, 1993), 119.
[36] "An act for preventing frauds by mortgages," Dec. 12, 1753, *N.Y. Col. Laws*, III: 957.
[37] See, for instance, Stephen DeLancey's certification of a mortgage, Nov. 12, 1766, *Van Vechten Family Papers*, Box 1, Folder 1.
[38] William Cockburn to John Tabor Kempe, Sep. 22, 1771, *Kempe Papers*, Box 13, Folder 4.

be "true copies of the originals."[39] In stark contrast, a land agent sent by the people of Minisink in Orange County was unable to obtain certified documents in a timely fashion for his clients' lawsuit, as the county clerk refused him access to the records without a specific writ for the purpose—the clerk deemed it wrong to let "every littil necessetus fellow" access the records and obtain copies.[40]

Even after one obtained all the relevant documents, that seldom settled the matter. Numerous land claims in eighteenth-century New York still hinged upon old grants, patents, Indian purchases, leases, and releases made before the province had established a uniform system for recording land grants and transactions. Hence, when a dispute arose over a piece of land, the court's decision upon competing claims often hinged upon the legal interpretation of a diverse body of relevant documents, each produced under different historical contexts and composed in different styles. The art of interpreting these documents, and translating them into solid claims upon land, was a major area of the New York lawyers' expertise.

Embroiled in numerous boundary disputes throughout the eighteenth century, Westchester County's land titles were probably as frequently subjected to contested legal interpretations as anywhere else in the province. Even in relatively smaller disputes such as those surrounding Colonel Caleb Heathcote's estate in the county, the lawyers' interpretation of old land grants and purchases played a major part. One of the disputes, brought to the Westchester County Court of Common Pleas in 1733 as an ejectment suit, concerned the boundary between Heathcote's estate and the township of Rye. Depending on the positioning of the "Rye line," which separated Heathcote's estate to the north and the township's possessions to the south, a long strip of land of about two mile's width could fall into either side.

[39] Goldsbrow Banyar to John Tabor Kempe, Jun. 10, 1763, Ibid., Box 13, Folder 2.
[40] Vincent Matthews to John Tabor Kempe, Jun. 13, 1757, Ibid., Box 15, Folder 10.

John Chambers, a prominent lawyer who would later become a Supreme Court justice, was retained by the claimants under the Heathcote patent (Heathcote had passed away in 1727). Chambers' preparation of the lawsuit was almost entirely about interpreting documents. First, he had to establish the legitimacy, and primacy, of a 1696 Indian purchase upon which the Heathcote claim rested. Chambers pointed out that this purchase was made several years before the township of Rye obtained its patent. Furthermore, the township's patent was made by New York's governor, not the king. While provincial land grants made by governors were generally treated as legitimate bases for land claims in eighteenth century New York, lawyers such as Chambers, when expedient to their immediate cause, could always point out that gubernatorial patents lacked the full authority of a royal grant. Pursuing this principle, Chambers insisted that the Indian purchase had at least as much legitimacy as the township's patent.[41]

Having established the legitimacy of Heathcote's Indian purchase, Chambers' next task was to ensure that the document would be read in a way favorable to his client's claim. This was no simple task, as land documents made in the colonial era seldom laid out boundaries with mathematical precision, typically resorting instead to an array of landmarks (trees, stones, hills, ponds, creeks, rivers, houses, paths, and so on) and imaginary lines connecting these reference points. The township's 1705 patent, which was surveyed by a committee appointed by the town for that purpose, had quite carefully laid out the boundaries by referring to a series of marked trees.[42] Heathcote's Indian purchase, in contrast, was much less detailed in its description of its boundaries, referring only to a few large landmarks such as rivers and plains, quite far removed

[41] John Chambers' brief on Elias Clapp v. James van Horne on the demise of Jonathan and Caleb Horton, Ejectment for Lands in Westchester County, *John Chambers Papers*, Box 6

[42] The township's careful survey was likely prompted by Heathcote's manorial grant of 1701, which partially overlapped with the township's claims. J. Thomas Scharf, *History of Westchester County, New York Including Morrisania, Kings Bridge, and West Farms, Which Have Been Annexed to New York City* (Philadelphia: L.E. Preston, 1886), 141–142.

from each other. Nonetheless, Chambers argued that the long imaginary lines connecting these landmarks were sufficient to prove that the 1705 township patent drew a line too far to the north, encroaching upon the land already purchased by Heathcote. A certain "White Plains" to the west and Byrom River to the east mentioned in the Indian purchase, in particular, lay significantly southward of the township patent's line, according to Chambers. With one large stroke horizontally connecting those two landmarks, Chambers invalidated the northern boundary laid out by the township, including all of the trees they had carefully marked for that purpose.[43]

In 1769, about thirty years after the Rye Line dispute, the Heathcote patent was embroiled in another small dispute, this time with the town of Westchester. As in the earlier dispute, a local contest over land would ultimately hinge upon the lawyers' interpretations of old documents. This time the lawyer hired to challenge the township's claims was John Tabor Kempe, and the key interpretive issue was the conditions attached to a 60-year old land grant. At meetings in 1699 and 1708, the township had granted Heathcote several tracts of land at his request, to be used for a dwelling house, a small pasture, a mill, a store house, a press house, and a hill house for the drying of oats. The land was granted as a "free gift from the town," probably in acknowledgment of Heathcote's stature in the county (he owned a large estate, and was colonel of the county militia) and his supposed role, while sitting in the governor's council, in helping the town of Westchester obtain a grant as borough-town.[44] Through inheritance and several conveyances, by 1769 the land had been transferred to two absentee landowners, James DeLancey and John Lewis Johnston. DeLancey and Johnston leased the land to one tenant, Michael Crow, who evidently made only limited use of it. Dispute arose when the township decided to reclaim the land, on the grounds that

[43] John Chambers' brief on Elias Clapp v. James van Horne on the demise of Jonathan and Caleb Horton, Ejectment for Lands in Westchester County, *John Chambers Papers*, Box 6
[44] Scharf, *History of Westchester County*, 181

it had been given only on condition that it would be put to full use as specified in the township's original grant to Heathcote.

The township brought attention to a passage in the document which stipulated that "in case the said Heathcote shall sell or dispose of the mills[,] that then all the lands above granted except that whereon his houses are built shou'd return to the town." In light of this clause, the township argued that DeLancey and Johnston, through their negligence, had effectively forfeited their ownership of the land; they had "suffered the mills to fall down" and failed to "erect[] them again." This was not exactly the type of situation referred to in the clause, of course. From the township's viewpoint, however, neglecting the mills was in effect no different from "dispos[ing] of" them. Moreover, their forefathers' underlying intent in inserting the clause was clearly to ensure that the land would be used by a contributing member of the community, willing to actually inhabit the land and provide valuable services such as operating mills. This intention could be seen in a related provision that "in case said Heathcote should not erect any buildings on said lands in the span of 10 years that then the same shou'd return to the town," and also in the general provision that only "so long as the said Heathcote or his heirs should remain in possession of the mills" would the grant stay in effect. Seen in this light, preventing the land from falling into the hands of absentee landowners like DeLancey and Johnston was precisely what the clause had tried to accomplish.

To counter the township's claim, Kempe insisted on a stricter construction of the clause in question. The specific wording of it, Kempe stressed, did not apply to "any other condition than that of selling or disposing of the mills." Unless the document included express terms to that effect, letting the mills decay should not be construed as a cause for forfeiture of the land. Regarding another part of the clause, in contrast, Kempe put forth a looser interpretation. It was the part providing that even if the township was found entitled to recover the lands, exception would be

made for those parts on which Heathcote's (or his heirs' or assigns') houses were built. The implicit intention here, according to Kempe, was that a substantial part of the land surrounding the houses and buildings should remain in the hands of the current landowner, even if he or she sold the mills and thereby became liable to return the rest of the lands to the township. It was "ridiculous to suppose," as the townspeople did, that the provision only applied to "the very spots the houses covered and no other."[45]

As both of the Westchester disputes demonstrate, land documents often left much room for interpretation, and those who desired to squeeze out the most favorable reading possible had good reason to hire lawyers such as Chambers and Kempe. Documentary support was key to secure landholding in late colonial New York, but that security often depended on the lawyers' ability to translate ambiguous, disputable wordings into indisputable boundaries and legally binding clauses.

If the procuring and interpreting of documents gave lawyers their core claim of expertise in land matters, the professionalized court culture of the eighteenth century opened up an increasing number of ways they could serve clients in land related issues. The New York court's procedural regularization as common law tribunals, for one thing, induced parties in land disputes to formulate their causes accordingly—as variations of a handful of familiar actions and precedents in the English common law tradition. New York's lawyers met this demand both by tailoring specific land claims into apposite common law procedures, and by helping clients strategically maximize their chances of success in the courts while minimizing delays and legal expenses.

Within this context of procedural formalization, ejectment emerged as the predominant method of bringing a land dispute to trial. Typically used to settle boundary disputes, an ejectment

[45] John Tabor Kempe's Brief on James DeLancey & John Lewis Johnston against John Hunt, n.d., *Kempe Papers*, Box 3, Folder 4.

suit nonetheless took the form of complaint against a simple trespass committed upon a lessee by a lessor; the lessor, as the complaint usually went, had entered the land and "ejected" the lessee before the latter's lease had expired. In almost all cases, this was pure legal fiction. The fictitious lessee, often named James Jackson or John Doe, stood in for one of the claimants as the plaintiff, while the other claimant was represented by the fictitious lessor-as-defendant, called the "casual ejector" and variably named Richard Roe or William Styles.[46] While a well-established legal convention imported from England, the proper formulation and use of such technical fictions nonetheless required substantial knowledge of common law procedure. To bring the legal fiction to serve the actual goal of solidifying a land title, a series of formal actions were necessary—from making the initial fictitious declaration, serving fictitious notices to litigants, and drawing up affidavits, to moving for rules binding the land title to the judgment in the fictitious lawsuit, calling for a jury panel or view of the lands, and obtaining and serving a writ of possession.[47] Without question, ejectment in common law was the exclusive domain of trained lawyers.

Along with their mastery of legal documents and procedure, lawyers brought to land disputes their usual shrewd legal strategizing—whether in choosing tribunals, timing the trial, altering jury composition, or shaping trial procedures. Take, for instance, the strategic choices made by William Cockburn and John Tabor Kempe on behalf of their mutual client in an ejectment suit in the early 1770s. Cockburn, a noted land surveyor, was retained as attorney by Thomas Swords in his dispute with the Corporation of Kingston over a 6000-acre tract of land in Ulster

[46] Moglen, "Settling the Law," 136–137; Alexander Hamilton, *The Law Practice of Alexander Hamilton; Documents and Commentary* (New York: Columbia University Press, 1964), ed. Julius Goebel and Joseph Henry Smith, III: 51n.

[47] For a detailed explanation of the steps required to establish a title with an ejectment suit, see Livingston, *Book of Precedents*, 17-22. For two examples of actual ejectment suits in late colonial New York, see James Jackson ex dem Oliver DeLancey, John Watts, John Van Cortlandt and others v. John Stile, John Jaycocks Tenant, July, 1773, *Kempe Papers*, Box 3, Folder 4; Thomas Robinson ex dem Trustees of Brookhaven v. John Stiles Tenant, Jan., 1747, *John Chambers Papers*, Box 1. Hilton, *Book of Entries*, 538.

County near Esopus.[48] Following a well-established pattern of litigation in late colonial New York, Sword hired John Tabor Kempe along with Cockburn, thus combining the strengths of a local attorney familiar with local affairs (as surveyor, Cockburn had gained in-depth knowledge of the lands in question) and a New York City lawyer with superior expertise in matters of law.[49] Proving the value of legal expertise, Cockburn and Kempe together made informed decisions for their client in each step of the legal preparation.

Upon conducting research on the case, Cockburn decided that given the existing documentary evidence, the jury would likely uphold the Kingston Corporation's claim. Sword's only chance lay in persuading the jury otherwise with a view of the lands guided by one Mr. Metcalf, who had surveyed the lands some time earlier.[50] Finding that Metcalf would be unavailable for the approaching winter court session, Cockburn strongly urged his client that the "cause must be put off" to a later term when Metcalf could attend.[51] Requesting a postponement of the trial, however, could create an impression that his client was simply stalling for more time. Hence, Cockburn suggested waiting to see if the opposing party might move for a postponement, thus bearing the responsibility for delay.[52] To this purpose, Cockburn seems to have conversed with several of the opposing party, getting them to agree that the winter season would make it inconvenient for everyone to attend a trial. Cockburn's scheme succeeded. The trial was postponed to the spring term by the parties' mutual consent.[53]

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[48] On William Cockburn's career as a land surveyor, see: David Yehling Allen, *The Mapping of New York State a Study in the History of Cartography* (ebook, 2011), 120–123, http://www.dyasites.com/maps/nysbook/Title.htm.

[49] William Cockburn to John Tabor Kempe, Aug. 22, 1770, *Kempe Papers*, Box 13, Folder 4; Robert Henry to John Tabor Kempe, Sep. 21, 1771, Ibid., Box 13, Folder 8.

[50] William Cockburn to John Tabor Kempe, Aug. 22 & 25, 1770, Ibid., Box 13, Folder 4. In ejectment suits, either party, at their own cost, could call for a jury's view of the disputed land. The view was conducted by six of the twelve jurors appointed to try the cause. *N.Y. Col. Laws*, III: 190-191. See also pp. 287-288 below.

[51] William Cockburn to John Tabor Kempe, Sep. 1770, *Kempe Papers*, Box 13, Folder 4.

[52] William Cockburn to John Tabor Kempe, Sep. 22, 1771, Ibid., Box 13, Folder 4.

[53] William Cockburn to John Tabor Kempe, n.d., Ibid., Box 13, Folder 4.

When the spring term approached, however, Cockburn found out to his dismay that Metcalf would still be unavailable for the trial. In the intervening months, Cockburn had in fact prepared a backup plan. Robert Yates, another surveyor, was brought in to serve as the secondary "shewer" of the lands on the plaintiff's side, and was asked to do a quick survey of the lands in preparation for the jury view. Cockburn doubted, however, that Yates' survey and presentation alone would carry as much weight with the jury as Metcalf's, especially since the latter's survey had been conducted from a more or less neutral stance, before the boundaries had come into question. Hence Cockburn was of the opinion that his client should postpone the trial once more, in the hopes that Metcalf would finally be available in the next term.[54] Kempe, who had been closely corresponding with both Swords and Cockburn, agreed on the necessity of having someone "well acquainted with the controversy" at the trial.[55] He was more concerned, however, about the cause having been "standing too long already."[56] "You may be certain," Kempe warned Swords and Cockburn, that "there will be a nonsuit if the cause is not tried next term."[57] Although they would not be able to present a strong case without Metcalf, it was better than running the risk of being nonsuited.

Having persuaded his client to go through with the trial, Kempe advised on further strategic choices that would enhance his chances of success. As their opponents, the Kingston Corporation, presumably enjoyed stronger support among locals, Kempe strongly suggested that they move for a foreign jury. Upon his client's assent, Kempe successfully moved the court to bring in jurors from Queens County, upon the pretext that the boundary between Ulster and Albany counties could be affected by the trial's outcome. Not satisfied with securing a foreign jury, Kempe also wanted to physically remove the trial from the opponents' home ground. Hence rather than let the cause

[54] William Cockburn to John Tabor Kempe, Sep. 22, 1771, Ibid., Box 13, Folder 4.
[55] John Tabor Kempe to Thomas Swords, Oct. 3, 1769, Ibid., Box 15, Folder 5.
[56] John Tabor Kempe to Robert Yates, Sep. 16, 1771, Ibid., Box 15, Folder 6.
[57] John Tabor Kempe to Thomas Swords, Aug. 12, 1772, Ibid., Box 15, Folder 5.

be tried in the Supreme Court's circuit session in Ulster County, Kempe suggested that they have it tried during a regular session in New York City. This could be justified, Kempe opined, by persuading the court that the trial involved complex boundary questions and would likely drag on for several sessions; hence, they could argue, the trial should initiate in New York City where the court sessions were more frequent.[58] By manipulating the timing and location of the trial, and the personnel involved, lawyers such as Cockburn and Kempe gave clients their best chance of success in New York's courts.

Equally adept at legal strategizing were John Crooke and James Alexander, while working for Cadwallader Colden in a smaller land dispute in Dutchess County in 1749. The dispute, between Colden's tenant Thomas Wolcott and his neighbor John Sacket, arose over a pasture lying between their farms. To assert their conflicting claims upon the pasture, Wolcott and Sacket had begun resorting to physical means such as cutting down fences and driving the other's cattle off into the woods. Responding to Wolcott's call for help, Colden hired Crooke, a local attorney, to go down to Wolcott's farm and look into the matter.[59] After conducting a preliminary research, Crooke laid out two possible courses of action. They could either sue Sacket on an action of trespass in the county court of common pleas or Supreme Court, or alternatively sue him before a justice of the peace by invoking a provincial statute, "a bill for preventing trespasses." According to that act, once Sacket was sued before a justice for trespassing (cutting trees, fences, etc.), he had the choice of either pleading guilty or demurring upon title (in other words, justifying the cutting of trees and fences by proving his title to the land). To do the latter, he was obliged to enter into recognizance with sureties, pledging to sue his adversary in the county court of common pleas,

[58] John Tabor Kempe to Thomas Swords, Oct. 3, 1769, Ibid., Box 15, Folder 5.
[59] Thomas Wolcott to Cadwallader Colden, Sep. 7, 1749, *The Letters and Papers of Cadwallader Colden*, 9 vols. (New York: AMS Press, 1973), IV: 135-136; Cadwallader Colden to John Crooke, Aug. 24, 1749, Ibid., IV: 134-135.

and to pay "treble costs" if the title was found against him in the trial.[60] Crooke opined that the latter approach—simply suing Sacket before a local justice—would suffice. In light of the substantial risk Sacket would have to bear by demurring and subsequently trying to defend his title in the county court, Crooke was "almost confident that he [Sacket] never will try his title" if forced into this situation.[61]

To Crooke's surprise, however, Sacket proved more than willing to take the risk. Sacket, in fact, had "taken ye very method" which Crooke had proposed to Wolcott and Colden; taking the offensive, he sued Wolcott before a local justice upon the aforementioned bill for preventing trespasses. Now the burden of proof was upon Wolcott. To avoid being fined for trespass and effectively losing the right to access the land, he had to prove his title at the next session of the county court. Sacket, as Crooke found out, was emboldened to take such aggressive action due to several factors. First, he had a rather solid claim. Long before Wolcott began to claim the pasture as Colden's tenant, "[Sacket] and his father had bin in possession [of the pasture] of about fifty year." Sacket and his father's actual possession of the pasture, as Wolcott himself admitted, was acknowledged by "the princebell men [and] neibours." Second, Sacket was taking expert legal advice. Joseph Murray, one of New York's leading lawyers, had advised Sacket to take quick legal action using the bill for preventing trespasses, the same strategy which Crooke belatedly suggested to his clients.[62]

With an accomplished lawyer now on the opposing side, the situation had become completely different. Crooke advised that a more careful research of the "true state of the titles by

[60] "A Bill for preventing of Trespasses," May 16, 1699, *N.Y. Col. Laws*, I: 401-403. Crooke perhaps had at his disposal one of the provincial lawyers' manuals such as William Livingston's. In his *Book of Precedents,* Livingston neatly summarized the key clauses and applicability of the act, while also offering a sample recognizance geared especially to the occasion. Livingston, *Book of Precedents,* 460-461.

[61] John Crooke to Cadwallader Colden, Sep. 9, 1749, *Letters and Papers of Cadwallader Colden,* IV: 135-136.

[62] Thomas Wolcott to Cadwallader Colden, Sep. 7, 1749, Ibid., IV: 135-136; John Crooke to Cadwallader Colden, Dec. 11, 1749, Ibid., IV: 168-169.

which the land is claimed on both sides" was needed, and more importantly, urged Colden to "employ one of the ablest council in New York to consult with."[63] Well aware of the importance of sharp legal strategizing in late colonial New York's legal milieu, Crooke, despite being a lawyer himself, knew that he could not compete against Murray in this regard. By his own admission, he was not "infallible" as a lawyer. Writing to Colden, Crooke stressed that every step of the legal action should be devised "in the properest manner," especially with an opposing attorney capable of capitalizing on the smallest mistake.[64] Taking Crooke's advice, Colden reached out to James Alexander, a lawyer whose reputation equaled, if not surpassed, that of Murray, and who was a close ally of Colden's in politics and land speculation.[65]

Much like Kempe in the Ulster County case, Alexander's first advice was to remove the trial to New York City. Especially since local opinion seemed supportive of Sacket's claim, it was imperative that Colden and Wolcott avoid the county court. They would "be in danger there," Alexander explained, not only "by the jury but also from the ignorance of the judges." In the Supreme Court, in contrast, the local knowledge of Sacket's long usage of the land would be less relevant, and the emphasis on formal documents and legal certainties would likely favor Colden's title. Alexander, in fact, did "not apprehend that Sacket will carry the cause on when moved to the Supream Court."[66] Although Sacket had shown a willingness to take legal action if necessary, his confidence, Alexander predicted, would not carry over outside his neighborhood.

Removing the trial to the Supreme Court was not a simple task, however. Based on the same reasoning as Alexander's, the opposing attorney would likely try to bring the trial back to

[63] John Crooke to Cadwallader Colden, Dec. 11, 1749, Ibid., IV: 168-169.
[64] John Crooke to Cadwallader Colden, Feb, 12, 1750, Ibid., IV: 198-199.
[65] On the close ties between Colden and Alexander, see: Philip J. Schwarz, *The Jarring Interests: New York's Boundary Makers, 1664-1776* (Albany: State University of New York Press, 1979), 64–73.
[66] James Alexander to Cadwallader Colden, Jan. 24, 1750, *Letters and Papers of Cadwallader Colden,* IV: 195.

the local court, where his client had an upper hand. In such an event, Wolcott's abortive attempt to change tribunals would only incur unnecessary fees, and may well predispose the local judges against him. Hence, before trying to remove the trial to the Supreme Court, Wolcott needed a strong legal argument justifying it against any anticipated counter motions. In this particular case, a strong counter motion was indeed likely on the horizon, since the statute upon which Sacket took legal action explicitly required Wolcott to prove his title in the county court of common pleas.

Alexander knew exactly what to do about this, thanks to his extensive experience and wide connection with other provincial lawyers. In a similar case a few years earlier, William Smith, Sr. had successfully placed his client's trial in the Supreme Court. Smith's client, just like Wolcott, had been sued under the "bill for preventing trespasses." When Smith tried to remove the cause to the Supreme Court by habeas corpus, the opposing attorney, John Alsop, countered with a motion for a procedendo (an order from the appellate court that the inferior court proceed to judgment). Alsop urged the Supreme Court to send the cause back to the county court, as the statute under which his client sued specifically appointed the county court to try the cause, and "gave no authority to the Supreme Court." In response, Smith argued that New York's Supreme Court, just like the King's Bench in England, had "cognizance of all causes" within the province as its court of "general jurisdiction." Nothing less than a parliamentary act disallowing it with "plain express & clear negative words" could take away the Supreme Court's authority to try a cause. The Supreme Court judges were persuaded by Smith's argument, and proceeded to try the cause against Alsop's objections. It probably helped that Smith also "showed authorities to prove that to be law." This precedent "pave[d] the way" for Colden and Wolcott "to walk in," Alexander opined. By using the same argument as Smith's, citing the same authorities, and also by simply bringing the

Supreme Court's attention to its own precedent, Alexander was confident that he could safely land Wolcott's cause in the Supreme Court.[67]

In sum, New York's lawyers gave clients plenty of reasons to hire them in land related matters. Whether in securing land titles with favorable interpretation of documents, or in making strategic use of court procedures, their expertise clearly mattered.

Legal Expenses and the Unequal Access to Expertise

By the mid-eighteenth century, few New Yorkers would have doubted the value of legal expertise in matters of credit and property, but not everyone could benefit from it. For one thing, the costs of hiring a lawyer and undergoing lawsuits were substantial. Lawyers in late colonial New York typically collected a retaining fee of one pound for lawsuits in county courts, and slightly more for lawsuits in the Supreme Court.[68] Retaining fees were only a small part of the costs, however.[69] Lawyers were entitled to a "term fee" of five shillings, for each term in which the case was in consideration at the court, and then there were myriad lawyer's fees for every step of the typically complex procedures of common law trials. These included five shillings for every motion, two shillings each for drawing up "every common process" such as capias and scire facias, three shillings for every "special writ" such as testatum, venditioni exponas, and procedendo, two shillings and three pence for every recognizance, four shillings for every common declaration, one shilling and six pence for every special declaration, six shillings for drawing every general issue, three shillings for every habeas corpus, another three shillings for drawing a bail piece, and so on.

[67] James Alexander to Cadwallader Colden, Jan. 22, 1750, Ibid., IV: 192-194.

[68] Robert R. Livingston, Jr.'s List of Court Costs and Docket of Legal Cases, 1770-1782, *Robert R. Livingston Papers*, NYHS, microfilm, Reel 1; Livingston, *Book of Precedents*, 412; Johnson, *John Jay, Colonial Lawyer*, 142.

[69] The terms "fees" and "costs" were often confused, and used interchangeably by colonial New Yorkers. Here I generally use "costs" to denote overall expenses billed to litigants, and "fees" to denote sums charged by lawyers and courts for specific services. Julius Goebel and T Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* (Montclair, N.J.: Patterson Smith, 1970), 731–732.

For each of these procedural motions and documents, oftentimes copies had to made (for the personal record of the litigant, or for serving a copy to the adversary), and formal entries had to be made into the issue roll and parchments kept by the court's clerk. Each of these copies and entries also incurred fees of between one and six shillings. Indicating how high these plethora of fees could pile up, the Supreme Court placed an upper limit to a lawyer's total fees in a lawsuit at five pounds and ten shillings.[70]

In addition to the lawyers' fees were also a number of court fees owed to judges, clerks, witnesses, and jurors. Upon surveying the Supreme Court minutes of the 1750s, Deborah Rosen reported that the average total cost of a lawsuit including both lawyers' fees and court fees generally ranged between 4 to 7 pounds.[71] At least after the mid-eighteenth century, similar categories of fees were charged in county courts. The bill of costs in a 1774 trial in Tryon County's Court of Common Pleas, for instance, listed no less than twenty items—fees for the attorneys and judges, for several of the lawyers' motions, for the drawing, filing, and copying of various documents, for entering records into the court's docket, and for the judgment and execution in the case. Even without any witnesses or jurors summoned, the total costs came up to nearly five pounds.[72]

In contested lawsuits where landownership or large sums of debt were at stake, the total costs could easily rise much higher. For ejectment suits where boundaries came into question, either one of the parties could move for a "view" of the land.[73] Typically six of the jurors were summoned to be shown the land by a surveyor and one or more "shewers" appointed by the parties.

[70] Livingston, *Book of Precedents*, 412-414.
[71] Deborah A Rosen, *Courts and Commerce: Gender, Law, and the Market Economy in Colonial New York* (Columbus, OH: Ohio State University Press, 1997), 69–70.
[72] Bill of costs in the Executors of John Van der Heyden v. Hendrick Mathias, County of Tryon Common Pleas, Nov. 15, 1774, *Samuel Ludlow Frey Papers*, NYSL, Box 1, Folder 34.
[73] See note 50 above.

Local inhabitants knowledgeable of the key landmarks might also be summoned as witnesses. "Chain bearers" were also necessary, as land titles were generally defined by a handful of landmarks, and chains were used to visualize and measure for the jurors the imaginary boundary lines supposedly connecting those landmarks. All of these persons—the surveyor, showers, chain bearers, witnesses, and jurors—had to be paid per day for the duration of the laborious survey and view.[74] A view for an ejectment suit in Dutchess County in 1771, which took three days, entailed a fee of £1 12*s*. for the surveyor, £1 16*s*. for the two chain bearers, and another £1 16*s*. for two witnesses. There was also a 5 shilling fee for "setting rule for view on notice of motion," a 10 shilling fee for the balloting of jurors for the view, and also miscellaneous fees for notices, records, and copies regarding the view which added up to 2 pounds and 4 shillings. Even without counting the jurors' and attorneys' fees, which were not listed separately in the bill of costs, the total cost of the view amounted to 8 pounds and 3 shillings.[75] In addition to these official expenses, some litigants also provided amenities such as wine and "victuals" to the jurors attending the view, presumably to curry their favor.[76]

Travel costs were also a major category of legal expenses, especially when prominent New York City lawyers were involved. In the late 1750s, New York's leading lawyers regularized their fees for travelling to county courts at 13 shillings and 4 pence per day of travel. The number of days allowed for travel ranged from 3 days for nearby Kings County, to 17 days for Albany County. So for a litigant to retain a New York City lawyer for a lawsuit in the Albany courts, he or she had to pay more than 11 pounds to cover the lawyer's travel costs alone. Dutchess, Ulster, and Suffolk County litigants had to pay between 5 and 8 pounds to retain a New York City lawyer for a trial at

[74] Livingston, *Book of Precedents*, 456.
[75] Bill of Costs in James Jackson ex dem Abraham Cuyler v. Benjamin Westervelt, Supreme Court in Dutchess County, June 12, 1771, *Kempe Papers*, Box 3, Folder 2.
[76] John Tabor Kempe to Jacobus Swarthout, Aug. 7, 1775, Ibid., Box 15, Folder 5.

their county courts, and for counties closer to New York City the cost was about 2 to 4 pounds.[77] Ignoring this agreement, Attorney General John Tabor Kempe charged no less than 30 pounds as his "usual council fee" for going up to Albany for a trial.[78] If this was a premium he attached to his exalted reputation, he evidently held fellow lawyer James Duane in the same esteem. When Kempe was unable to personally attend a trial for a client in Albany, he recommended Duane as his replacement, instructing the client to pay Duane the same amount of "council fee."[79] Attorneys' travel charges were avoided if a trial was held in New York City. But for litigants outside of New York City, a trial at the Supreme Court or Chancery incurred equally substantial costs to cover their own travels, and where necessary, those of the witnesses and jurors. Lastly, bringing in foreign juries obviously led to extra travel costs for the jurors.

While lawsuits were generally expensive, hiring a lawyer especially caused costs to mount up. Lawyers escalated legal expenses not only with their own hefty fees, but also by utilizing their expertise in manipulating court procedures. Almost invariably, it was lawyers who moved for a foreign jury or for a jury's view of a tract, and who helped clients move causes away from local tribunals. All such actions increased costs. The lawyers' manipulations typically led to lengthier, and hence costlier, lawsuits. As shown, lawyers could cause delays to buy time to build a stronger case for their clients, or to ensure the attendance of key witnesses. Even when deliberate manipulation of the trial date was not the objective, lawyers' procedural manipulations—demurrers, pleas in abatement, motions for special bail, motions for a struck or foreign jury (and of course, opposing lawyers' attempts to obstruct any and all such motions)—prolonged lawsuits.[80]

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[77] Livingston, *Book of Precedents*, 437, 450.

[78] John Tabor Kempe to Rutger Bleecker, May 8, 1772, *Kempe Papers*, Box 14, Folder 11; John Tabor Kempe to John Van Alen, May 8, 1772, Ibid., Box 15, Folder 6.

[79] John Tabor Kempe to Rutger Bleecker, June 4, 1772, *Kempe Papers*, Box 14, Folder 11.

[80] The usual fees charged for composing a struck jury, for instance, included two shillings to the lawyer for attending the process, one shilling for the sheriff's serving summons, 1*s*. 6*d*. for the copying and serving of the processes, 2*s*.

Whenever a procedural motion or objection was made, the court typically spent a term to consider the motion, incurring additional term fees, judges' and clerk's fees, and fees for filing motions, entering records, making copies, serving notices, and so on.

For submitting a motion for habeas corpus, for instance, lawyers typically collected nearly two pounds for their services. This sum did not include the handful of court fees incurred at the inferior court where the lawsuit initiated, which the litigant owed even if the cause was successfully removed to a higher court.[81] The suit of the executors of Evert Bogardus against John Hardenbergh in the 1770s, for instance, was a relatively simple affair. No witnesses or jurors were summoned, and in the end the cause was evidently resolved without a trial. Either the defendant defaulted, or the parties reached a settlement. Still, it ended up being a costly affair, thanks to the lawyers' procedural motions. The suit was initiated in an inferior court before being removed to the Supreme Court by habeas corpus, where it dragged on for three terms without a trial. During its brief stay in the inferior court, the suit incurred £2 4*s*. 6*d*. in the usual lawyers' fees and various fees for filing and copying documents. Similar fees during the three terms in the Supreme Court, in addition to the fee for processing the habeas corpus, added up to £4 5*s*. 6*d*. The overall costs, almost entirely composed of the lawyers' and courts' fees for processing procedural motions, came up to six and a half pounds.[82]

Even the province's primary equity court was not free from costly procedural delays concocted by lawyers. Ordered by the governor in 1727 to examine the causes of the frequent

3*d*. to the clerk for attending, 1*s*. 6*d*. for the clerk's copying of the panel, and another 1*s*. 6*d*. for a copy of the finalized venire. Livingston, *Book of Precedents*, 456.

[81] Ibid., 455.

[82] Bill of Costs in John Hardenbergh v. Ex[rs] of Evert Bogardus, *Robert R. Livingston Papers*, Reel 1, Robert R. Livingston, Jr.'s List of Court costs and docket of legal cases, 1770-1782, Supreme Court, 6.

delays in Chancery, a committee of councillors concluded that the main problem lay in the "abuses in the practice of the law":

> After appearance of the def[t][,] pretences are used to delay putting in their answers, pleas and demurrers, sometimes for want of a copy of the bill[,] sometimes on pretence of want of writings &c[,] and after one time given is expired other pretences ... are used to get new time which not only tends much to the delay of the compl[t]s but to the increasing of the charges by the fees of such motions, or petitions, for time, and when all that is obtained often the practitioners put only in demurrers or pleas dilitory [motions to delay the court's proceedings in a cause].

As a remedy to these abuses, the committee recommended that the court require attorneys to submit any such procedural motions within eight days, with affidavits proving the necessity of the delay.[83] The regulations were either poorly implemented, or lawyers simply found ways around them, judging from William Livingston's observation two decades later that there still was "a general clamour and dissatisfaction" regarding the "dilatory proceedings in Chancery."[84]

It is not surprising, then, that contested lawsuits with lawyers on both sides could easily lead to exorbitant costs. In an aforementioned ejectment suit in Dutchess County, for example, the total expense amounted to nearly 35 pounds, largely due to the lawyers' motions for a jury and a view of the lands, and their prolonging of the lawsuit for four terms.[85] Similarly, for handling three

[83] "An Ordinance for Regulating and Establishing Remedies, for Abuses in the Practice of the Law," Livingston, *Book of Precedents*, 426.

[84] William Livingston et al., *The Independent Reflector, Or, Weekly Essays on Sundry Important Subjects, More Particularly Adapted to the Province of New-York* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1963), ed. Milton M. Klein, 250–252.

[85] Bill of Costs in James Jackson ex dem Abraham Cuyler v. Benjamin Westervelt, Supreme Court in Dutchess County, June 12, 1771, *Kempe Papers*, Box 3, Folder 2.

lawsuits involving James Duane's land claims in Albany County during the early 1770s, John Duncan charged Duane a total of about 52 pounds (about 17 pounds per case).[86] Duane was no stranger to exorbitant legal costs. As a lawyer, he was retained in numerous costly ejectment suits, including one involving a disputed tract of land on the border of Albany and Ulster Counties. For the last four years (out of fourteen) of the lengthy legal battle alone, the defendants' costs amounted to no less than 180 pounds.[87] Debt cases generally cost less than land-related cases, but hiring a lawyer could still be expensive. Hired to defend a debtor in 1774, John Tabor Kempe charged the already indebted client more than six pounds for the lawyer's fees alone. This included about two pounds for the various procedures (warrant of attorney, copy of writ and declaration, drawing bail piece and notice of bail, and two term fees), the usual retaining fee, and an additional three pounds and four shillings for "several attendances and advice to you [the client] on the subject of this suit."[88] No wonder even the great landlords grumbled about the heavy expenses of lawsuits.[89]

With lawsuits frequently incurring such high expenses, it was perhaps inevitable that lawyers would sometimes have trouble collecting fees from their clients. Even John Tabor Kempe, despite his authority as attorney general, was no exception. In his private practice, Kempe often had to cajole former clients whose payments were "long due."[90] The effort to collect fees from such clients could also pit lawyers against each other. During the 1760s, Kempe was in a bitter dispute with fellow lawyer John Alsop over the fees due from a mutual client. George Spencer, a merchant who had been harassed by a mob in a rough music incident, and who also had bitter

[86] John Duncan's Account with James Duane, 1768-1775, *Van Vechten Family Papers*, Box 11, Folder 52.
[87] Moglen, "Settling the Law," 137.
[88] Robert Sinclair v. John Cross and others, Costs due to J. T. Kempe from Defendant, June 1774, *Kempe Papers*, Box 3, Folder 2.
[89] Sung Bok Kim, *Landlord and Tenant in Colonial New York: Manorial Society, 1664-1775* (Chapel Hill: University of North Carolina Press, 1978), 412; Milton M. Klein, *The American Whig: William Livingston of New York* (New York: Garland Pub., 1993), 163.
[90] Henry Van Schaack to John Tabor Kempe, Dec. 14, 1773, *Kempe Papers*, Box 14, Folder 6; John Tabor Kempe to James Barclay & Thomas Duncan, Jr., Mar. 8, 1775, Ibid., Box 14, Folder 11.

competitors in business (whom Spencer accused of conducting illicit trade), hired Alsop and Kempe in a series of lawsuits in the Supreme Court and Court of Admiralty both against the rioters and against his merchant competitors. The multiple lawsuits went on for several terms, involving a large number of defendants, witnesses, and jurors.[91] By the time Alsop drew up the costs in early 1761, the legal fees due to him amounted to no less than 270 pounds. In addition, Alsop had also been acting as Spencer's de facto agent while preparing the lawsuits. Hence, "for services done [out] of court & cash advanced or paid according to [Spencer's] several orders, not usual to be put in bills of costs," Alsop charged another 175 pounds, bringing the total costs to a whopping 445 pounds.[92] One of the reasons Alsop did not mind letting such high costs accrue before collecting any was that he was indebted to Spencer. Alsop had recently bought from Spencer a house priced at £900, of which he only managed to pay £190. For the rest, he gave Spencer a note of hand for £410, and "promise[d]" to pay Spencer's wife the remaining £300. Alsop's fees in Spencer's lawsuits were to be credited toward the £710 he still owed Spencer.[93]

Matters became complicated when Spencer retained Kempe to work alongside Alsop as his counsel. As was often the case, Alsop, the lawyer with a closer connection to the client, assumed the primary role of managing the bill of costs. According to the arrangement, Alsop would collect both lawyers' fees from Spencer, then pass on to Kempe what was due him. When Alsop finally presented the bill of costs to his client, however, Spencer refused to pay anything, pointing to the fact that the unpaid fees were less than what Alsop still owed him. Hence Kempe's fees should be paid out of Alsop's pocket. Alsop, on the other hand, argued that the costs of the lawsuits had exceeded his debt to Spencer. The difference arose because Alsop only considered his £410

[91] George Spencer to John Tabor Kempe, Nov. 30, 1759, Oct. 20, 21, 22 & 24, 1760, Apr. 20, 1761, Aug. 23, 1765, Ibid., Box 14, Folder 6; John Alsop to John Tabor Kempe, Feb. 19, 1761, Ibid., Box 13, Folder 1.
[92] John Alsop to John Tabor Kempe, Feb. 21, 1761, Ibid., Box 13, Folder 1.
[93] George Spencer to John Tabor Kempe, Aug. 23, 1765, Ibid., Box 14, Folder 6.

note of hand as his immediate debt. Apparently, he deemed the additional £300 he owed Alsop's wife as payable at a later time. Hence, not only should Spencer pay him £45, the difference between Alsop's fees and his debt on the note of hand, but he should also pay whatever fees due to Kempe separately.[94]

Kempe, deciding that Spencer's position had better merit (or perhaps thinking it would be harder to collect money from Spencer, who had by then moved to Philadelphia), pressed Alsop to make satisfaction for his fees in the lawsuits. Kempe was in disbelief that Alsop would consider "himself entitled to be paid all his costs," while Kempe "should remain unsatisfied for [his] services."[95] Alsop, for his part, vehemently denied what he saw as Kempe's "unexpected and groundless charges."[96] A series of increasingly acrimonious letters between the two lawyers was cut short by Alsop's death. The dispute soon resumed, however, with Kempe now demanding his "just due" from Alsop's son. The dispute over Kempe's uncollected fees was finally taken to the arbitration of other lawyers.[97] Whether Kempe eventually recovered his fees is unknown, but the case is a striking demonstration of the difficulties that lawyers could encounter in collecting their fees.

Having been made well aware of these difficulties, lawyers such as Kempe became highly sensitized to the matter of fee collection. Upon hearing that a client of his (John Van Alstyne) was leaning toward discontinuing a lawsuit, for example, Kempe immediately wrote to Albany lawyer Rutger Bleecker, who had been working with Kempe for the same client. Kempe was "very desirous of knowing whether Mr. Van Alstyne intends to drop this affair or not, as he ought in

[94] John Alsop to John Tabor Kempe, Feb. 19 & 21, 1761, Ibid., Box 13, Folder 1.
[95] John Tabor Kempe to John Alsop, Feb. 19, 1761, Ibid., Box 14, Folder 11; John Tabor Kempe to John Alsop (Jr.), May 2, 1761, Ibid., Box 14, Folder 11.
[96] John Alsop to John Tabor Kempe, Feb. 19, 1761, Ibid., Box 13, Folder 1.
[97] John Tabor Kempe to John Alsop, Feb. 26, 1761, Ibid., Box 14, Folder 11; John Tabor Kempe to John Alsop, Jan. 3, 1764, Ibid., Box 14, Folder 11.

such case to be furnished with my bill of costs."[98] Also writing to Bleecker regarding a mutual client who desired Kempe to represent him in a trial at the Albany Circuit Court, Kempe asked Bleecker to help "secure the engagement for the council fees for going up [to Albany]."[99] Kempe, in fact, ended up not attending the trial, as neither Bleecker nor the client responded to him with the desired assurance in time for the upcoming term. "If this should prove a disappointment" to the client, Kempe later proclaimed, "it must be attributed to a neglect on his part."[100] Similarly, before fully engaging himself in what promised to be a costly ejectment suit, Kempe reminded his client that he was not "yet secured respecting the costs."[101]

To assuage the lawyers' concerns over fee collection, some clients offered security or even payment in advance. Asking Kempe to obtain a copy of a complaint lodged against him in a New York City court and to advise him on the matter, Henry Ten Eyck, Jr. of Albany, for instance, sent Kempe five pounds in cash, while pledging himself for the remainder in case the costs exceeded that sum.[102] More typical, probably, were clients offering financial instruments as security. While demanding this form of security from a prospective client, Kempe stated that it was "customary for a client to engage by note of hand for the payment" of the lawyer's fees.[103] A promissory note did not completely secure the lawyer's collection of fees, but it gave much better security than a simple verbal promise. George Spencer did not offer Kempe any such securities, but certainly understood how sensitive lawyers were about fee collection. Seeking to retain Kempe as counsel, Spencer wrote to him: "Permit me to assure you, sir, that you'll find me the best client that ever

[98] John Tabor Kempe to Rutger Bleecker, Jun. 9, 1773, Ibid., Box 14, Folder 11.
[99] John Tabor Kempe to Rutger Bleecker, May 8, 1772, Ibid., Box 14, Folder 11.
[100] John Tabor Kempe to Rutger Bleecker, June 4, 1772, Ibid., Box 14, Folder 11.
[101] John Tabor Kempe to Thomas Swords, Aug. 12, 1772, Ibid., Box 15, Folder 5.
[102] Henry Ten Eyck, Jr. to John Tabor Kempe, Sep. 1, 1772, Ibid., Box 14, Folder 7.
[103] John Tabor Kempe to John Van Alen, May 8, 1772, Ibid., Box 15, Folder 6.

you had, & perhaps ever will have, by the time my affairs are intirely settled, so that I flatter my self you'll readily grant my request as you value your interest."[104]

In late colonial New York, then, it was well understood both by litigants and lawyers that lawsuits with legal counsel were costly affairs, and that not everyone could afford them. To obtain the services of a professional lawyer, a litigant should not only be able to pay the substantial fees and costs, but should also be able to secure the payment beforehand, or give the lawyer reasonable assurance of payment. It was not easy for a litigant to have and give such confidence regarding the payment of legal expenses, especially given the capacity of late colonial New York's lawyers to escalate expenses with myriad procedural motions. Embarking on a lawsuit with legal representation meant facing the possibility that the lawsuit could be prolonged for several terms, be moved to a higher court, entail costly special motions, and involve multiple payments not only to the lawyer, but also to numerous witnesses, jurors, and court officials. To be able to sustain such expenses, and perhaps more to the point, to be able to persuade a lawyer that he would receive full and timely payment regardless of the amount of the final bill, one had to possess substantial assets, whether in the form of money, credit, or real estate.

Most New Yorkers in the eighteenth century lacked such assets. During most of the colonial period, urban poverty was pervasive and increasing. In 1773 alone, New York City's municipal authorities assigned between six hundred and eight hundred New Yorkers to poorhouses and out-relief—a considerable number out of the city's population of about twenty-two thousand.[105] Throughout the century, New York City's authorities also struggled to regulate a

[104] George Spencer to John Tabor Kempe, Dec. 1, 1759, Ibid., Box 14, Folder 6.

[105] Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (Baltimore: Johns Hopkins University Press, 1981), 10–11; Robert E. Cray, *Paupers and Poor Relief in New York City and Its Rural Environs, 1700-1830* (Philadelphia: Temple University Press, 1988), 67–77; Gary B Nash, *The Urban Crucible: Social Change, Political Consciousness, and the Origins of the American Revolution* (Cambridge, Mass.: Harvard University Press, 1979), 402.

sprawling underground economy surrounding cheap shops, taverns, and "disorderly" houses, where poor laborers and slaves exchanged stolen and smuggled goods that their meager incomes did not allow them to procure legally.[106] The middling sorts were not typically in a position to spend fortunes on lawsuits either. Enjoying little security against the recessions and currency shortages which became increasingly frequent with New York's deeper involvement in the Atlantic economy, many of the middling artisans and traders were perennially cash-strapped and debt-ridden during the eighteenth century.[107] With insolvent debtors filling up the prisons, the provincial legislature was forced to seek debt relief measures beginning in the 1730s. In the absence of systemic bankruptcy laws, these acts were always offered as strictly temporary remedies. But due to the chronic and widespread insolvency among New Yorkers, they had to be constantly renewed, and ended up staying in force throughout most of the late colonial period.[108]

In the country, tenants and small farmers were equally cash-strapped, living "only a bad harvest or two away from poverty," as one scholar of early New York's rural economy notes.[109] Their subsistence often entailed chronic indebtedness, as they continually purchased items on

[106] Serena R. Zabin, *Dangerous Economies: Status and Commerce in Imperial New York* (Philadelphia, Pa.; Oxford: University of Pennsylvania Press, 2011), 57–80. Peter Linebaugh and Marcus Rediker, *The Many-Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Boston: Beacon Press, 2000), Ch. 6.

[107] Simon Middleton, *From Privileges to Rights: Work and Politics in Colonial New York City* (University of Pennsylvania Press, 2006), 193–195. According to Beverly McAnear, skilled artisans such as carpenters earned up to about £90 a year in New York City during the 1760s. Given that a year's board was about £15 or less, they were probably in comfortable financial positions. McAnear notes, however, that many urban workers struggled to find regular employment, in some cases earning only about £30 a year. With living costs rising rapidly after the mid-eighteenth century, the portion of urban workers attaining freemanship declined, reflecting their deepening financial insecurity. Beverly McAnear, "The Place of the Freeman in Old New York," *New York History* 21, no. 4 (1940): 418–430.

[108] Various acts entitled "An act for the relief of insolvent debtors within this colony, with respect to the imprisonment of their persons," 1730, 1732, 1743, 1748, 1750, 1751, 1753, 1754, 1755, 1756, 1757, 1759, 1761, 1767, 1774, *N.Y. Col. Laws*, II: 669, 753, III: 312, 694, 822, 866, 924, 1019, 1099, IV: 19, 103, 182, 343, 526, 563, 747, 928, V: 701, 706.

[109] Thomas J. Humphrey, "Leases and the Laboring Classes in Revolutionary America," in Simon Middleton and Billy G. Smith, ed., *Class Matters: Early North America and the Atlantic World* (Philadelphia: University of Pennsylvania Press, 2008), 168-184 (see especially p. 177).

credit from local stores, and in the case of tenants, often fell arrears in their rent payment.[110] Tenants and freeholders did have one important asset, that is, their leasehold or freehold. Selling their sole steady source of livelihood, however, surely could not have been anything more than a last resort. Tenants, moreover, were restricted in their ability to sell their land, as the landlord typically retained the right to refuse the sale, or demand a portion of the money received from the sale.[111]

To these ordinary New Yorkers, engaging in a costly lawsuit was taking a considerable financial risk. Joseph Crane, Jr. of Dutchess County was probably not the only one who, when facing a court appearance, had to worry first about the costs. On hearing that he was accused of wrongdoing and summoned to an imminent trial in the circuit court for the county, Crane, seeking to avoid "the cost of which [he] understood would be very great," immediately "set off and rode all that night" to procure several affidavits and prevent the costly trial.[112] Unable to raise the requisite sum on their own, poor litigants relied on the help of others, covering the expenses of a lawsuit, for instance, with money for "the most part borrowed amongst [...] neighbours."[113] John Kennedy of Dutchess County was also too "poor unfortunate" to take his claim of about five pounds to court, but fortunately he had a "few welwishers" who "freely contribute[d]" to the legal expenses, even retaining a lawyer for him.[114] Even after scraping together enough money to initiate a lawsuit, litigants of moderate means still had good reason to worry that their assets might run dry if the lawsuit was prolonged, or that they would be disadvantaged in court against an adversary who could afford better legal counsel. Commenting on his adversaries in a lawsuit, Johannis Klaus

[110] See Chapter 7, pp. 375-376.
[111] Kim, *Landlord and Tenant in Colonial New York*, 223–228.
[112] Joseph Crane, Jr. to John Tabor Kempe, Aug. 13, 1766, *Kempe Papers*, Box 13, Folder 5.
[113] Unidentified writer to John Tabor Kempe, n.d., Ibid., Box 13, Folder 9.
[114] John Bickerton to William Kempe, Nov. 26, 1753, Ibid., Box 15, Folder 8.

of Albany, for example, lamented that "they being superior to me in point of money; I am not able to cope with them in common law."[115]

Wealthy landowners and merchants, in contrast, were much better equipped to sustain the heavy costs of a lawsuit. New York's large landowners typically held multiple disposable landholdings, as a result of their deep engagement in land speculation. When the need arose, they could release some of their speculative land titles, or simply offer them as a substitute for monetary payment. Handling large volumes of trade with numerous persons of means, New York's merchants enjoyed unparalleled access to credit. Successful merchants also possessed valuable property in urban areas which they could liquidate or use as security if necessary, and held high-value bonds, bills, and notes which they could assign to others to fulfill a payment or satisfy a debt.[116]

The aforementioned George Spencer, for example, was able to retain John Alsop as his lawyer by selling him a house. The costs of the lawsuit, which amounted to £190, were deducted from the £900 Alsop owed Spencer for the house. Instead of receiving immediate payment for the remainder, Spencer, perhaps anticipating more lawsuits in the future, kept Alsop indebted to him for the balance. More lawsuits did happen, costing Spencer a total of £445 by 1761. Throughout these expensive suits, Spencer, thanks to his position as creditor to Alsop, could delegate to him the handling of the entire business including payment of myriad court fees. In both instances, Spencer's possession of substantial assets—property for the initial retention of Alsop, and credit for the later lawsuits—was what enabled him to engage in costly cases with the support of a lawyer.[117] For retaining John Tabor Kempe as his second counsel, Spencer used assets in a different

[115] Johannis Klaus to William Kempe, Jun. 6, 1757, Ibid., Box 15, Folder 10.
[116] Countryman, *A People in Revolution*, 9.
[117] George Spencer to John Tabor Kempe, Aug. 23, 1765, *Kempe Papers*, Box 14, Folder 6; John Alsop to John Tabor Kempe, Feb. 18, Feb. 21, 1761, Ibid., Box 13, Folder 1.

way. For Kempe's "trouble & expences" in the lawsuit, Spencer offered him "one moiety of whatever I may recover thereby." As a prospective creditor against his defendants, here Spencer was using his expected future assets, or "stock," both to compensate for Kempe's services, and to incentivize him to bring his full expertise to the case.[118]

Lawyers and the Profit-Oriented Use of Land and Credit

As Spencer's case suggests, possession of credit and property not only enabled the hiring of a lawyer for a particular cause, but also led wealthy landowners and creditors to form lasting ties with lawyers. This was partly because the protection of one's land titles and financial claims required a readiness to engage in legal battles. It was also because landowners and merchants in late colonial New York were constantly on the lookout for new investment opportunities, and lawyers, both in and out of the courtroom, were effective supporters of such speculative and entrepreneurial ventures. The value of legal expertise in profitable ventures was nowhere more evident than in the privileged possession and use of land—whether in acquiring or selling land, consolidating land claims, or profiting from the rise of land's value.

Eighteenth-century New York was a fertile ground for profit-oriented ventures surrounding land primarily due to three factors. First, the pattern of skewed land distribution established in the early decades of English rule produced generations of landowning families who both possessed large quantities of surplus land, and also had the financial capacity to invest in more land. This circumstance ensured that New York's land market would seldom see any shortage of supply or demand throughout the century. Second, while the main players in the land market were well established, their holdings were less stable. New York's history of rapid land grabbing, fueled by

[118] George Spencer to John Tabor Kempe, Aug. 23, 1765, Ibid., Box 14, Folder 6; John Alsop to John Tabor Kempe, Feb. 19, 1761, Ibid., Box 13, Folder 1.

the provincial government's unscrupulous use of land grants as political favors, led to a situation where ill-defined and conflicting claims would periodically put the ownership of land in flux. Third, accelerated economic and demographic growth, particularly in the decades before and after the Seven Years' War, led to rising land values. Especially when combined with the first and second factors, this circumstance provided further motive for land speculation. As land-hungry settlers improved more areas of New York and raised their value, speculators sought to gain a windfall by purchasing undervalued, unimproved tracts of land at a pittance, and turning a profit by attracting settlers to the area, or selling at a markup as other speculators bought into expectations that the land would soon be settled and rise in value.[119]

The law almost invariably came into play with such speculative ventures, because there was at least one preexisting land claim for virtually every inch of land in the colony (and beyond, as numerous land claims encroached upon the territories of neighboring colonies). Typically, there had already been latent discrepancies and overlaps between several land patents and Indian purchases, but the claimants had not been interested enough to solidify possession due to the low value of the land. Once they heard news that the area might begin to attract settlers, or that a speculator was trying to purchase the lands, however, everyone with a potential title to the land rushed in to resuscitate their long-dormant claims. The vague specifications of old land documents would finally be brought under intense scrutiny, as each claimant vigorously sought to invalidate competing claims. Before long, one of the parties would resort to a lawsuit to assert his or her claim. New York's lawyers, as seen above, knew how to use the legal system to give clients in land disputes an advantage in the courts. They knew which documents to procure and how to interpret them to justify a claim, and were adept at the strategic manipulations available in New

[119] Ruth Loving Higgins, *Expansion in New York, with Especial Reference to the Eighteenth Century* (Philadelphia: Porcupine Press, 1976); Moglen, "Settling the Law," Ch. 3.

York's courts. The lawyers' role in establishing landownership was not confined to their handling of lawsuits, however. They also helped clients identify pieces of land worth investing in, gain privileged access to those lands, purchase them on good terms, and have the land properly surveyed, partitioned, and documented.

In his recommended course of study for law students, William Smith, Sr., included surveying as one of the "sciences necessary for a lawyer." A prospective New York lawyer should be well acquainted with the "arts of surveying & book keeping," Smith explained, "because he will have frequent occasion for this branch of knowledge in the practice of law."[120] It was an apt recommendation, since the resolution of land disputes often converged upon surveys. A key part of interpreting land documents was the task of connecting the documented description of land with the actual physical terrain. To identify which of the available documents lent the strongest support behind a particular claim, and to read the document in a way that maximized a claimant's possession, one had to know the language of surveyors who had created those physical descriptions. Knowledge of surveying also enabled informed decisions as to whether a costly jury view was necessary, and on which part of the disputed lands. Lawyers such as John Chambers, as seen in some of the cases discussed above, were adept at this art. Indicating the close tie between surveying and lawyering in late colonial New York, numerous men including Alexander Colden, George Clinton, Robert Yates, John Alsop, and William Cockburn had active careers as lawyer-surveyors.[121]

For those speculators thinking ahead, conducting a careful survey at the stage of land acquisition was a good safeguard against any potential challenges from competing claims. In late

[120] Paul M. Hamlin, *Legal Education in Colonial New York*, (New York: Da Capo Press, 1970), 197.
[121] Allen, *The Mapping of New York State*, 120, 249; Hamlin, *Legal Education in Colonial New York*, 102, 154, 155, 162; John Alsop to Gilbert Livingston, Nov. 19, 1733 & Apr. 10, 1734, *John Alsop Papers*, NYHS, Folder 1; Land Survey conducted by John Alsop, Oct. 1727, *John Chambers Papers*, Box 1.

colonial New York's charged atmosphere surrounding land titles, what speculators needed was not only someone who could give them an accurate survey, but who could also conduct and record the survey with an eye to anticipated legal disputes. No one was better suited for this task, of course, than a lawyer-surveyor. George Clarke, for example, relied on John Chambers' expertise when he decided to settle his vast speculative landholdings along the border with Connecticut, seeking to bequeath them to his sons as stable, profitable possessions. In 1748, Clarke wrote to Chambers: "If there should be any doubt about the boundaries of any of the lots I beg you will get them re-surveyed and pay the charge out of my son's money who consents to it as it is for his interest."[122] Similarly, the Albany City Corporation frequently turned to lawyer-surveyor Robert Yates whenever the threat of competing claims upon its outlying landholdings called for a preemptive survey of their boundaries.[123]

Closely intertwined with their ability to measure and map land was the New York lawyers' proficiency in assessing both its current and anticipated economic value. As New York's private land market matured in the eighteenth century, the value of any given tract closely reflected numerous geographical, social, and politico-economic factors—from the soil quality and distance to major cities, towns, and rivers, to the improvements made on the soil, the available infrastructure such as roads and mills, the legal certainty of the title, and the security from Indian raids.[124] From a landowner or speculator's standpoint, these factors mattered mainly because they determined the prospects of attracting farmers and tenants to the land. Hence, when surveyors, agents, or promoters advertised a piece of land to prospective buyers in the late colonial period, they

[122] George Clarke to John Chambers, May 10, 1748, Ibid., Box 1.
[123] Joel Munsell, *Collections on the History of Albany: From Its Discovery to the Present Time ; with Notices of Its Public Institutions, and Biographical Sketches of Citizens Deceased* (Albany, N.Y.: J. Munsell, 1865), I: 241, 242, 263, 264.
[124] Kim, *Landlord and Tenant in Colonial New York*, 139–141; Thomas J. Humphrey, *Land and Liberty: Hudson Valley Riots in the Age of Revolution* (DeKalb: Northern Illinois University Press, 2004), 20.

frequently stressed that the land "will soon be very valuable as the country is settling fast." Then they might substantiate the claim by mentioning some specific features, by giving a detailed and "true account of the soil and timber," or pointing out that a "very fine road" recently constructed made "those lands about that place valuable."[125]

Whether acting as land agents themselves, or making assessments based on information provided by agents and surveyors, late colonial New York's lawyers helped clients make informed assessments of land value. Considering whether it would be the right time to sell some of his father's landholdings in New York, for example, George Clarke, Jr. instructed Goldsbrow Banyar, his agent and secretary, to "loose no time" in asking John Chambers about the "real value" of the land.[126] William Bayard, a wealthy New York City merchant, similarly relied heavily on his lawyer George Clinton in deciding whether and when to sell a 1000-acre piece of land in Orange County he had recently acquired. After viewing the land and also speaking with several locals who were "well acquainted with its quality & situation," Clinton reported that the soil in the area was generally "very stoney," and that Bayard's tract was reputed to be the "worst of the whole." To make matters worse, the "great scarcity of cash ma[de] it impossible to sell lands at near full value." Clinton concluded that the land would not "sell for more than 15 shillings [per] acre if for that."[127]

For those hoping to profit from land, surveying and assessing its value were important, but this would serve little purpose unless one could actually acquire a piece of land. While private purchase from other colonials was one way of doing so, the best speculative opportunities lay in the "unsettled" land. By legislative design, purchasing land from natives in eighteenth-century

[125] Abraham Oothout to John Tabor Kempe and others, Dec. 20, 1764, *Kempe Papers*, Box 14, Folder 4; Joseph Chew to unspecified recipients, Mar. 3, 1775, *Samuel Ludlow Frey Papers*, Box 1, Folder 9.
[126] George Clarke to Goldsbrow Banyar, Apr. 16, 1760, *Golsbrow Banyar Papers*, NYHS, Box 1.
[127] George Clinton to William Bayard, June 25, 1769 & Oct. 8, 1770, *Bayard-Campbell-Pearsall Families Papers*, NYPL, Box 1, Folder 1.

New York was far more complicated than a private land purchase from a fellow colonial. The centralized Indian purchase system required that anyone interested in a piece of native land first obtain from the provincial government a license to purchase from the natives. After 1736, the process was further centralized, as prospective purchasers were made to apply to the surveyor general for an official survey of the land they were interested in. Following the conclusion of the Seven Years' War in 1763, not only the surveying but the negotiations themselves had to be conducted under the authority of the governor or the superintendent of Indian affairs. As several historians have pointed out, the centralized system made it almost impossible for individuals to purchase small quantities of land directly from natives. Official surveys were prohibitively expensive, as were negotiations with natives, which often required lengthy meetings and generous provisions of food, alcohol, and gifts. The expenses were bearable only for wealthy speculators purchasing large tracts. Moreover, those who controlled the Indian purchase system—governors, surveyors general, and Indian superintendents—were not above abusing their power for the exclusive benefit of their friends and allies among the provincial elite.[128]

While instructing his agents to survey and purchase several thousand acres of Mohawk land in 1761, for example, Surveyor General Alexander Colden stressed that "the gent[lemen] concerned are my particular friends and therefore [I] hope you will do all in your power to serve them & oblidge me." The gentlemen seeking to purchase the lands included Peter V. B. Livingston and Oliver DeLancey, members of New York's wealthiest families. Along with the licenses entitling his friends to purchase the land, Colden sent his agents instructions to conduct the survey with the "greatest expedition," and "to act as prudently and savingly as tho it was for yourself & make the purchase on the most reasonable terms." The provisions and liquor for negotiating with

[128] Moglen, "Settling the Law," 120-121; Kim, *Landlord and Tenant in Colonial New York*, 134–136.

the natives should be procured at the "cheapest rates" possible, and the chain bearers and markers for the survey should also be hired "at the cheapest wages."[129]

If the Indian purchase system practically ensured men of wealth and status exclusive access to native lands, turning these land investments into solid and profitable possessions required further legal, financial, and political maneuvers. To fully establish a land title, the Indian deed had to be confirmed by a patent from the governor, or ideally from the Crown. Even those speculators and landowners who already held a patent often desired a new one, as many of the old land grants inherited from the seventeenth or early-eighteenth century lacked legal certainty. They had typically been granted by governors as personal favors, and often included vaguely defined tracts of land which overlapped with other grants and Indian deeds.[130] The process of securing such titles was seldom free from contention, as speculators frequently competed against each other, and old claimants, alerted to the speculators' ventures, tried to protect or revive their claims. For those speculators and claimants who could afford their services, late colonial New York's lawyers had much to offer in each step of the contentious acquisition of land.

For the same reasons that they were effective at defending land titles at trial, lawyers were adept at drawing up petitions for contested land claims. The audience they pleaded to in the two situations was not too different, after all, as several of the councillors doubled as Supreme Court justices, and the governor sat in the Chancery. Just as they would for trials, for petitions lawyers also prepared well-argued justifications of their client's land claims. If the governor and council saw merit in the lawyer's argument and granted the title, the client gained possession while effectively preempting a costly lawsuit over the land. To claim a piece of "vacant land" lying just south of its boundaries, for example, the Albany City Corporation hired William Smith, Jr. to draw

[129] Alexander Colden to Isaac Vrooman, May 28, 1761, *Samuel Ludlow Frey Papers*, Box 1, Folder 8.
[130] Higgins, *Expansion in New York*, Ch. 3; Kim, *Landlord and Tenant in Colonial New York,* 134.

a petition to the governor and council. The corporation already knew their main line of argument; the land in question had in fact "intended to have been granted to the corporation" along with its charter of incorporation, but the "surveyor's unskilfulness at that time" erroneously left the land outside of the city's bounds. Not trusting its own ability to formulate this position into a strong legal argument, however, the corporation relied on the expertise of Smith. The corporation deemed it well worth the costs and trouble, although it entailed not just the lawyer's fees, but also having a council member travel to New York City with relevant "maps and papers."[131]

Drafting a good petition was an important step toward obtaining a land grant, but not the only one. In New York's oligarchic power structure, private correspondences and conversations with the political elite, along with personal attendance at legislative meetings where petitions were heard, went a long way toward obtaining a favorable decision. New York's prominent lawyers were in a good position to conduct this kind of business. By frequently handling their legal affairs, lawyers developed strong personal connections with the provincial elite. Moreover, many lawyers, either by birth or marriage, belonged to the several families that controlled New York's politics. Using these connections, some of the lawyers became bona fide members of the political elite themselves, serving as councillors, assemblymen, and attorneys general.[132] In short, elite lawyers had access to the inner circle of political figures who determined the distribution of land in colonial New York.

James Duane was one such lawyer. Regarding a client's petition for land, for example, Duane reported that he "had an opportunity of speaking upon it to his excellency, but not so fully as I shall do when necessary." Duane let his client know that he was perfectly capable of bringing the governor's and council's attention upon the matter, but he also knew the right time to do so.

[131] Munsell, *Collections on the History of Albany,* I: 133.
[132] Moglen, "Settling the Law," 105.

Given their preoccupation with ongoing "publick troubles" (probably referring to the Stamp Act crisis), Duane apprehended that they might be "irritated" if pressed upon a petty land petition. He assured his client, however, that the petition "will be laid before the council" as soon as the troubles subsided.[133]

Even a younger and less well-connected lawyer such as Peter Van Schaack could be an important asset for clients pursuing land grants. Soon after Van Schaack began practicing regularly in New York City, land claimants from his hometown in Kinderhook and neighboring town New Canaan began seeking his services. The proprietors of the two towns each hired Van Schaack to present their petitions "before his excellency and the honorable council board." Clearly expecting from Van Schaack much more than a simple delivery of the document, they promised to reimburse "any expense attending our application." They wanted him to act as their advocate—that he would "do us the favor of interesting yourself in our behalf."[134] Van Schaack met his clients' expectations not only by actively promoting their petitions, but also by providing timely intelligence about relevant developments in the government. When he found out that the legislature had just passed new road and district laws which might affect his Kinderhook client's land claims, for instance, Van Schaack lost no time to alert them. Promising to send a full copy of the act shortly (the act was "not yet printed"), he first sent them an "extract" of the passages that he deemed most relevant to his clients.[135] When neighboring manor lord John Van Rensselaer petitioned for an enlarged land grant, Van Schaack saw that it would pose an even graver threat to the Kinderhook proprietors' land claim. Without waiting to hear his clients' reaction to the news, he immediately petitioned for

[133] James Duane to John Duncan, Mar. 11, 1766, *Van Vechten Family Papers*, Box 11, Folder 52.
[134] David Wright et al. to Peter Van Schaack, Jan. 20, Mar. 26, 1772, *Van Schaack Family Papers*, Folder: more correspondence, 1775-.
[135] Peter Van Schaack to Peter Vosburgh et al., Mar. 30, 1772, Ibid., Folder: P.-end.

a "proviso" that the governor and council not grant Van Rensselaer any of the lands claimed by his Kinderhook clients.[136]

Given the heavy competition for land in late colonial New York, protecting one's land claim from competitors' conflicting land petitions was just as important as promoting one's own petition. New York City lawyers gave clients invaluable support in this regard. Van Schaack did this for his Kinderhook clients. So did John Chambers, when part of his client's land claims were threatened by the land petition of two neighbors. Chambers promptly entered a "cav[ea]t" against the petition.[137] Similarly, when the Albany City Corporation was "informed that some person or persons are about obtaining a deed or grant" for land that the corporation claimed, they sought to obstruct it by hiring New York City lawyers William Smith, Jr., William Livingston, and John Morin Scott.[138] For the purpose of obstructing competitors' land grants, and for preventing costly legal disputes against competing claims, it was well worth hiring a lawyer not just for a single petition, but for the long-term solidification of one's land title. By having a well-connected and knowledgeable lawyer constantly looking out for any new competing land claims or relevant political developments, and by having the lawyer provide timely "advice & direct[ions]" on any such contingencies, land claimants could draw closer to the secure landholding they desired—to rest assured "that hereafter no dispute may arise on that subject."[139]

In the eighteenth century, New York's land speculators often formed partnerships to collectively apply for large tracts of land. Even for the wealthy, it made sense to share the substantial costs of land surveys, petitions, and potential legal disputes. The establishment in the

[136] Peter Van Schaack to Cornelius Van Schaack et al., Dec. 29, 1772, Ibid., Folder: P.-end. For the larger context of the Kinderhook dispute, see: Kim, *Landlord and Tenant in Colonial New York*, 348-349.
[137] Philip Livingston to John Chambers, Apr. 20, 1739, *John Chambers Papers*, Box 1.
[138] Munsell, *Collections on the History of Albany*, I: 192-193.
[139] Philip Livingston to John Chambers, Apr. 20, 1739, *John Chambers Papers*, Box 1.

early eighteenth century of a coherent system for partitioning land and apportioning quitrent dues further encouraged joint applications for land. Hence, even after successfully obtaining a land grant, a partition among the "joint tenants" was necessary before each patentee could use any part of the land as a private possession.[140] Lawyers were hired both to ensure that the partition would not leave behind any disputes among the erstwhile partners, and also to sort out any such lingering disputes following a partition. George Clarke Jr., who inherited numerous speculative land titles from his father, always counted on the expertise of John Chambers for this purpose. Many of Clarke's titles had been obtained in partnership with other speculators, but were left poorly surveyed and divided. It was a necessary but delicate task to "settle" any of those lands with a new partition. In the 1750s, for example, Clarke asked Chambers to "get a division made of the tract of land in the Mohawks country between my father and Mr. Currey," and also between his father and "Mr. Murray in the county of Albany." For both partitions, Clarke trusted Chambers to decide whether it would suffice to have "the decision made on the face of the map," or if a costly physical survey ("running it with a chain") would be necessary. Once the lines were drawn, Chambers could also be trusted to ensure that the new boundaries would carry legal certainty, by having the appropriate "deeds of partition drawn and executed to confirm the same."[141]

The land claimants' ultimate goal in solidifying possession, of course, was to profit from it. What made the land profitable was settlement, and to have anyone settle either as farmers or tenants, the land first had to be partitioned and subdivided into smaller lots.[142] Thus when George Clarke, Jr. sought the help of his lawyer in partitioning land, he did this because he did not want to lose any time in "promoteing the settlement of our lands in that country"[143] Similarly, a

[140] Moglen, "Settling the Law," 124-6; Kim, *Landlord and Tenant in Colonial New York,* 136-137.
[141] George Clarke to Goldsbrow Banyar, Apr. 6, Aug. 28, 1754, *Goldsbrow Banyar Papers*, Box 1.
[142] Kim, *Landlord and Tenant in Colonial New York,* 137-139.
[143] George Clarke to Goldsbrow Banyar, Aug. 28, 1754, *Goldsbrow Banyar Papers*, Box 1.

landowner in Claverack (one Mr. McComb) hired a New York City lawyer to "settle the line of division between him and his neighbors," upon being informed of a group of prospective migrants—"many familys which will come over immediately" to "settle in some part of this country."[144]

Partition was not the only issue that had to be cleared before a land claimant could lease or sell land. If there was any lingering doubt about the claimed land title or boundaries, it was worth hiring a lawyer to make sure that leasing or selling the land would not lead to any troubles. This was why, for instance, the Albany City Corporation consulted lawyers Evert Wendell and Richard Williams in 1734 regarding a 1000-acre land they sought to lease to tenants. The Corporation believed they were entitled to the land as they had purchased it from the Mohawks in accordance with a royal grant, but they had reason to apprehend challenges to their title. Governor William Cosby had been hotly denouncing the legitimacy of the Albany Corporation's patent and Indian purchase, and after asking to see the original copy of the Indian deed in 1733, reputedly burnt it in front of the mayor of Albany City.[145] Three decades later, the Corporation again sought legal advice regarding their right to dispose the lands, turning to a younger generation of elite lawyers—William Smith, Jr., William Livingston, and John Morin Scott. What prompted the Corporation to reassess the legality of their claim was the prospect of selling it: Several individuals had applied to purchase parts of the land.[146]

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[144] George Coventry to Col. Rensselaer, Jan. 9, May 27 & May 28, 1761, *Van Rensselaer-Fort Papers*, NYPL, Box 1, Folder 1760-1761.

[145] Joel Munsell, *The Annals of Albany* (Albany: J. Munsell, 1850), X: 52-54; "Instructions given by the mayor aldermen and comonalty in common council of the city of Albany convened to Jacob H Ten Eyck and Philip Schuyler esq[rs] representatives for the city and county of Albany," c. 1774, *Henry Ten Eyck, Jr. 1744-1795 Papers*, AIHA; Deposition of John De Peyster, Mar. 18, 1769, *Papers of Van Rensselaer, Schuyler, Ten Eyck and Ten Broeck Families*, AIHA, Folder 2.

[146] Munsell, *Collections on the History of Albany*, I: 192-3, 198, 204.

George Clinton, as may be recalled, helped assess the market value of a 1000-acre land which his client, William Bayard, was hoping to sell at some point. Despite predicting that it would not fetch a good price, Clinton suggested that his client should try to sell the land. He gave two reasons for this. First, Clinton predicted that the land "will not rise in price" unless there was a dramatic shift in the colony's monetary policy sometime soon, which he deemed unlikely.[147] Second, Clinton brought attention to the insecure status of Bayard's claim upon the land. Bayard, in fact, only had partial claim to the land. It was originally owned by William Alexander, but had recently been mortgaged to Bayard as security for Alexander's debt. Clinton conceded that this was "good security" for the debt, insomuch as it gave Bayard full ownership of the land in case Alexander defaulted.[148] In late colonial New York's volatile credit market, however, it was risky to remain a mortgagee for too long. It was hardly unusual for the debtor to mortgage the same property to other creditors, sometimes unbeknownst to the first mortgagee.[149] Hence, Clinton advised, it was best to liquidate the mortgaged property when his client could, and thereby avoid any potential competitions or disputes with other mortgagees. Given the uncertainties that could arise in the mortgage arrangement, Clinton warned Bayard, it would "not be safe in you to wait much longer before you sell."[150]

Clinton was also well-versed in the legal and financial technicalities of selling the land. He suggested that Bayard should divide the land into "lots of about 200 acres each," pointing out that "it will certainly sell much in lots or farms of about that size than in gross." To avoid any lingering legal troubles, this division and sale had to be done with care, however. Bayard should first procure

[147] George Clinton to William Bayard, Oct. 8, 1770, *Bayard-Campbell-Pearsall Families Papers*, Box 1, Folder 1.
[148] George Clinton to William Bayard, Dec. 7, 1772, Ibid., Box 1, Folder 1.
[149] "An act for preventing frauds by mortgages," Dec. 12, 1753, *N.Y. Col. Laws*, III: 957.
[150] George Clinton to William Bayard, Dec. 7, 1772, May 27, 1773, *Bayard-Campbell-Pearsall Families Papers*, Box 1, Folder 1.

from Alexander, the mortgager of the land, "a power of attorney irrevocable to sell as many of said lots as will satisfy [Bayard's] demand." Selling the land in smaller portions would also require a local agent who could readily show the lands to any prospective buyer. Although Clinton already found and recommended one "Mr. Wynhook" for this purpose, he advised against letting the local agent handle any of the financial aspects. That business was best left in the more able hands of a lawyer like himself. To facilitate the land sale, Clinton also urged his client to make an advertisement throughout the colony, directing any inquiries toward Clinton. This was absolutely necessary since "new lands in this part of the country" were "more generally sold to strangers than to inhabitants."[151] From clearing the legal right to divide and sell the land, to advertising and showing the land to buyers, the logistics of land sale was not a simple affair, and lawyers like Clinton were well equipped for the task.

Land speculators probably had the most to gain from hiring professional lawyers in eighteenth century New York, but wealthy creditors also had good reasons to frequent the lawyer's services. Lawyers played a central role in facilitating secure, formal credit relations, and in handling law-abetted debt recovery. The main beneficiaries of such formalized credit advancement and debt recovery were creditors of large sums. In contrast to small debts, which were typically extended as part of personal, ongoing exchanges of daily necessities, large-value loans were often made on stricter, impersonal terms, entitling the creditor to financial gains in the form of interests and penal sums. Creditors of large sums found it well worth hiring a lawyer both to enhance the security of their credit holding, and to recover debt under the authority of law. While there were no doubt exceptions to the rule, it was generally wealthy merchants and landowners who had the capacity to lend large sums of money, and to hire lawyers for credit management and debt recovery.

[151] George Clinton to William Bayard, Oct. 8, 1770, Dec. 7, 1772, Ibid., Box 1, Folder 1.

The bulk of debt cases handled by John Jay during the last decade of the colonial period, for instance, was of fifty pounds or higher value.[152] Few lower- or middling-class New Yorkers would have had occasion to lend such large sums to another person, even if they had the capacity to do so. The court and tax records of Tryon County, analyzed earlier, corroborate the claim that in general, creditors of large sums were significantly wealthier than their neighbors, and were much more prone to hire lawyers in recovering debt.[153]

Credit advancement and land ownership, in fact, were often closely intertwined with each other. Advancing credit could easily lead to land acquisition, as a debtor might offer a piece of land to satisfy the debt, or might default upon a debt after having offered land as security. Especially as mortgaging land became a widespread means of securing a debt, the distinction between creditor and land speculator was often blurred. Since these creditors of large sums were seldom prospective farmers, their primary interest in the mortgaged land was its market value and profitability. Hence, from assessing the land's value to ascertaining its legal title and salability, the same considerations that went into land speculation came into play when a creditor like James Duane demanded from his debtor a mortgage upon his farm.[154] As a creditor, John Tabor Kempe also frequently demanded security from his debtors in the form of mortgaged land. In deciding whether a piece of land offered him was sufficient security, he paid keen attention to factors that would affect the land's value, such as a projection that the area "is settling very fast."[155] The services of lawyers such as John Kelly and George Clinton held unique value for such wealthy creditors. Combining legal and financial expertise with the inside knowledge of a real estate agent, these lawyers helped clients make comprehensive appraisals of their options as both creditor and

[152] Johnson, *John Jay, Colonial Lawyer*, 97.
[153] See Chapter 2, pp. 75-77.
[154] James Duane to Mr. Ten Broeck, 1768, *Ten Broeck Family Papers*, AIHA, Box 1, Folder 13.
[155] Samuel Stevens to John Tabor Kempe, Oct. 31, 1771, *Kempe Papers*, Box 14, Folder 6.

prospective landowner. They could weigh the relative security and profitability of a financial instrument against a mortgaged piece of land, and help foresee and overcome any legal hurdles in transitioning from creditor to landowner to land seller.

* * *

New York's economic and demographic growth in the eighteenth century, along with its abundance of unsettled land, created vast opportunities for economic gain. The colony's bustling commercial activities amidst chronic currency shortage gave creditors the perfect environment to profit by charging interest and applying stiff penalties on their cash-strapped debtors, and also by demanding mortgages from them. There was even more profit to be made with land, especially by acquiring unsettled, undervalued tracts of land, raising the land's value with improvement, and then selling and leasing to settlers. For either venture to work, legal expertise was crucial. Both creditors and land grabbers needed the secure support of law to know with confidence that their ventures would yield profit, and to have a competitive advantage over others similarly trying to profit from credit and land. Lawyers held the key to fulfilling these needs.

Legal professionalization gave lawyers a wide array of means to influence the use and allocation of land and credit. They were proficient in using written instruments, land documents, and formal court procedures to their clients' advantage. They knew how to evaluate and enhance the value and security of property. And they were second to none in devising legal strategies to protect creditors and landowners from competing claims. Because their services in profitable ventures were so valuable, they could charge a hefty price for their expertise. Only the wealthiest in the province had the means to secure payment of lawyers' fees without worrying about the duration and costs of a lawsuit, and since they had the capital to engage in large ventures, they

were also the ones with the best reason to spend fortunes on legal expenses. Hence, especially in matters of land and credit, the wealthy practically gained exclusive access to superior legal expertise. Wealthy creditors, landowners, and speculators already enjoyed considerable social and political privileges that gave them a head start in exploiting the best opportunities for economic gain. But without the firm support of law, it would have been difficult to perpetuate that advantage in an expanding, volatile economy. By securing their wealthy clients' advantages in the use and allocation of land and credit, lawyers played a key role in translating their wealth into further economic privilege. All things considered, Cadwallader Colden was right. New York's lawyers did make the law serve the interests of the wealthy.

CHAPTER 7

"Exertions of Pretended Legality of Law"

Lawyers and the People

Lawyers' main clients were wealthy creditors and landowners. As they became increasingly active in supporting their clients' wide-ranging economic ventures, however, lawyers frequently came into contact with less affluent New Yorkers. Many of New York's middling and lower sorts lacked access to legal expertise, and when they encountered lawyers, it was often as adversaries of the lawyers' affluent clients. Not surprisingly, when lawyers deployed formal doctrines and procedures in matters that affected them, it was seldom to the commoners' benefit. Lawyers were especially adept at circumventing communal customs, and redefining property and credit relations in strict legal terms, thereby clearing the path for wealthy speculators, landowners, and creditors to appropriate economic resources for private gains. As lawyers steadily increased their hand in matters of landownership, tenancy, and debt throughout the late colonial period, ordinary New Yorkers grew alienated by a legal system which diverged from their expectations of just and equitable use of land and credit.

Tenants, Landlords, and Lawyers

Tenancy in manorial estates was a major, if not the predominant, arrangement of land usage in eighteenth-century New York. The system was particularly widespread in the rich soils surrounding the Hudson Valley, where proprietary families such as the Van Rensselaers, Livingstons, Van Cortlandts, and Philipses built sprawling manors based on land grants made in

the late-seventeenth and early-eighteenth centuries. Following the conclusion of the Seven Years' War, the manor system expanded to northwestern frontier regions surrounding the Mohawk Valley. By the last decades of the colonial period, thousands of New Yorkers were tilling land as tenant farmers.[1]

Historians have long debated the social and economic nature of New York's tenancy arrangements, especially in light of a series of land riots that swept the great manors in the mid-eighteenth century. Progressive historians Carl Becker and Irving Mark deemed colonial New York's landlord-tenancy relationship a prime example of class-based oppression in early American society.[2] Expanding upon Becker's and Mark's theses, later historians such as Staughton Lynd and Edward Countryman understood New York's land riots as manifestations of the deep, pervasive class conflict that began to fracture colonial society.[3] In the same vein, Rowland Berthoff and John M. Murrin emphasized the semi-feudal nature of New York's manorial economies, contrasting its rigid socio-economic order with the egalitarian freehold systems of small farmers' communities.[4]

The late 1970s saw a major revisionist interpretation on the subject, forcefully put forward by Sung Bok Kim. Based on extensive research on the socio-economic structure of Hudson River Valley manors, Kim argued that abundance of land and shortage of labor induced most New York landlords to give tenants very generous terms and treat them with "extraordinary patience." New

[1] Sung Bok Kim, *Landlord and Tenant in Colonial New York: Manorial Society, 1664-1775* (Chapel Hill: University of North Carolina Press, 1978), vii.

[2] Carl Becker, *The History of Political Parties in the Province of New York, 1760-1776,* 2nd ed. (Madison (Wis.): University of Wisconsin Press, 1960), 5–22; Irving Mark, *Agrarian Conflicts in Colonial New York, 1711-1775* (Port Washington, N.Y.: I.J. Friedman, 1965).

[3] Staughton Lynd, "Who Should Rule at Home? Dutchess County, New York, in the American Revolution," *The William and Mary Quarterly,* 3rd Series, 18, no. 3 (1961): 330–59; Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (Baltimore: Johns Hopkins University Press, 1981), 1-71.

[4] Rowland Berthoff and John M. Murrin, "Feudalism, Communalism, and the Yeoman Freeholder: The American Revolution Considered as a Social Accident," in Stephen G. Kurtz and James H. Hutson, ed., *Essays on the American Revolution* (Chapel Hill: University of North Carolina Press, 1973), 256-88.

York's rioters were not oppressed tenants, according to Kim, but merely opportunistic "petty landed bourgeois" farmers trying to enlarge their landholdings by exploiting border disputes between New York and its neighboring colonies.[5] While Kim's thesis has left a strong imprint upon subsequent historiography,[6] Thomas Humphrey's recent work swings the pendulum back to emphasizing the radical nature of the riots. The Hudson River Valley rioters' defiant pursuance of independent land ownership, Humphrey argues, was rooted in widespread discontent over deepening socio-economic inequality under the landlords' manorial system.[7]

What is certain is that the relationship between New York's landlords and tenants defies easy generalization. The relationships varied from one manor to another, and even within the same manor, it was not unusual for some tenants to enjoy better terms than others. By the mid-eighteenth century, however, there was a general tendency toward uniform, formal leases with strict, legally enforceable terms, and toward reliance on the colony's legal system for resolving disputes between landlords and tenants. Professionalized law, in other words, began to assume a larger role in defining landlord-tenant relationships.

Without the labor of farmers, the landlords' speculative land investments could not be turned into profitable possessions. The unimproved soils had to be rendered into arable farm lands, and facilities such as dwelling houses, barns, sheds, fences, gardens, and roads ("improvements") needed to be built and maintained. Hence, New York's landlords tended to offer generous terms to recruit tenants to their lands, especially during the developmental phase of a manor. Leases

[5] Kim, *Landlord and Tenant in Colonial New York*. The quotes "extraordinary patience" and "petty landed bourgeois" are from p. 219 and p. 415, respectively.

[6] Patricia U. Bonomi, *A Factious People: Politics and Society in Colonial New York* (New York, N.Y.: Columbia University Press, 1971), 213-222; Cynthia A. Kierner, *Traders and Gentlefolk: The Livingstons of New York, 1675-1790* (Ithaca: Cornell University Press, 1992), 110–125.

[7] Thomas J. Humphrey, *Land and Liberty: Hudson Valley Riots in the Age of Revolution* (DeKalb: Northern Illinois University Press, 2004); idem, "'Extravagant Claims' and 'Hard Labour': Perceptions of Property in the Hudson Valley, 1751-1801," *Pennsylvania History: A Journal of Mid-Atlantic Studies* 65 (1998), 141-166.

signed during this phase often featured very long durations, some lasting for a lifetime, three lifetimes, or in perpetuity.[8] Taking into account the fact that the land would not produce enough crops during the early stages of improvement, landlords offered new tenants initial rent-free periods, allowed the use of the landlords' mills free of cost, and even provided livestock and advanced cash.[9] If a tenant fell in arrears in paying rent, which happened frequently, the landlord generally allowed the tenant to stay on the land as long as he continued to till it.[10] Tenants were also customarily allowed to keep the improvements they made on the land, or at least to reap part of the profits if they decided to sell any of the barns, dwelling houses, and fences they had built.[11]

Most of these promotional terms were unwritten. Even the duration of the lease was sometimes based on nothing more than a verbal agreement between the landlord and tenant.[12] Tenants, nonetheless, did not see these generous terms solely as voluntary gifts from landlords. They understood them as resulting from negotiations between their needs for settling on the land, and the landlords' desire to have the land improved. They saw the unwritten terms as consonant with custom, and earned by their labor.[13] In other words, tenants understood the semi-perpetual duration of leases, the provision of necessities, and leniency in rent collection as part of the landlords' customary obligations. Landlords like James Duane were well aware of this. Writing to his agent, Duane wryly observed that tenants "wou'd rather have occasion to receive, than be enabled to pay any thing for the first few years of their settlement."[14] Especially during the

[8] Kim, *Landlord and Tenant in Colonial New York*, 117, 175-178, 185; Humphrey, *Land and Liberty*, 17; Eben Moglen, "Settling the Law: Legal Development in New York, 1664-1776" (Ph.D. Diss., Yale University, 1993), 131-133, 147; Colin D. Campbell and Rosemary G. Campbell, "Early Land Leases in the Cherry Valley Patent, 1743-1851," *New York History* 90, no. 1/2 (2009): 59–77.
[9] Humphrey, *Land and Liberty*, 15; Kim, *Landlord and Tenant in Colonial New York*, 169–171.
[10] Humphrey, *Land and Liberty*, 23–24; Kim, *Landlord and Tenant in Colonial New York*, 209–221.
[11] Kim, *Landlord and Tenant in Colonial New York*, 179, 250-270.
[12] Ibid., 178-180, 186.
[13] Humphrey, *Land and Liberty*, 13.
[14] James Duane to John Duncan, Mar. 11, 1766, *Van Vechten Family Papers*, NYSL, Box 11, Folder 52.

developmental phase of a manor, landlords usually succumbed to the tenants' expectations, since their prospects of profit rested on the tenants' shoulders. Thus, Duane advised his agent to "take pains to please tenants, as the prosperity of my settlement will depend a good deal on their being satisfied."[15]

Tenants saw the secure possession of their leasehold also as part of the landlords' unwritten obligations toward them. When he became embroiled in a dispute with his neighbor over a pasture which lay in his leasehold, Thomas Wolcott of Orange County turned to his landlord, Cadwallader Colden, for redress. Wolcott's neighbor had been sending in cattle and "distroy[ing] [Wolcott's] corn and grass," claiming the pasture as his. While employing a deferential tone ("as a child I wait for your counsell and releff"), Wolcott made it clear that he deemed Colden responsible for protecting the leasehold: "I expect you will defend me," Wolcott wrote, "in co[u]rt." Wolcott justified his expectation based on the fact that he had "done a great deal of labour" on the land, and also by the verbal promise Colden had supposedly given him: "You told me the last time I saw you that I might do any thing within that survey." Although he put it gently, Wolcott wanted to make sure his landlord understood this as an obligation: "I have great faith in your promises to me: as well as in your titell of the land I now live upon."[16]

It was not just rent that the landlord gained in return for fulfilling his written and unwritten obligations to the tenant. Landlords typically owned the stores, gristmills, and sawmills which the tenants relied upon. While in one respect these were valuable services to the tenants, in another it meant that landlords enjoyed a lucrative monopoly over almost every aspect of the tenants'

[15] James Duane to Isaac Vrooman, Jan. 20, May 5, 1765, *James Duane Papers*, NYHS, microfilm, Roll I. Quoted in Kim, *Landlord and Tenant in Colonial New York*, 164.
[16] Thomas Wolcott to Cadwallader Colden, Dec. 26, 1749, *The Letters and Papers of Cadwallader Colden*, 9 vols. (New York: AMS Press, 1973), IV: 179-180.

economic needs—from their daily consumptions, to the processing of their produce into marketable goods, to collecting and selling them.[17] By controlling the flow of goods in and out of their manors, landlords such as the Livingstons were able to build a thriving trade connecting New York's rural economies with the Atlantic market.[18] Booming commerce contributed to rising land value, another important source of potential economic gain for the landlord. To actualize that potential, however, the landlord had to take one of several courses of action. Raising the rent, and collecting unpaid rents or debts more strictly, was one option. Another was to lease the land to new tenants at higher rent. Or, if a certain part of the land such as a stream, path, pasture, or mine became valuable, the landlord might try to claim that part. Lastly, the landlord could opt to sell the land to another landlord or to individual farmers. For all of these actions, the landlords' customary obligations posed an obstacle. As the early generous promotional terms came back to bite them, enterprising landlords sought ways to shed those obligations and maximize gains from the enhanced commercial potential of the land. They often found the solution in professionalized law.

During the eighteenth century, landlords increasingly preferred formal leases abetted by law. At first glance, written leases should have also been welcomed by tenants, as they ostensibly gave them stronger security in lease holding. In contrast to tenants-at-will, tenants under formal leases were protected by written terms against arbitrary eviction. The specific terms of the lease, however, made this nominal security little more than illusory. Formal leases entitled landlords to employ forceful measures for recovering unpaid rent, including eviction and distraint of property. The standardized leases Sir William Johnson used for tenants in his Mohawk Valley manor, for example, gave him the legal right to enter and distrain the property of any tenant whose rent was

[17] Kim, *Landlord and Tenant in Colonial New York,* 158-161, 228-231; Humphrey, *Land and Liberty,* 14, 22-23.
[18] Kierner, *Traders and Gentlefolk,* Chs. 2 & 3.

more than 30 days in arrears.[19] Given how tenants frequently failed to pay their rent on time, such clauses exposed them to an ever-looming threat of losing their leases or improvements.[20] In practice, most landlords continued to refrain from harsh methods such as distraint and eviction. But with formal leases placing the law unequivocally on the landlords' side, restraint from forceful rent collection and eviction took on a different meaning. Rather than the result of a mutual understanding between the tenant and landlord about customary obligations, leniency in rent collection could now be construed as a unilateral decision taking place within an unequal power relation. Formal leases and the legal enforcement that they entailed, in short, put tenants at the mercy of landlords.

Not just in rent collection and eviction, but also regarding the improvement of land, formal leases reinforced unequal relationships between landlord and tenant. According to the terms of the standardized leases his tenants were made to sign, Sir William Johnson could reclaim the leasehold of any tenant who failed to improve the land over a span of three months, or who failed to plant and keep up at least 50 apple trees. Tenants were also required to use Johnson's grist mill for grinding their grain and corn, for which they would pay one-tenth of what they ground. The lease also included a detailed provision of Johnson's rights in case any valuable minerals were found in the leasehold. From "turn[ing] up the ground" and digging for the minerals, to opening new roads, erecting new mills and dams, and using timber and stones on surrounding land, the provision let Johnson conduct a full unencumbered operation to profit from the minerals. All the tenant would be entitled to was a reduced rent accounting for those parts of the land no longer available for farming. The lease also gave Johnson the right of "first refusal" if the tenant desired to sell the leasehold—before trying to sell the leasehold to anyone else, the tenant must first offer it to

[19] Indenture between Sir William Johnson and William Fraser, 1769, *Van Vechten Family Papers*, Box 1, Folder 1.
[20] See note 127 below.

Johnson "at the lowest price or value to be had." If Johnson declined the offer, allowing the tenant to sell the land to a third party, the tenant still owed Johnson "one full years rent, over and beside the rent then due and in arrear for the said premises."[21]

With such clauses, landlords could fully expect to extract the best future value out of the land—whether by claiming valuable resources, ensuring that the tenant would work to improve the land's value, or taking a significant portion of the profits arising from the tenant's economic activities and improvement on the land. By ensuring their future profit with strict legal terms, formal leases freed landlords from the need to pander to their tenants' expectations of customary obligations.

By the mid-eighteenth century, most landlords were trying to use formal leases to define their relationship with tenants. For recruiting new tenants, the shift toward formal leases was a relatively easy process. While the landlords' constant need for labor must have given new tenants some degree of bargaining power, the fact that most formal leases were prepared and offered by landlords as standardized printed forms points to the fundamentally unequal positions of landlords and tenants in setting the terms of leases.[22] To make matters worse, some tenants were illiterate, making it difficult for them to bargain for better written lease terms. Take, for instance, the manner in which Michael Crow became a tenant of James DeLancey and John Johnston in 1769. Crow "heard the lease read [to him] before he signed his name to it twice, [then] he heard it read once afterwards."[23] The authorship of written (and printed) lease terms was monopolized by landlords. The only choice the tenant had was to take it or leave it.

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[21] Indenture between Sir William Johnson and William Fraser, 1769, *Van Vechten Family Papers*, Box 1, Folder 1. On the use of the quarter sale provision in the Hudson Valley manors, see: Kim, *Landlord and Tenant in Colonial New York*, 223–228.

[22] Humphrey, *Land and Liberty*, 20–22.

[23] The King against Benjamin Tems, Sep. 9, 1773, *John Tabor Kempe Papers*, NYHS, Box 1, Folder 4.

With existing tenants, the landlords' bid to introduce formal leases was not as simple. Many tenants were reluctant to shift to the formal leases penned by their landlords. Especially if they had already been tilling the land for several years, tenants felt that their unwritten lease terms were protected by communal custom and the mutual understandings they had formed with landlords. Hence, when Frederick Philipse III sought to introduce formal leases to his manor in 1760, none of his existing tenants signed on to the new leases. Even though Philipse enticed them with a secure tenancy "for three lives [generations]," his tenants opted to remain tenants at will.[24] Some landlords, such as Beverly Robinson and the Van Cortlandts, pressured tenants to sign new leases despite their reluctance. By evicting a few recalcitrant tenants and distraining property from others whose rent was in arrears, these landlords could effectively threaten their tenants to sign on to the new leases, even when they included unpopular terms such as shortened lease terms and the requirement to pay rent in cash.[25] Other landlords such as the Livingstons and Van Rensselaers simply raised their tenants' rent or began demanding more punctual rent payment. Here too, the threat of eviction and distraint were the most effective means of forcing tenants to accept the landlord's demands.[26]

Especially since many tenants believed that their landlords were bound by customary obligations toward them, legal professionalization provided a crucial background enabling the landlords' increasingly aggressive stance toward tenants. The expectation that the courts would uphold the formal lease terms allowing strict rent collection, eviction, and distraint, rather than the tenants' claims of customary rights, emboldened landlords to take such unpopular measures. For

[24] Kim, *Landlord and Tenant in Colonial New York*, 180.
[25] Ibid., 186–187, 384-390; Humphrey, *Land and Liberty*, 67.
[26] Kim, *Landlord and Tenant in Colonial New York*, 211–214.

some landlords, this heightened expectation might have been enough. For more prudent landlords who wanted to ensure that they would have the law on their side, however, there was no one better to turn to than a professional lawyer. Conveniently enough, most landlords in late colonial New York, in the process of acquiring and settling land, had already built strong ties with one or more lawyers. Hence, whenever legal support became necessary while revising lease terms or dealing with tenants, landlords knew on whose expertise they could rely.

For George Clarke, Jr., that lawyer was John Chambers. It had been Chambers who helped Clarke partition and consolidate his father's numerous speculative land titles in the 1740s and 1750s. Once that task was accomplished, Clarke immediately turned his attention to settling the land with tenants. As other landlords did during the period, Clarke made his new tenants sign formal leases. Although the long-distance correspondence with him was often faulty and time-consuming, Clarke always consulted Chambers on his tenants' lease terms: Should he offer new tenants a rent-free period of ten years instead of seven, for instance, to speed up settlement? How could he advertise this to prospective tenants while keeping the existing tenants' rent-free period fixed at seven years? Fearing that "those tennants should fly back, & insist on new terms" commensurate with what was offered the new tenants, Clarke, with "Chambers[']s advice & directions," carefully timed the advertisement. Chambers executed as many leases as he could with those tenants who had "already agreed to lease," before putting out the advertisement for new tenants with more generous terms. Chambers' delicate maneuver starkly illustrates the landlords' reasons for preferring strictly enforceable lease terms drawn up by lawyers.[27]

Clarke already had local agents who recruited tenants and collected rent on his behalf, and an able secretary, Goldsbrow Banyar, who managed the rent rolls. But he did not trust either of

[27] George Clarke, Jr. to Goldsbrow Banyar, May 16, 1752, Jan. 1 & Jul. 23, 1753, *Goldsbrow Banyar Papers*, NYHS, Box 1.

them with drawing up the formal leases. Clarke's agent for his Cherry Valley tracts, "Mr. Dunlap," in fact proposed in 1754 to prepare the tenants' leases himself. This would have made sense, since Dunlap was largely responsible for recruiting new tenants and settling them into would-be leaseholds in the estate. Banyar, however, opined that drawing up leases was a "matter of too much consequence" to entrust to a local agent. Heeding Banyar's advice, Clarke waited until Chambers could draw up and execute proper leases.[28]

Four years later, Dunlap's own demands as a tenant clashed against Chambers' lawyerly approach toward tenancy. One of the earliest settlers in Clarke, Sr.'s estate in Cherry Valley, Dunlap had soon become the Clarke family's trusted local agent. To further incentivize Dunlap's recruitment and settlement of new tenants, in 1743 Clarke promised to reward him with two prime leaseholds ("lotts no. 39 & 51," which amounted to about 200 acres) once he "settled" 2000 acres with tenants. By 1755, Dunlap had well surpassed the goal, having brought in enough tenants to settle on a collective acreage of more than 3000 acres. Referring to Clarke's promise, Dunlap demanded that Chambers accordingly draw up conveyances for the two lots. To Dunlap's dismay, the lawyer refused.[29] Chambers pointed out that while Dunlap claimed he was entitled to a "conveyance gratis" (leasehold without rent), Clarke's letter only promised him a lease "on the like terms with the other tenants." Hence, only if Clarke gave him "explicit orders" to convey the leasehold on Dunlap's desired terms, along with an appropriate power of attorney to that particular purpose, would Chambers draw up and execute the deed.[30]

[28] Goldsbrow Banyar to George Clarke, Jr., Jan. 8, 1754, Ibid., Box 1.
[29] Goldsbrow Banyar to George Clarke, Jr., Jul. 25, 1758, George Clarke, Jr. to Goldsbrow Banyar, Aug. 28, 1758, Ibid., Box 1.
[30] Goldsbrow Banyar to George Clarke, Jr., Dec. 16, 1758; George Clarke, Jr. to Goldsbrow Banyar, Mar. 8, 1759, Ibid., Box 1.

Although Dunlap's was a rather special case given his exalted role in developing the estate, his thinking was in line with most tenants of late colonial New York. He believed that the personal agreement between the landlord and tenant, and the latter's improvement of the land, should determine the terms of tenancy. Chambers, on the other hand, saw tenancy primarily as a tool for enhancing the value of the property and generating stable income for his client, the landlord. Committing to unnecessarily generous terms, especially those that deviated from the carefully standardized legal terms prepared for other tenants, was not advisable. Mirroring the disagreement between Dunlap and Chambers, the elder and younger Clarkes' differing stances on the issue epitomized the changing attitudes of landlords during the eighteenth century. If the elder Clarke represented the early-generation landlords' eagerness to recruit tenants with informal, generous terms, his son represented the changed stance of mid-century landlords, who pursued formal leases with sharp, uniform legal definitions, often with the support of professional lawyers. Fortunately for Dunlap, Clarke, Jr. bowed to his ailing father's wishes, who wanted to honor his promise to Dunlap. The Clarkes did not entirely ignore their lawyer's advice against excessively generous lease terms, however. Dunlap would have the leaseholds free of rent, but he was made to pay, against his desire, the annual quit rent owed to the king.[31]

Once the leases were signed, lawyers also helped enforce lease terms against tenants who failed to pay rent or improve the land as required. The Albany City Corporation, for example, frequently threatened legal action against tenants whose rent fell in arrears. The Corporation's tenants in the northern frontier town of Schaghticoke, perhaps emboldened by their distance from

[31] George Clarke, Sr. to John Chambers, Jun. 3, 1759, George Clarke, Jr. to Goldsbrow Banyar, Jun. 1, 1759, May 14, 1761, Ibid., Box 1.

the city, were particularly laggard in their rent payment.[32] As early as 1727, the Corporation struggled to deal with Schaghticoke tenants who "neglected to pay their rent according to the tenure of their indentures."[33] The Corporation turned toward more forceful measures at mid-century. To this purpose, they consulted William Smith, Jr. on the feasibility of suing the tenants. When Smith answered that "actions for rent are well maintainable against ye tenants who refuse to pay the rent," the Corporation promptly retained him to prosecute them, and sent the Schaghticoke tenants an "advertisement" about the imminent lawsuits. The advertisement pointedly noted that the Corporation would send copies of recalcitrant tenants' leases "to Mr. Smith in New York," implying that tenants would be sued strictly in accordance with the formal lease terms they were bound to.[34]

For Robert G. Livingston, a New York City merchant and absentee landlord of an estate in Dutchess County, improvement was the issue that prompted him to seek the help of a lawyer.[35] As with other landlords, Livingston already had a lawyer who had been helping him manage his estate. Robert's nephew Gilbert Livingston, a local attorney based in Dutchess County, handled most of Robert's land-related matters in the area, including dealing with tenants. In 1773, Robert was intent on renovating a mill included in the leasehold of one of his tenants, "Mr. Noxon." Anticipating that Noxon would not willingly obey his directions to repair the mill, Robert sent his nephew to press him into compliance. The best way to do this, Robert figured, was to have a lawyer remind Noxon about the legal enforceability of formal lease terms. "It shall be as ye law directs in this case according to his lease, & agreeable thereto you must act, for he is not to be trusted," cautioned

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[32] Stefan Bielinski, "Schaghticoke," https://www.nysm.nysed.gov/albany/na/sgtke.html; Beth Klopott, "Schaghticoke," *The Hudson Valley Regional Review*, II: 1 (March, 1985), 29-33.
[33] Joel Munsell, *The Annals of Albany* (Albany: J. Munsell, 1850), IX: 2.
[34] Joel Munsell, *Collections on the History of Albany: From Its Discovery to the Present Time ; with Notices of Its Public Institutions, and Biographical Sketches of Citizens Deceased* (Albany, N.Y.: J. Munsell, 1865), I: 83-84, 87.
[35] Kierner, *Traders and Gentlefolk*, 60, 140.

Robert. Further, once Noxon agrees to do the repair, Gilbert should "let it be under his hand writing what he promisses." Robert wanted to make sure that his reluctant tenant would be bound by law, not just by a personal promise, to undertake the desired improvement.[36]

Gilbert accordingly went to talk with Noxon, but the tenant's resistance was stiffer than anticipated. Noxon's reasons for refusing to repair the mill are unclear, but it certainly had to do with a conflict of interest between landlord and tenant. Robert probably calculated that a renovated mill would enhance the property value of all the surrounding leaseholds. Noxon, evidently, did not foresee enough personal gain from the repair worth the costs and labor that it would require. Agreeing with Noxon was the millwright, Isaac Dennis. Dennis was "very averse to repairing the mill," reported Gilbert, and "thinks it will be throwing so much money away." On top of the costs and labor of the repair, Dennis also had to worry about his wages as millwright, which would have to "wait ... till the job is done." Whether Noxon was trying to protect Dennis's interest, his own, or both, he "absolutely refuse[d] to do any thing more" about the mill "unless compelled by law."

Noxon was more resourceful than other tenants, which explains his defiant stance against his landlord. As a justice of the peace, he probably knew a few things about the law, and in fact, he had already consulted local attorney Bartholomew Crannell about his rights and obligations as a tenant, visiting him with his "lease then in his hands." From the consultation, Noxon was assured that there was no "separate article on [his lease] concerning the repairs." Strictly speaking, Robert did not have any legal right to oblige Noxon to repair the mill. Finding that Noxon's confidence had thus been boosted, Gilbert recommended a course of action which New York's lawyers' often favored. "On mature consideration," he advised his client that it was "best not to commence a suit against [Noxon] here in the country court, as he is one of the assistant justices himself and it must

[36] Robert G. Livingston to Gilbert Livingston, May 31, 1773, *Gilbert Livingston Papers*, NYPL, Box 1, Folder 4.

be tryed by a jury who will be perhaps half of them in the mob interest." Robert would "stand a double chance," however, if he "sue[d] him in the supreme court & have the matter tryed" by "some able council." For this Gilbert recommended another lawyer in the Livingston family, Robert R. Livingston, Jr., who practiced in the Supreme Court. Gilbert promised to send a copy of the lease and "give all the information I can" to the New York City lawyer hired by his client, whether he be Robert R. or someone else.[37] A resourceful tenant such as Noxon might be able to withstand his landlord's pressure by consulting a local attorney. But even in such cases, the landlord could ultimately gain an upper hand by hiring a New York City lawyer and taking legal action in a higher tribunal.

While it is uncertain whether Robert G. Livingston took his nephew's advice, plenty of other landlords did use legal action against insubordinate tenants. William Livingston, for instance, received a major boost in his early career by serving Dutchess County proprietors' ejectment proceedings against their tenants.[38] During the late 1760s, he handled more than fifty ejectment suits in the Supreme Court against rebellious Hudson Valley tenants.[39] In some instances, tenants facing ejectment suits from the same landlord pooled money to retain a lawyer of their own. As was the case of Robert G. Livingston against Noxon, however, landlords usually had the capacity to hire better lawyers. When his tenants in Normans Kill, Albany joined together and retained local attorneys Peter W. Yates and Robert Yates to defend themselves from eviction, for example, John Van Rensselaer countered by hiring two New York City lawyers, William Smith, Jr. and John Morin Scott.[40]

[37] Gilbert Livingston to Robert G. Livingston, Sep. 28, 1773, Ibid., Box 1, Folder 4.
[38] Milton M. Klein, *The American Whig: William Livingston of New York* (New York: Garland Pub., 1993), 158.
[39] Ibid., 169.
[40] Peter W. Yates to John Tabor Kempe, Jan. 25, 1774, *Kempe Papers*, Box 14, Folder 9.

Squatting and Rioting against the Law

Professionalized law was deployed against tenant farmers not just by their own profit-oriented landlords, but also by other landowners and speculators. Some of the disputes between New York's large land claimants involved unsettled land, but it was hardly unusual for a dispute to arise over pieces of land already settled with tenant farmers. When the landlord's title or claimed boundaries were challenged by other claimants, tenants who had been tilling the land were suddenly exposed to the threat of eviction. Although their livelihoods were at stake, tenant farmers usually had little say in the ensuing fictive ejectment suits conducted among wealthy speculators and landowners. Neither did small farmers who had purchased freeholds from large claimants, some of whose titles later proved insecure.

Daniel Scott was but one of many such tenants and small farmers in late colonial New York. Scott had settled in the Hoveout in Dutchess County, taking a lease from the group of English patentees claiming the area. There had been conflicting claims upon the land, but when the English patentees commissioned New York's Attorney General William Kempe to protect their title, Scott and the other tenants must have thought their leaseholds well secured. As it turned out, they had overestimated the influence of the newly appointed attorney general. In 1756, Scott wrote to Kempe with alarm that "William Smith lawyer threatens to sue me for trespass." The Beekman and Philipse families who owned large tracts of land in Dutchess County were not giving up on their claim of the Hoveout, and had hired an eminent lawyer to match Kempe's authority and expertise. Scott's neighbor John Wright was also frightened by the great Dutchess proprietors' threat that they would "bring an ejectment against" him. In the ensuing months, amid rumors that the Dutchess proprietors had begun leasing the land to other tenants, Scott and Wright held on to

their precarious leaseholds, "hopeing to hold [them] under ye Old England patent."[41] Their hopes were dashed when Kempe died in 1759, leaving the tenants practically on their own. Before long, the threatened ejectment suits became reality. Some of the tenants chose to stay on the land and resist the forced evictions, but by then they were no longer recognized as tenants. In the eyes of the law, they had become squatters.[42]

When their leaseholds or freeholds became embroiled in legal dispute, tenants and small farmers seldom had the resources to take part in prolonged lawsuits to protect their possessions. Moreover, a leasehold or small freehold was typically grounded upon a long chain of grants and conveyances. Attorney General John Tabor Kempe's description of the complex situation surrounding the "Westenhook Patent" in Albany could have easily applied to many other land disputes. "The original shares are become so divided among the numerous descendants & purchasers," Kempe explained, that it had become practically impossible to trace and resolve all the conflicting "deductions of title."[43] Hence, a legal battle over disputed land usually became an exclusive game played among the original patentees, their descendants, and wealthy speculators who had purchased large portions of the patent in question. They were the only parties whose stakes in the outcome were sizeable enough, and whose documented evidences were clear enough, to invest in costly lawsuits. Once these large-scale legal battles concluded, repercussions would begin to reach the small leaseholds and freeholds further down the chain of "deductions," deciding the fate of tenants and small farmers.

If tenants and small farmers had any input in such lawsuits, it was usually with their testimonies. Christian Nelles, for example, was able to play a small role in trying to protect his

[41] Daniel Scott to William Kempe, Jan. 11, 1756, Ibid., Box 15, Folder 11; John Wright to William Kempe, Jun. 29, 1756, Ibid., Box 16, Folder 1.
[42] Kim, *Landlord and Tenant in Colonial New York*, 367–375.
[43] John Tabor Kempe to William Tryon, Jun. 11, 1774, *Kempe Papers*, Box 15, Folder 6.

leasehold amidst a large-scale, prolonged legal battle. Philip Livingston, Nelles' original landlord, had been granted an expansive tract of land in Canajoharie based on an Indian deed he and his partners obtained in 1731. The Mohawks, probably with good reason, accused Livingston and his partners of defrauding them with a clandestine survey. Livingston died in 1749, but not before entrenching his title by selling and leasing parts of the land to other colonists. Despite the complications, the Mohawks had never given up on their claims, and were finally able to bring their cause to the New York courts in the 1760s.[44] Nelles' contribution was in defense of Livingston's title. He testified that for the past thirteen or fourteen years, he had tilled the land and paid rent as Livingston's tenant. Up until recently, he had "always lived peaceably upon the said land & never was disturbed by any Indians neither did they ever ask any hire or rent of him for the said land." Nelles' deposition was taken by a local justice, who sent it up to be presented in the governor's council and Supreme Court.[45] There, it would be considered along with myriad other pieces of evidence by a small group of elite lawyers, judges, and royal officials.[46] Aside from the few words recorded in those depositions, Nelles and the other tenants had little input in the legal decisions that could lead to their eviction. Tenants who had committed to the opposite side were equally helpless.[47]

[44] The Mohawk's revitalized efforts to recover the Canajoharie lands was triggered by several factors—the aggressive land development schemes of German trader George Klock, the native-friendly turn of British Imperial policy toward the end of the Seven Years' War, and the support of the powerful Superintendent of Indian Affairs Sir William Johnson. David L. Preston, *The Texture of Contact: European and Indian Settler Communities on the Frontiers of Iroquoia, 1667-1783* (Lincoln: University of Nebraska Press, 2009), 270–274.

[45] Deposition of Christian Nelles taken by Wilhelmus Dillenbouk, Feb. 24, 1762, *Kempe Papers*, Box 1, Folder 6.

[46] Minutes of the Governor's Council held at Fort George in New York City, Apr. 7 1762 & Jan. 12, 1763, Ibid., Box 1, Folder 6; John Tabor Kempe's Notice to William Livingston on The King v. George Klock, May 23, 1763, Ibid., Box 1, Folder 6.

[47] Taking from the European land grabbers' strategy, the Mohawks had begun leasing the disputed Canajoharie lands to white settlers. Brief state of the case between the Connajoharie Indians and those that hold under a patent granted to Abraham Van Horne, David Provoost Philip Livingston & Mary Burnet, n.d., Ibid., Box 1, Folder 6.

By letting formal doctrines and legal technicalities determine the outcomes of most land disputes, legal professionalization widened the distance between wealthy land claimants who invested heavily in lawyers to take advantage of professionalized knowledge, and tenants and small farmers who increasingly felt left out of the legal process determining landownership. When ordered to evacuate the land following legal disputes in which they had been rendered helpless bystanders, some tenants and farmers chose to defy the law. Depending on the context and manifestation of their collective resistance, they were variably labelled squatters, rioters, or rebels.

Not all squatters were helpless victims of land disputes. Some had knowingly purchased freeholds or taken leases from questionable sources, or were at least aware that they were siding against better-established land titles. Many of late colonial New York's rural rebellions were led by such risk-taking squatters. Some had taken leases from natives. Others had become independent farmers by obtaining grants from the government of a neighboring colony. In both scenarios, the indigenous landlords or rival provincial governments were eagerly recruiting settlers, offering very generous lease or purchase terms, in order to bolster their claim upon contested lands—lands which were also claimed by one of the great landlords, usually supported by the New York government. In all likelihood, the tenants and farmers who took those generous offers knew about the legal and political uncertainty of the underlying land title. When New York's proprietors and government tried to push them out, defining them as squatters, many were prepared to fight back.

The land riots that convulsed the northern Hudson Valley in the 1750s and 1760s centered on the eastern outskirts of the Livingston and Van Rensselaer manors. Claiming those borderlands as their own, the Massachusetts government had begun granting freeholds to settlers both from New England and New York. Some of the lands were also claimed by the Stockbridge Indians.

Sometimes backed by patents from the Massachusetts General Court, the Stockbridges were leasing the land to white settlers on extremely generous terms. Squatters from the New York government's perspective, those farmers would form the core of northern Hudson Valley's land rioters. Further up north in the Green Mountains, the speculative scheme of New Hampshire's Governor Benning Wentworth laid the grounds of a fierce rural insurgency against New York's proprietors and government. Numerous landless men and women from Connecticut, Massachusetts, and New York took the faulty but cheap New Hampshire grants, and would later fight for their land, earning notoriety as the rebellious "Bennington mob" or Green Mountain Boys. In the southern Hudson Valley riots, border disputes with other colonies played a minor role. There, the squatters' insurgence coalesced around the Wappinger Indians' claim upon parts of the interrelated Morris, Philipes, Cortlandt, and Robinson families' manors. Just like the Stockbridges in the northern valley, the Wappingers sought to reclaim their ancestral lands against great proprietors by incorporating poor white settlers as their tenants. As in the northern Hudson Valley, these settlers would spearhead the rebellion against New York's landlords.[48]

While squatters were the main driving force behind land riots, tenants of New York's manors also participated in significant numbers. When tenants joined the rioters, they brought their leaseholds with them, claiming that they now owned the land permanently, free of rent. To prevent an avalanche of tenant defection, landlords quickly responded by evicting rebellious tenants. During the northern Hudson Valley riots of the 1750s, local law enforcement was busy serving such evictions. In 1755, for example, Albany's sheriff "turned two men out of possession of lands, which one of them had first settled under Mr. Livingston, and the other under Mr. Renselaer, but

[48] Humphrey, *Land and Liberty*, 42–81.

of late pretended to hold under Massachusetts Bay."[49] The defection of tenants was serious enough for John Van Rensselaer to personally accompany his posse "to goe and see what his said tenents were about and see if he could prevent their falling from him and joining the Boston people." He was right to worry. Upon encountering a gathering of rioters, Rensselaer was "grately surprized by seeing severell of his own tennents and mr Livingstons tennents with severell New England people." Among the tenant-turned-rioters was Robert Noble, who would soon gain notoriety as one of the rioters' most prominent leaders. Noble, according to Rensselaer, had been his tenant for six or seven years, following his father's tenancy of nearly thirty years.[50] Despite Robert Livingston, Jr. and John Van Rensselaer's efforts, more tenants defected during the resurgence of riots ten years later. According to one report, about 250 of the Livingston and Van Rensselaer tenants joined rebellious actions against their landlords in the summer of 1766.[51]

The decisions of these tenants were shaped by both aspiration and discontent. Rebellious tenants aspired to become freeholders by grabbing the opportunity opened up by border disputes between colonies. Those who took Indian leases shared the same aspiration. Nominally they would still be tenants, but it was usually upon terms that made them de facto freeholders. The Mohawks in Ticonderoga, for example, gave their white tenants leaseholds of more than 300 acres each for the term of 999 years.[52] As alluring as the prospect of gaining landownership may have been, it was not an easy decision to join the rioters. By turning against their landlords, rebellious tenants ran a serious risk of being evicted from the land which they had been tilling for years, and

[49] Minutes of the Governor's Council held at Fort George in New York City, Apr. 1, 1755, *Transcripts of Council Minutes and Assembly Journals Transmitted to the Board of Trade, 1686-1775*, NYSL, Minutes from Dec. 24, 1754 to Sep. 1, 1755, 42.
[50] Deposition of John Van Rensselaer, Feb. 1755, *Van Rensselaer-Fort Papers*, NYPL, Box 1, Folder 1755-1759; Deposition of Henry Van Rensselaer, Feb. 7, 1755, Ibid., Box 1, Folder 1755-1759.
[51] Humphrey, *Land and Liberty*, 60.
[52] "Instructions given by the Mayor Aldermen and Comonalty in Common Council of the City of Albany convened to Jacob H Ten Eyck and Philip Schuyler Esq[rs] representatives for the City and County of Albany," c. 1774, *Henry Ten Eyck, Jr. 1744-1795 Papers*, AIHA.

prosecuted by the government as outlaws.[53] For most tenants, the encouragement of natives and rival colonies alone would not have been sufficient grounds for the momentous decision of joining a rebellion. Deeply held grievances against the landlord system was what pushed them toward the risky alternatives. New York's tenants might not have suffered under feudal obligations, and the landlords often treated tenants with leniency, but it was an undeniably exploitative system. Not only did landlords take a substantial portion of the tenants' output as rent, but they also reaped most of the commercial benefits from connecting the tenants' agricultural production with the Atlantic market. The system was built to deny the tenants' ability to reap the fruits of their labor, in order to protect the landlords' economic privilege.

The land rioters' aspirations were closely intertwined with the perceived inequity of New York's land system. Theirs was a modest aspiration—gaining stronger economic competence and security through landownership. Those modest goals were hard to attain for tenants, who had limited prospects of economic accumulation even if they exerted themselves to improving the leasehold. The increased use of formal leases in the mid-eighteenth century further underlined the tenants' economic dependence and lack of security. Under the strict, legally binding lease terms, falling arrears in rent at any time exposed tenants to the possibility of eviction or distraint. Their economic activities were constrained within the bounds of the landlords' facilities and intermediation, and even their long-term improvements upon the land were partially claimed by the landlord. By excising aspects of mutual customary obligation between the landlord and tenant, formal leases secured the landlords a steady stream of profit, while ensuring that tenants would remain in a dependent, insecure position. New York's land system made economic competence

[53] Humphrey, *Land and Liberty*, 52.

and security difficult not just for tenants, but for landless people in general. With their massive pools of capital, political clout, and ability to afford expert legal counsel, wealthy landlords and merchants eagerly invested in any unsettled land with the potential of generating profit in the near future. As a result, prospective farmers either had to purchase from the landlords at a marked-up price, or agree to become their tenants.[54]

The desire for landownership and antipathy toward New York's land system were the two common threads tying squatters and rebellious tenants together. What combined these shared sentiments into a bold challenge against landlords was the sense of entitlement. While the rioters' specific goals, tactics, and rhetoric varied, a common theme emphasized by almost every rioter was their entitlement to the land as the people who resided and labored upon it.[55] When squatters petitioned (whether to the government of New York or any other colony) for land grants, they invariably justified their claims by eliciting the "labour they bestowed in improving the lands."[56] What entitled them to the land, instead of landlords and speculators, was the maxim that the "land belongs to its bona fide tillers."[57]

Not limited to rioters, it was a sense of entitlement broadly shared by people who lived and worked on the land. Take, for instance, the attitude of those who settled in the new estates George Clarke, Jr. developed in the upper Hudson Valley and Mohawk Valley during the mid-eighteenth century. Bent upon profiting from the lands quickly, for several years Clarke and his father had been instructing their local agents to attract settlers to the lands with verbal promises. Clarke was intentionally biding his time before offering formal leases to the settlers. That way, he could benefit

[54] Ibid., 20.
[55] Ibid., Chs. 2 & 3. See especially p. 142.
[56] "Petition to the Governor William Tryon of the Inhabitants of Spencertown," Nov. 24, 1772, *New York Colonial Manuscripts, Land Papers, 1642-1803,* NYSL, XXXII: 114. Quoted in Humphrey, *Land and Liberty*, 56.
[57] "The Case of the Inhabitants of New Canaan," *New York Land Papers*, XXXIII: 6. Quoted in Kim, *Landlord and Tenant in Colonial New York*, 358.

from the settlers' development of the land and township without committing to anything. Once the lands became more arable, and the township better facilitated for inhabitance and trade, their overall value rose along with Clarke's prospects of profit, whether he chose to "sell or lease" the lands at that point. If he chose to lease the land, he no longer had to offer vague, generous terms as he had earlier. Thereafter tenants were required to sign short-term leases of seven to ten years, with strict stipulations for rent payment and land improvement formulated by lawyer John Chambers. At this stage of land development, the early settlers became expendable. They would either have to succumb to the new lease terms, or leave. Clarke's early settlers did not easily yield to their absentee landlord's plan, however. Despite lacking any legal title or lease upon the land, they would "scarcely leave the lands," on the grounds that they were the ones who had "actually settled" there and "made improvements."[58]

As usual, the landlord's will prevailed. A decade later, Clarke's estates were mostly filled up with tenants on short, formal leases, as he had desired. His trouble with tenants were not over, however. In late 1761, Clarke's secretary Goldsbrow Banyar reported that numerous tenants in Albany were "destroy[ing] the timber" to the "great prejudice to the farms." This was partly Clarke's own fault. Since he insisted on short-term leases, his tenants were more interested in the immediate use value of the land's resources, rather than any implications on the long-term value of the land. As Banyar observed, "tenants on short leases are apt ... to avail themselves of every method advantageous to themselves however distressing to their landlords." Especially in the early stages of land development, farmers needed wood to build barns, dwellings, fences, and so on. Those constructions generally helped improve the land value, however, and are unlikely to have caused concern as hurting the landlords' interest. Given that the cutting of timber took place during

[58] Goldsbrow Banyar to George Clarke, Jr., Nov. 23, 1754, *Goldsbrow Banyar Papers*, Box 1.

the winters of 1761 and 1762, Clarke's tenants were likely using the wood as fuel.[59] Through their actions, the tenants were showing that they were entitled to use the land's resources for their needs. Clarke, not surprisingly, did not share those notions. He promptly instructed Banyar to threaten the "trespassers" with prosecution, and after some consideration, opted to sell the land rather than trying to discipline his troublesome tenants.[60]

The tenants' and farmers' defiant sense of entitlement was often buttressed by their communities' shared interests and values. Francis McDormet probably should have taken this into account when he tried to claim a "large tract" in Beaverkill, Albany, which he expected to be "worth a large sum of money." The tract of land, while nominally belonging to Wessels Ten Broeck, was a de facto commons on which the townspeople had long relied for wood. As McDormet's partner John West put it, albeit in a pejorative light, "the neighbours all round this land are cutting & destroying the timber & rideing it from this land dayly." Although not as wealthy and powerful as the great proprietors, McDormet was a typical land grabber seeking to profit by procuring undervalued tracts of land. Travelling from Ulster County, he had been busily searching around for such land, and had found a desirable tract in Beaverkill. Since the nominal owner made little use of the woodland, McDormet claimed that it was legally a "vacancy" and that he had "discovered" it. By doing so, he immediately earned the "ill will of them people." Led by local justice Valentine Fiere, the townspeople condemned McDormet for making claims "without paying any acknowledgement to the owners of the land." Labelling him a "great desterber of the

[59] Goldsbrow Banyar to George Clarke, Jr., Oct. 7, 1761, Nov. 30, 1762, Ibid., Box 1.
[60] George Clarke, Jr. to Goldsbrow Banyar, Feb. 20, 1763, Ibid., Box 1.

peace," the townspeople applied to Justice Fiere to block the outsider's disruptive and selfish venture.[61]

In early modern Anglo-American usage, "the peace" could mean many things. Commoners often construed the term to include a wide range of behavioral norms conducive to the collective good of the community.[62] When New York's tenants and farmers claimed that they were entitled to the land for having lived on it peacefully while improving it, they meant that they used the land and resources productively while respecting the customary, interpersonal obligations within the community. This is why, although there was no shortage of private bickering over boundaries and resources among neighbors, ordinary New Yorkers could nonetheless form a strong consensus on certain aspects of landownership and usage. In defining the intrusive land grabber as a "disturber of the peace," Beaverkill's inhabitants were confirming their consensus that stable, contributive members of the community, and no one else, were entitled to customary usage of the town's land and resources.

Closely connected with the expansive concept of peace, popular conceptions of legality were also usually grounded in community and custom. Early modern Anglo-Americans expected the law to reflect their customary notions of acceptable social and economic activities. The idea that the common law in England and its affiliated provinces roughly corresponded with long-standing communal customs was a powerful, if illusory, notion undergirding the people's sense of legality. Despite the short history of the British American colonies, many ordinary colonists understood their communal customs as stemming from an imagined continuum of English legal

[61] Valentine Fiere to William Kempe, Dec. 13, 1753, *Kempe Papers*, Box 15, Folder 9; John West to William Kempe, Mar. 6, 1754, Ibid., Box 16, Folder 1.

[62] Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009), 94-95.

principles passed on since "time immemorial."[63] Hence, even when the emerging professionalized version of common law told them otherwise, commoners often insisted that their use and ownership of land was just and lawful, especially when they had their community's support.

Samuel Weeks' resistance to eviction rested upon such popular notions of lawful landownership. Early in 1748, Weeks was served a notice of ejectment from the 80-acre land he lived on in Oyster Bay, Long Island. The ejector, Benjamin Hill, had a legal claim based on the convoluted history of the land's ownership. The grounds for Hill's claim could be traced back three decades, when his late father-in-law Daniel Latham purchased the lot. Soon after the purchase, Daniel "was rendered unfit for business by falling into a melancholy state, which gradually gained upon him till he died." Whether it was financial ruin or mental illness that debilitated him, the land he purchased was left unimproved as a result. Daniel had a daughter, Sarah, and two brothers, Beverly and Jo^{s}. Beverly had been especially close to Daniel. Daniel's purchase of the land, in fact, would have been impossible without Beverly's support. Even though Daniel owed him money, Beverly encouraged his brother to invest in the land. Hence, when Daniel died, Beverly assumed "the chief management & care of ye family," including taking care of his niece Sarah and managing the property she inherited from her father.

Since no one in the family had immediate use for the 80-acre lot, Beverly thought it best to dispose of it. Sarah, then 17 years old, consented to her uncle's plan, and promised to finalize the deed when she reached the legal age. With this understanding, the unimproved land was sold at a small consideration to a poor farmer, the father of Samuel Weeks. As it happened, Beverly also soon succumbed to "a declining & careless state" before passing away. The signing of the

[63] John Phillip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (DeKalb: Northern Illinois University Press, 2004); idem, *The Ancient Constitution and the Origins of Anglo-American Liberty* (DeKalb: Northern Illinois University Press, 2005).

conveyance was thus uncompleted. Weeks' father, in the meantime, began tilling the land. Neither he nor Samuel Weeks, who stayed on the land after his father's death, thought it necessary to ask Sarah Latham to finalize the deed—until Sarah's husband Benjamin Hill saw an opportunity in the unwritten status of Weeks' possession. He decided to claim the land based on his wife's legal right as heiress to Daniel Latham's property. By then, Weeks and his father had lived on the land for a combined three decades.

Benjamin Hill's initiative was no doubt enabled by the professionalization of New York's courts. By undermining the validity of informal transactions and customary usage, professionalized law gave New Yorkers like Hill a powerful tool to exploit any weaknesses lying in old, ill-defined land titles. Popular resistance against such initiatives remained strong throughout the late colonial period, however. Writing to Hill, Weeks implored him to honor the unwritten intentions and obligations underlying his possession of the land. While Beverly Latham might have lacked the formal right to sell the land, given the circumstances, Weeks argued, he "was doubtless well assured of ye equity of what he did." Lending support to Weeks' claim was Jo^{s} Latham, Beverly's other brother. Jo^{s} agreed that his brother had harbored no fraudulent intentions, but "thought [it] just and reasonable to sell the land." Both Weeks and Jo^{s} also reminded Hill that his wife Sarah had promised to support the transaction. It was nothing more than a verbal promise, of course, but a no less binding obligation which "can be testified by living evidences [neighbors]." Finally, Weeks pointed out that when his father took possession of the lot, "the place was much out of repare so that he was obliged to lay out a great deal in order to fit it for his living upon it." Weeks had continued to improve the lot over the years. He was a "poor man" who relied on the land for his living, "so that if he should lose by going to court it would be too hard for him."

Weeks was aware that the court would likely support Hill's claim. "An advantage is left to you," Weeks conceded. "But pray consider ye inequality of it," he implored Hill. Just because Hill's cause had stronger merit in light of formal legal rules did not mean it was a just and equitable one. As Weeks saw it, he had "as much justice on [his] side, tho not so much strength." Jo[s] Latham expressed a similar view while supporting Weeks. The situation surrounding the lot was one of those instances where the formal, written law did not correspond well with the customary understandings of law. Jo[s] chastised Hill for trying to capitalize on the former by ignoring the latter: "The law is very uncertain & thee charge is very certain." Weeks' neighbors, as the "living evidences," also lent support to his claim. Introducing themselves as "inhabitants about Samuel weeks, as friends to justice, tho no way interested in his case," eleven neighbors signed their names under a short statement confirming that Weeks' account was "a true relation of his case." They hoped "that the great & wise author of justice may guide & direct" Hill's decision about whether to pursue or drop the ejectment.[64]

Neither Samuel Weeks nor his neighbors became rioters. But similar community-oriented notions of legitimate landownership undergirded the rioters' defiant claims upon land. As long as they worked on the land, lived peacefully with neighbors, and used the land's resources within the bounds of communal custom, they were entitled to possess the land and derive economic value from it. When this modest dream of basic economic security and competence was thwarted, some squatters, tenants, and farmers risked everything to attain the independent landownership they felt entitled to. In doing so, they clashed with powerful landlords and their loyal tenants. And in most cases, rioters also ended up defying the law. The physical struggles against local law enforcement and loyal tenants occasioned the most visible and dramatic expressions of the rioters' defiance

[64] Samuel Weeks to Benjamin Hill, Oct. 7, 1748, Jo: Latham to Benjamin Hill, Apr. 6, 1748, *Bayard-Campbell-Pearsall Families Papers*, NYPL, Box 21, Folder 9.

against the law. A quieter but equally important clash over legitimate land ownership surrounded the court proceedings and legal maneuvers of landlords, judges, royal officials, and lawyers.

Legal Professionals against People on the Land

In a number of ways, legal professionals played a major role in crushing the small farmers' dreams of landownership. One way was by bringing the full force of the law against squatters and rioters. As the first step in expelling squatters, landlords usually obtained a judgment against them (an eviction from the land or a prosecution for breach of the peace) at the county court, which set local law enforcement in motion. Most landlords, in fact, were already donned with legal authority as justices of the peace, and wielded strong influence upon the sheriffs, constables, and other local justices.[65] New York's local law enforcement was notoriously ineffectual, however.[66] John Van Rensselaer's frustration with justices and sheriffs was shared by many landlords. As Van Rensselaer and others repeatedly discovered, it was one thing to obtain a judgment against riotous squatters in the county court, and another to evict them according to the judgment.[67]

Hence, especially for quelling large riots, landlords turned to higher legal authorities for stronger enforcement of the law. The attorney general and justices of the Supreme Court readily lent their authority to protect the landed elite's property. In 1770, for example, the Supreme Court indicted Bennington rioters Nathan Stone, Joseph Wright and several others for treason. Faced

[65] Kim, *Landlord and Tenant in Colonial New York*, 93, 107-110. Albany's Abraham Yates, Jr., for example, was appointed as high sheriff largely through Robert Livingston, Jr.'s influence. As soon as Yates became sheriff, Livingston began cajoling him to attend to disturbances in the Livingston manor. These were de facto orders which were mostly complied with by the latter; when not, Livingston admonished Yates, for instance reminding him that he had "desir[ed] [Yates] to come down to execute the judgments of courts for turning [Livingston's] rebellious tenants out of possession." Robert Livingston, Jr. to Abraham Yates, Jr., Nov. 16, 23 & Dec. 15, 1756, Apr. 14 & 27, 1757, May 15, 1757, May 18, 1757, *Abraham Yates, Jr. Papers*, NYPL, Box 1.

[66] Douglas Greenberg, "The Effectiveness of Law Enforcement in Eighteenth-Century New York," *The American Journal of Legal History* 19, no. 3 (1975): 173–207.

[67] Kim, *Landlord and Tenant in Colonial New York*, 347–348.

with this grave indictment, the rioters escaped to New Hampshire, and begged the judges for pardon. Showing the utmost "repentance," they gave "promises of better behavior" and "submission to the government of Newyork," if allowed to return home without punishment.[68] A few years earlier in Dutchess County, mob leader William Prendergast stood before a specially composed Court of Oyer and Terminer. Here, too, a bench composed of the colony's foremost legal professionals indicted the notorious rioter for high treason. Upon the judges' recommendation, Prendergast would later receive a royal pardon, but not before they sentenced him to a gruesome execution that entailed decapitation and the quartering of his body. The intentionally severe and public sentence probably had its desired effect, instilling fear into Prendergast and the other rioters.[69]

In addition to intimidating rioters with harsh legal punishments, the attorney general and Supreme Court justices had the power to push local law officers toward stricter enforcement against rioters. Well aware of the sheriffs' and constables' frequent reluctance to confront rioters, John Tabor Kempe wrote directly to sheriffs to ensure their due enforcement of the law. During the late 1760s, for example, Kempe was at pains to have several rioters in Cortlandt manor arrested. For more than two years, the leading rioters, including Joseph and William Redman, had been evading arrest. Kempe held Westchester County's sheriff and constables directly accountable for the failure to arrest the rioters. After emphasizing that "it is absolutely necessary for the public peace and the safety of the kings subjects, that such enormities be punished as an example to others," Kempe admonished the sheriff. "It is plain," Kempe opined, that "if proper endeavors had

[68] Judges and Justices of Cumberland County to John Tabor Kempe, Dec. 4, 1770, *Kempe Papers*, Box 14, Folder 1.

[69] Thomas J. Humphrey, "Crowd and Court: Rough Music and Popular Justice in Colonial New York" in Matthew Dennis, Simon P Newman, and William Pencak, ed., *Riot and Revelry in Early America* (University Park, Pa.: Pennsylvania State Univ. Press, 2002), 107-124 (especially 116-118); Herbert Alan Johnson, *John Jay, Colonial Lawyer* (New York: Garland Pub., 1989), 41–41; Julius Goebel and T Raymond Naughton, *Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776)* (Montclair, N.J.: Patterson Smith, 1970), 626–627.

been used they [the rioters] might have been found." In light of the constables' spectacular ineptitude, Kempe could not but question their commitment to their duties: "I hope there is no disinclination in your deputies, yet to what better cause can I impute their not serving these processes[?] I ought not to suppose they are afraid of [the rioters] (as it is rumored) because if they are, I think you would not employ persons as your deputies who are afraid to do the duty of their offices."

Allowing that the sheriff's and constables' ineptitude might be owing to their ignorance of the formal legal process, Kempe provided explicit instructions on how to use the law against violent transgressors. If the rioters "go armed to prevent their being taken, and it can be proved, it is sufficient cause for a justice of peace to issue out a special warrant ag[ains]t them, to execute which the posse may be raised, and doors broke open if they cannot be taken without."[70] Months later, with Westchester law enforcement still having made no progress, Kempe's tone grew less tolerant. Despite Kempe's detailed instructions, the constables had once again returned "non ests," in other words claiming that the rioters simply could not be found. Kempe would have none of this. To him, the constables' repeated "false returns" only showed "how ignorant and careless they are in their duty." The constables' continued failure to arrest the rioters was ultimately the sheriff's responsibility, Kempe sternly reminded him: "Let me request you sir to see your deputies do their duty better, for however unwilling I am to do it, my duty will otherwise compel me at least to complain to the gov[erno]r."[71] Kempe's threat was not a hollow one, as one of his frequent duties as attorney general was to reprimand and prosecute negligent local law officers.

[70] John Tabor Kempe to Isaac Willet, Sheriff of the County of Westchester, May 12, 1766, *Kempe Papers*, Box 15, Folder 6.
[71] John Tabor Kempe to Isaac Willet, Sheriff of the County of Westchester, Feb. 16, 1767, Ibid., Box 15, Folder 6.

Law enforcement was not the only area in which Kempe clashed with rioters and squatters. As the Crown's leading advocate in the colony, the attorney general handled many of the prosecutions against squatters. Professional knowledge mattered in these prosecutions. Kempe demonstrated this early in his career, in his prosecution of John Henry Lydius.

Lydius was a land speculator, but not a typical one. Although he seems to have had some success as a merchant, and briefly served as an alderman in Albany City, he was not one of the landed and mercantile elite who usually took part in large land acquisitions.[72] Hence, New York's authorities were greatly surprised when they found that a little-known Albany trader had begun developing two large tracts of land (adding up to about one million acres) lying near the northeastern frontier of the colony. Lydius claimed the two tracts, called Otter Creek and Wood Creek, based on an Indian deed he had obtained in 1732 while trading with the Mohawks, and a confirmatory 1744 grant from William Shirley, then governor of Massachusetts.[73] For some time, Lydius had resided on part of the land with his family. But the Seven Years' War forced him to relocate to Albany City. As the war drew toward its conclusion, Lydius decided to resume settlement on the lands. This time, however, he had a much grander plan. In 1760, he put out an advertisement "inviting and incouraging any British subjects" to "settle & inhabit" the lands.[74] Settlers would have to work hard to cultivate the unimproved land and set up a township on their own, but they were offered very generous terms in return. Following a rent-free period of no less than twenty years, Lydius's tenants would begin paying an annual rent of five shillings sterling for each hundred acres of arable land.[75] This was less than one tenth of the average rent charged by

[72] Munsell, *Collections on the History of Albany,* 121, 122, 125, 136; Preston, *The Texture of Contact*, 56–59.
[73] Minutes of the Governor's Council, Dec. 15, 1761, *Kempe Papers*, Box 1, Folder 8.
[74] Jury's Special Verdict in the King v. John Henry Lydius, n.d., Ibid., Box 1, Folder 8.
[75] Indenture between John Henry Lydius and Ezra Hawley, Feb. 17, 1762, Ibid., Box 1, Folder 8.

New York's landlords.[76] Land-hungry settlers soon began flocking in not just from other parts of New York, but also from Connecticut and Rhode Island.[77] Among them was even a justice of the peace from Dutchess County.[78] According to Lydius, within months he had already executed leases to some 800 families.[79]

New York's political elite immediately reacted. In late 1760, the governor's council summoned Lydius, demanding that he "shew by what right he claims those lands." The governor and council had good reason to be alarmed. Granting land had long been one of New York's governors' primary means of securing the provincial elite's support, and most councillors were closely connected with the province's great proprietors through kinship and interest. Part of the tract claimed by Lydius, in fact, had already been granted to Stephen Bayard, a wealthy merchant; another tract had been granted to the manor lord Robert Livingston, Jr. According to the council, there were other parts within Lydius's claim that were "intended to be granted by this government to sundry petitioners."[80] Even if that was not true, the governor and council would have had every reason to prefer keeping the tracts available for other members of the provincial elite who might eventually be interested in acquiring the land. Despite his deep animosity toward them, Lieutenant-governor Cadwallader Colden was on board with the great proprietors on this issue. Colden was

[76] Sung Bok Kim estimated that the average annual rent in Hudson Valley manors was about 1 shilling (in New York money) per acre. Kim, *Landlord and Tenant in Colonial New York*, 197.

[77] Thomas Young, *Some Reflections on the Disputes between New-York, New-Hampshire, and Col. John Henry Lydius of Albany: To These Reflections Are Added, Some Rules of Law, Fit to Be Observed in Purchasing Land, &c.* (New-Haven: Printed and sold by Benjamin Mecom, 1764), 4.

[78] Feb. 20, 1761, New York (State) et al., *Calendar of Council Minutes, 1668-1783* (Albany: University of the State of New York, 1902), 357.

[79] Minutes of the Governor's Council, Feb. 18 & Dec. 15, 1761, *Kempe Papers*, Box 1, Folder 8.

[80] Minutes of the Governor's Council, Dec. 3, 1760, Ibid., Box 1, Folder 8; Jury's Special Verdict in the King v. John Henry Lydius, n.d., Ibid., Box 1, Folder 8; Humphrey, *Land and Liberty*, 50–51.

"fully perswaded that Lydeus is a very dangerous man & should be glad to have him well curbed." Lydius needed to be "th[o]roughly humbled" through legal action.[81]

The most frequent method for resolving land disputes was ejectment suits. This was a costly and time-consuming method, however. Ejecting Lydius this way would have incurred overwhelming complications for New York's elite. They would have had to prove the merit of each competing title they owned, which would entail the usual messy process of comparing old land grants and Indian purchases, resurveying the land, and finally serving evictions on each tenant. Moreover, none of this could apply to those lands that the New York government had supposedly been planning to grant to others. Against unorthodox claimants like Lydius, however, there was an easier way. The governor ordered Attorney General Kempe to prosecute Lydius "in his majesty's name for intruding into those lands."[82] The rationale was that at least some parts of the land in question had been vacant prior to Lydius's venture. Any vacant lands within the British dominion, the argument went, belonged to the king, and "cannot be disposed of but by patent under the great seal."[83] With this premise, the burden of proof was placed on Lydius. Unless he could prove that his title to the land was valid, he was an "intruder on the kings possessions."[84] Lydius and his settlers, in other words, were no more than illegal squatters against the Crown.

While less complex than an ejectment suit, prosecuting a land claimant as an intruder on the king's possessions could also call for a great degree of legal expertise, especially if the claimant was willing to fight back with the law. Unlike most poor squatters, Lydius had the means to employ good lawyers. He also had a good reason to do so, as the stakes were unusually high in his case

[81] Cadwallader Colden to Sir William Johnson, Jun. 6, 1762, Sir William Johnson, *The Papers of Sir William Johnson* (Albany: University of the State of New York, 1921-1965), X: 467.
[82] Minutes of the Governor's Council, Dec. 3, 1760 & Dec. 16, 1761, *Kempe Papers*, Box 1, Folder 8.
[83] Argument for the King on special verdict on information for intrusion into two tracts of land belonging to the Crown, n.d., Ibid., Box 1, Folder 8.
[84] 2^{d} argument on the part of the Crown in answer to the argum^{t} on the part of the def^{t}, n.d., Ibid., Box 1, Folder 8.

thanks to his ambitious scheme of land development. Whitehead Hicks and David Ogden, experienced lawyers in New York and New Jersey, respectively, took on the defense of Lydius. Initially, Hicks was the sole counsel. Representing Lydius in a council hearing late in 1761, Hicks argued that his client should not be tried in a New York court since he "claimed no title to the premisses under this government." Lydius's title was instead legitimized by his Indian purchase and the corresponding Massachusetts grant. The councillors, not surprisingly, scoffed at this claim. Hardened by decades of intercolonial border disputes, New York's elite had no compunction about ignoring any land claim that did not originate from their own government, unless they received an explicit royal order to the contrary.[85] The council flatly declared that it "would not suffer the point of jurisdiction or limits of the province, which extend indisputably to the lands in question, to be argued in this case," and went on to conclude that "the said Indian deed and instrument, vested no title to the premisses in the said John Henry Lydius." Lydius did not deserve to defend his title in a civil lawsuit. He was but a squatter who should be prosecuted for his offense.[86]

After some delay involving missing witnesses, Lydius was finally brought before the Supreme Court justices and a jury convened in the circuit court in Albany. Attorney General Kempe brought the charges against Lydius, and the defense was now led by David Ogden. Since the governor's council had already invalidated Lydius's land title, Ogden focused on denying his client's culpability as an intruder. His argument rested on two points of law.[87] First, he challenged the doctrine that any vacant land in the colony automatically belonged to the king. Citing several English treatises and precedents, Ogden argued that the king did not actually possess any piece of

[85] Philip J. Schwarz, *The Jarring Interests: New York's Boundary Makers, 1664-1776* (Albany: State University of New York Press, 1979), 227–233.
[86] Minutes of the Governor's Council, Dec. 15, 1761, *Kempe Papers,* Box 1, Folder 8.
[87] There was a third point of law, in fact, regarding how to interpret the jury's special verdict, which was discussed earlier. See Chapter 5, pp. 222-224.

land until his title was established by an official record or by a court's ruling.[88] If anyone had been occupying a vacancy ("where the property is in no man"), it was "part of the liberty of Englishmen" for the occupier to maintain possession until the king's title was clearly established. Ogden, in other words, tried to shift the burden of proof to the Crown's side. Unless the prosecution could find a document or court record in which George the Third or one of the late kings had explicitly claimed the land in question, Lydius had the right to enter and possess the vacancies he had discovered.

Ogden's second point concerned the legal definition of intrusion. Ogden brought attention to a slight discrepancy between two oft-used English treatises in their definitions of intrusion. According to Sir Edward Coke's *Institutes of the Lawes of England,* "he that entreth upon any of the King's demesnes & taketh the profits is said to intrude on the king's possessions." Thomas Wood's *An Institute of the Laws of England* defined intrusion upon the king's land almost identically, except for omitting the phrase "& taketh the profits." Ogden opined that this was surely nothing more than an error Wood had made while abridging Coke's *Institutes*, which any common law lawyer would agree to be the greater authority. As Ogden put it, "the authority of my lord Coke can't be lessened by Wood's wrong abridgment." Having established this, Ogden argued that the attorney general's whole charge was built upon this "wrong abridgment." If Kempe had consulted proper English authorities, he would have realized that "to make an intrusion both an entry on the kings lands & receiving the profits are necessary." Lydius might have surveyed the land and leased out parts of it, but as long as he had not received any profits from the land (note that his lessees were free of rent for the first twenty years), he was not an intruder in a legal sense.[89]

[88] For this part of his argument, Ogden cited Sir Geoffrey Gilbert's *An Historical View of the Court of Exchequer,* Sir Edward Coke's *Institutes of the Lawes of England*, and Jacob Giles' *A New Law Dictionary.*

[89] David Ogden, "Answer to the argument of the attorney general," Apr. 7, 1764, *Kempe Papers*, Box 1, Folder 8.

If Ogden's technical arguments perfectly illustrated late colonial New York's professionalized legal culture, Kempe's lengthy rebuttal showed that he could match the expertise of any contemporary lawyer in the province. Regarding the English legal treatises and precedents Ogden cited, Kempe agreed that "all those authorities are law," but argued that Ogden had either misunderstood or misapplied them. The first of Ogden's "two grand points" was a case of misapplication, according to Kempe. All of the authorities Ogden cited there—the old English statutes and precedents which supposedly limited the king's claim upon vacant lands—only applied to "particular cases" in England. Those statutes and court decisions, Kempe argued, "relate[d] to nothing but old state titles long dormant"—pieces of land which had been granted by the Crown but subsequently became de-facto vacancies due to lack of usage. The statutes and precedents Ogden cited were about the legal conditions that should be met before the Crown could reclaim such lands. It was a doctrine, in other words, meant to apply only to "such lands as have once passed from the crown." Vacancies in the American colonies did not fall under the purview of the doctrine, since those were lands which the king had never granted to anyone. And "all lands within the kings dominions, not granted by the crown is vested in the king, the original property being in him." Hence, the lands which Lydius entered belonged to the king (ignoring, of course, Lydius's Massachusetts grant), making him an intruder on the king's possessions.

To drive his point further, Kempe engaged in a thought experiment. What would happen if the doctrine limiting the king's claim upon vacancies, as the defense claimed, could in fact be applied to cases such as Lydius's? "Then it would follow," Kempe pointed out, that "the king could not originally grant any of its ancient demesnes nor can now grant any of the waste lands in America, for no office has been found to entitle the king to either, nor did the kings right appear by any other matter of record, but stood on the policy of the constitution alone." If the king were

to be entitled to land only by prior record or court decision, he had never been legally entitled to any of the lands in the colonies. Hence, "all the grants in America are void, and as the subject must make title to them under the king[,] no man in America can have any title at all." In laying out this counterfactual deduction, Kempe professed that his only purpose was to expose "the absurdity of it [the defense's application of the doctrine], and it's inconsistency with daily practice." It was no doubt a shrewd move, however, to drive his opponent's argument to a logical conclusion which no proprietor in the colony would be willing to accept.

Kempe also had plenty to offer against the second point of law raised by Ogden, regarding the definition of intrusion upon the king's possessions. Here, it was a matter of misunderstanding the intent of English legal scholars. Coke had indeed mentioned the receipt of profits within his definition of intrusion, but in Kempe's reading, that was not meant as a necessary condition. Coke's intention, instead, was to say that there were two types of intrusion—one being an entry on the lands animo possidendi (intending to possess), and the other, the act of taking profit from the lands. The dual definition was necessary because as a form of legal action, intrusion was meant to provide the king an all-encompassing means to protect his land. Among "common persons," there were two types of legal actions for protecting one's right to land—ejectment suits and actions of trespass. The former was used to protect one's title and possession, while the latter was for protecting the land's resources from anyone who might "cut[] and carr[y] off the wood, grass, corn &c."—in other words, from trespassers taking profit from the land. Far from limiting the scope of intrusion charges, then, Coke's intention was in fact the opposite; to ensure that the king could use intrusion charges both against claimants and trespassers.

Seen in this light, Wood's definition of intrusion in his treatise was not a "wrong abridgement" of Coke's. Kempe surmised that when Wood omitted the clause about receiving

profits, it was because he was discussing intrusion in the context of the determination of land titles. The type of intrusion equivalent to trespass was not his subject there, hence he probably found no reason to confuse the reader by mentioning it. To buttress his interpretation, Kempe pointed to relevant English precedents collected by Coke. In cases where the crown brought a charge of intrusion "as in an ejectm[en]t," i.e. with the intent of establishing the king's title to a piece of land, all of the precedents showed that "the receipt of the profits [was] of no consideration." The informations against intruders only mentioned it "in general words without specifying what profits were received," which clearly showed that the prosecutors did not place "any weight in the cause." Also, in all of the recorded special verdicts in intrusion, "the jury say nothing of the profits, and yet judgm^{t} [was given] for the king." Kempe claimed that Coke's reports were "full of instances of this kind." Lydius might have not taken profits from the land yet, but he had "made many leases, was upon the tract, had it surveyed and a map made, and granted divers parts of it for townships claiming it as his own." That was sufficient, according to Kempe's interpretation of relevant English authorities and precedents, to charge him as an intruder on the king's land. Overall, the defense had either twisted the meaning of select passages in English authorities, or elicited doctrines and precedents which were "little applicable" to the case at hand. "Like drowning men," Kempe derided, Lydius's attorneys were "grasp[ing] even at a shadow for support."[90]

Lydius was an unusual squatter. As a successful merchant and alderman, he had the resources and connections for hiring professional lawyers. And although ultimately voided by the court, he had an Indian deed and a land grant to support his claim, something that not all squatters could boast. Despite those strengths, in the end Lydius had no more success in New York's courts

[90] Argument for the King on special verdict on information for intrusion into two tracts of land belonging to the Crown, n.d., Ibid., Box 1, Folder 8; 2^{d} argument on the part of the Crown in answer to the argum^{t} on the part of the def^{t}, n.d., Ibid., Box 1, Folder 8.

than any other squatter. The court gave New York's landed and governing elite the quick remedy against squatters they desired. Late in 1760, the governor had already issued a proclamation threatening to prosecute anyone who settled in the lands under Lydius's title. Less than four years later, Lydius was convicted for intrusion into the crown lands.[91] If someone like Lydius ended up not only losing his land, but also being convicted as an intruder on the king's land, other squatters probably stood no chance of success in a New York court.

With the odds stacked against them, however, some squatters still tried their luck in the courts, if only to be disappointed. Samuel Munro was one of those squatters. During the 1750s, Munro moved from Connecticut to the southern Hudson Valley, taking a lease from the Wappinger Indians. Most of those lands were also claimed by New York's landlords, however. Soon Munro became embroiled in a legal struggle against the Philipse family, as they began to bring ejectment suits against the Wappingers and their tenants. As usual, the landlords were represented by some of the province's most prominent lawyers—James Duane and John Morin Scott in this case. The Wappingers, on the other hand, were unable to procure a New York attorney. "Having no counsel assigned them and being unable properly to conduct the matter themselves without any assistance," as an anonymous observer noted, the Wappingers predictably lost against Philipse in the ejectment suits. According to the New York courts, they and their tenants were squatters. Encouraged by the resilience of their white tenants, however, the Wappingers continued the fight. They appointed Munro as their "guardian" to defend them in court alongside sachem Daniel Nimham.[92]

[91] John Tabor Kempe to Harmanus Schuyler, Aug. 13, 1764, Ibid., Box 15, Folder 5.

[92] Oscar Handlin and Irving Mark, "Chief Daniel Nimham v. Roger Morris, Beverly Robinson, and Philip Philipse - An Indian Land Case in Colonial New York, 1765-1767," *Ethnohistory* 11, no. 3 (1964): 193–246; Humphrey, *Land and Liberty*, 78–82; Kim, *Landlord and Tenant in Colonial New York*, 366–380.

By the early 1760s, the Philipses were well aware of Munro's leading role in the Wappingers' and their tenants' resistance. Early in 1765, they got what they wanted. The governor's council ordered Attorney General Kempe to prosecute Munro and several others for "maintaining the Indian right, selling pretended titles," and for "setting up Indian titles as paramount to the kings." Using the same strategy they had deployed against Lydius, the council and attorney general treated Munro and the other Indian tenants as squatters who did not deserve to defend their title in a civil lawsuit. The squatters' offense was against the Crown, hence there was no need to invoke and evaluate the Philipses' title (which, according to the Wappingers, rested upon fraudulent Indian purchases made by Beverly Robinson and others). Munro and his followers had instigated the natives to defy the Crown's original title within its dominion, and encouraged others to join their rebellious cause. These were punishable acts "dangerous to the tranquility and discouraging the settlem[t] & improvement of the colony."[93]

Sentenced to jail by the Supreme Court, Munro protested. "There was no legall authority for such a prosecution," he wrote to the attorney general. The prosecution was part of the New York authorities' continued legal manipulations to deny the right of the Wappingers and their tenants to a fair trial. They

> did not think proper to dispute mr Robinsons fraudulent deed when laid before his honour & council, and the Indians not being able to make a defense themselves, I presumed to alledge the falsity of said deed, but was oppos'd by being told I had no authority to speak in their behalf. Thus was I silenced, while this false deed was looked upon to be good, and so passed at that time without any opposition.

[93] John Tabor Kempe to unidentified recipient, Mar. 21, 1765, *Kempe Papers*, Box 15, Folder 5.

Munro's protests fell on deaf ears. Still in prison two years later, he wrote to the attorney general again, but this time only to plead for a pardon. After years of struggle, he had finally given up on finding justice within New York's legal system.[94]

The line separating legitimate leaseholders and freeholders from squatters was not always clear, especially to commoners who lacked legal knowledge and inside connections with the elite. Within New York's legal milieu, it was not unusual for an erstwhile farmer or tenant to be transformed into a squatter almost overnight. When that happened, legal professionals were usually the ones enabling that legal redefinition, and facilitating the eviction and punishment of those who were now defined as squatters.

Nathaniel Bearmore thought he was a freeholder on his farm in Orange County, until he received a letter from Attorney General Kempe in the winter of 1762. Bearmore had purchased the farm from one Mrs. Mutts who had since passed away. Kempe informed him, however, that Mutts had never had any right there, and the land was "the king's only." One can only imagine Bearmore's despair as he read the attorney general's threatening words: "You have been an intruder on the kings lands, ever since you have been there, and are punishable as such, should the law take its due course." In a sense, though, Bearmore was less unfortunate than his neighbors. The reason Kempe bothered to contact him at all was because his was not the only land involved. Kempe knew that several farmers in the area were especially adamant about their title to the land, and had been "tampering with" neighbors to join their "conspiracy to disturb the kings possession." Kempe promised to take "no further notice" of Bearmore's trespass if he fully cooperated in identifying those leading squatters. Exemption from prosecution would be his sole reward for

[94] Samuell Monrow to John Tabor Kempe, Oct. 3 & 8, 1765, May 5, 1767, Ibid., Box 14, Folder 3.

making sworn affidavits implicating his neighbors, however. Bearmore would still have to evacuate his farm, as the law did not recognize him as a freeholder.[95]

Land grabbers were usually behind the legal professionals' drive to push out small farmers. Based on a contested patent which he had purchased, John De Noyelles began to assert his landownership in Orange County aggressively during the 1760s. The lands he claimed were already being used by inhabitants, several of whom confronted De Noyelles. In 1760, one of them, "claiming the land as his own," demanded De Noyelles to leave, and "challenged [him] to [a] fight" when he refused. De Noyelles wrote to Attorney General Kempe, asking him to prosecute the assailant as an example. De Noyelles knew he could count on Kempe's support not only because he could assure payment of the "fees and necessary charges," but also because he was partners with him in land acquisition. In the same letter complaining of his neighbors' assault, De Noyelles informed Kempe that he had "found a good deal more vacant land and very valuable in the county of Orange." He was well aware that those supposedly "vacant" lands were in fact occupied by the inhabitants, "kept by another patent." Nonetheless, with the attorney general's support he did not "doubt we may have a patent."[96]

Francis McDormet and John West, as seen earlier, antagonized the inhabitants of Beaverkill, Albany, by trying to claim a woodland customarily used as a commons. Just as De Noyelles did, McDormet and West counted on the support of Attorney General William Kempe in pursuing their claim upon the "vacancy" they had "discovered." After reporting to Kempe their altercations with the inhabitants, West continued:

> I hope s[r] you'l be so kind as to lett us share a like each with you in the patent. Our dependance is wholly on your assistance & what can be done here we shall do if possible & what can be

[95] John Tabor Kempe to Nathaniel Bearmore, Feb. 18, 1762, Ibid., Box 14, Folder 11.
[96] John De Noyelles to John Tabor Kempe, Jul. 9, 1760, Ibid., Box 13, Folder 6. On the history of the underlying land dispute, see: Frank Bertangue Green, *The History of Rockland County* (New York: A.S. Barnes, 1886), 32.

> & must be done in New York we begg you will be so kind as too carry it on & to send us your directions, which I shall imiediately follow; I should think it most proper when we take a grant to take it for all the vacant land in the county of Albany lying between the Catskills Creek & the south bounds of the county of Albany as the county & the creek runs.

West also attached a "list of the boundarys of severall patents" in the area, so that Kempe could draw up proper legal boundaries for their land petition. As any land grabber in New York was perfectly aware, formal documents, legal procedures, and professional expertise were the best weapons for pursuing land acquisitions against the customary possession and usage of small farmers.[97]

In a legal culture in which public and private domains were not always clearly distinguished from each other, the attorney general was in a particularly good position to acquire land. His authority and expertise made him the ideal partner for land grabbers like De Noyelles and McDormet. John Tabor Kempe was especially adept at using his position to suppress squatters and small farmers for his and his partners' benefit. In 1765, he invested in thousands of acres of land in the Green Mountain region, partnering with a handful of patentees including prominent lawyer-proprietors James Duane and John Duncan. The lands had long been under intercolonial dispute, but he felt safe to invest after hearing that the king had confirmed a boundary favorable to New York. His access to the inner circle of New York's elite no doubt enabled him to act upon the news before others. To realize his and his partners' speculative dreams, however, he had to push out the numerous farmers who had settled in the area under the New Hampshire grant. Together with Duane, Kempe led the legal assault against the settlers, heaping ejectment suits upon them, and after they resisted eviction, prosecuting them as squatters. No wonder the resilient squatters, who would eventually become known as the "Bennington mob" or "Green Mountain

[97] John West to William Kempe, Mar. 6, 1754, *Kempe Papers*, Box 16, Folder 1.

Boys," saw the New York lawyer-landowners as their main enemies. In 1772, they mockingly printed a poster offering a reward for the arrest of Kempe and Duane.[98]

The attorney general may have played a particularly prominent role, but he was not the only legal professional who facilitated speculative land grabs to the detriment of small farmers. James Duane and John Duncan were frequent partners helping each other with land speculations, often interchanging the roles of lawyer and client. Following the conclusion of the Seven Years' War, Duane was one of many speculators who became keenly interested in the fast-settling Mohawk Valley lands. Together with several partners, he petitioned in 1766 for an Indian purchase worth about 13,000 acres around Schoharie Creek. Standing in his way were squatters who had strong ties with the Mohawks. Duane decided it would be easier to buy out the "Schoharie intermeddlers" rather than outright force them out. He had no intention of letting them stay on the land, however. He asked Duncan, who was acting as his lawyer and agent in the area, to negotiate with the squatters. They would be given monetary compensation if they left the land peacefully, and if they also helped persuade the Mohawks to sell their land to the partners. Duncan was instructed to threaten the squatters with legal action, lest they refuse to accept the offer. The squatters claimed the land based on their own purchase from the Mohawks, as Duane was aware. Duncan was to dash any hopes the squatters might have of the government's acknowledging those "secret purchases" from the Mohawks. They should be told that "the lands they never can have, and if they persist they will assuredly be prosecuted."

The roles were reversed regarding a 2,000-acre "pine land" near Duane's estate. Duane had purchased the rights to the unsettled land from a British officer, and was planning to obtain a patent

[98] Catherine Snell Crary, "The American Dream: John Tabor Kempe's Rise from Poverty to Riches," *The William and Mary Quarterly*, 3rd Series, 14, no. 2 (1957): 190–194; Michael A. Bellesiles, *Revolutionary Outlaws: Ethan Allen and the Struggle for Independence on the Early American Frontier* (Charlottesville: University Press of Virginia, 1993), 81–82, 98.

for it. Duane invited Duncan to join the petition as a partner. In return for Duncan's services for him in the Mohawk Valley, Duane would act as Duncan's lawyer in acquiring the pine lands and managing his "interest" in the venture. Duane knew he was using privileged connections and information to grab land before others. Hence, he cautioned Duncan to make sure his power of attorney would be delivered quickly and safely: "It requires dispatch as all eyes are keeping for vacancies."[99]

Major speculators in their own right, Kempe, Duane, and Duncan were lawyers at the top of the chain in the competition for "vacant" lands. Lesser lawyers such as Gilbert Livingston might have seldom engaged in speculations of their own, but they supported clients' land grabbing with their expertise.[100] Following a well-established pattern in land speculation, Annard Aspenard had purchased a tract in Dutchess County, which he held for some time (probably waiting for the land value to increase) before deciding to sell in 1772. By selling subdivided lots to land-hungry settlers at a marked-up price, Aspenard was finally about to reap the profits from his speculation. The only problem with the plan was that the lands were vacant on paper, but not in reality. When Silas Gennan and several others arrived to settle under Aspenard's title, they found that the lands were already occupied. In the lot Gennan purchased, there was one carpenter who "refuses to give Gennan possession and continues to crop the land," and another living in a nearby farm "who refuses to quit the same and is felling timber." Upon hearing Gennan's complaint, Aspenard sent Livingston to resolve the problem. The solution he desired from his lawyer was to find out all the squatters and evict them: "I desire you'll take such steps with those persons or any others you may receive information of, that have not purchas'd of me as you shall think proper in order to gain

[99] James Duane to John Duncan, Sep. 15, 1766, *Van Vechten Family Papers*, Box 11, Folder 52.
[100] Not to be confused with the elder Gilbert Livingston, who also practiced law. Paul M. Hamlin, *Legal Education in Colonial New York*, (New York: Da Capo Press, 1970), 150–152.

possessions and prevent them from committing any more waste on the land." Aspenard entrusted Livingston to decide if it would be "necessary to prosecute" any of them.[101]

New York's landlords and speculators knew how often their privilege-based, profit-oriented claims met with resistance from tenants, freeholders, and squatters. They also knew that professionalized law, if knowingly used, could give them a powerful advantage against resistant small farmers. This is why all of the great landowning families became semi-permanent clients of leading lawyers such as John Tabor Kempe, James Duane, William Livingston, William Smith, Jr., and John Morin Scott.[102] Proving their value to their wealthy clients, lawyers helped ensure that small farmers would be unable to challenge the great proprietors' claims, at least within the bounds of law—whether by negating the small farmers' land claims and customary rights, evicting them as squatters, or by prosecuting them as outlaws.

Land, Lawlessness, and Legality

Many small farmers believed that the colony's legal process unjustly robbed them from the secure landownership they were entitled to. Distrust of the legal system deepened as provincial courts time and again upheld the large landowners' claims. Antipathy toward lawyers mounted in proportion to their growing proficiency in making the law speak for the greed of landlords and speculators rather than the needs of small farmers. Few, if any, expressed the commoners' grievances over land and law better than Thomas Young and Ethan Allen.

Young was an itinerant doctor who practiced in New York's backcountry. During the 1750s, he found most of his patients in the scattered small farmers' communities along the Hudson

[101] Annard Aispenard to Gilbert Livingston, May 15, 1772, *Gilbert Livingston Papers*, Box 1, Folder 3.
[102] Humphrey, *Land and Liberty*, 78–80; Kim, *Landlord and Tenant in Colonial New York*, 331, 355-356, 410; Bellesiles, *Revolutionary Outlaws*, 317n.

Valley.[103] It was probably during one of those travels that he heard about John Henry Lydius's speculative scheme, and decided to join the ambitious venture. In addition to taking a few shares, Young surveyed several parts of the land with Lydius's sons, and laid out the plans for two of the eight projected townships.[104] When New York's authorities began to clamp down on Lydius's scheme, Young took up his pen to protest what he saw as unjust oppression. Vested interest no doubt motivated him to compose his lengthy *Some Reflections on the Disputes between New-York, New-Hampshire, and John Henry Lydius of Albany*. But Young's rhetoric also strongly reflected the desires and grievances of the people who worked on the land, which he must have come to empathize with while treating small farmers in the backcountry.

Part of the pamphlet, as could be expected, was devoted to showing the legitimacy of Lydius's Indian deed and Massachusetts grant. The crux of Young's impassioned argument lay elsewhere, however. What truly legitimated Lydius's settlement plan, in Young's mind, was the unpalatable alternative to it—New York's exploitative land system. "How many gentlemen, in the province of New-York," Young asked, "keep thousands of acres of excellent soil in wilderness, waiting till the industry of others round them, raise their lands to three, four, or more pounds per acre?" The landed elite's speculative, "monopolizing" acquisition of land hurt small farmers by driving up the price of land and subjecting tenants to exorbitant rents. If not for the stranglehold of landlords, Young suggested, New York's abundant lands could "furnish many poor families with the means of very comfortable living." And those farming families fully deserved such economic security from the land, as a due "recompence to [their] labours thereon." Lydius's was one of the few settlement plans which, by offering very generous terms, ensured that the farmers

[103] Henry Herbert Edes, *Memoir of Dr. Thomas Young, 1731-1777* (Cambridge [Mass.]: Wilson, 1910), 15-17, 26; Countryman, *A People in Revolution*, 157–158.
[104] Deposition of Thomas Noble taken by Bushnell Bostwick, Nov. 30, 1761, *Kempe Papers*, Box 1, Folder 8; Untitled document summarizing Thomas Young's deposition of Oct. 1761, Ibid., Box 1, Folder 8.

would get their due from working the land. Lydius's own claim to the lands, grounded in "long possession" and "unparallel'd industry to settle" the lands, was aligned with the small farmers' notion of legitimate landownership. This was the true reason, in Young's view, why New York's "landed gentlemen" were so intent on destroying Lydius's plan. It was a dangerous aberration which threatened, and exposed, the landlords' exploitative pattern of acquiring and using land.

The landed elite's most powerful weapon was the province's corrupt legal system. The council and attorney general's prosecution of Lydius, while touted as due legal process in New York, was anything but. Young had no doubt that Lydius's claim, although voided by New York's legal authorities, was "clear, just, lawful, and absolutely determinate." And contrary to the attorney general's charges, Lydius and his followers were the "farthest of all men from acting as riotous despisers of lawful authority." In Young's view, there was nothing lawful about the ejectment and prosecution against Lydius. "Instead of beating us by law," New York's landlords and legal authorities were intent upon "impossessing themselves on our lands by low craft and illegal fraud, of the worst kind, being carried under cover of law." Lydius and his lessees' "calamity" was just another example of the small farmers' unjust suffering in New York. Under their legal system, farmers were never secure on the land, as they constantly had to worry about being subjected to "disputes of the title whereon they seat themselves to improve." Young concluded with a statement that inverted the supposed relationship between legal authority and lawful possession: "As to what jurisdiction we are appointed to, we care not, provided they give us an equal chance with the rest of our fellow-subjects." It was equitable treatment of the farmers' landownership and tenancy that legitimated a legal system, not the other way around.[105]

[105] Young, *Some Reflections on the Disputes between New-York, New-Hampshire, and Col. John Henry Lydius of Albany*.

Young's efforts went to naught, as the New York authorities successfully quashed Lydius's scheme. No doubt radicalized through his fight against a provincial legal system, Young became something of an itinerant revolutionary in the ensuing period of imperial crisis, espousing the commoners' cause in Albany, Boston, and Philadelphia against what he saw as entrenched privilege. Shortly before he became fully engrossed in radical politics, he spent a few years travelling around the disputed border of New York and New Hampshire, not far from some of the lands which Lydius had unsuccessfully claimed. There he met many like-minded settlers who had just migrated from New England, including Ethan Allen. The two became close friends during the early 1760s, with Allen receiving an informal liberal education from the better-educated Young.[106] Given Allen's radical turn in the subsequent years, Young's criticism of New York's landlordism and legal system evidently influenced the emerging leader of the Green Mountain Boys.

Allen largely owed his leadership among Green Mountain's farmers to his outspoken opposition against New York's land speculators and legal professionals. In 1769, he travelled to Albany to defend his and his neighbors' title to the Green Mountain lands. They had settled on the lands after purchasing cheap New Hampshire grants, which New York's speculators vigorously sought to invalidate. The Albany court's judgment predictably went against the Green Mountain farmers, but in the ensuing years they would fiercely, and successfully, resist any attempt to enforce the New York courts' decisions.[107] Allen's account of his experience in the Albany court, which he later developed into a full-blown condemnation of New York's legal system, crystallized the ideas underlying the squatters' defiant resistance.

In his *Brief Narrative of the Proceedings of the Government of New-York, Relative to their Obtaining the Jurisdiction of that Large District of Land, to the Westward from Connecticut River,*

[106] Edes, *Memoir of Dr. Thomas Young.*
[107] Bellesiles, *Revolutionary Outlaws,* Chs. 4 & 5.

Allen missed few opportunities to contrast New York's privileged speculators and lawyers against Green Mountain's hard-working farmers. In the Albany court, Allen noted how New York's "fraternity of land-monopolizers" along with the "principal attornies" appeared with "great fashion and state." The Green Mountain farmers, in contrast, "appear[ed] in but ordinary fashion, having been greatly fatigued by hard labour, wrought on the disputed premises." The starkly contrasting appearances were a precursor to the rigged contest that would follow. The New York lawyers' argument rested on little more than what they could derive from "perusing the old obsolete and abdicated Charter from King Charles to the Duke of York." Nonetheless, the court was easily swayed by the "disingenuous cunning of Messieurs Duane, and Kemp, and their associates." Neither did it help that "part if not all of the judges and attornies [were] interested in the said subsequent patents from the Government of New-York." There was little room for justice and equity that day in the New York court, as "interest, connection, and grandeur, easily turned the case against the forlorn defendants."[108]

Allen's denigration of the New York court's proceedings was rooted in his deep conviction of the farmers' entitlement to land. Emphasizing "the extreme fatigue, hunger, and infinite hardships the inhabitants had undergone in the settlement and cultivation of a wilderness country," Allen declared that the Green Mountain Boys' claim to the land was a matter of "self-preservation"—the "preservation and maintaining of our property." They had every right to resist the decisions of New York's courts, because under that colony's jurisdiction, "law has been rather used as a tool (than a rule of equity) to cheat us out of the country, [which] we have made vastly valuable by labour and expence of our fortunes." Allen exhorted his fellow farmers not to be

[108] Ethan Allen, *Brief Narrative of the Proceedings of the Government of New York, Relative to Their Obtaining the Jurisdiction of That Large District of Land to the Westward from Connecticut River, Which, Antecedent Thereto, Had Been Patented by His Majesty's Governor and Council of the Government of New Hampshire* (Hartford: Eben Watson, 1774), 6-8, 58.

"fooled or frighted out of our property" by New York's "criminal prosecutions against us for being rioters (as we are unjustly denominated)."[109]

In Allen's mind, there was no question that New York's legal and political system was deeply corrupt. Their government was "nothing more than a party, chiefly carried on by a number of gentlemen attornies," and their courts did little more than perpetuate "an unequal and biassed administration of law." As most rebels did prior to the American Revolution, Allen carefully distinguished his condemnation of the provincial legal system from a lawless disregard of the British constitution. It was the New York courts, led by their lawyers, who "have acted contrary to the spirit and design of the good and righteous laws of Great-Britain, which, under a just administration, never fail to secure the liberty and property of the subject." For Allen, the judgments passed and enforced in New York "under pretence of law" were "in reality a violation of law, and an insult on the constitution, and authority of the crown, as well as to many of us in person." What truly undergirded Allen's sense of legality, however, was a typically popular understanding of the law—"right and wrong," Allen insisted, "are eternally the same to all periods of time, places and nations." No amount of the New York landowners' and lawyers' "inhuman exertions of pretended legality of law," then, could repudiate the obvious rights of the farmers who actually lived and worked on the land. "Can any man" argue, Allen rhetorically questioned, "that these gentlemen have just right to the lands labours and fortunes of the New-Hampshire settlers?"[110]

Allen and the Green Mountain Boys expected that their message would "undoubtedly convince the impartial reader" of their just cause. One of their objectives in printing numerous public messages, including Allen's *Brief Narrative,* was to recruit more landless people to their

[109] Ibid., 37-38, 57.
[110] Ibid., 15, 21-22, 63.

side. Thus they emphasized that small farmers in their Green Mountain community could "peaceably enjoy the right of soil of lands they possess, which, under the jurisdiction of New-York they cannot."[111] To persuade the squatters in Clarendon to obtain land titles under the New Hampshire grants rather than the New York speculators' title, the Green Mountain Boys promised to "assist you in purchasing reasonably." They would do so by using "force against oppression": If anyone "demand[ed] an exorbitant price for your land we scorn it and will assist you in mobbing such avaricious persons."[112] Numerous squatters and small farmers responded to the Green Mountain Boys' recruitment, evidently agreeing that their defiance against New York's legal authority was justified.

Few small farmers would have been able to speak their minds as eloquently as Young and Allen, or had the occasion to do so in a published statement. But what they were unable to put into printed words, they showed with their actions. Many squatters chose to defy the law when ordered to leave the land. When they resisted court decisions with force, they began to be called rioters, and were prosecuted as such. Even then, many rioters refused to back down. It was not just inveterate riot leaders such as William Prendergast or Robert Noble who continued to defy the law. No less defiant were little known rioters such as Stephen Tippett and his neighbors, who insisted on their right to the land despite the court's decision handing it to proprietor Cornelius Bogardus. In 1774, Tippett and others were "indicted for assembling in a riotous manner, and burning and destroying [Bogardus's] fence and improvements." The law did not deter them. "Two or several

[111] Ibid., 5.
[112] Copy of a letter from Hawley & others to Benjamin Spencer & Amos Marsh & the People of Claredon, n.d., *McKesson Papers*, NYHS, Box 1.

times since their indictment," Bogardus complained to the attorney general, they "assembled as before and repeated their offence."[113]

Rioters were often emboldened by the community's support. Despite the considerable risks of abetting known criminals, many inhabitants helped rioters evade arrest. The difficulty of arresting rioters, as seen in an earlier example, was a frequent source of frustration for Attorney General Kempe.[114] His attempts to have John Henry Lydius and his co-conspirators arrested were no more successful. As he did for the Westchester County sheriff, Kempe gave careful instructions to Albany sheriff Harmanus Schuyler on how to arrest Lydius and co, for instance cautioning him to "call in so much assistance as to secure them, and prevent while you are entering on one side of the house, their escaping at the other."[115] Despite Kempe's frequent instructions and exhortations, months passed without any success in arresting Lydius and his cohorts. Kempe angrily threatened Schuyler that "if they should escape now, you must take the consequences upon yourself." It was unacceptable that criminals so frequently "escape with impunity" in the province.[116] Kempe could find no one else to blame than local law enforcement, but perhaps it was not entirely their fault that the squatters had been able to "keep out of the way," as local attorney Peter Silvester suggested.[117] In all likelihood, Kempe already knew that the neighbors' protection of the squatters was the real issue. Even before Lydius was brought to trial, Kempe had been suspecting that communal support would make it difficult to convict him. Hence, while ordering the sheriff to summon a large number of witnesses for the trial against Lydius, Kempe instructed him to make

[113] Cornelius Bogardus to John Tabor Kempe, Apr. 25, 1774, *Kempe Papers*, Box 13, Folder 2.
[114] See pp. 347-348 above.
[115] John Tabor Kempe to Harmanus Schuyler, Dec. 31, 1764, *Kempe Papers*, Box 15, Folder 5.
[116] John Tabor Kempe to Harmanus Schuyler, Jan. 21, 1765, Ibid., Box 15, Folder 5.
[117] Peter Silvester to John Tabor Kempe, Feb. 25, 1763, Ibid., Box 14, Folder 5.

sure word would not spread out about the summons that were about to be served, as he was "afraid they may get out of the way" to avoid testifying against Lydius.[118]

Rioters were not isolated from the community because their defiance was rooted in a widely shared distrust of New York's legal system. People who worked on the land—whether they were tenants, freehold farmers, or squatters—did not feel that the law protected their right to a secure land-based livelihood. The most dramatic expression of this sentiment was the squatter-rioters' violent confrontations against landlords, loyal tenants, and local law enforcement. Perhaps more telling, however, was the widespread obstruction of land surveys. Throughout the mid-eighteenth century, surveyors frequently complained of being assaulted and sent away by angry mobs. In 1762, for example, the attempts of Jonathan Brown, Elisah Bud, and Charles Clinton to survey a tract of land in Westchester County were repeatedly obstructed by groups of "yeomen" in the area. One of them "trod his feet upon the [surveyors'] chain," and another "took hold of their chain and would by no means permit them to proceed upon the said survey." The surveyors and chainbearers had no choice but to "quit the said survey."[119] An attempted survey in Wallumschack, Albany in 1771 was similarly obstructed by a gathering of about twenty locals. Brandishing "sticks staves clubs and other offensive weapons," they "menace[d,] threaten[ed], and put in great fear and terror" the commissioners and surveyors, forcing them off the land.[120] Up in the Mohawk Valley, Cadwallader Colden's authority as surveyor general did not save him and his son from having their survey obstructed by "some evil disposed persons."[121]

[118] John Tabor Kempe to Harmanus Schuyler, May 23, 1763, Ibid., Box 15, Folder 5.
[119] Minutes of the Governor's Council, Nov. 23, 1762, Ibid., Box 1, Folder 4; Deposition of Jonathan Brown, Elisha Bud, and Charles Clinton taken by William Smith, Sr., Oct. 20, 1762, Ibid., Box 1, Folder 4.
[120] Draft of Information for a Riot & Obstruction in King v. Silas Robinson, Jan., 1771, Ibid., Box 2, Folder 2.
[121] Minutes of the Governor's Council, Aug. 9, 1754, *Transcripts of Council Minutes*, Minutes of Council from the 28th day of May to the 18th December, 1754, 59.

Farmers obstructed surveys because they knew that these were seldom innocuous, unbiased endeavors to make the land more legible for the public. Land surveying in late colonial New York was part of the complex legal process of solidifying landownership. Common farmers who already lived on the land seldom commissioned these costly surveys. It was usually absentee land speculators who needed surveys in order to partition a large patent among partners, and subdivide each share into smaller lots that could be sold or leased to settlers.[122] If the small farmers' understanding of the land and its boundaries was grounded in local knowledge—actual possession, customary usage, and familiarity with the physical terrain—the impulse behind land surveys was to render such local knowledge obsolete. Speculators wanted to replace it by imposing upon the land a more technical, formal knowledge created by surveyors and lawyers. That way, they could ensure that the legal documents (land grants, Indian deeds, and conveyances) they had acquired would be translated into tangible sources of profit, superseding the local community's customarily understood rights to the land.

Obstruction of land surveys, in this context, stemmed from the same mentality underlying the commoners' frequent disregard of borders. New York's perennial border disputes against neighboring colonies—New Jersey, New Hampshire, Connecticut, and Massachusetts—were almost always complicated by farmers (or squatters, depending on one's perspective) who straddled boundaries and adhered to whichever jurisdiction helped their cause.[123] These farmers

[122] The aforementioned Westchester survey obstructed by locals, for instance, was commissioned by four patentees who had "put themselves to great charge and trouble in appointing commissioners, a surveyor and a clerk, and pursuing the direction of a law." The proprietors retained John Tabor Kempe to prosecute the rioters in the Supreme Court. They signed a bond worth 100 pounds securing their payment of the legal fees. "The memorial and petition of Abraham Depeyster Anne Delancey, Lewis Johnson and Mathew Clarkson on behalf of themselves and others, complaining of a riotous obstruction to the partition of the west, middle and east patents in West Chester County," Nov. 23, 1762, *Kempe Papers*, Box 1, Folder 4; Abraham De Peyster Lewis Johnson Ann Delancey & Matthew Clarkson Bond to John Tabor Kempe, Dec. 3, 1763, *Kempe Papers*, Box 1, Folder 4.

[123] The squatters' disregard of the boundaries with New Hampshire, Massachusetts, and Connecticut have been discussed elsewhere in the context of major New York land riots. For a similar case taking place in New York's border with New Jersey, see: Deposition of Thomas Dekay of Orange county, Justice of the Peace, July 27, 1754,

were not acting out of loyalty to any particular colony, but out of their own interest and sense of entitlement. As Thomas Young unabashedly declared, what mattered to the people was whether they would be allowed to own and use the land, not the question of which jurisdiction they belonged to.[124] Borders between colonies and boundaries between patents were set by large landowners, speculators, lawyers, and surveyors, with little regard to the needs and desires of the farmers who already lived on the land. Commoners could not affect those decisions made in courtrooms and in private correspondence among the elite, and subsequently presented as carrying the full weight of the law. But when surveyors and lawyers came to their communities to actualize those legal decisions, the people on the land were able to show their disagreement with the law by obstructing surveys, ignoring borders and jurisdictions, defying evictions and prosecutions, and hiding outlaws.

Lawyers, Debt, and the People

The handling of debt was also a sensitive area of law that affected the lives of most ordinary New Yorkers. While it did not spark collective resistance as land related issues did, the thrust of professionalization and formalization alienated commoners from the law.

Notwithstanding the increased availability of written instruments and formal procedures, informal book debt was still the primary form of credit transaction among small farmers, tenants, artisans, and laborers throughout the prerevolutionary eighteenth century. Its flexibility was well-suited to support the personal exchanges of goods, resources, and labor among neighbors. Book

Deposition of Samuel Finch, of Minisinck, Orange county, Aug. 1, 1754, Deposition of George De Kay of Orange County, n.d., *New York Colonial Manuscripts* (transcripts), NYSL, Box 4, Folder 1, Folder 2; Petition of the Trustees of the Patents of Minisinck and Wawayandanch for relief ag^{t} the incroachments of the people of New Jersey, *Transcripts of Council Minutes,* Minutes of Council from the 28th day of May to the 18th December, 1754, 54.

[124] Young, *Some Reflections on the Disputes between New-York, New-Hampshire, and Col. John Henry Lydius of Albany*, 20.

debt creditors often allowed their neighbors to accumulate unpaid debt for months, sometimes even years, before seeking legal recourse. Even when they finally took their claims to local justices, creditors seldom demanded any interest or damages, and as long as the debts were acknowledged, they frequently granted extensions to debtors who could not immediately satisfy their debts. A verbal promise made before the presiding justice, or a simple note of hand (with no penalties or interest attached) usually sufficed for the debtor to obtain an extension.[125]

Leniency made sense given the communal context in which most book debts were contracted. Creditors personally knew their debtors, and especially when a complaint was made before a local justice, the community knew about the debt relationship. Hence, as long as the debtor was reputed to be a stable member of the community and an industrious person, creditors on book debt could feel reasonably certain that the debtor would keep on working toward satisfying the debt. Leniency in intra-communal debt relations, in this sense, primarily depended upon one's reputation within the community. The community decided whether someone was an honest, hard-working, stable, and hence credible member. When physician Benjamin Chase was accused of cheating Samuel Southworth with a forged bill, for example, his neighbors in Dutchess County petitioned on his behalf, stating that Chase "maintains the character of a man of honour in princip[le] and action" and is "industrious in his business & faithfull in his calling." Southworth, on the other hand, was a man who could not be "trusted with the interest business or concerns of other men nor does he imploy himself in any thing like an honest man for his own support." Underlining their claim that they were conveying the whole community's sentiment, the petitioners stated that Southworth carried "no credit with us in these parts."[126]

[125] See Chapter 2.

[126] Benfort Hunt and others to William Kempe, May 26, 1754, *Kempe Papers*, Box 15, Folder 9. A credit system based on reputation could be more problematic in populous urban spaces like New York City. There, colonial New Yorkers often had to evaluate a stranger's credibility based on appearances of status, a situation which conmen frequently

To a large extent, the communal norms surrounding credit carried over to landlord-tenant relations. Tenants were chronically indebted to landlords in the form of book debt, for rent in arrears, for items and services purchased in the landlord's storehouse and mills, and sometimes for capital that had been provided by the landlord for improving the leasehold.[127] Detailed account books and ledgers kept by landlords such as the Dewitt family of Dutchess County show tenants accumulating debt for buying mutton, beef, liquor, and "sundry goods" from the landlord's storehouse, for borrowing a horse, or for unpaid rent. The ledgers also credited tenants for their labor and produce—for spinning, hoeing, mowing, threshing, for making shoes and clothings, for "service as carpanter," for supplying butter and milk, or for labor simply noted as "dayswork."[128] The latter aspect was key to the landlord-tenant relationship surrounding informal debt. As long as the tenant continued to work on the land, generating revenue for the landlord in the long term, the tenant's unpaid rent and debt did not call for harsh measures such as eviction or distraint.

This is why landlords were typically lenient toward their tenant debtors.[129] Asking Philip Schuyler to exempt his tenants from military service early in 1776, for example, John Johnson pointed to the large amount of outstanding debt they owed him. His tenants had been "for near two years supported by [him] with every necessary, by which means they have contracted a debt of near two thousand pounds, which they are in a likely way to discharge in a short time if left in peace."[130] The latter expectation explains why landlords such as Johnson allowed their tenants to continue with such a hefty unpaid debt in the first place. Leniency made sense to the creditor when

exploited. Serena R. Zabin, *Dangerous Economies: Status and Commerce in Imperial New York* (Oxford: University of Pennsylvania Press, 2011), 25-31.

[127] Humphrey, *Land and Liberty*, 17, 23-24, 26; Kim, *Landlord and Tenant in Colonial New York*, 209–210.

[128] Account Book and Ledger, *Dewitt Family Papers*, NYSL, Boxes 47 & 48.

[129] On the landlords' leniency in rent collection, see: Kim, *Landlord and Tenant in Colonial New York*, 211, 219, 221, 242; Humphrey, *Land and Liberty*, 24; Moglen, "Settling the Law," 135.

[130] John Johnson to Philip Schuyler, May 18, 1776, *Papers of Van Rensselaer, Schuyler, Ten Eyck and Ten Broeck Families*, AIHA, Folder 3.

they had a stable, personal relationship with the debtor grounded in the community, and knew that the debtor had the intention and ability to eventually satisfy the debt.

John's cousin Guy Johnson also understood the rationale behind intra-communal leniency. When his tenant Godfry Shoe was sued by one Whitmore for a debt of 27 pounds, Johnson interposed in his behalf by writing to Bryan Lefferty, the creditor's lawyer. Johnson opined that Shoe deserved leniency, as he kept "a good improvement" and would be able to satisfy the debt "if he had time." Johnson also suggested that his request was in line with communal sentiment, which Lefferty was less sensible of due to his recent arrival in the community: "Your pushing these matters at this time must have a very bad effect, and I shall be very sorry to find the effects realized to your disadvantage."[131] Harsh measures against debtors were unpopular, especially if the community saw the debtor as deserving of leniency. This was not a matter of mercy. A debtor was entitled to some degree of leniency as long as he or she was known by the community as an honest, hard-working person who could, and would, eventually pay back the debt.

Hence, when a landlord like John Van Cortlandt began to pursue strict rent collection, distraining property from indebted tenants and evicting tenants whose rents were in arrears, the tenants felt entitled to fight back.[132] Leniency was a built-in aspect of customary credit relations within the community, including between landlord and tenant. Indebtedness did not justify taking away a tenant's sole source of livelihood, especially if the tenant had been improving the land with his labor. In a similar vein, small farmers in Putney, Cumberland County showed their disapproval when the sheriff distrained Leonard Spaulding's cattle on behalf of a creditor. About eighty neighbors—almost every adult in the town—gathered to retrieve the cattle from the creditor's barn

[131] Guy Johnson to Bryan Lefferty, Aug. 16, 1773, Johnson, *Papers of Sir William Johnson,* IIX: 864.
[132] Kim, *Landlord and Tenant in Colonial New York*, 384–390.

and return it to Spaulding.[133] Livestock was a necessary part of a farmer's subsistence. It should not be taken away just to satisfy a debt.

Informal debt was not without its weaknesses, however. Uncertainty was latent in the informal, interpersonal underpinnings of book debt, and when a dispute arose, the community did not always have a consensus on which side to support. The account books, ledgers, and receipts which supposedly proved debt obligations were kept by the creditor, after all. Some debtors questioned the veracity of these one-sided financial records. One disgruntled debtor complained that his creditor, Mr. Pintard, failed to "give me credit upon his book," and declared that he "will not be ga[u]ged by [Pintard's] book for they have never been good for me."[134] Richard Combs of Hempstead, Queens County, was even more direct in raising suspicions about his creditor's account book. Summoned to a local justice's court upon John Birdsall's debt claim against him, Combs called for a jury trial. At the trial, Birdsall "did produce an ac[coun]t, upon a loose piece of pap[e]r," which he claimed "was truly coppied from his book, which he had left at home." Upon Combs' insistence on seeing the account book, Birdsall, with "a great deal of seeming reluctancy," agreed to go fetch it. Soon after Birdsall left for home, Combs began wondering if it was safe to let him retrieve the account book alone. Combs "suspected, that Birdsall had no such ac[coun]t in his books" at all, and was further "suspicious that Birdsall would be so base as to make an ac[coun]t, after he went home." Whether Combs was able to reveal any actual foul play can only be conjectured, but the fact that he could raise such strong suspicions in public indicates the fragile nature of informal book debt.

Despite such weaknesses, for the most part book debt served its purpose well, facilitating myriad daily exchanges in New York's chronically currency-deprived communal economies. This

[133] Bellesiles, *Revolutionary Outlaws*, 77.
[134] Unidentified writer to John Tabor Kempe, n.d., *Kempe Papers*, Box 14, Folder 1.

was because credibility was paramount within these informal economies. Earning the reputation as someone "so base as to" keep fraudulent accounts was a costly price to pay for trying to make a few dishonest gains from small-value transactions with neighbors. To the point, John Birdsall reacted strongly against Combs' accusations in the above case. He made a complaint to the attorney general, which prompted Combs to aver that he had "had no ill intention, nor meant any hurt to Birdsall[']s person or goods" in raising suspicions against his record keeping. [135] For most commoners, maintaining reputation as a credible person was simply indispensable for continuing economic life within the community.[136] Aside from the rare occasion where an actual fraud was involved, most disputes on intra-communal book debt arose over small discrepancies—differing assessments of the due compensation for a service, disputes over the quality of purchased items, or simple errors in accounting. Creditors and debtors customarily resolved such disputes either through private settlement, or through the mediation of a local justice.[137]

The communal underpinnings of informal debt relations, however, had little influence upon individuals with the intention and means to circumvent communal custom. Wealthy absentee landlords like Cadwallader Colden might heed communal sentiment to some extent, but they were not as beholden to it as the commoners inhabiting the community. In 1729, Colden was beginning to feel dissatisfied with the informal bookkeeping of his local agent Mr. Heath in Newburgh, Orange County. Operating Colden's weigh-house in the town, Heath had the important task of managing the flow of produce, goods, and credit among local farmers, traders, and Colden. Upon

[135] David Batty to William Kempe, Aug. 23, 1754, Ibid., Box 15, Folder 10.
[136] For a discussion of the importance of reputation in Dutch colonial New York's economy, see: Elaine Forman Crane, *Witches, Wife Beaters, and Whores: Common Law and Common Folk in Early America* (Ithaca, N.Y.; Bristol: Cornell University Press, 2012), Ch. 1.
[137] See Chapter 2, pp. 87-88, Chapter 3, pp. 137-138.

"general inspection of the book" kept by Heath, Colden noticed several discrepancies which undervalued the credit due to him, and decided that his agent had been generally lax in his transactions with locals. The problem, evidently, was that he gave credit too easily, whereas when Colden personally oversaw the weigh house, he "never gave at any time any credit in the weigh house to any person but [the] noted merchants of the town." As someone living in the community, Heath had no trouble engaging in informal exchanges with local farmers. Colden, on the other hand, had little respect for such customary practices, or the credibility that inhabitants carried within their community. In his eyes, only well-known merchants were credible enough to merit any transaction upon credit. To recover his losses (which he attributed to Heath's lax management), Colden turned to his lawyer James Alexander. Alexander was to inspect Heath's account book, and compute the additional "ballance" due to Colden. Upon collecting the sum from Heath, Alexander was to give him a receipt, but not a discharge, just in case they might later discover further sums due to Colden. If Heath refused to show him his full accounts, Alexander was to "use all lawfull means to force him to it."[138]

As Colden did, landlords in subsequent decades would increasingly turn to professionalized law in an effort to better secure their profits as landowners and creditors. Profit-conscious landlords preferred formal leases and written credit instruments abetted by law over informal agreements and credit advancements, as the former freed them from communal norms and obligations. In 1732, for example, Philip Livingston instructed his agent to make all his tenants sign conditional bonds or short-term notes for any unpaid rent and debts.[139] Once tenants and debtors were bound by formal contracts, landlords and creditors could deploy the law to sidestep any communal expectations of customary leniency. Especially with the support of lawyers,

[138] Cadwallader Colden to James Alexander, Jan. 9, 1729, *Alexander Papers, 1668-1818*, NYHS, Box 3, Folder 1.
[139] Philip Livingston to Henry Van Rensselaer, Jr., Jan. 3, 1732, *Van Rensselaer-Fort Papers*, Box 1, Folder 2.

creditors could more easily pursue profit-oriented credit advancement, and use stricter collection and distraint of property to secure their debts, interests, and damages.

Led by wealthy merchants and landowners, the Albany City Corporation was no stranger to strict law-abetted debt collection. During the 1730s, the corporation began to take legal action for recovering outstanding debt and rent. Lawyer Richard Williams was hired for suing a handful of debtors and tenants for "what they are in arrear to the city." During that period, however, the corporation just as frequently showed leniency to its debtors and tenants. Upon "taking her circumstances into consideration," for example, the corporation abated one third of the wheat Marritje Winne owed. Jan Christianse was granted a similar abatement in consideration of his "poor circumstances." When Guilleyn Verplanck failed to pay any more than half of the five pounds he owed the corporation upon a note of hand, the treasurer was ordered to "give up said note cancell'd without further payment." This was in "charitable consideration" of the fact that Verplanck, a poor man himself, had made the note of hand to help his indebted sister, widow Rachel Winne.

By the 1770s, there was a noticeable change in how the corporation dealt with its debtors and tenants. It periodically placed advertisements in local newspapers directed to "all persons that are any way indebted to this Corporation." By the deadlines given in the advertisements, they were required to come to the city's treasurer either to satisfy their debt, or give a "bond with security." Otherwise, as the corporation pointedly noted in the advertisements, the debtors' accounts would be "put in the hands of an attorney." It was not an empty threat. The corporation did take legal action against debtors and tenants who failed to make payment or bind themselves to pay soon. Indicating the substantial number of resultant debt litigations, the corporation instructed the treasurer to hire all of the city's attorneys for the purpose, having the lawsuits "equally divided"

among them.[140] At least on one occasion, the corporation also hired a lawyer to distrain property from a tenant whose rent was in arrears.[141]

Lawyers were trained to be good at such business. William Livingston's *Book of Precedents* spends numerous pages discussing debt litigation, distraint, and eviction. The "directions for distress," for instance, are presented in four steps, detailing when and how the lawyer may distrain "horses goods or grain [he] can find on the premises," how to compile an inventory of the goods and appraise the value in the presence of a "constable and two neighbours," when and how to post a public notice for the sale of the goods, and how the revenue from the sale should be apportioned between the landowner and constables. For each step of the process there are lengthy notes naming the relevant English statutes and common law precedents that could be cited to support the lawyer's actions. Additional notes give more minute instructions, for example explaining how "a distress may be taken for part of ye rent where ye goods are not sufficient to satisfy it," in which case an action of debt should be made for the remainder, "whereby both ye goods & person are made liable." Another note cautions that "no distress can be till after ye rent due; no door can be broke open to make distress but if ye outer door be open one may break open an inner door."[142]

Such knowledge was necessary, as harsh measures against debtors could meet with stiff resistance, and if any fault was found in the process, there was a chance that the debtor might complain of having been subjected to unlawful measures. John Van Rensselaer found himself in trouble by frequently distraining property from his tenants during the mid-1740s. While he no

[140] Sep. 28, 1769, Dec. 11, 1770, May 10, 1771, Mar. 27, May 1, 1772, Munsell, *Collections on the History of Albany,* I: 207, 221-222, 227, 236, 237.
[141] Aug. 12, 1774, Ibid., I: 265.
[142] William Livingston, *Book of Precedents,* p.136.

doubt felt justified in doing so on account of the unpaid rent and debt, by ignoring the careful legal processes as outlined in Livingston's *Book of Precedents*, he invited accusations of arbitrarily extorting property. Rensselaer belatedly hired attorney Benjamin Nicolls to defend him against the charges. Given the arbitrary manner in which Rensselaer had been recovering his debt and rent, however, Nicolls frankly found "no small difficulty in finding a method to defend" him. Nicolls opined that the best recourse would be to find a pretext to nonsuit the plaintiffs—to "contrive a plea," as he put it, to "bar the plaintiffs" from having a trial. Sensing that the utmost legal expertise would be required to make the ploy work, Nicolls also engaged John Murray to advise legal strategy.[143]

Rensselaer might have gotten away with his harsh debt collection thanks to his lawyers' skillful maneuvers. But things would have been much easier for him had he hired a lawyer to handle the process of debt collection and distraint from the outset. More prudent creditors did just that. Although distraining property was usually the sheriff's duty, creditors had their lawyer oversee the process, ensuring that the distraint was conducted lawfully, and that the sheriff extracted as much value from the debtor's property as possible. Warrants of distraint issued by the county courts of Dutchess and Albany noted the name of the creditor's attorney, suggesting that by the late colonial period, it had become accepted practice to have an attorney oversee distraint.[144]

John Tabor Kempe's instructions to Albany Sheriff Henry Ten Eyck, Jr. show why creditors wanted a lawyer to handle distraint. Ordered by the court to distrain William Snyder's property, Ten Eyck reported that he could not find any "goods nor chattels land or tenements" in the defendant's possession to satisfy the debt. Kempe flatly denounced Ten Eyck's return as "of

[143] Benjamin Nicolls to Henry Van Rensselaer, Nov. 26 & 1746, *Van Rensselaer-Fort Papers*, Box 1, Folder 1746-7; Benjamin Nicolls to John Van Rensselaer, Dec. 23, 1746, Ibid., Box 1, Folder 1746-7.

[144] Warrant to Recover Peter Weeber's Debt to Martin Hoffman, May 8, 1762, *Gilbert Livingston Papers*, Box 1, Folder 2; Warrant to Distrain, Jun. 5, 1772, *Henry Ten Eyck, Jr. 1744-1795 Papers*, AIHA.

no avail nor legal." If the defendant did not have enough to satisfy the full debt, the sheriff should seize as much property as possible, and report the residue that was still owed so that a new action of debt could be commenced upon that sum. If the sheriff found absolutely nothing valuable in the defendant's possession, he should "positively say that the defendant has nothing" in his bailiwick. This gave "the plaintiff a remedy against [the sheriff] if he can prove the def[endan]t has any thing in [the sheriff's] bailiwick."[145] Kempe, in short, knew how to use the law to ensure that the sheriff would do his utmost to extract value from the debtor.

Local attorney Gilbert Livingston was in no position to castigate sheriffs, but he had no trouble handling distraint and eviction for his client and uncle Robert G. Livingston. In the winter of 1773, Gilbert travelled to the farm of one of Robert's tenants, Michael Hopkins. His mission was to "secure" the rent Hopkins owed Robert. Upon arriving at Hopkins' house, Gilbert immediately began to make an inventory of all the valuables worth distraining. Hopkins initially tried to obstruct Gilbert, "very unwilling to let [him] have anything." He eventually gave in, however, to Gilbert's "threats & persuasions." How Gilbert threatened and persuaded the tenant is not specified, but if Robert was like most other contemporary New York landlords, he must have had Hopkins sign a lease which entitled the landlord to distraint and eviction whenever a certain amount of the tenant's rent was in arrears. Gilbert probably reminded Hopkins of those legally enforceable terms, and may have urged that his resistance would only incur a costly legal action. At any rate, Gilbert no longer met any resistance from Hopkins as he took away his "wench" (a female slave, evidently, given how Gilbert treated her as transferable property) that day, and came back the following day "with a hired man" to seize several pieces of furniture and anything else of

[145] John Tabor Kempe to Henry Ten Eyck, Jr., Aug. 31, 1772, *Kempe Papers*, Box 15, Folder 6.

value. Gilbert was aware that Hopkins was "very poor & either cannot or will not work," but this only prompted him to act quickly before anyone else might claim Hopkins' articles. "I thought it necessary to hurry for I found the nest of creditors very much alarmed on my comeing up," he reported to Robert, no doubt proud of his own astuteness. In all, Gilbert was able to seize property worth about 100 pounds for his client.

Losing his domestic slave and furniture was not the end of Hopkins' woes. Robert also sought his lawyer's opinion on whether he should keep Hopkins on the leasehold following the distraint. Gilbert recommended not to. Opining that Hopkins was "by no means a good tenant," he went on to evaluate two other locals who could potentially replace Hopkins. There was one Johnston who was interested in taking over the leasehold, but "he will not do," according to Gilbert, as he was known "by good information" to be "pritty much in debt." Then there was one Green, who was known as an "industrious man," and more importantly, "offers to give unquestionable security for the rent." The choice was obvious, except for yet another option. The farm's market value had risen "so high," that selling it might be more profitable to Robert. Gilbert in fact already knew at least one potential buyer, "one Burr a man of good interest in N.E who has a mind to buy the old place of hopkins."[146]

Unaware of the plans being considered by his landlord and his lawyer, Hopkins, in the meantime, was still hoping to keep his leasehold, and perhaps even regain some of his distrained property. His letter to Robert on the occasion, probably the last he ever sent him, is worth quoting at length:

> Mr. Gilbert Levingstone was here last week, with demand for the rents of your lands which I now lie on; I confess they should have been paid before now, but ye peculiar circumstances of my family have heretofore renderd it extremely difficult: my wife ... was sick for a long time,

[146] Gilbert Livingston to Robert G. Livingston, Feb. 2, 1773, *Gilbert Livingston Papers*, Box 1, Folder 3.

> her disease of a very singular kind, very distressing, & for the most part delirious, which put me to great cost, and expence. I have likewise been very infirm myself, unable to do much for the support of my family. Your demands are just, & I have no disposition to wrong you in the least, & I have experienced too much of your generosity & clemency, to imagine you have any inclination to oppress or injure one, already sunk into the dust by a series of misfortunes and disappointments. I can hardly think, therefore, [that the] orders your kinsman executed, were by your direction. ... I should be glad still to live on your land & I have thoughts of proposing ye building of a barn ... I have also a dividend in my fathers estate which would be sufficient to pay you all ye b[ac]k rents. I should be glad if it would answer [ ] the articles y^{r} kinsman has taken be restored in full or in part. I should be very glad of ye little negro girl, as I have no help but an aged mother and she altogether unequal to the task, and if in your goodness you can afford me any relief.[147]

Notwithstanding the deferential language and pleas to mercy, underlying Hopkin's request of leniency was an unmistakable sense of expectation. It was an expectation, shaped by years of what Hopkins saw as a personal relationship, that the landlord would treat the tenant with "generosity & clemency" in trying times. Hopkins' expectation corresponded with customary norms regarding indebtedness held by many ordinary New Yorkers—the idea that anyone who has proven to be an industrious and stable member of the local community deserved some degree of leniency during temporary indebtedness. Hopkins' claim to customary leniency did have one weakness in it, as he was well aware of. Due to his and his wife's illness, he had not been very productive in recent years. Conscious of this, he touted a plan to improve the leasehold, and a financial source for more punctual rent payment in the future.

Hopkins already sensed, however, that his relationship with Robert had changed. In the past, if Hopkins is to be believed, Robert had at least put on a pretension of generosity. What allowed Robert to shed any such pretensions now was the enhanced profitability of the land and the support of professionalized law. As Gilbert's advice to him indicated, Robert stood to gain either by selling the land, or by replacing Hopkins with a more productive tenant. In order to do

[147] Michael Hopkins to Robert G. Livingston, Feb. 5, 1773, Ibid., Box 1, Folder 3.

either, Robert would have to extricate himself from several things—his personal relationship with the existing tenant, his customary obligation as a landlord, and communal expectations of leniency toward debtors. Robert was fully willing to go through with all this. Turning a deaf ear toward Hopkins, he complimented his nephew on his handling of the distraint, assuring that he would be well compensated, and wishing him good luck in evicting Hopkins: "I hope you will succeed in turning him [out]" using "all ye methods you can."[148]

While Robert's desire for more profitable use of the land was the root cause behind his changed stance toward Hopkins, Gilbert played a key role in enabling it. His assessment of the land's value and the credibility of potential tenants helped his client's decision to remove his old tenant, and he also undertook the unsavory task of distraint and eviction. Most importantly, he helped his client fully exploit the impersonal, formal, and strict property and credit relations supported by professionalized law. Hence, Hopkins was not entirely off the mark in directing most of his resentment toward the lawyer. In the same letter to his landlord, Hopkins complained about the harsh treatment he received from Gilbert Livingston:

> He used me in a manner somewhat unkind & severe, took away my little negro girl ... & most valuable part of my household furniture ... and threatened likewise to turn me out of doors, & where to go god knows. However if your kinsman has attended your orders I have nothing to say, only this much, [that] your treatment, is so very different from what I have heretofore rec[eive]d at your hands.

Many landlords and creditors at least showed some degree of discomfort going against customary obligations and communal norms. Lawyers, on the other hand, seemed perfectly capable of "unkind & severe" treatment toward those holding on to informal claims upon credit and property, and were hired by wealthy creditors and proprietors for that very reason. They were

[148] Robert G. Livingston to Gilbert Livingston, March 8, May 18, 1773, Ibid, Box 1, Folder 3.

outsiders not bound by communal relationships and norms—specialists in making impersonal legal rules serve the interests of the wealthy.

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When the rioter William Prendergast proclaimed that "it was high time the great men such as the att[orne]y gen[eral] and the lawyers should be pulled down," he was expressing a sentiment shared by many ordinary New Yorkers in the late colonial period.[149] Lawyers clashed with the people in areas of economic life that deeply mattered to them—landownership, tenancy, and debt. With the support of lawyers, wealthy speculators grabbed most of the colony's arable land, forcing small farmers either to purchase freeholds at a marked-up price, or become tenants of an estate. Those farmers who sought alternative ways of claiming land were quickly defined as squatters, and were subjected to evictions and prosecutions engineered by lawyers. Both in property and credit relations, lawyers helped wealthy landlords and creditors ignore communal customs and impose strict, exploitative terms upon tenants and debtors.

The formal legal norms espoused by lawyers antagonized many ordinary New Yorkers. Professionalized law determined the use and allocation of land and credit according to principles and procedures which commoners often found hard to comprehend or agree with. Small farmers, tenants, artisans, and laborers were disappointed when the law time and again failed to protect their modest dreams of economic competence and security based on continued labor, long residence, and stable interpersonal relations and customary understandings within a community. Worse, professionalized law's firm hand repeatedly exposed them to further economic insecurity in order to secure the profitable speculations, land developments, and credit advancements of the

[149] Kim, *Landlord and Tenant in Colonial New York*, 387; Humphrey, *Land and Liberty*, 69.

wealthy. Against a legal system that seemed increasingly unresponsive to their needs and desires, some commoners resorted to defying the law by squatting, rioting, obstructing surveys, and traversing boundaries. These "lawless" acts were undergirded by a widespread sense that especially in economic matters, the law as practiced in New York was diverging from popular notions of justice and equity. Spurred on by the exclusive expertise of lawyers, the law was being transformed into a tool of the few against the many.

CHAPTER 8

The Five Pounds Act and Its Enemies

Legislation, Legal Change, and Popular Politics

The overall trend in late colonial New York's legal change was toward increasing exclusiveness. As professionalized law steadily improved its effectiveness in securing private economic gains, wealthy landowners and creditors sought to monopolize the advantages from retaining legal expertise. As a result, small farmers, tenants, artisans, and laborers found difficulty obtaining competent legal representation against the aggressive claims of the economic elite. New York's political system was also exclusive, with matters of political significance almost exclusively determined by a small governing elite composed of royal officials and a handful of wealthy families. Compared to its legal system, however, New York's politics did have a certain degree of openness, thanks in large part to endemic competition among the provincial elite. Competition among the elite over economic gains did not call for much popular support, especially as professionalized law became the preferred means of asserting their claims. Competition for political power, however, now and then gave the elite a strong reason to seek popular support. Through those small openings afforded by provincial politics, the people found a few opportunities to express their grievances, albeit indirectly, against the colony's deep socio-economic inequality and the legal system that helped entrench it. Especially through debates over the jurisdiction of lay justices and the suitability of lawyers as representatives, popular expectations of law were able to claim a small but lasting place in New York's political discourse.

Lawyers and New York's Politics

For more than a century, Carl Becker's thesis has loomed large in historians' understanding of early American politics. Urging historians to look deeper into the long-term internal political developments of the American colonies, Becker famously stated that America's revolutionary political struggle was not just about "home rule," but in equal measure about "who should rule at home." Along these lines, Becker emphasized the "medieval" nature of New York's colonial politics. The colony saw no shortage of internal political struggles throughout its existence, but before the imperial crisis, those were no more than closed contests among a handful of aristocratic families vying for positions of power. As members of those families took turns to aggrandize their personal influence through patronage, intermarriage, and factional alliances, the majority of New Yorkers remained excluded from the colony's political process, and were oppressed under the socio-economic inequality it perpetuated. It was only with the onset of imperial crisis, according to Becker, that New York's aristocratic dominance finally began to unravel in face of an emerging movement for political democratization.[1]

Becker's thesis laid the framework for numerous subsequent studies of colonial New York's politics.[2] But the thesis has also been challenged. Several case studies suggested that

[1] Carl Becker, "Nominations in Colonial New York," *The American Historical Review* 6, no. 2 (1901): 260–75; idem, *The History of Political Parties in the Province of New York, 1760-1776,* 2nd ed. (Madison (Wis.): University of Wisconsin Press, 1960).

[2] Studies that expanded upon Becker's insight include those by Staughton Lynd, Alfred Young, and Edward Countryman. Lynd offered a detailed case study tracing the origins of Anti-federalism in Dutchess County to class conflict under New York's manor systems. Picking up, chronologically, where Becker left off, Young detailed the role of a new type of political leadership in democratizing New York's politics following independence. Adding a deeper dimension of social history to Becker's framework, Countryman argued that New York's decaying political system and social contradictions precipitated a broad range of revolutionary-era popular movements that finally ushered in a new political society. Staughton Lynd, "Who Should Rule at Home? Dutchess County, New York, in the American Revolution," *The William and Mary Quarterly,* 3rd Series, 18, no. 3 (1961): 330–59; idem, *Anti-Federalism in Dutchess County, New York; a Study of Democracy and Class Conflict in the Revolutionary Era.* (Chicago: Loyola University Press, 1962); Alfred F. Young, *The Democratic Republicans of New York; the Origins, 1763-1797* (Chapel Hill: University of North Carolina Press, 1967); Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (Baltimore: Johns Hopkins University Press, 1981).

colonial New York's electorate was much broader, and provincial elections much more contested, than Becker conceived. Building upon these empirical findings, historians began to reevaluate the nature and significance of New York's assembly. Becker had correctly identified the opportunistic pattern of New York's high politics: during each governor's term, a handful of the province's landed and mercantile elite secured political privileges by winning the presiding governor's favor. Those who failed or refused to do so formed opposing factions, typically using the assembly to maintain political influence. Gaining control of the assembly, however, was not as easily accomplished as Becker had suggested. Despite the viva voce process, voters did not always choose the candidates nominated by aristocratic patrons. Hence, political factions often had to appeal to voters by invoking everything from local interest, patriotism, and ideology to religion and ethnic ties. They had to develop persuasive rhetoric, build coalitions, organize supporters, and direct the voters' attention to issues, not just personalities.[3]

Aristocratic control in colonial New York, then, was much more porous than Becker had thought—it was an "accessible oligarchy," in one historian's term. Especially for those among the elite who sought positions of power through assembly seats, popular support mattered. Seen from this perspective, popular politics in New York was not something that had simply been bottled up until the imperial crisis finally enabled its explosion. Thanks to endemic internal competition among the provincial elite, a strong undercurrent of popular politics had steadily grown and entrenched itself in New York's political system and culture. For historians Patricia Bonomi and

[3] Nicholas Varga, "Election Procedures and Practices in Colonial New York," *New York History* 41, no. 3 (1960): 249–77; Patricia U. Bonomi, "Political Patterns in Colonial New York City: The General Assembly Election of 1768," *Political Science Quarterly* 81 (1966), 432–447; Milton M. Klein, "Democracy and Politics in Colonial New York," *New York History*, 1959, 221–46; Roger Champagne, "Family Politics versus Constitutional Principles: The New York Assembly Elections of 1768 and 1769," *The William and Mary Quarterly*, 3rd Series, 20 (1963), 57–79. On the other hand, John Guzzardo's study showed that in the Mohawk Valley during the late colonial period, elections were almost completely controlled by aristocratic patronage. John C. Guzzardo, "Democracy Along the Mohawk: An Election Return, 1773," *New York History* 57 (1976), 30–52.

Alan Tully, colonial New York's factious politics was a precursor to the fluid, inclusive party politics that would characterize American democracy after independence.[4]

Lawyers were an important presence within New York's accessible oligarchy. Their command of uniform law generally helped the provincial government's cause of establishing centralized authority.[5] As several provincial lawyers gained respectability as "gentlemen of the law" and honed their expertise in legal and constitutional matters, moreover, governors began to see them as useful allies in politics. Recommending John Chambers to a position in the council, for example, Governor George Clinton wrote to the Lord of Trades that Chambers was "a gentleman of an exceptionable character, an opulent fortune, strongly attached to his majesty, and perfectly skilled in the constitution of this province, having been a noted practitioner in the law for a great many years."[6] Similarly, Governor Henry Moore recommended William Smith, Jr. as councillor since "he is now at the head of the profession of the law and will be of great service in the council as his opinions may always be depend[ed] on not only from his knowledge of the law but his integrity."[7] By the mid-eighteenth century, lawyers such as Joseph Murray, James Alexander, John Chambers, and William Smith, Sr. had become fixtures of New York's high politics, serving as councillors and giving private counsel to the governor.[8]

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[4] Patricia U. Bonomi, *A Factious People: Politics and Society in Colonial New York* (New York: Columbia University Press, 1971); Alan Tully, *Forming American Politics: Ideals, Interests, and Institutions in Colonial New York and Pennsylvania* (Baltimore: Johns Hopkins University Press, 1994). The quote "accessible oligarchy" is from Tully, *Forming American Politics*, 365-381.

[5] William Edward Nelson, *The Common Law in Colonial America, Vol. II: The Middle Colonies and the Carolinas, 1660-1730* (New York: Oxford University Press, 2013), Conclusion.

[6] George Clinton to the Lords of Trade, n.d., *John Chambers Papers*, NYSL, Box 1.

[7] William Smith, *Historical Memoirs of William Smith, Historian of the Province of New York, Member of the Governor's Council and Last Chief Justice of That Province under the Crown, Chief Justice of Quebec* (New York, 1956), ed. William H. W. Sabine, 38.

[8] On the lawyers' rise of status and political clout during in colonial New York, see: Gregory Afinogenov, "Lawyers and Politics in Eighteenth-Century New York," *New York History* 89 (2008): 143–62; Milton M. Klein, "From Community to Status: The Development of the Legal Profession in Colonial New York," *New York History* 60, no. 2 (1979): 133–56.

Lawyers played an even more prominent role when sitting on the other side of New York's factious politics, in leading opposition against the governor and ruling party. Given the frequent oscillations of New York's administration, no one permanently belonged to the court or country faction. Depending on who ran the administration, a lawyer like James Alexander might be a close ally of the governor or his most bitter opponent. Especially as opposition leaders, however, lawyers left an indelible mark on New York's political history.

Alexander, along with fellow lawyer William Smith, Sr., led the opposition against Governor William Cosby in the early- and mid-1730s. As was often the case, the lawyers' opposition was motivated by self-interest, but using their rhetorical skill as lawyers, they turned it into a matter of principle. Alexander and Smith's speculative interest in a substantial tract of land was dealt a blow when Cosby, soon after arriving in the colony, joined a group of speculators with a competing claim upon the land. When Chief Justice Lewis Morris was suspended by Cosby for refusing to support him in a dispute over the governor's salary, Alexander and Smith quickly joined Morris to launch a vigorous opposition against Cosby's rule. Their main strategy was to use the press to galvanize broad public support behind their cause. To this purpose, they founded a newspaper (*New-York Weekly Journal*) devoted to political opposition. As lawyers, Alexander and Smith were especially well equipped to criticize Cosby's bid to establish a new equity court, which Cosby wanted so he could obtain a favorable decision in his dispute with the previous governor over unpaid salary. The lawyers portrayed Cosby's attempt as a tyrannical encroachment upon the New Yorkers' right to jury trial.

Unable to prove anyone's authorship of the anonymous essays, Cosby instead had the newspaper's printer, John Peter Zenger, charged with libel. Alexander and Smith initially took up the defense, but their strident attempts to turn the trial into an indictment of Cosby's administration

led to their disbarment by Chief Justice James DeLancey. Alexander and Smith found an apt replacement, however, in Philadelphia lawyer Andrew Hamilton. Hamilton successfully persuaded the jury to accept a legal innovation—the dictum that the public was entitled to open criticism of magistrates, as long as the criticism was based on truth. The argument was Hamilton's, but Alexander made it part of New York's public memory by publishing a lengthy account of the trial.[9] Especially against a governor attempting to assert his authority over the provincial judiciary, Alexander and Smith showed that legal knowledge could be used to great effect in shaping popular-based partisan opposition.

During the 1750s, a younger generation of lawyers, including Smith's son, built an even more successful oppositional faction. The "triumvirate," as they were soon nicknamed, were William Smith, Jr., William Livingston, and John Morin Scott. The three lawyers' initial foray into political discourse was focused on military and religious, rather than legal, issues. As Presbyterians, the triumvirate saw the growing influence of the Church of England as a grave threat to the colonials' religious and political liberty. They were especially intent on preventing Episcopalians from turning the colony's first public funded college into an Anglican establishment. Following the precedent of Alexander and Smith, Sr., the triumvirate turned to the press as their primary means of opposition. In the *Independent Reflector* and other writings, Livingston and his cohorts effectively applied English Whig rhetoric to provincial politics, fashioning themselves as vigilant guardians of the people's liberty against emergent tyrannical forces within the province. The

[9] Stanley Nider Katz, *Newcastle's New York; Anglo-American Politics, 1732-1753* (Cambridge: Belknap Press of Harvard University Press, 1968) 61-77; James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal*, ed. Stanley Nider Katz (Cambridge, Mass.: Belknap Press of Harvard University, 1963), 1–35; Bonomi, *A Factious People*, 108–120; William Edward Nelson, "Legal Turmoil in a Factious Colony: New York, 1664-1776," *Hofstra Law Review* 38 (2009), 127-129, 151-154.

triumvirate only had partial success both in their immediate goal of turning King's College into an institution of liberal education, and in their larger goal of uniting the colony's dissenters against Anglicans. They had successfully built a lasting political power, however, that relied heavily on public discourse and popular support.[10]

The triumvirate's knowledge of English political history helped develop their oppositional rhetoric, but it was their legal expertise that made them uniquely effective in spearheading political opposition. Cadwallader Colden, a staunch royalist, gave the young lawyers the perfect opportunity to bring their professional knowledge into politics. As acting governor, Colden vigorously sought to strengthen royal prerogative against the rising power of provincial factions. For more than a decade since the late 1740s, Chief Justice James DeLancey's faction had practically dominated both the legislative and executive branches of the provincial government. Colden believed that DeLancey's power owed in large part to his stable position and wide influence as the province's chief justice. Hence, when DeLancey died in 1760, Colden, as the new acting governor, saw an opportunity to stem the power of factional leaders once and for all. By making the Supreme Court justices' tenure dependent on the Crown's pleasure (or the governor's, in effect) rather than guaranteed "during good behavior," and by appointing as chief justice an outsider without any ties to the provincial factions, Colden sought to strike at the nerve center of factional power.

[10] Thomas Jones, *History of New York during the Revolutionary War and of the Leading Events in the Other Colonies at that Period* (New York: New York Historical Society, 1879), ed. Edward F. DeLancey, 5–17; Dorothy Rita Dillon, *The New York Triumvirate: A Study of the Legal and Political Careers of William Livingston, John Morin Scott, William Smith, Jr.* (New York: Columbia University Press, 1949), 31-53; Milton M. Klein, "The Rise of the New York Bar: The Legal Career of William Livingston," *The William and Mary Quarterly*, 3rd Series, 15 (1958), 334–58; idem, *The American Whig: William Livingston of New York* (New York: Garland Pub., 1993), Chs. VIII, IX, & X; Tully, *Forming American Politics*, 136–142.

New York's legal fraternity as a whole resisted the move, but it was the triumvirate's public writings that turned the issue into an "inflaming topic" beyond the confines of courtrooms.[11] Launching a new journal (the *American Chronicle*) for the purpose, the triumvirate lampooned Colden's ignorance of law, and criticized his usurpation of gubernatorial powers toward thwarting the provincials' right to an independent judiciary.

The judicial tenure controversy fizzled out when the crown sent instructions unequivocally upholding Colden's position, and when newly appointed governor Robert Monckton struck a compromise by appointing justices from among the provincial bar, albeit with tenures during good behavior. Encouraged by his partial success, however, Colden pushed further against the judiciary upon resuming the acting governorship in 1763. Using an otherwise immaterial civil lawsuit (*Forsey v. Cunningham*) as a test case, Colden sought to expand the governor and council's appellate power. Going against a well-established provincial tradition confining the council's scope of review to specific procedural errors and irregularities pointed out in a writ of error, Colden claimed that the governor in council had the power to review the facts in any case appealed from the province's common law courts. It was a move that would have greatly enhanced royal authority by rendering any decision in the provincial courts reviewable, and reversible, by the governor.

The triumvirate once again led the press war against Colden. The new controversy lent itself more easily to Whig rhetoric than the earlier judicial tenure issue. Now it was not solely judicial independence at stake, but also the provincials' right to jury trial, one of the most cherished English privileges. Legal issues rarely connected so well with popular political rhetoric. The triumvirate relentlessly drove the point that Colden's was an "entirely new, unconstitutional, and illegal" move that would render jury trials meaningless by allowing the governor to overturn any

[11] Benjamin Pratt to Thomas Pownall, Jan. 7, 1762, *The Letters and Papers of Cadwallader Colden*, 9 vols. (New York: AMS Press, 1973), VI: 113-116.

verdict. They adeptly portrayed Colden's attempt as a classic case of arbitrary power threatening the people's liberty.[12]

The triumvirate was at the pinnacle of its political success in 1765. The so-called Livingston Party, which was composed mainly of the triumvirate and several powerful landowning families of the Hudson Valley, had already gained a majority in the assembly since 1759. It was with their public rhetoric, however, that the triumvirate won popular support. When news of the Stamp Act arrived in the colonies, the triumvirate initially led the New Yorkers' opposition to the act. Already having positioned themselves as the public's spokespersons against gubernatorial tyranny, they employed the same type of rhetoric to condemn the Stamp Act as an encroachment upon the colonials' liberty. Following a "town meeting" in late 1765 which several hundred "freemen and freeholders" of New York City reputedly attended, for example, William Smith, Jr. drew up a list of "instructions" to the city's representatives in the assembly. Writing on behalf of the constituents, Smith demanded that the representatives oppose both Colden's measures and the Stamp Act. The former was a "most dangerous attempt" which "if it obtains must inevitably ruin this country," and the latter was "repugnant to the principles of the British Constitution, and utterly inconsistent with our liberty and safety."[13]

The triumvirate's identification with popular political causes did not last long, however. As opposition to the Stamp Act intensified, they retreated from their outspoken defense of the colonials' liberty. The aforementioned instructions written by Smith, in fact, signaled the growing rift between the triumvirate and popular sentiment. At the meeting, the Sons of Liberty had

[12] Milton M. Klein, "Prelude to Revolution in New York: Jury Trials and Judicial Tenure," *The William and Mary Quarterly*, 3rd Series, 17 (1960), 440–62; idem, *The American Whig*, Ch. XII; Nelson, "Legal Turmoil in a Factious Colony," 154–156; Dillon, *The New York Triumvirate*, 54–81.

[13] William Smith, Jr., First draft of instructions proposed at a town meeting, Nov. 26, 1765, to John Cruger, Philip Livingston, Leonard Lispenard & William Bayard Esqrs representatives in the General Assembly of the freemen and freeholders of the City and County of New York, *William Smith Papers*, NYPL, Box 2.

demanded that the assembly openly defy Parliament by passing an act to annul the Stamp Act. Alarmed by these radical demands seemingly supported by many of New York City's middling- and lower-sorts, the triumvirate tried to steer the movement back in a more moderate direction. Professing to represent the peoples' demands, the triumvirate wrote an attenuated set of instructions that condemned the Stamp Act, but stopped short of defying parliamentary authority. The lower order's "spirit of mobbing," however, could not be contained by the maneuvers of Smith and his associates. The triumvirate's fall from public favor was further accentuated when the Sons of Liberty confronted them with a demand squarely placed upon the legal profession. The Sons demanded that New York's lawyers, instead of passively resisting the Stamp Act by staying away from the courts, take a more assertive stance by resuming business while refusing to pay the stamp duties. Predictably, the triumvirate failed to comply.[14]

The triumvirate and their faction's political shift was part of a familiar pattern in New York's factional politics. By late 1765, the Livingstons had good reason to distance themselves from any hints of popular radicalism. They were the leading power in the assembly, had allies in the council, and had the favor of the newly appointed governor. They were the court party now, and as New York's factions invariably did in similar situations, the Livingstons quickly lost their enthusiasm for popular political causes.[15] Some popular causes the triumvirate actively opposed, however, for reasons beyond political opportunism. Even while they were currying popular favor, Livingston, Smith, and Scott had been quietly but vigorously opposing a popular measure their social conservatism and legal professionalism would not let them tolerate—the Five Pounds Act.

[14] Milton M. Klein, "New York Lawyers and the Coming of the American Revolution," *New York History* 55, no. 4 (1974): 383–407; Mary Lou Lustig, *Privilege and Prerogative: New York's Provincial Elite, 1710-1776* (Madison, N.J.: Fairleigh Dickinson University Press, 1995), 128–134; Tully, *Forming American Politics*, 168–171.

[15] Tully, *Forming American Politics*, 250–251. Although Livingston advocates formed a majority in the assembly, it should be noted they did not always act as a party or voted together on issues. Bonomi, *A Factious People*, 230–232.

Lawyers against the Five Pounds Act

On the surface, the Five Pounds Act was one of the most simple, unassuming legislations of the colonial period. It only concerned the lowest end of the judicial system, and while it refined the justices' procedure somewhat, all it did essentially was expand the jurisdiction of justices of the peace on small civil causes—raising the ceiling of values that litigants could claim before a justice from forty shillings (two pounds) to five pounds. That seemingly inconsequential increase, however, was not taken lightly by the colony's legal profession.

When the bill was first proposed in late 1754, it passed without much opposition. This can be attributed to several factors—New York's legislators were keen on dealing with the explosion of small debt litigation in the mid-century, and the act was designed as a temporary measure applying mostly to rural areas.[16] More importantly, at that point the implications of the act probably had not dawned upon many of the lawyers. Still, the lawyer-dominated council made a few pointed amendments to the bill prepared by the assembly, presaging the much stiffer opposition they would mount against it later on. Chaired by William Smith, Sr., the council's committee for considering the bill strictly limited its duration to four years, and inserted the phrase "or his attorney" in one of the sentences to ensure that plaintiffs could lodge claims and conduct trials at justices' courts through lawyers.[17]

[16] On the steep increase of civil litigations in New York in the 1750s, see: Deborah A Rosen, *Courts and Commerce: Gender, Law, and the Market Economy in Colonial New York* (Columbus, OH: Ohio State University Press, 1997), 85–85. Eben Moglen suggests that the Five Pounds Act was created specifically to deal with a sharp increase in debt litigation due to contraction of credit during the early 1750s. Eben Moglen, "Settling the Law: Legal Development in New York, 1664-1776" (Ph.D. Diss., Yale University, 1993), 239-240. An Act to impower Justices of the Peace to Try Causes from forty Shillings to Five Pounds, Dec. 7, 1754, *N.Y. Col. Laws*, III: 1011-1016.

[17] Dec. 5 & 6, 1754, *Journal of the Legislative Council of the Colony of New York - Began the Eighth Day of December, 1743; and Ended the 3Rd of April, 1775* (New York Senate, 1861), II: 1178-1180; New York (State) and General Assembly, *Journal of the Votes and Proceedings of the General Assembly of the Colony of New-York. Began the 8th Day of November, 1743; and Ended the 23rd of December, 1765* (New York, 1766), II: 432.

The council was less cooperative when the assembly sought to strengthen the act the following year. The new bill prepared in late 1755 was not significantly different in content from the previous one, but it repealed the earlier "Forty Shillings Act" of 1737 upon which the Five Pounds Act was based. Technically, the 1754 Five Pounds Act applied only to cases of between forty shillings' and five pounds' value. For smaller claims, it still left intact the earlier act pertaining to the justices' jurisdiction in cases of forty shillings or less value. The implication was that once the temporary Five Pounds Act expired, the upper ceiling of the justices' jurisdiction would be lowered back to forty shillings.[18] The 1755 Five Pounds bill, in contrast, was designed to completely supersede the preexisting Forty Shillings Act, giving semi-permanent status to the increased jurisdiction of justices.[19] After a short discussion, the council rejected the bill. Five of the seven councillors responsible for the decision were leading members of the colony's legal profession—James Alexander, Daniel Horsmanden, Joseph Murray, John Chambers, and William Smith, Sr.[20]

The council's opposition notwithstanding, the assembly was intent on making the enlarged justices' jurisdiction a lasting feature of New York's judicial system. Sometime after sending up the bill to the council, the assembly appointed two of its members to inquire of the councillors "what progress they have made in the bill, sent up for their concurrence."[21] Upon the council's rejection of the bill, the assembly immediately began drawing up another one. By the fall session of 1756, they had a new Five Pounds bill. Taking the council's disapproval into account, they retreated from the 1755 bill's strong terms. The new bill was only to apply to cases of between

[18] An Act for Establishing and Regulating Courts to Determine Causes of Forty Shillings and under in this Colony, Dec. 16, 1737, *N.Y. Col. Laws*, II: 964-967; Five Pounds Act of 1754, Ibid., III: 1011-1016.
[19] Dec. 12 & 13, 1755, *Votes and Proceedings of the General Assembly*, II: 46-467; Dec. 17, 1755, *Journal of the Legislative Council*, II: 1227.
[20] Jan. 16, 1756, *Journal of the Legislative Council*, II: 1235.
[21] Feb. 4, 1756, *Votes and Proceedings of the General Assembly*, II: 480; Feb. 4, 1756, *Journal of the Legislative Council*, II: 1240.

forty shillings' and five pounds' value, leaving the Forty Shillings Act intact as the only permanent act regarding the individual justices' civil jurisdiction.[22] Regardless of this tactical retreat, the council rejected it again.[23]

Undaunted by the council's intransigence, the assembly prepared yet another bill during the following winter's session. Perhaps calculating that the council would be hard pressed to reject the bill for a third time, the assembly boldly put forward a more expansive bill than any of the previous ones. Not only would it supersede the Forty Shillings Act, but it would also encompass, for the first time, the cities of New York and Albany and the borough of Westchester.[24] With the stakes thus raised, the younger members of the provincial bar stepped in. Tipped off, in all likelihood, by the councillors, fifteen "practicers of the law" presented a lengthy petition against the 1757 Five Pounds bill. The petitioners comprised the colony's most active lawyers regularly practicing in the highest tribunals, including the triumvirate of Livingston, Smith, and Scott. A year earlier, twelve of them had also signed their names to an agreement restricting admission into New York City's bar.[25]

The petition, which was read in council in early 1758, contained a lengthy preamble and fourteen keenly argued points purporting to prove that the act would not only hurt the interests of the petitioners, but would also be "vastly detrimental to the province in general."[26] At least one historian has duly pointed out the narrow self-interest underlying the lawyers' opposition to the Five Pounds Act. The enlarged jurisdiction of justices would likely cut into the inferior courts'

[22] Sep. 29 & Oct. 5, 1756, *Votes and Proceedings of the General Assembly*, II: 504-505; Oct. 29, 1756, *Journal of the Legislative Council*, II: 1276.
[23] Nov. 30, 1756, *Journal of the Legislative Council*, II: 1288-1289.
[24] Dec. 8 & 9, 1757, *Votes and Proceedings of the General Assembly*, II: 540-541; Dec. 13, 1757, *Journal of the Legislative Council*, II: 1308. The assembly's draft of the bill has not survived, but the lawyers' petition against the bill shows that it enlarged the act's scope to include everywhere in the colony including the cities of Albany and New York and the borough of Westchester. Mar. 16, 1758, Ibid., II: 1325.
[25] Paul M. Hamlin, *Legal Education in Colonial New York* (New York: Da Capo Press, 1970), 160–162.
[26] Dec. 21, 1757, *Journal of the Legislative Council*, II; 1313.

caseload, thus reducing one source of the lawyers' income and diminishing their opportunities for gaining professional experience.[27] There was much more at stake, however. In the Five Pounds Act, the lawyers saw a dangerous innovation that reversed the trend of legal professionalization in the colony, and a precedent that could undermine the stable legal and social order they envisioned for the colony's future.

The opening premise of their argument was the observation that New York's justices were a poor, ignorant, unscrupulous lot.[28] They simply could not "be trusted with the powers specified in this bill," according to the lawyers. With an enlarged jurisdiction, countless complaints would follow the justices' "inevitable error[s]." The act would also "multiply law suits" and "excite a litigious spirit." This was because many local justices, "indigent even to necessity," eagerly solicited causes for fees, and could be easily approached anywhere, mingling with the people and trying causes in "private houses, dram shops, and obscure corners." Judicial proceedings held in such venues easily degenerated into "disorderly conventions" where "there is no solemnity, no awe."

The lack of order and authority in the justices' proceedings, in turn, made it easy for litigants to disregard "the sacred laws of truth." Hence, the act would effectively "establish a school for the propagation of perjury." What the lawyers feared, ultimately, was a breakdown of social order. If "all is noise and confusion, passion, party spirit and rage" in the courts, the same disorder

[27] Afinogenov, "Lawyers and Politics in Eighteenth-Century New York," 156. In a different context, Milton Klein remarked that New York's legislature, since, 1728, had prevented lawyers from taking cases under 20 pounds' value. This is a misreading of the statute in question, which intended to limit cases brought directly to the Supreme Court; under the act, cases of less than 20 pound value had to be taken initially to a county court. The 1745 update of the act stipulated that lawyers practicing in the Supreme Court also had the right to take any case in the inferior courts, including those of less than 20 pound value. Klein, "From Community to Status," 154; *N.Y. Col. Laws*, II: 462-467, III: 469-473, 546-548.

[28] See Chapter 1, p. 20.

would carry over to every other aspect of the people's behavior. An enlarged jurisdiction of justices would "debauch their morals, encourage idleness, and provoke the breach of the king[']s] peace."

To restore order, the magistrates had to be chosen from among "gentlemen of rank, education and estates" as in England. More importantly, the legal system should act as a stabilizing force for society, which could be accomplished only if the courts adhered to "the course and order of the common law of England." The common law, the lawyers asserted, was "the best inheritance that English men have derived from their ancestors." New York, of course, lacked the basis of legal stability England enjoyed from its long history—the colony "still labours so much under the disadvantages of its infancy." The colony's legal development, however, had been set on the right track. Its court system was "well calculated to give a free course to the dispensation of justice," and the legal profession, although still small in numbers, was gradually raising the standard of legal practice close to that of the mother country.

The Five Pounds Act threatened to derail New York's legal development from its due course of professionalization. It did so by destabilizing the legal system with an innovation "subversive of the common law, and repugnant to the wisdom of the English nation." If enlarging the individual justices' civil jurisdiction was beneficial to the public, the lawyers averred, it "would have long ago obtained in England." The act would impede legal professionalization also by stymying the growth of legal professionals. As discussed earlier, the lawyers emphasized that inferior courts were an invaluable training ground for young lawyers—a function the act would undermine by reducing the inferior courts' caseload.[29] The reduction of the inferior courts' business would also discourage young men of "skill, spirit and education" from taking up county clerkships. This would be a great loss to the system, as the "gentlemen in the law" serving as clerks

[29] See Chapter 4, pp. 194-195.

had greatly contributed to stabilizing the county courts' operations. They helped "prevent barbarism [and] injustice" by "removing doubts" and "render[ing] the course of justice, more regular and dispatchful."[30]

As councillor and senior member of the legal profession, William Smith, Sr. added his opinion in support of the younger lawyers. Smith agreed that the Five Pounds Act was a "dangerous innovation" that had no precedent in the mother country. He also echoed the lawyers' concern that the act would "discourage the study of the law, and all improvement in science." Without the guidance of properly trained legal professionals, Smith emphasized, the people would suffer from a "general ignorance of the laws of their mother country." As a result, "error, partiality, corruption and perjury" would permeate the courts, which would not only "lessen the security of the subject as to his liberty and property," but would also introduce "horrid confusion and disorder in [the] government."

Years later, William Smith, Jr. reiterated the arguments of his father and the petitioning lawyers, with even stronger emphasis on the broad social repercussions of an enlarged jurisdiction of unqualified justices. Writing in late 1766, by which time the Five Pounds Act had been in force for more than a decade, Smith claimed that "the complaints that our counties in general are in great disorder are almost universal." The growing social disorder, which symptoms included "perjury rioting & treason and a growing wantoness and dissoluteness of manners," was largely due to the Five Pounds Act's tendency of putting "the magistracy into contempt." This was inevitable since the act, by burdening the office with an enlarged role in civil matters—"business foreign to its

[30] Petition of officers, practicers of the law in the inferior courts, Reasons humbly offered to the Council against the Bill intitled An Act to empower Justices of the Peace to try Causes to the Value of Five Pounds & under and for repealing the two Acts therein mentioned, Mar. 16, 1758, *Journal of the Legislative Council*, II: 1323-1326.

original design," as Smith emphasized—pushed the better sorts away from serving as justices. The Crown was "consequently compelled to offer [the offices] to their inferiors ... who took the office as a means to subsistence." The judicial duties predictably "overwhelm[ed]" these unqualified justices, leaving their courts in disarray.

Underlying Smith's dire appraisal of the Five Pounds Act's effects was a legal and social conservatism shared by most elite lawyers. Holding the English judicial tradition in great veneration, Smith stressed that in its "original design," the "institution of justices of the peace is admirable. It was a device to have spies among the multitude, to inspect & regulate their manners." The institution worked best when "men of property and prudence" were enlisted to focus on "preventing disorder" and "superintend[ing] the morals of the people." Asking justices to handle a wide range of cumbersome civil matters only led to a degeneration of the office, and a widespread contempt of the provincial courts. From Smith's elitist viewpoint, this would inevitably lead to a collapse of the entire social and political order, as the "multitude are too apt to transfer their contempt of the court to every other [body] of magistrates and when the spirit of subordination is totally left [uncontrolled] there can be no government.[31]

Taken together, the lawyers' opposition to the Five Pounds Act revealed a legal philosophy and social outlook grounded in their position as a distinct professional group and emerging political elite. While their Whiggish emphasis on protecting provincial rights against tyranny briefly aligned them with popular political causes, the lawyers harbored a fundamentally elitist social vision in which only "gentlemen of rank, education and estates" should be empowered to maintain social and political order. Professionalized law had a special place in their version of elitist Whig ideology. The best antidote to tyrannical tendencies both from above and below was

[31] William Smith, Jr. to Governor Henry Moore, Oct. 22, 1766, *William Smith Papers*, Box 2; William Smith, Jr.'s dissent against continuing the Five Pounds Act, n.d., Ibid., Box 2.

an adherence to time-proven, carefully balanced institutions and laws. As provincials in the British Empire, the colonials already had access to such ideal laws and institutions in the British Constitution and common law. Drawing upon the mother country's laws and applying them to the colony, however, required care and knowledge. This was why legal professionals had to play an especially large judicial and political role in the colonies. Only the "science" of law could secure a path of rational, orderly improvement for the colony, helping it graduate from its "infancy" and "barbarity" and approximate the social, legal, and political stability of the mother country.[32]

Despite the lawyers' strong opposition, the enlarged jurisdiction of justices prevailed. In early 1758, the council, after disallowing two earlier bills, finally assented to the new Five Pounds Act, albeit with amendments. The act would once again be limited to a term of four years, and more importantly, the key jurisdictions of New York City, Albany City, and the borough of Westchester would remain untouched by the act. This meant that the Mayor's Courts of New York City and Albany City, where many of the leading lawyers practiced, would still handle all civil suits within their jurisdictions regardless of value. The assembly disagreed with the amendment, and thus the bill remained deadlocked for months. The assembly finally gave in to the amendment during its very last session in 1758, before it was dissolved under the Septennial Act mandating elections for a new assembly at least every seven years.[33] The very next year, however, the new assembly passed a Five Pounds bill bringing the entire colony into its purview once and for all. The assembly likely knew that the council would be more cooperative this time, as two of the former lawyer-councillors (James Alexander and Joseph Murray) were no longer present. Against

[32] Petition against the Five Pounds Act, *Journal of the Legislative Council*, II: 1323. Along similar lines, Alan Tully characterized the New York triumvirate as "provincial Whigs." Tully, *Forming American Politics*, 237–241.

[33] Mar. 20 & 22, 1758, *Journal of the Legislative Council*, II: 1327, 1330-1331; An Act to impower Justices of the Peace to Try Causes to the Value of Five Pounds and under, Dec. 16, 1758, *N.Y. Col. Laws*, IV: 296-301; William Smith *The History of the Province of New-York*, 2 vols. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1972), ed. Michael G. Kammen, II: 229-230.

William Smith, Sr.'s dissent, the council passed the bill without amendment. From that point on, New York's justices of the peace, along with the mayors, recorders, and aldermen of New York City and Albany City, enjoyed uninterrupted jurisdiction over civil matters of up to five pounds' value throughout the remaining colonial period.[34]

Popular Politics and the Five Pounds Act

How did the Five Pounds Act survive against the lawyers' virulent opposition? The immediate answer can be found in the influence of two generations of political factions led by the DeLancey family. Chief Justice James DeLancey was more responsible than anyone for introducing and entrenching the act into New York's judicial system. In 1753, when the Five Pounds Act was first proposed, DeLancey enjoyed an unprecedented degree of power and influence on New York's politics. DeLancey's rise to power did not happen overnight. Using his familial ties in England and his position in the provincial council and Supreme Court, DeLancey gradually expanded his connections and influence in the colony during the 1730s. In the mid-1740s, helped by a mutually beneficial alliance with house speaker David Jones, DeLancey gained control of the assembly. He also served as acting governor for several years in the mid- and late-1750s.[35] During most of the time when the Five Pounds Act was first introduced and debated, then, DeLancey was at the height of his powers, exercising broad influence on practically every branch of the provincial government.

[34] Dec. 13, 1759, *Votes and Proceedings of the General Assembly,* II: 606; Dec. 15 & 24, 1759, *Journal of the Legislative Council,* II: 1381, 1388; An Act to impower Justices of the Peace Mayors Recorders and aldermen to try Causes to the value of Five pounds and under and for Repealing an act therein mentioned, Dec. 24, 1759, *N.Y. Col. Laws,* IV: 372-377.

[35] Lustig, *Privilege and Prerogative,* Chs. 4 & 5.

In all likelihood, the movement to enlarge the justices' civil jurisdiction was initiated by DeLancey. The Five Pounds bill was introduced during the first assembly term following DeLancey's assumption of acting governorship. It was drafted and presented to the assembly by John Watts, one of DeLancey's closest political associates.[36] While discussing the creation of the act in his history of New York, William Smith, Jr. noted that it "was a favorite law of the Lieutenant Governor's."[37] Whether or not DeLancey was the one who first came up with the idea, he certainly became its strongest supporter. In early 1758, with the council having rejected two previous assembly bills of similar nature, and with the lawyers scheduled to present their petition against the new bill in the council, DeLancey stepped in to help push it through. First, he solicited the Crown's support. Writing to the Lords of Trade, DeLancey introduced the Five Pounds Act as a "bill which the Assembly have very much at heart." Explaining that the act allowed justices to try small causes of up to five pounds value "in a summary way, with expedition and at a small expence," DeLancey stressed that it was a "very beneficial one for the poor." Anticipating concerns over the justices' arbitrary proceedings, DeLancey pointed out that the act provided for either litigants' right to call for a jury trial. Despite the act's obvious benefits and its built-in safeguard against arbitrary decisions, the bill was in great danger of being rejected once more in the council. DeLancey blamed this upon the influence of New York City's attorneys, who opposed the act for purely selfish reasons—they worried that the justices' enlarged jurisdiction would greatly reduce their caseload, along with their "profit by writs, declarations, pleas &c."[38]

[36] Oct. 16, 1754, *Votes and Proceedings of the General Assembly*, II: 390. Watts also drafted the 1756 Five Pounds bill. On Watts's close ties with Chief Justice James DeLancey and his role in building DeLancey's faction, see Clifton James Taylor, "John Watts in Colonial and Revolutionary New York" (Ph.D. Diss., University of Tennessee, 1981), Ch. 5.

[37] Smith, *The History of the Province of New-York*, II: 177-178.

[38] Leiutenant-Governor DeLancey to the Lords of Trade, Jan. 5, 1758, *Doc. Rel. N.Y.*, VII: 342-3.

With the date appointed for the council hearing of the lawyer's petition approaching, and not having obtained any response from England, DeLancey decided to address the council directly on the matter. Together with Watts, DeLancey sent a special message to the council ostensibly on behalf of the assembly. According to DeLancey and Watts, the assembly, "in justice to their constituents cannot avoid being sollicitous about a bill which experience has shewn to be attended with such happy effects in the several counties where it took place, and which the disinterested part of the good people of this colony are impatiently expecting to see continued." DeLancey and Watts also wanted to make sure that the act would apply to the entire province, as was designed by the assembly: They desired that "the City of New York, and such other parts of the Colony, as have hitherto been precluded, and where its use is apparently necessary, may not longer be deprived of the Benefits almost universally acknowledged to arise therefrom, the House hopes the Council will not continue to defer their concurrence thereto."[39] It was unusual for the governor and assembly to apply such direct pressure on the council over a piece of legislation. In his historical memoirs, William Smith, Jr. later criticized DeLancey's course of action as an "unparliamentary mode of arguing and corresponding with each other."[40]

DeLancey's high-handed intervention was probably a major reason why the bill, albeit with the council's amendments, passed into law against the lawyers' strong opposition. Delancey would die shortly thereafter, but not before further securing the future of the act. Late in 1759, the Lords of Trade finally gave their opinion on the Five Pounds act. The law, they unequivocally stated, did not meet their approval. If it was a "perpetual one," they would have immediately recommended

[39] A Message from the General Assembly by Mr. Watts and Col. De Lancey, Feb. 1, 1758, *Journal of the Legislative Council*, II: 1318.
[40] Smith, *The History of the Province of New-York*, II: 229-230.

its repeal. The act would be allowed to stay in force since its term was limited anyway, but DeLancey was explicitly instructed against renewing it any further: "You will not give your assent to a revival of this law, or to any law of the same nature, without a clause be inserted in it, suspending its effect, until his maj^{ty}'s pleasure can be known."[41]

DeLancey responded with a lengthy defense of the Five Pounds act. He claimed that the law had thus far only had "good effects" in the province, and that he had never heard of any complaints of "inconveniencies" caused by it. In response to the Board of Trade's criticism that the act vested too much power in the justices' summary decisions, DeLancey elicited two provisions in the act that rectified any arbitrariness on the justices' part; either litigant, as pointed out earlier, could demand a jury trial, and if there was "manifest partiality or corruption" in the justice's proceedings, litigants could appeal against the decision in the Supreme Court. Having thus defended the act on judicial grounds, DeLancey added that the act would be beneficial both to the Crown and his subjects "in a political light." Since justices were appointed by the governor in council, thus representing the royal prerogative in the counties, "the greater their powers are, if they be not oppressive to the people, the greater weight and influence will the government have, and be better able to carry on his majesty's service." In closing his message, DeLancey "flatter[ed]" himself that he had given sufficient reasons why the act should not be repealed. If the lords were still intent on recommending its repeal, however, DeLancey "humbly" requested an explanation of their "opinion to that purpose," so "that the members of the assembly and the people in general who are most earnestly desirous of the continuance of the law, from the benefit and ease they receive from it, may be prepared by degrees to expect his majesty's disallowance of it." By emphasizing that the act enjoyed broad public support in the colony, DeLancey, albeit in

[41] Lords of Trade to Lieutenant-Governor De Lancey, Nov. 14, 1759, *Doc. Rel. N.Y.*, VII: 406.

deferential language, was challenging the Lords of Trade to give the people a good reason the popular act should be quashed.[42]

Shortly before writing his response, in fact, DeLancey had already signed a new Five Pounds bill into law. (DeLancey claimed that he received the Board of Trade's instruction, conveniently enough for him, just after giving his assent to the bill) Bringing New York City, Albany City, and the borough of Westchester into its purview, the Five Pounds Act of 1759 was much more expansive than the one that the Board of Trade had just condemned.[43] Whether it was due to DeLancey's intransigence, or the realization that the act had already gained too much momentum in the province, the Board of Trade reversed its stance. A few months after receiving DeLancey's response, the board advised the Crown to confirm the 1759 Five Pounds Act. They had consulted one of the Crown's advisors, Sir Matthew Lamb, who found "no objection to [the act] in point of law." DeLancey's advocacy, however, was cited as the Board's main reason for recommending confirmation: "It appears by a letter from the late lieu^{t} & governor (an extract of which we humbly beg leave to annex) that he gave his assent to this act, not only in compliance with the earnest request of the assembly, but from his own knowledge of the great usefullness of it." Royal confirmation was accordingly granted in early 1761.[44]

By that time DeLancey had passed away, and the Livingston party had wrested control of the assembly away from DeLancey's faction. But the Five Pounds Act lived on. Since the act was still limited to a four-year term, in late 1763 the Livingston lawyers had another opportunity to discontinue the act. But they desisted from terminating an act that the people had probably grown

[42] Lieutenant-Governor DeLancey to the Lords of Trade, Feb. 16, 1760, Ibid., VII: 426-7.
[43] Dec. 24, 1759, *Journal of the Legislative Council,* II: 1391.
[44] Report of the Board of Trade, to the King, on an act relating to powers of justices of the peace, Dec. 19, 1760, *Letters and Papers of Cadwallader Colden,* V: 379-380; The Board of Trade to Cadwallader Colden, Feb. 12, 1761, Ibid., VI: 9-10.

accustomed to, and that had recently received royal confirmation. In light of the Forty Shillings Act having been in existence for more than two decades without ever having received royal confirmation, the prompt confirmation of the 1759 Five Pounds Act must have carried considerable weight. The legislature quietly extended the act for five more years.[45] Controversy over the act would resume in the late 1760s, but until then, the act remained untouched as a lasting legacy of Chief Justice James DeLancey.

DeLancey's political opponents had a theory to explain his ardent support of the Five Pounds Act: he was using local justices as pawns in extending his faction's influence throughout the province. One of the first to bring attention to this aspect was William Smith, Sr. While arguing against the Five Pounds Act of 1758, Smith alleged that justices of the peace had recently become a key link in New York's political corruption. Ideally, the governor, with the advice and consent of his council, should appoint "men of approved integrity" as new justices. In recent years, however, it had become customary for the governor to liberally issue new peace commissions based on "lists" submitted by assembly members. The assemblymen justified these recommendations based on their familiarity with their constituents, but their real objective was to secure the "votes and interests" of the new justices commissioned through their support.[46] Smith claimed that he had heard of numerous such examples. In his recent visit to one of the county courts, for example, Smith was surprised to find that many of the county's ablest justices had been replaced by new faces. When he asked what had become of them, a local knowledgeable about the

[45] Nov. 15, 16, 17 & 30, 1763, *Votes and Proceedings of the General Assembly*, II: 723-725, 732; Dec. 13, 15 & 16, 1763, *Journal of the Legislative Council*, II: 1523, 1526-1527; An Act to Continue an Act Entitled An Act to impower Justices of the Peace Mayors, Recorders and Aldermen to try Causes to the value of Five pounds and under, and for repealing an Act therein mentioned, Dec. 20, 1763, *N.Y. Col. Laws*, IV: 736-737. The triumvirate may have been reluctant to discontinue a popular act at a time when they needed strong public support in their political battle against Lieutenant-Governor Cadwallader Colden.

[46] On the politically driven appointment of justices, see Chapter 3, pp. 101-111.

situation explained "that they had been put out of office, because they had voted against the sitting members at the last election, and were not friends to what was called in the county term the present administration, meaning not that of the government, but of the sitting [assembly] members."

An enlarged jurisdiction of justices under the Five Pounds Act would only worsen this "evil" by making the position even more desirable to unscrupulous men. And with assembly members freely giving recommendations to such men in return for political support, not only would county administrations become dominated by corrupt oligarchies, but the province's entire political system would be disrupted. By strengthening the assembly members' corrupt local bases of power, the Five Pounds Act "will give an excessive weight to the Lower House that will destroy the ballance of power lodged in the several branches of the legislature," even enabling "that house to control a governor."[47] No doubt with DeLancey's administration in mind, Smith also added that in case the governor himself was in cahoots with the assembly as faction leader, the tyranny would be even more formidable. Years later while writing his *Historical Memoirs*, William Smith, Jr. agreed with his late father. By making the office of local justice "more lucrative," the Five Pounds Act "tied together the links of corruption between the election jobbers and the Assemblymen, and between the latter and the Governor, and formed a chain of dependence" that corrupted the political system to its core. Therein lay the true reason, according to Smith, that DeLancey was so attached to the act. It "augmented his influence in every part of the colony."[48]

The popularity of the act itself, however, was an equally important reason DeLancey promoted it. Smith, despite his strong dislike of the act, admitted as much in his *History of New York.* Explaining the political background of the first Five Pounds bill, Smith pointed to the public's unrest and discontent in 1753 caused by French and Indian invasion and the controversy

[47] William Smith, Sr.'s dissent against the Five Pounds Act, *Journal of the Legislative Council*, II: 1328-1330.
[48] Smith, *The History of the Province of New-York*, II: 177-178.

over King's College. "It therefore concerned the governor and his party," Smith explained, "to improve the ensuing session for securing the favor both of the Crown and the people, and the autumn session was therefore no sooner commenced, than two popular bills were introduced." The Five Pounds act was one of the two "popular" bills.[49] Throughout the period of his political dominance, indeed, DeLancey had always been eager to curry popular favor. Once his faction gained control of the assembly, DeLancey frequently promoted popular legislation to this purpose.[50] Hence, it is difficult to imagine that he would tout the Five Pounds Act as a popular one if he did not genuinely believe it to be so. If he thought he was pushing through an unpopular measure solely for political expediency, there would have been little reason to loudly claim that the "people in general ... are most earnestly desirous of the continuance of the law, from the benefit and ease they receive from it."[51] Echoing DeLancey's confidence in the act's popularity, the Five Pounds Act of 1759 opened with a preamble triumphantly stating its raison d'etre: the act "has been found by experience ... to be greatly advantageous to the inhabitants being thereby enabled speedily and at small expence to come at justice."[52]

By all accounts, DeLancey and his cohorts had gauged public sentiment regarding the act correctly. If usage is any measure, the response to the act was overwhelming. The act, it is worth remembering, did not mandate that cases of five pounds or less value be taken to a justice instead of the county court; it merely gave it as an option. As the lawyers themselves noted in their 1758 petition, no sooner was the law created than the local justices' dockets became full with small debt

[49] Ibid., II: 168.
[50] Alan Tully also saw the Five Pounds Act as a prime example of the DeLancey faction's popular measures. Tully, *Forming American Politics*, 236–237.
[51] Lieutenant-Governor DeLancey to the Lords of Trade, Feb. 16, 1760, *Doc. Rel. N.Y.*, VII: 426-7.
[52] An Act to impower Justices of the Peace Mayors Recorders and aldermen to try Causes to the value of Five pounds and under and for Repealing an act therein mentioned, Dec. 24, 1759, *N.Y. Col. Laws*, IV: 372-377.

cases everywhere the law was in effect. Contrary to the lawyers' dire predictions, the justices' enlarged role in civil matters worked well, giving ordinary New Yorkers much-needed affordable legal support of their daily credit transactions. The small claims jurisdiction of justices probably worked all the better due to the large influx of plebeian justices who lacked wealth, education, and status—the very men whom the lawyers deemed unqualified for the task. In handling the inhabitants' myriad litigations based on personal book debts, plebeian justices more than made up for their lack of legal knowledge with their personal familiarity with locals and their attentiveness to the litigants' needs.[53]

Hence, while Smith, Jr. and other lawyers were probably correct in arguing that the Five Pounds Act encouraged politically driven patronage in the appointment of justices, the effect of this "corruption" was not as unequivocally negative as they thought. For local justices to have any political value within the factional "chain of dependence," they had to have popular support within their locale. What made them valuable to factions was their ability to influence voters. One way of doing that would have been coercion. But that required wealth and status, which, as the lawyers tirelessly pointed out, were exactly what the plebeian justices lacked. They had no "weight" over the people; they were instead merely one of them.[54] But it was precisely the plebeian justices' ability and willingness to "herd with the common people" and curry their favor which made them capable of influencing voters, and hence made them valuable to factions such as the DeLancey party.[55] In this sense, the system of patronage and vote solicitation ensured that only those with the willingness to serve popular needs would be selected as justices. It was no coincidence, then, that the same act which boosted the politically driven appointment of plebeian justices also resulted

[53] See Chapters 2 & 3.
[54] William Smith, Jr. to Governor Henry Moore, Oct. 22, 1766, *William Smith Papers*, Box 2.
[55] Lewis Morris, Jr., "Draft Essay on the Magistracy," n.d., *Lewis Morris Papers, 1735-1754*, NYHS. Quoted in Tully, *Forming American Politics*, 333.

in the judicial system's more or less successful handling of small debt litigations in accordance with the people's needs.[56]

Elite lawyers such as William Smith, Jr., however, failed to see anything positive in such developments. Evaluating the Five Pounds Act years later in his *History of New York*, Smith bitterly commented that the "mischievous consequences of these contemptible, summary, and disorderly jurisdictions, have greatly overbalanced the delay and expense assigned as the motives for this innovation."[57] The lay justices' informal processes were antithetical to the lawyers' deeply held legal professionalism, making it difficult for the lawyers to appreciate any positive contributions the justices may have made to the judicial system. The lawyers were of course aware that the enlarged jurisdiction of justices was favored by many commoners, and that the justices' appointment and operations rested on popular support. It was that very popularity, or popular nature, of the lay justices, however, that bothered lawyers. Far from imposing a law-informed social order upon the people, plebeian magistrates were unduly susceptible to popular demand. They lacked the ability, or will, to instill in the people "a spirit of subordination essential to good government."[58] Just like Chief Justice DeLancey's faction, plebeian justices corrupted politics and society with their eagerness to please the people in order to win their support. Hence, for New York's Whig lawyers, the harmful impact of lay justices and their enlarged jurisdiction extended far beyond the legal system, disrupting the colony's entire social and political order.

The relentlessly pejorative portrayal aside, New York's lawyers were largely correct in their assessment of the plebeian justices' relationship with the people. Take the case of Mr. Noxon

[56] See Chapter 3, pp. 130-139.
[57] Smith, *The History of the Province of New-York*, II: 177-178.
[58] William Smith, Jr.'s dissent against the Five Pounds Act, Dec. 13, 1768, *Journal of the Legislative Council*, II: 1677-1678.

of Dutchess County, whom we featured earlier for his resistance against his landlord's order to repair a mill.[59] Noxon was a busy man in the community. In addition to being a tenant, he also ran a beer house and served as a local justice. His roles in the community as tavern keeper and magistrate seem to have been almost indistinguishable from each other at times. After receiving John Kane's complaint against Hugh Ross on an unpaid debt, for example, Noxon summoned both parties to his beer house. Ross appeared on time, but Kane did not. Kane had been away from home when the constable visited him to serve notice of the trial. He belatedly saw the written notice left by the constable, and rushed to Noxon's beer house. There he found Noxon, Ross, and the constable already discussing the case (over plenty of refreshments, one could imagine). Upon Kane's arrival, Noxon said he should be charged with contempt (presumably for his late appearance), and promptly dismissed both him and Ross. Kane seems to have had quite a few enemies in the community, some of whom were present in the tavern that day. He attributed Noxon's arbitrary proceeding to the influence of those locals: "This fellow was pushed on by some people to act as he did and he being a propper instrument for them … it gives them pleasure as they say it must cost me time and money without any prospect of reimbursement." As many litigants with means did when they decided that communal adjudication would not work for them, Kane went on to hire a lawyer to recover his debt at a higher court.[60]

As Noxon's case suggests, New York's plebeian justices did not necessarily act as principled champions of popular rights. More often, they simply lacked enough independent status and power to resist pressure either from above or below. Pressure from above, in fact, sometimes pitted them directly against the local populace. In the Hudson Valley and in the Green Mountains, local justices, along with sheriffs and constables, were often at the forefront of arresting and

[59] See Chapter 7, pp. 329-331
[60] John Kane to Gilbert Livingston, Apr. 26, 1771, *Gilbert Livingston Papers*, NYPL, Box 1, Folder 3.

punishing land rioters. Hence it was not infrequent for justices to be embroiled in violent clashes with rioters, and in case they seemed especially zealous in performing their duties, they could even be targeted as a main enemy of the rioters.[61] One such justice was Samuel Peters of Dutchess County, who was captured by rioters and subjected to public humiliation in 1766.[62] In colonial New York's decentralized legal and political milieu, however, local magistrates often found the pressure from below much more immediate than any pressure from above. Elite lawyers were not the only ones who constantly complained of the local justices' weak authority in this context. The attorney general, governor, council, and Supreme Court judges were frequently frustrated by the justices' inability, or unwillingness, to execute orders and enforce law upon the people.[63]

Sometimes justices were caught in a conundrum, receiving conflicting demands from above and below. During the early 1760s, Jacob Freese and Stephen Van Dyck were enlisted by Henry Van Rensselaer to help prosecute several locals who had supposedly disturbed Rennselaer's possession. Claiming part of the land as their own, the "rioters" had forcefully displaced a number of stones marking the boundaries of Rensselaer's estate. Although Rensselaer was formally acting in his capacity as a justice of the peace, his power as manor lord undoubtedly placed him in an entirely different league from other justices. Fully conscious of his exalted status and power, Rensselaer singlehandedly directed the course of the judicial process against the rioters. He simply needed two more justices to sit by and acquiesce to his lead, since the law required the presence of at least three justices for such criminal prosecutions. Freese and Van Dyck initially succumbed to the manor lord's will, giving their assent to the "judgment" he gave against the rioters. As it

[61] Countryman, *A People in Revolution*, 40, 44.
[62] Thomas J. Humphrey, "Crowd and Court: Rough Music and Popular Justice in Colonial New York" in Matthew Dennis, Simon P Newman, and William Pencak, *Riot and Revelry in Early America* (University Park, Pa.: Pennsylvania State Univ. Press, 2002), 115-116.
[63] Douglas Greenberg, "The Effectiveness of Law Enforcement in Eighteenth-Century New York," *The American Journal of Legal History* 19, no. 3 (1975): 173–207.

turned out, however, the rioters enjoyed considerable popular support in the community. With numerous witnesses supporting them, the rioters retaliated by charging the three justices with maladministration. Evidently fearing popular antipathy more than the manor lord's wrath, Freese and Van Dyck equivocated. They blamed Rensselaer for threatening them to help push through the prosecution against the rioters, and joined the latter in claiming that the whole judicial process had been illegal. In light of the two justices' new attitude, the rioters and their supporters immediately changed their stance toward them, now finding Rensselaer solely responsible for the maladministration, and writing to the attorney general to lift their complaints against Freese and Van Dyck.[64]

The positions of other plebeian justices within their communities were not too different, but unlike Freese and Van Dyck, many chose to side with the people from the outset. For Albany's magistrates, that entailed protecting locals from the British army's demands. During the Seven Years' War, Albany's inhabitants frequently grumbled about the requirement placed upon them to supply horses, wagons, wood, and living quarters for the military.[65] When they resisted the demands, local magistrates often either supported or condoned the inhabitants' actions. In 1756, Albany's sheriff, upon the complaint of a British officer, arrested eleven wagon drivers for refusing to service the army. Several magistrates immediately approached the sheriff, pointedly questioning whether the drivers did not have good reason to refuse the demands, and whether they did not

[64] Situation of the proceeding of Henry Van Ranssalaer esq^{r} against a number of persons at Claverack on a supposed riot, n.d., *John Tabor Kempe Papers*, NYHS, Box 12, Folder 2; The King v. Henry Van Rensselaer & two other Justices, Recognizance for Def^{ts}' costs, Ibid., Box 2, Folder 4; Affidavit of Ties Bont, William Rase, Abraham Hallebeck & Jan Bont, Ibid., n.d., Box 11, Folder 8; Jacob Reese to John Tabor Kempe, Jan. 2, 1766, Ibid., Box 13, Folder 7; Inhabitants of Claverack to John Tabor Kempe, Jan. 1, 1766, Ibid., Box 13, Folder 7; Inhabitants of Claverack to John Tabor Kempe, Apr. 15, 1766, Ibid., Box 14, Folder 3; Stephen Van Dyck to John Tabor Kempe, May 3, 1766 & Jul. 31, 1769, Ibid., Box 14, Folder 8; John Tabor Kempe to Stephen Van Dyck, Ibid., Box 15, Folder 6.

[65] Douglas Edward Leach, *Roots of Conflict: British Armed Forces and Colonial Americans, 1677-1763* (Chapel Hill: University of North Carolina Press, 1986), 81–82.

deserve to be released from imprisonment. Taking the suggestion, the sheriff promptly released the prisoners.[66] In the same year, Justice De Lamater of Esopus, Ulster County similarly supported the inhabitants' refusal to furnish wagons for the use of the army.[67] The British commander in America was incensed by the local law enforcement's inaction against the colonials' constant shirking of duties. Pressed by the commander, the provincial council sent down orders to justices of the peace to strictly enforce the civilians' duties in support of the war.[68] Even then, magistrates like Justice Quackenbush of Kinderhook were reluctant to exact punishments according to the instructions. When the British army complained of one Van Alsten for repeatedly disobeying orders to "load carridges," Quackenbush had no choice but to have him arrested. Quackenbush immediately recommended pardoning Van Alsten from punishment "on promise of better behaviour," however, urging that he deserved mercy "in consideration of his circumstances."[69]

Justices frequently pleaded for leniency in behalf of defendants and offenders who had the community's sympathy. Justice Michael Jackson of Goshen, Orange County, for example, wrote to the attorney general in 1762 in behalf of Abraham DeWitt, who was imprisoned for "passing" counterfeit money. Jackson averred that DeWitt was known in the community as an "ignorant" but "civilized man," and that he "was led into that crime by bad company." He had not "been guilty of any material crime before this," Jackson emphasized, and all the "men of credit" in the community supported the plea to discharge him from prison.[70] Jackson apparently failed to change

[66] Abraham Yates, Jr., "Journal and Copybook, 1754–1758," Apr. 1756, *Abraham Yates, Jr. Papers*, NYPL.
[67] John Hansen to Governor Charles Hardy, Jul. 12, 1756, *New York Colonial Manuscripts*, NYSL, Box 4, Folder 9; Deposition of John Boemendal, Jul. 12, 1756, Ibid., Box 4, Folder 9.
[68] Governor Hardy to the justices of the peace of Ulster and Dutchess county in relation to their duty under warrants for impressing wagons &c for the public service, Jul. 19, 1756, Ibid., Box 4, Folder 9; Governor Hardy to the magistrates of Ulster and Dutchess Counties in relation to impressing wagons & c to be sent to Albany, Sep. 20, 1756, Ibid., Box 4, Folder 9. Leach, *Roots of Conflict*, 87–90; Alan Rogers, *Empire and Liberty: American Resistance to British Authority, 1755-1763* (Berkeley: University of California Press, 1974), 82–84.
[69] Memorandum on a complaint against the sheriff of Albany, Apr. 1758, *Kempe Papers*, Box 11, Folder 8.
[70] Michael Jackson et al. to John Tabor Kempe, Apr. 7, 1762, Ibid., Box 13, Folder 9.

the attorney general's mind, however. After some delay, DeWitt was prosecuted for the crime at the county court. As the trial approached, two locals were bound by recognizance to testify as witnesses of the crime. The two witnesses appeared at the trial accordingly, but after giving evidence to the grand jury, "through ignorance they came home before the court broak up and without their discharge." The court sued them "for non appearance," charging them a heavy fine. Once more, Jackson wrote to the attorney general, now asking to have the two men's fines abated. He agreed with them in "think[ing] it very hard to pay so much cost" when in fact they had faithfully attended the trial and given evidence, "looking upon it to be their duty." Jackson was "very much perswaded they did not leave the court out of contempt but through ignorance."[71] Whether Jackson's interposition succeeded is unknown, but his efforts must have surely been appreciated by the local populace.

In places like Cumberland County in the Green Mountain region, where New York's central authority barely reached, magistrates were especially susceptible to popular demand. Contrary to the government's expectation that the local justices would help assert New York's jurisdiction in the region against squatters, Cumberland's justices frequently condoned riotous behaviors and succumbed to the squatters' demands. Against the demand of New York creditors, for example, in 1775 Justice Thomas Chandler bowed to the Cumberland inhabitants' desire to have all proceedings on debt claims delayed until the next harvest.[72] When the New York government ordered Cumberland's judges and justices in 1770 to charge the rioters with treason, they failed to have any arrested. Claiming that the rioters were all hiding from law enforcement and repentant, the justices instead wrote to the government to recommend leniency toward the

[71] Michael Jackson to John Tabor Kempe, Feb. 1766, Ibid., Box 13, Folder 9.

[72] Thomas J. Humphrey, *Land and Liberty: Hudson Valley Riots in the Age of Revolution* (DeKalb: Northern Illinois University Press, 2004), 58; Michael A. Bellesiles, *Revolutionary Outlaws: Ethan Allen and the Struggle for Independence on the Early American Frontier* (Charlottesville: University Press of Virginia, 1993), 108.

rioters, asking that they "may be indulged to return to their houses undisturbed by prosecutions."[73] Hoping that spatially separating the justices from the people might induce them to act more like proper magistrates representing the government's authority, in 1775 the legislature passed a law specifically preventing Cumberland County's justices from conducting judicial processes in a tavern.[74] The law's lifespan was cut short by the Revolution, but it is doubtful that it would have had much effect.

Far removed from the traditional English ideal of squire as magistrate, New York's plebeian justices instead stood out for their social, economic, and political dependence. This made them susceptible to political corruption, but from the common people's standpoint, the justices' lack of independent wealth and status made them more approachable, and malleable toward the people's needs. That very same quality made plebeian justices especially problematic in the eyes of New York's Whig lawyers. The plebeian justices' expanding presence seemed to represent an alarming rise of popular justice and politics in the counties, undermining the carefully managed social order preferred by lawyers, and allowing the law to be bent according to the people's whims.

In the early 1760s, the triumvirate of Livingston, Smith, and Scott was engaged in a bitter political battle against what they perceived as tyranny from above, in the form of Colden's attempted judicial reforms. Soon, however, they became equally concerned about tyrannical forces rising from below. The social disorder during the Stamp Act crisis brought these concerns to the forefront, quashing any illusions the lawyers might have had about controlling the direction of popular political zeal. The lawyers saw the Stamp Act rioters' unruly behavior as an extension of

[73] Joseph Lord and others to John Tabor Kempe, Dec. 4, 1770, *Kempe Papers,* Box 14, Folder 1.
[74] An Act to prevent Causes being tried in Taverns by Justices of the Peace in the County of Cumberland, Apr. 1, 1775, *N.Y. Col. Laws,* V: 780.

a trend that had already been going on for some time. In their minds, the rise of plebeian justices since mid-century both represented and exacerbated the steady growth of unregulated popular enthusiasm in the province.[75] With the 1759 Five Pounds Act, the popular magistracy that had been plaguing the country gained entry into the provincial centers of New York City and Albany. The lawyers tried hard to prevent this, but to no avail. The struggle over the justices' jurisdiction was fierce, but since it took place almost exclusively within the closed chambers of the legislature, the public was largely unaware of the internal debate among the legal and political elite. That situation would change in the late 1760s, as intensified factional competition triggered a public backlash against the lawyers' political and legal initiatives.

"No Lawyer in the Assembly": Popular Politics and Anti-Lawyer Sentiment

The imperial crisis of the mid-1760s precipitated a shift of balance within New York's factional politics. The Livingston party, as noted earlier, began to lose its popularity due to their increasingly lukewarm attitude in opposing the Stamp Act. The DeLancey faction, on the other hand, had been in a subdued, disorganized state for some time since the death of their leader, before the imperial crisis opened the door to their gradual resurgence. The Livingston party was still in a dominant position during much of the mid- and late-1760s. They had the assembly under their influence since the late 1750s, and from late 1765 to 1769, they also enjoyed the strong support of the newly arrived governor Henry Moore. Popular sentiment was a different matter, however. Led by Captain John DeLancey, son and namesake of the late factional leader, the reinvigorated DeLancey party actively sought popular favor by aligning with the Sons of Liberty's militant

[75] William Smith, Jr. to Governor Henry Moore, Oct. 22, 1766, *William Smith Papers*, Box 2.

protests against Parliamentary acts.[76] The DeLancey party's radical turn starkly contrasted with the social conservatism of the leading lawyers in the Livingston party. William Smith, Jr., for example, observed that the DeLancey party's "wanting to head the mob" had made them lose all "credit" with "the weighty citizens who all disapproved of the riot."[77] What Smith and other leaders of the Livingston party clearly underestimated, however, was the growing potency of popular support in New York's politics.

The 1768 election for the provincial assembly, mandated under the Septennial Act, was the first in seven years. The DeLancey party leaders had been waiting for the moment. Recent developments had placed them in a good position to claim popular support, and they were eager to exploit this advantage in the polls. Targeting John Morin Scott, who was running for one of New York City's four assembly seats, the DeLancey party launched a vigorous negative campaign against the Livingston party's lawyer-dominated leadership. While lawyers were by no means exclusively involved on the Livingston party's side, the prominent public presence of Livingston, Smith, and Scott made it convenient to identify their party's leadership with lawyers. The DeLancey advocates claimed that whereas their party was led by merchants who contributed to the overall prosperity of the city and province, the manipulative lawyers helming the rival party pursued their own interest and that of their wealthy clients to the detriment of everyone else's. The lawyers, and by extension the Livingston party, could not be safely entrusted with the responsibility of representing the people.

The anti-lawyer rhetoric of the 1768 electoral campaign has not escaped the attention of historians. Milton Klein, in particular, argued that the DeLancey party's negative campaign was

[76] Bonomi, *A Factious People*, 230–236; Tully, *Forming American Politics*, 170–171, 250-251; Taylor, *John Watts in Colonial and Revolutionary New York*, 190-191, 241.
[77] Smith, *Historical Memoirs*, 47.

built upon a strong undercurrent of anti-lawyer sentiment that had continued since the earliest days of the colony's existence. The lawyers' growing professionalism and status in the mid-eighteenth century, according to Klein, only deepened New Yorkers' "intrinsic distrust" against them. Even while relying on the lawyers' leadership and knowledge in contests against prerogative power in the early to mid-1760s, the public regarded them with a "double vision," not quite able to shed their deep-held distrust of the profession. Hence there was always a good chance for an opposing faction to challenge the lawyer-politicians, which is exactly what the DeLancey party did in the late 1760s.[78] Although Klein elicited numerous instances of express anti-lawyerism preceding the 1768 elections, his analysis ultimately depicts the New Yorkers' anti-lawyer sentiment as part of an almost universal, "intrinsic" cultural attitude shared by many common people throughout history. In Klein's analysis, in other words, the specific social circumstances of mid-eighteenth century New York play little role in explaining the explosion of anti-lawyer rhetoric during the 1768 election.

Many subsequent studies implicitly adopted Klein's perspective in understanding the place of anti-lawyerism in New York's politics. Roger Champagne, for example, concluded that the 1768 electoral contest, including the DeLancey party's anti-lawyer campaign, was all about opportunistic competition among factions, involving few if any concrete "constitutional" issues.[79] Similarly, Luke Feder recently argued that the 1768 campaigns were largely efforts to draw upon political symbols to establish, or tarnish, the personal characters of particular candidates. Anti-

[78] Klein, "From Community to Status"; idem, "New York Lawyers and the Coming of the American Revolution." The quotes "intrinsic distrust" and "double vision" are from p. 394.
[79] Champagne, "Family Politics versus Constitutional Principles."

lawyerism was merely a long-standing "stereotype" which the DeLancey party found expedient to draw upon.[80]

To be sure, some of the DeLancey campaign's anti-lawyer rhetoric seemed to treat the danger of lawyers in politics as an essentially timeless issue, averring that the legal profession had always been inherently inimical to public interest. Looking back at the role of lawyers in English political history, for example, a DeLancey advocate reminded voters that the "blessed Parliament" during Edward the Third's time had no lawyers, whereas the notorious Charles the First was closely advised by lawyers.[81] DeLancey proponents questioned how the lawyers could be viewed as men of conscience when they always serve their clients' interests, not "law and equity." That lawyers would always "place their own interest over public interest" followed from their very profession, "where allurements to corruption are mighty and numerous."[82] Another writer shuddered to imagine what would happen "were we to entrust our liberty, and property, in the hands of the only men among us, who look upon themselves to have separate interests from the rest of the community." Lawyers were "certainly a body of people, who do not advance the great interests of a state." Rather than adding to the wealth of "the common stock," they "drew a great abundance of it for their own use," and "thriv[ed] by the miseries of others."[83]

Against such sweeping accusations, the Livingston advocates had good cause to protest that it was unjust and unreasonable "to lay it down as a maxim, that every lawyer is corrupt."[84] By bringing attention to the candidates' profession, the DeLancey campaign was trying to divert the

[80] Luke J. Feder, "'No Lawyer in the Assembly!': Character Politics and the Election of 1768 in New York City," *New York History* 95, no. 2 (2014): 154–71; idem, "The Sense of the City Politics and Culture in Pre-Revolutionary New York City" (Ph.D. Diss., Stony Brook University, 2010), Ch. 2.
[81] "The Voter's New Catechism," *New-York Journal,* Mar. 4, 1768.
[82] *New-York Journal,* Feb. 20, 1768.
[83] *New-York Journal,* Feb. 25, 1768.
[84] "To the Freeholders and Freemen of the City and County of New-York," *New-York Journal,* Mar. 3, 1768.

voters' attention from the candidates' known "abilities and integrity," which should be the main consideration in the choice of representatives.[85] "Why are we quarrelling about the immaterial circumstance," the Livingstons questioned, "whether he be a merchant or a lawyer, a churchman or Presbyterian, that represents us?"[86]

The DeLancey anti-lawyer campaign might have indeed been driven by the narrow objective of tarnishing John Morin Scott's character, but it went far beyond simply invoking generic stereotypes about lawyers. New York's social and legal changes of the preceding decades had created specific anxieties and grievances over the growing power of lawyers, and the DeLancey campaign focused on arguments that would resonate with those particular concerns. As one of the DeLancey propagandists tried to make clear, their claim was not "that *no* lawyer can in *any* place be a proper representative of the people." What they sought to establish, instead, was that "it would be the highest imprudence" to choose any lawyer as a representative "in *this* place under its present circumstances."[87] Over a series of pamphlets and newspaper essays, the DeLancey campaign brought up an array of points which could be gathered under three heads—the lawyers' (lack of) commitment to protecting provincial rights; legal professionalization's impact on the accessibility of law; and the suitability of lawyers as legislators.

As anyone with passing knowledge of New York's politics would have easily predicted, the DeLancey party lost no time in invoking the Livingston lawyers' equivocation during the Stamp Act crisis. Obviously assuming that the public was well aware of their own outspoken opposition against the act, the DeLancey party highlighted the contrasting stance of the lawyers

[85] "To the Freemen and Freeholders of the City and County of New-York; and to Every Friend to Liberty, *New-York Journal*, Mar. 3, 1768.
[86] "The Farmer's Letter, No. 12, must be deferred till another opportunity, to make room for the following Address to the Public," *New-York Gazette*, Feb. 29, 1768.
[87] "Remarks on a Piece with 17 Queries, publish'd in Mr. Parker's Gazette of Monday February 15, 1768, are humbly recommended, by a sincere friend, &c.," *New-York Journal*, Feb. 26 & Mar. 1, 1768.

during the crisis. The lawyers were criticized for not continuing business in defiance of the Stamp Act, as the Sons of Liberty had demanded. The lawyers' passive and irresponsible boycott was blamed for exacerbating the suffering of both creditors and debtors during the time. Even their most conspicuous contribution—drawing up petitions protesting the act—was belittled as something which could have easily been done by others.[88] In sum, the lawyers showed "a surprising unconcern, indifference, and backwardness of meddling, when the most important interests of their country, were at the most dangerous crisis."[89]

The DeLancey party wanted to make sure, however, that their campaign against the Livingstons would tap directly into the heart of New Yorkers' antipathy toward lawyers. Well aware of the widespread discontent with provincial courts, the DeLancey campaign sought to associate every disagreeable aspect of the court system squarely with the lawyers. One of their main points was that under the lawyers' influence, law and equity had become virtually inaccessible to most ordinary people. The first problem was expense:

> The monstrous exorbitancy of lawyers fees, and court charges, is a matter so well known, and so severely felt, that it is needless to enlarge upon it here. It is necessary for the interest of the province, that there should be laws to reduce these fees, to establish an equitable proportion between the service to be done, and the sum to be paid for it; also to regulate the practice of the law, so that nothing may be charged but what is actually done, and nothing done but what is just and necessary, that no person may be put to needless expence in the defence or recovery of his property, and that our courts of justice may afford us that general security and advantage, which was the original design of their institution.[90]

[88] "John A Nokes versus Tom A Stiles, or Queries against Queries," *New-York Journal*, Feb. 20 & 25, 1768.
[89] "Remarks on a Piece with 17 Queries," *New-York Journal*, Feb. 26 & Mar. 1, 1768.
[90] Ibid.

The law should provide the people with an affordable means to secure their property, but New York's lawyers had made that nearly impossible. The DeLancey campaign correctly pointed out that the great expenses in courts owed not only to the exorbitant fees charged for each category of service, but also to the lawyer's procedural manipulations.[91] The only remedy against this was legislative action. The fees should be closely regulated, and a "reformation of the proceedings" should be imposed upon courts so that only "just and necessary" processes could be made and charged for. "If you choose lawyers to represent you," the DeLanceys warned voters, "they will never suffer any effectual law to pass for this purpose."[92]

Lawyers had made the law inaccessible also by effectively changing its content. From the lawyers' perspective, of course, they were simply trying to bring provincial legal practice closer to that of the mother country. To the many ordinary New Yorkers who expected that the common law should roughly correspond with their common sense and communal custom, however, the formal doctrines and procedures introduced by lawyers only seemed to make the law unnecessarily obtuse.[93] The DeLancey campaign adroitly appealed to this widely felt alienation from professionalized law. The lawyers were singled out as the "first men to perplex law, and make themselves work in their interpretation."[94] They had made themselves "the masters of the laws" by "warp[ing]" it "to their own interest, at the expence of all others," and by "oppos[ing] every attempt to render [their] practice less vague and dangerous."[95] They were the ones who kept "the law lock'd up, so that we can get no benefit from it without paying them for it."[96]

[91] See Chapter 6, pp. 289-291.
[92] "Letter from New-Jersey, February 19th, 1768," *New-York Journal*, Feb. 25, 1768.
[93] See Chapter 5, pp. 249-255.
[94] "Letter from New-Jersey," *New-York Journal*, Feb. 25, 1768.
[95] "From the White-Hall Evening-Post," *New-York Journal*, Feb. 26.
[96] "The Voter's New Catechism," *New-York Journal*, Mar. 4, 1768.

Despite their opponents' obvious superiority of legal knowledge, the DeLancey camp's essayists did not shy away from challenging the lawyers on the level of legal philosophy. "One great fault that gentlemen of the law have been observed to be extremely liable to," one essayist boldly proclaimed, "is the laying a greater stress upon the formalities of judicial proceedings, than upon the reason and spirit of the law." The writer's criticism of formal law was unabashedly grounded in an egalitarian construction of human faculty and natural law: "The faculty of reasoning, is a gift that we know comes immediately from god, It will never mislead those that honestly, diligently and carefully use and improve it,—It is the dernier resort in all difficulties, it is the test of all pretentions, it is the law of laws."[97] In a similar vein, another wrote that "it must ever be the constant wish of a people that the laws should be made as full and plain as possible, because the safety of their persons and their properties must ever depend on the clear comprehension of their own rights." Contrary to this wish, lawyers constantly complicated the law, reveling in its "glorious uncertainty."[98]

The Livingston lawyers, of course, had plenty of learned arguments against such "grossly ignorant" conceptions of law. Responding to the plain legal philosophy espoused by the DeLancey propagandists, the Livingston advocates lectured that "when we speak of the law of reason, and the municipal law of a nation, we speak of two different things," and that within the particular jurisdiction of a nation, there was an unavoidable "necessity to deviate in numerous instances, from the law of natural reason."[99] In a civilized society, another writer chimed in, "human wisdom" alone could not possibly grapple with the sheer "perplexity and multiplicity of civil concerns." Hence, "the profession of the law is an honourable, and, in the hands of an honest man, a useful

[97] "Remarks on a Piece with 17 Queries," *New-York Journal*, Feb. 26 & Mar. 1, 1768.
[98] "From the White-Hall Evening-Post," *New-York Journal*, Feb. 26.
[99] *Vindication, of the Professors of the Law, in answer to the remarks on the 17 Queries* (New York, 1768).

profession." Because "the study of that profession enables them to detect all aberrations from the rules of distributive justice, and to guide the many who tho' bound by, are nevertheless under an unavoidable ignorance of the law." Connecting the argument back to the issue at hand, the writer questioned "why then should it be objected, that an extraordinary knowledge of the law, disqualifies a man for a representative? Is not the security to the public increased by that knowledge, if it be attended with integrity?"[100] One could conjecture, however, that the lawyers' elaborate arguments and emphasis on professional knowledge probably did more harm than good to their party's cause. To a large extent, such arguments would have only played into the hands of the DeLancey campaign, which accused lawyers of cloaking the law with complex, alien principles.

The common people's preference for plain principles over professionalized law was not simply due to an "intrinsic" distrust of lawyers, but due to specific changes that had been taking place in New York's courts. Legal professionalization not only made the law less accessible to the middling and lower sorts, but it also actively exacerbated their disadvantage against wealthy landlords and creditors. The lawyers' control of the courts deeply impacted the people because their deployment of expertise was often exclusively in service of the monopolistic interests of the wealthy. As one DeLancey propagandist lamented, the lawyers had "almost become sovereign masters of our persons and property."[101] The "objection against our lawyers," another emphasized, was not based on a groundless prejudice against the profession. It was rather due to "their having obtain'd an undue influence, and an almost uncontroulable power, in the exercise, use, or application of the laws;—and having used that influence and power in a manner that we think highly oppressive and injurious to the people.[102]

[100] Ibid.
[101] *New-York Journal*, Feb. 25, 1768.
[102] "Remarks on a Piece with 17 Queries," *New-York Journal*, Feb. 26 & Mar. 1.

As proof that lawyers tended to deepen the economic insecurity of ordinary New Yorkers, the DeLancey campaign invoked an incident still fresh in the public's memory—the lawyers' role in prosecuting land rioters. The Livingston campaign, in fact, advertised this as a good example of the lawyers' public-spiritedness. "Did not a number of the gentlemen of the law, when called upon in the year 1766," they asked, "generously assist in supporting the powers and authority of civil government, and in suppressing the late riots in Dutchess and Albany? Did they not chearfully leave their families and business, and serve the public with diligence and fidelity for six weeks together, without fee or reward?"[103]

Several DeLancey writers were quick to raise doubts about the lawyers' claim that they had assisted the prosecutions free of charge, but that was not their main focus, of course. Suspecting that the public was more sympathetic to the rioters than to their prosecutors, the DeLanceys asked whether "the lawyers [took] any notice of the infringement on the liberties of Noble, and all his neighbours, who were illegally dispossessed by the sheriff of Albany in 1766."[104] "The Rioters were undoubtedly culpable," the DeLancey writers admitted, but it was questionable whether they deserved such harsh prosecution as exacted by the lawyers.[105] The rioters, after all, had been driven to extralegal means because of landlords' oppression and the inaccessibility of law: "The landlords fell upon such severe methods, as drove the tenants to the disagreeable necessity of seeking redress by violent means, as the law (the only channel thro' which people aggrieved can obtain redress) was absolutely barred against them—the lawyers generally refusing

[103] "17 Queries," *New-York Gazette*, Feb. 15, 1768.
[104] "Letter from New-Jersey," *New-York Journal*, Feb. 25, 1768.
[105] "Remarks on a Piece with 17 Queries," *New-York Journal*, Feb. 26 & Mar. 1, 1768.

to take their cause in hand."[106] "Did none of [the rioters] labour under hardships," the DeLanceys questioned, "for which they were not able to obtain any Redress?"[107]

Not satisfied with appealing to popular conceptions of justice, the people's alienation from professionalized courts, and their suspicion of lawyers, the DeLancey campaign strove to channel anti-lawyer sentiment into a more solid argument specifically against having lawyers as legislators. In addition to arguing that the province's lawyers always placed their personal interest over the public good, the DeLanceys warned that the lawyers had already gained too much power both in legal and political matters. If seated in the assembly, they would "acquire a power dangerous to the welfare of the province"—a power which they would no doubt abuse to serve the interests of the wealthy landed families they were connected with. In their hands, the law and government would be turned into "instrument[s] of oppression"[108]

The Livingston party countered by underlining the value of legal and constitutional knowledge in legislative matters. Connecting legal professionalism with Whig ideology, the Livingston lawyers questioned: "Is not the power and prerogative of the crown, circumscribed and limited by the law? If so, is it possible for a man to know when the power and prerogative of the sovereign is unduly extended, and the rights of the people invaded, unless he has some competent knowledge of the law and constitution?[109] Especially during a time when provincial liberty was deeply threatened, it was imperative to have men of "knowledge, integrity, and firmness" as the people's representatives. These exceptional leaders were "the guardians who must watch with a jealous and discerning eye over our liberties; know where to mark the constitutional extent of our

[106] *A Few Observations on the Conduct of the General Assembly of New-York* (New York, 1768).
[107] "Remarks on a Piece with 17 Queries," *New-York Journal*, Feb. 26 & Mar. 1, 1768.
[108] Ibid.
[109] 17 Queries, *New-York Gazette*, Feb. 15, 1768.

rights, and persevere in the measures they may adopt for their preservation."[110] The Livingston campaign reminded the public of the lawyers' prominent role in protecting provincial rights against tyrannical governors such as William Cosby and Cadwallader Colden.[111] They also pointed out that the colony's assemblymen had already been frequently consulting lawyers on numerous matters of weight, "under a sense of their [the lawyers'] superior abilities, without hesitation follow[ing] their advice."[112]

To rebut these counterarguments, the DeLancey campaign needed something more concrete—a palpable example demonstrating the dangers of having lawyers as representatives. They focused on two examples. One was the proposed regulation of legal fees, which would never pass into law, the DeLanceys asserted, if lawyers were in the assembly. Although it was certainly a pertinent issue to many voters, the effectiveness of the example was somewhat hampered by the fact that it was mostly hypothetical. As the Livingston party correctly pointed out, legal fees in the province had been controlled by ordinances of the governor in council—it had never been a legislative matter.[113] The DeLancey party's position, of course, was that regulation of fees should now be brought into the purview of the legislature.[114] But since there had not been an actual precedent, they could not convincingly argue that a lawyer-representative would oppose such an act. They lacked concrete evidence against the Livingston campaign's claim that "the lawyers never did oppose a regulation of fees."[115] The DeLancey campaign's other example, in contrast, was a statute which already had a well-documented history in the legislature, and hence lent itself

[110] "The Farmer's Letter deferred," *New-York Gazette*, Feb. 29, 1768.
[111] 17 Queries, *New-York Gazette*, Feb. 15, 1768.
[112] "The Mirror, n. 18," *New-York Gazette*, Mar. 7, 1768.
[113] "To the Freeholders and Freemen of the City of New-York," *New-York Journal*, Feb. 20, 1768; *Vindication, of the Professors of the Law.*
[114] "Letter from New-Jersey," *New-York Journal*, Feb. 25, 1768.
[115] *Vindication, of the Professors of the Law.*

more easily to the argument that lawyers would not pursue legislation beneficial to the public. It was the Five Pounds Act.

The Five Pounds Act was still in force in 1768, but its continuation was far from certain. The current act was scheduled to expire in late 1769.[116] Unbeknownst to the public, and probably also to the DeLancey leadership, William Smith, Jr. and his cohorts were again trying to bring the act to an end. Since the act had several times survived opposition in the legislature, and had been given royal confirmation, there was a good chance that it would continue to be renewed. Hence, the lawyers decided that the only way to quash it was by the king's repeal. With the newly appointed governor on their side, this was an attainable goal. In 1766, Smith sent Governor Moore his "remarks on the act submitting civil causes to the decisions of justices of the peace." In forceful language, Smith brought back all of the points his father and the petitioning lawyers had made against the Five Pounds Act in 1758—from the "improper nomination" of justices encouraged by the act, and the predictably appalling conduct of justices thereby appointed, to the far-reaching judicial, social, and political effects of the fallen state of local magistracy. Smith concluded his message by urging that "the remedy is obvious." Somehow "good men [must] be reintroduced" as justices, while "many now in must be removed," and overall "the number of the justices [should be] greatly reduced, and their authority in civil concerns severed from the office." For all of those purposes, it was imperative to have the Five Pounds Act repealed.[117]

Taking Smith's suggestions to heart, Moore wrote to England recommending the Five Pound Act's repeal. His lengthy critique of the act was almost entirely drawn from the lawyers' invectives. Lamenting about the "low mean and despicable state" of New York's local government,

[116] Five Pounds Act of 1763, *N.Y. Col. Laws*, IV: 736-737.
[117] William Smith, Jr. to Governor Henry Moore, Oct. 22, 1766, *William Smith Papers*, Box 2.

Moore pointed to the Five Pounds Act as the "chief cause of debasing the magistracy." Following the lawyers' arguments point by point, Moore explained that the act had fostered rampant "prostitution of the commissions," which led to an influx of "low, illiterate, mean persons into the commission many of whom subsist entirely by it." Just as the lawyers had done, Moore stressed the far-reaching impact of these unqualified justices and their unruly proceedings. Sarcastically referring to them as judges, he averred that "almost every day a petty court is held by some one or other of these respectable judges and at a public house where a concourse of people [are] drawn together either as parties, pleaders, jurors, witnesses or spectators." No wonder "the common people [were] losing all that respect which was due to the commission," and were becoming accustomed to "treat with contempt those wretched shadows of magistrates which were immediately before their eyes." The commoners' habitual contempt of local magistrates, Moore warned, was beginning to undermine their subordination to authority in general. Thus, the Five Pounds Act was greatly contributing to the "weakness of the government." His conclusion, not surprisingly, was identical to Smith's. The number of justices should be greatly reduced, and many should be replaced by "abler men." None of this was possible while the Five Pounds Act was in force, however, and the assembly would no doubt refuse "to make the least alteration in it." Hence, it needed to be repealed with the Crown's authority.[118]

The DeLancey party seems to have been unaware of these behind-the-scene moves, but they nonetheless sensed that the uncertain future of the Five Pounds Act would make a good political issue. In one of the earliest pamphlets that launched the DeLanceys' anti-lawyer campaign for the 1768 election, the lawyers' longstanding opposition to the Five Pounds Act was offered as proof of "the selfishness of these wretches, and the sordid principles upon which they act." The

[118] Governor Moore to the Earl of Shelburne, Oct. 1, 1767, *Doc. Rel. N.Y.,* VII: 978-980.

act, the anonymous pamphleteer emphasized, was "doubtless designed to relieve the poor, by preventing their being put to any considerable expence, for the recovery of trifling debts." Despite the act's obvious benefit to the public, "it is notorious, that they [the lawyers] not only made all the opposition to it here [the assembly], that they possibly could, but even petitioned and remonstrated to his majesty and council, in order to prevent its passing, or to procure a disallowance of it, in case it should be passed." Only the late Governor DeLancey's timely intervention kept the act alive. Here was the concrete example that the DeLancey campaign sought—proof that the public's interest would suffer from having lawyers as legislators.

The pamphlet, which was a lengthy indictment of the assembly's recent performance under the lawyers' and landed elites' influence, concluded by citing the continuation of the Five Pounds Act as a major reason lawyers should be kept out of the assembly:

> This beneficial and useful law (which will expire in two years) we must never expected to see renewed, if any of these gentry should get footing in the house; for which reason, I sincerely hope that we may unanimously agree to keep them out of all public offices, especially those of such a nature as may put it in their power to act inconsistent with, and repugnant to, the general interest of the community.[119]

With their vigorous efforts to quash a popular act widely publicized, no doubt for the first time, the Livingston lawyers knew they had to come up with a good response. In one of the newspaper essays addressing the subject, the Livingstons tried to belittle the specific legislative issues brought up by the DeLanceys. Referring to the Five Pounds Act and the proposed "table for the regulation of fees" as "little provincial acts," the article mockingly asked: "Are these the mighty objects that have been displayed to captivate [the voters]?"[120] For the most part, however, the

[119] *A Few Observations on the Conduct of the General Assembly*.
[120] "To the Freeholders and Freemen of the City and County of New-York," *New-York Journal*, Mar. 3, 1768.

Livingston party was well aware that the small claims jurisdiction under the Five Pound Act was widely used by the middling and lower sort, and hence that it would be unwise to simply brush it away as an inconsequential statute. In other essays, the Livingston campaign was at pains to defend the lawyers' stance toward the act.

Most likely penned by the triumvirate themselves, the essays repeated the array of criticisms against the act that had been presented in the 1758 lawyers' petition and in William Smith, Sr.'s dissent. By highlighting the supposed defects and pernicious effects of the act, the lawyers strove to persuade the public that they had opposed the act "not from selfish motives," but from genuine concern for the public. In one of the few passages they newly added, the lawyers, aware of the act's popularity for supporting small book debt transactions, tried to urge the seriousness of rampant perjury that the act supposedly encouraged: "Will not the wretch who is permitted to swear you out of a book debt with impunity," the Livingstons asked, "soon be tempted to swear you out of your life too, when it stands in competition with his interest?"[121]

Compared to their earlier, strident opposition to the act within closed chambers, however, the lawyers' tone was now noticeably defensive. Even while criticizing the act, the Livingston campaign constantly emphasized that the lawyers had only been opposing it "in its present form." They had no objection to the act's intent of providing affordable legal recourse to creditors on small claims. In fact, "the gentlemen of the law, to convince the public that they were not moved in their opposition to this act from motives of interest, but a love for justice, some time ago proposed, and actually drew a bill to empower certain persons of reputation and ability in each county, to hear, try, and determine causes to the value of five pounds."[122] The bill seems to have been drawn up by William Smith, Jr. around 1766 and presented to Governor Moore, but it never

[121] "To the Freeholders and Freemen of the City of New-York," *New-York Journal*, Feb. 20, 1768.
[122] Ibid.

materialized.[123] The Livingstons vaguely suggested that the bill never gained traction because it "did not coincide with the politicks and private interest of some people."[124] It is questionable, at any rate, that the public would have preferred such a system over the enlarged justices' jurisdiction. By the mid-eighteenth century, many New Yorkers firmly associated legal professionals with high legal expenses and obtuse formal doctrines and procedures. The lower order preferred the informal lay justices' courts for a reason, although the elitist lawyers failed to appreciate it.

In another effort to persuade the public that the lawyers had never opposed the intent of the Five Pounds Act, they began claiming that their opposition had only concerned the law's operation in the counties, not in the city. This was far from true, of course. Protecting New York City and Albany from the enlarged justices' jurisdiction was one of the lawyers' major objectives in petitioning against the 1757 Five Pounds bill, a goal which they initially did achieve through the council's amendment to the bill. Behind the scenes, William Smith, Jr. had very recently tried to obtain a repeal of the act, which would have shrunk the justices' jurisdiction everywhere including in the cities. At any rate, confining their opposition against the act to the counties was an ingenious move, given that the main audience for their current campaign was voters in New York City.

The lawyers' past criticisms of the act were now refashioned as criticisms directed specifically toward the enlarged jurisdiction of country justices. Stressing the vastly different circumstances in urban and rural areas, the Livingston campaign urged that the lawyers obviously had no reason to object to keeping the act intact in the city:

> Here all the advantages intended by it may be secured, without the mischiefs that result from it to the counties. Here the justices courts are not held at taverns, in the counties they are; this encourages idleness, drinking, gaming, and often leads to perjury. Here a few people only attend the courts, the parties and their witnesses. There great numbers, and from a considerable

[123] William Smith, Jr. to Governor Henry Moore, Oct. 22, 1766, *William Smith Papers*, Box 2; Governor Moore to the Earl of Shelburne, Oct. 1, 1767, *Doc. Rel. N.Y.*, VII: 978-980.
[124] "To the Freeholders and Freemen of the City of New-York," *New-York Journal*, Feb. 20, 1768.

> distance are collected, as idle spectators. There they have not so frequent and pressing calls for money, as people have in a city, where they can neither eat nor drink without money; hence there is not the same necessity in point of convenience, for their speedy recovery of small debts. There the officers fees and those of witnesses attending from a great distance, and the very frequent trials by juries, run the costs up to between thirty and forty shillings; here I suppose they seldom or ever reach ten shillings; often much less.[125]

The problem of the justices' qualifications also lent itself well to the Livingstons' newfound emphasis on city vs. country distinctions. Whereas the corrupt nomination process had been plaguing the country with unqualified justices, "our magistrates in the city," the Livingston campaign pointed out, "are not appointed by the crown, nor under the influence of an assemblyman, but are elected by the people." While lauding the popular choice of magistrates as a bulwark against corrupt appointments, the Livingstons did not retreat from their usual emphasis on professional knowledge as the backbone of proper adjudication. Referring to the ready availability of lawyers in the city, and the fact that the current mayor was also "by profession a lawyer," they approvingly noted that "the magistrates in this city, are furnished with proper means of information, whenever they are at a loss" regarding judicial matters.[126]

Finally, the Livingston campaign tried to narrow the issue to John Morin Scott's candidacy. "The gentleman who is a candidate," they argued, "has no private interest to serve by opposing" the Five Pounds Act. Scott, as was "well known," had "long since quitted" practicing in county courts, which caseload would be primarily affected by the act.[127] Business in the Supreme Court, wherein Scott focused his current practice, was in fact greatly increased by the act, since the unqualified justices' proceedings inevitably led to the frequent "removal of causes from the justices courts into the supreme court." Hence, for leading lawyers such as Scott who practiced

[125] "The Farmer's Letter deferred," *New-York Gazette*, Feb. 29, 1768.
[126] "To the Freeholders and Freemen of the City of New-York," *New-York Journal*, Feb. 20, 1768.
[127] "The Farmer's Letter deferred," *New-York Gazette*, Feb. 29, 1768.

mostly in the city, the Five Pounds Act in fact served their pecuniary interests.[128] Through all of their carefully constructed, ingenious arguments, the Livingston campaign's intention was clear. Bowing to the public's strong support of the act, they were at pains to show "that the objection made by the lawyers to the five pound act, thus qualified, evidently arises not so much from a regard to their private interest, as to that of the public good."[129]

The Livingston lawyers' claims were not entirely driven by cynical political calculation. While their narrow self-interest as practitioners no doubt played a part in it, their opposition to the Five Pounds Act also stemmed from a particular vision of legal, social, and political development for the colony. The enlarged jurisdiction of lay justices stood directly at odds with the rational, orderly legal development which the lawyers vigorously pursued. For William Smith, Jr. and his fellow lawyers, proper legal development was key to helping the colony mature while maintaining social and political order. Demographic, territorial, and commercial growth incurred countless complex economic and political disputes. To prevent the colony from falling into tyranny or anarchy under the pressure of such problems, the firm guiding hand of the law and constitution was indispensable. For the law to properly serve its stabilizing and rationalizing role, in turn, the growth of legal professionals should be encouraged; the court's practices should be regularized under their guidance; and for weighty legal and constitutional issues, the government should frequently rely on the legal professionals' wisdom.

The law, in other words, should provide a stable core for society and polity. This was best achieved when the former was insulated from the latter's influence. New York's Whig lawyers believed that the law should develop primarily according to its own internal logic, firmly rooted

[128] "To the Freeholders and Freemen of the City of New-York," *New-York Journal*, Feb. 20, 1768.
[129] "The Farmer's Letter deferred," *New-York Gazette*, Feb. 29, 1768.

in English common law and the British constitution, and carefully tweaked only when social and political developments created an absolute necessity. In the 1758 petition against the Five Pounds Act, the lawyers stated this legal conservatism as the basic premise underlying their opposition to the act. The common law, they stressed,

> is a political fabrick raised upon the experience of ages, with such an intimate connection and correspondency of its parts, that the least alteration in either, must necessarily injure and debilitate the whole frame; and therefore no innovations on it even to be attempted, in the courts of justice, but for the most weighty reasons.[130]

If any change was necessary, as they hinted toward the end of the sentence, that decision should be made in the courts, by the bench and bar. This is why the lawyers immediately balked at the legislature's attempt to enlarge the justices' jurisdiction. The proper jurisdiction of various courts and magistrates should be set in accordance with common law tradition. Alterations in the court system, as in the Five Pounds bill, should not easily be made by assemblymen who lacked understanding of the law. "Of the scope and tendency of the bill," the lawyers stressed, "none can be such competent judges, as those whose profession leads them to a more intimate knowledge of the law."[131] This was not to deny that the legislature had the right to create statutory laws. But statutes should never be used for making a significant change in the law which could impact the carefully balanced "whole frame" of the legal system. In the terminology of contemporary lawyers, provincial legislatures should not pass any statutes "repugnant" to the common law and British constitution.[132] The determination of repugnancy, of course, should be made by legal professionals.

[130] Lawyers' Petition against the Five Pounds Act, *Journal of the Legislative Council*, II: 1324.
[131] Ibid., II: 1324.
[132] Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, Mass.: Harvard University Press, 2004), 2–7.

The Five Pounds Act's alteration of New York's judiciary system, then, was a major rebuttal of the lawyers' conception of legal development, inverting the relationship between legal change and socio-political development idealized by lawyers. Instead of keeping legal change a self-contained, carefully guided process, and letting legal stability lay the bedrock of stable social and political growth, the Five Pounds Act was an instance of politically driven legislation impacting the legal system.

The point was not lost on the DeLancey propagandists. In condemning the lawyers' opposition of the Five Pounds Act, and using it as an example of their unsuitability as legislators, the DeLanceys directly refuted the lawyers' ideal of self-contained legal change. The law, instead, should be malleable according to the people's needs and preferences. And as representatives of the people, the assembly should rightfully play a major part in reforming the legal system when necessary. "Many of the neighbouring states," the DeLancey propagandists claimed, had "made great and judicious reformations in the practice of their courts. But so needful a work has perhaps never been seriously thought of in this country."[133] Needless to say, this was due to the obstruction of lawyers, as demonstrated in their repeated attempts to obstruct the Five Pounds Act.

To discredit the lawyers' claim that their conservative stance toward legal change helped promote legal certainty, the DeLanceys insisted that experience showed the opposite to be true. The professionalization of New York's courts under the lawyers' influence had only made the law obtuse and inaccessible to any but the lawyers and their clients. If legal development was left in the hands of lawyers, the "uncertainty" of law that confounded ordinary New Yorkers would only worsen.[134] Twisting the lawyers' claim as guardians against laws repugnant to the common law and constitution, the DeLanceys called for secure measures "to prevent our representatives, for the

[133] "From the White-Hall Evening-Post," *New-York Journal*, Feb. 26.
[134] Ibid.

future, from passing any laws repugnant to the general interest." To this purpose, they proposed that galleries should be erected in the assembly room, and the public should be given free access to hear the debates of the house. That way, they could stay "well informed what bills are preparing," and "if any of them should be thought to be improper, oppressive, or inconvenient, or to have any ill tendency, they may have an opportunity to petition and remonstrate against them, before they are passed into laws."[135] The message was clear. Laws should not be created and modified by a small coterie of legal experts, but by the people through their representatives.

If the votes are any indication, the public approved the DeLancey party's anti-lawyer message. Livingston advocates retained a slim majority, but the DeLanceys succeeded in dramatically increasing their numbers in the assembly. More to the point, John Morin Scott was dealt a humiliating defeat. And while it is uncertain how much impact the DeLancey campaign had outside of New York City, it must have at least partially contributed to manor lord Robert R. Livingston's surprising loss in Dutchess County.[136] The short-lived 1768 assembly, during what turned out to be its only session, passed a bill extending the Five Pounds Act for five more years. The council approved the bill, albeit against the dissent of William Smith, Jr., who had recently replaced his father as councillor.[137] Governor Moore, in the meantime, had been advised that the king did not find repeal of the Five Pounds Act necessary, deeming a "reform in the magistracy" to be an adequate remedy to the problems cited by Moore. Firmly persuaded of the act's harmfulness, Moore nonetheless tried to keep alive his hopes of eventually quashing it. He refused to give his assent to the new bill brought up from the assembly and council, demanding that "some

[135] *A Few Observations on the Conduct of the General Assembly of New-York.*
[136] Champagne, "Family Politics versus Constitutional Principles," 68; Bonomi, *A Factious People*, 163:244–246.
[137] *Journal of the Legislative Council*, II: 1675, 1677.

alteration" be made in it to remedy the ills that had been caused by the enlarged jurisdiction of justices.[138]

The DeLancey party had no intention of letting the Five Pounds Act expire, however. For the new provincial elections held in early 1769 (occasioned by the 1768 assembly's dissolution following a standoff over the Massachusetts Circular Letter), the parties no longer focused their campaigns on anti-lawyer rhetoric, debating instead a range of issues including the Anglican church's power and resistance to imperial policies.[139] Upon winning majority in the house, however, the DeLancey party did not forget the popularity they had earned by raising the Five Pounds Act and other legal issues. Ignoring Governor Moore's demands that the act should be significantly amended to reduce the justices' powers, the DeLancey-led 1769 assembly did the exact opposite. In its very first session, it passed a new "Ten Pounds Act." As its nickname suggests, the act increased the justices' civil jurisdiction to cases of up to ten pounds' value.

The DeLancey party's bold move was no doubt based on the confidence that they enjoyed strong public support on the issue. The governor would have been the first to agree with the assessment. Following his conditional veto of the 1768 Five Pounds bill, Moore complained that "a very ungenerous as well as unjust construction was put on what I then said, and to serve a particular purpose I was represented in some parts of the province as an enemy to the bill, which I only endeavoured to render really beneficial to the country." Opposing the Five Pounds Act was an exremely unpopular move, enough to worry even the governor. This was why he had to grudgingly assent to the Ten Pounds act. As he explained to the Lords of Trade, he obviously had

[138] Governor Moore to the Earl of Hillsborough, May 26, 1769, *Doc. Rel. N.Y.,* VIII: 166-7.
[139] Tully, *Forming American Politics*, 177–180.

strong reservations against the act, "but such is the prepossession in favour of it, that I could not have rejected it without giving the greatest uneasiness."[140]

William Smith, Jr. also experienced firsthand the popular zeal in support of the act. Since the governor vetoed the 1768 Five Pounds bill right after Smith had lodged his dissent against it in the council, some blamed him for the veto: "My protest last session agt. the £5 Act," Smith later noted, "had excited instructions from a few in Queens & Westchester intimating that my influence with him [Governor Moore] had prevented the passing of the continuing bills."[141] Evidently worried that Smith's unpopular move would cast aspersions on the lawyers and hurt them in the upcoming new elections, the Livingston party published an article defending Smith's conduct. "That the public may not be imposed upon, and drawn into a belief that Mr. Smith was against a cheap and speedy relief for small causes," the author (who was perhaps Smith himself) presented a copy of Smith's reasons of dissent against the 1768 Five Pounds bill. Having presented the full contents of Smith's dissent, the author opined that "from the whole it appears that Mr. Smith is as fond of a five pound act as any other person, and that the only question between him and others is, whether the present Five Pound Act will not be made better by a removal of the objections, and a cure of the defects mentioned in his protest." The fact that Smith had actually proposed an alternative system for handling small claims was once again brought up. And finally, to drive the point further, the author claimed to "have heard Mr. Smith declare, both before and since his protest, that he was so far from opposing a summary process, that he would readily concur in a ten pound act, if the power was put under a safe and proper direction."[142] In an ironical twist that

[140] Governor Moore to the Earl of Hillsborough, May 26, 1769, *Doc. Rel. N.Y.,* VIII: 166-7.
[141] William Smith, Jr.'s dissent against the Five Pounds Act, *Journal of the Legislative Council,* II: 1677-1678; Smith, *Historical Memoirs*, 51.
[142] "Mr. Parker, a Bill was sent up by the House...," printed in New York, Jan. 10, 1769.

clearly attests to the popularity of the enlarged jurisdiction of justices, the Livingston party may have in fact been the first to publicly support a Ten Pounds Act.

Riding on the success of the anti-lawyer campaign, the Delancey party pushed further measures against lawyers. During the same session in which they passed the Ten Pounds Act, the assembly also raised the lower limit of suits that could be initiated in the Supreme Court to fifty pounds—a 60% increase from the previous ceiling of twenty pounds. The act, although generating less controversy, was driven by the same spirit as the Five/Ten Pounds Acts. It greatly increased the share of lower courts (county courts, in this case), while reducing the cases handled by professional lawyers in higher courts.[143] It also protected local litigants from a strategy that lawyers frequently deployed for wealthy clients—removing a suit to the Supreme Court. As seen earlier in several examples, lawyers used this strategy specifically when they knew that the opposing party lacked the means to procure proper legal representation and bear the costs of a lawsuit in New York City.[144] Initially, in fact, the assembly had wanted to make the lower limit of Supreme Court lawsuits one hundred pounds. That bill miscarried, inducing the assembly to settle with a more moderate restriction at fifty pounds. Lawyer Peter Van Schaack, with good reason, "look[ed] upon this bill as an effect of an almost universal clamor against the law and its practisers." Especially with the DeLancey faction controlling the assembly and actively pandering to popular anti-lawyer sentiment, Van Schaack worried that a "total destruction of the profession" might be imminent.[145]

[143] An Act for preventing Suits being brought in the Supreme Court of this Colony for any Sums not exceeding Fifty Pounds, May 20, 1769, *N.Y. Col. Laws*, IV: 1088-1090.
[144] See Chapter 5, p. 202, Chapter 6, p. 284, Chapter 7, pp. 330-331.
[145] Peter Van Schaack to Peter Silvester, Jan. 1, 1769, Henry C. van der Schaack, *The Life of Peter van Schaack: Embracing Selections from His Correspondence and Other Writings during the American Revolution and His Exile in England* (New York: Appleton, 1842), 8.

Van Schaack's consternation must have deepened a few months later, when a new act prevented Supreme Court judges from being elected as representatives in the assembly.[146] Although it did not carry, there was also discussion in the assembly about preventing lawyers from sitting in the governor's council.[147] The assembly's crusade to reform the legal system and curb the lawyers' influence, however, did not last long. The DeLancey party's narrow political motives had been behind most of those bills, and once the party secured power, they predictably began to lose interest in popular causes.[148] Most of the anti-lawyer acts—the act against Supreme Court judges as representatives, the act setting the lower limit of Supreme Court lawsuits at fifty pounds, and finally the Ten Pounds Act—were later repealed by the Crown.[149] The Assembly passed a new Five Pounds Act to replace the voided Ten Pounds Act, but did not attempt to revive the other acts.[150] The new Five Pounds Act in fact included a small but significant amendment signaling the legislature's retreat from upholding popular legal practice. With the amendment, tavern keepers were outright barred from trying civil causes as justices.[151]

Aside from keeping the jurisdiction of justices enlarged, then, the colony's legal system was ultimately unscathed by the late-1760s' anti-lawyer politics. The courts continued to operate under formal procedures, and lawyers went on to hone their professional expertise, finding fertile ground for its application in New York's courts. Neither did the Revolution significantly hamper New York's continued legal professionalization. Although quite a few notable lawyers including William Smith, Jr. became loyalists, plenty of others joined the revolutionary cause, ensuring that New York's legal system would continue to be operated by trained professionals. Prominent

[146] An Act declaring certain persons therein mentioned incapable of being members of the General Assembly of this Colony, Jan. 27, 1770, *N.Y. Col. Laws*, V: 73-74.
[147] Smith, *Historical Memoirs*, 69.
[148] Tully, *Forming American Politics*, 252–252; Countryman, *A People in Revolution*, 82, 90-92.
[149] *N.Y. Col. Laws*, IV: 1088, V: 73.
[150] Five Pounds Act of 1772, Ibid., V: 304.
[151] *Journal of the Legislative Council*, II: 1829-1830; Smith, *Historical Memoirs*, 119.

colonial lawyers such as James Duane, John Jay, and Robert R. Livingston were still able to claim leadership in legal and constitutional matters, playing a major part in drafting New York State's first constitution.[152]

Antipathy toward lawyers and professionalized law also lived on. During the Revolution, a new class of political leaders emerged, challenging the traditional ruling elite's dominance of New York's politics. These new politicians were generally from humbler social backgrounds, were ambitious and opportunistic, and were much more willing to pander to popular sentiments than the colonial elite had been. A handful of these "Clintonian" leaders, including Abraham Yates, Jr., Robert Yates, Gilbert Livingston, and Governor George Clinton, had been young local attorneys during the colonial era. Unlike prominent lawyers like Duane and Jay, however, these men were no longer committed to professionalized law. Although hardly radicals, their commitment was to the popular cause, sometimes including popular expectations of the law.[153] That stance of New York's new political leadership no doubt enabled the revival of the Ten Pounds Act early in 1787. The new Ten Pounds Act, in addition to greatly enlarging the justices' jurisdiction, added several provisions geared toward popular expectations. The act allowed litigants, by their mutual agreement, to have their cause tried without process, hence enabling them to avoid summons and warrant fees. Another provision barred litigants from hiring a lawyer for any cause under the purview of the act, thus sealing the justices' summary proceedings on small claims from the influence of legal professionals.[154]

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[152] Klein, "New York Lawyers and the Coming of the American Revolution," 403–405.

[153] Young, *The Democratic Republicans of New York; the Origins*, 39–51.

[154] An Act for the more speedy Recovery of Debts to the Value of Ten Pounds," Apr. 17, 1787, New York (State) and Thomas Greenleaf, *Laws of the State of New York: Comprising the Constitution, and the Acts of the Legislature, since the Revolution, from the First to the Fifteenth Session, Inclusive* (New York: Printed by Thomas Greenleaf, 1792), 445–454.

The Power to Change the Law

New York was not the only colony that expanded the lay justices' jurisdiction, or had controversies over it. "For the more easy and speedy recovery of small debts and damages," Georgia's legislature expanded the summary jurisdiction of justices to ten pounds in 1756. New Jersey's legislature passed a similar act in 1769.[155] That the New Jersey act went through similar debates as in New York is hinted in a letter from a "tradesman of New-Jersey," printed in the newspapers in late 1771. The anonymous tradesman, who explained that he "necessarily contracted many debts" due to the "great scarcity of circulating cash," recounted his contrasting experiences in the court of common pleas and in a justice's court. In 1769, he was sued for three separate debts in the court of common pleas. Although the amount of each debt was rather small, each between seven and ten pounds, and although he readily satisfied the debt and interests upon being sued, he ended up paying costs almost commensurate to the principal he owed. The bills of costs of the three debt cases, which altogether came up to more than twenty pounds, were calculated by lawyers representing the creditors. When asked about the exorbitant charges, they answered that the costs were correctly assessed "according to the table of fees."

The following year, the tradesman was sued for another small debt of about nine pounds, but this time it was before a justice of the peace. He quickly confessed judgment after being summoned by the justice, who informed him that he was legally entitled to "three months stay of execution." When the tradesman finally paid the debt toward the end of the generous three-month extension, his costs still came up to a mere three shillings and three pence. Amazed, he asked the

[155] Joseph H. Smith, "Administrative Control of the Courts of the American Plantations," *Columbia Law Review* 61, no. 7 (1961), 1226 n. 77; Georgia (Colony) Council, *Journal of the Upper House of Assembly, January 7, 1755, to March 12, 1775, Inclusive; Comp. and Pub. under Authority of the Legislature by Allen D. Candler.* (Atlanta, Ga: Franklin-Turner Co., 1908), XVI: 433; Gov. Franklin to the Earl of Hillsborough, Mar. 10, 1772, New Jersey Historical Society, *Documents Relating to the Colonial, Revolutionary and Post-Revolutionary History of the State of New Jersey* (Newark, N.J., 1880), X: 333; William Nelson and A. Van Doren Honeyman, *Extracts from American Newspapers, Relating to New Jersey, 1704-1775.* (Trenton, N.J., 1894), 596 n. 1.

justice "why all my creditors had not been so kind as to" sue him at a justice's court, upon which the justice explained that the Ten Pounds Act did not exist at that time. The tradesman borrowed a copy of the act from the friendly justice. Upon perusing it, he was "astonished that so advantageous a law had not been passed almost as soon as the colony was settled," and was certain that "not a man in the colony could dislike it." The justice told him he was mistaken, as "all the gentlemen lawyers disliked it." The "attornies," the justice explained, "thought it [ten pounds] too large a sum to trust a single magistrate with." The justice agreed with the tradesman, however, who opined that the act's provision for jury trial and appeals against the justices' decisions surely offset any concerns of arbitrariness. The justice added that fewer than one in twenty debt cases brought before him proceeded to a costly trial, as "generally the defendant acknowledged the debt, confessed judgment, took the benefit of the law, by staying execution three months, otherwise paid the debt and costs."

The tradesman concluded his letter by exhorting "every freeholder and inhabitant in this province, to join unanimously with me, and heartily petition the Governor, Council and Assembly at their next session" to revive "this excellent law" which was soon to expire.[156] The style and content of the letter leads one to suspect that the tradesman's character and story might have been entirely fictitious. Even if it was a carefully crafted piece of fiction to promote continuation of the Ten Pounds Act, it clearly suggests that the move to enlarge the justices' civil jurisdiction, just as in New York, hinged upon popular antipathy toward professionalized courts and lawyers, and the widespread preference of informal summary jurisdictions as an alternative.

In the Carolinas, small farmers in the Regulator movement expressed similar sentiments and demands about the law during the late 1760s. One of the South Carolina Regulators'

[156] "A Tradesman of New-Jersey," Aug. 15, 1771, Nelson and Honeyman, *Extracts from American Newspapers, Relating to New Jersey*, 576-578.

grievances was about the "slowness of law proceedings and expences thence arising" in the courts due to the "chicanery of lawyers." Given the way "proceedings at law are now managed," they complained, "poor persons have not money to answer the cravings of rapacious lawyers." One of the remedies they demanded was that the "length and enormous expence of law suits be moderated" through regulation, and that "some subordinate courts" consisting of justices and freeholders be erected in each parish to try "small and mean causes, and other local matters." The Regulators further wanted to ensure that these lower jurisdictions would be free from professionalized law, and that the legislature would support the continuation of those jurisdictions. Hence, they demanded "that no attorney be put into commission of the peace and that their number be limited in the common house of assembly."[157] Similarly, the North Carolina Regulators called for a regulation of the lawyers' fees, along with an expanded lower court committed to popular notions of justice. They demanded "that all debts above 40*s*. and under £10 be tried and determined without lawyers, by a jury of six freeholders, impaneled by a justice, and their verdict be enter'd by the said justice, and be final judgment."[158]

It would be intriguing to see how popular demands about the law circulated among the North American colonies and across the Atlantic. There are few if any such studies, however, and no evidence has been found pointing to any external influence upon the New Yorkers' anti-lawyerism and demand for enlarged justices' jurisdictions. In the absence of such evidence, it may be conjectured that the similar patterns emerging in several colonies owed to similar internal changes their societies were undergoing in the eighteenth century. Legal professionalization was no doubt a major common factor. The commoners' antipathy toward professionalized law evident

[157] "Remonstrance of the Back Country," Nov. 1767, Jack P. Greene, ed., *Colonies to Nation, 1763-1789* (New York: McGraw-Hill, 1967), 99-105.
[158] Petition of Anson County, Oct. 9, 1769, Ibid., 105-107.

in New York and elsewhere was not simply due to an inherent distrust of lawyers. Their grievances against the law, and alienation from it, stemmed from specific social and legal developments. With good reason, they began to see professionalized law's exclusive accessibility to the wealthy as a major factor deepening socio-economic inequality. Hence, their demands were essentially about making the law more open. One way to do this was by making professionalized law more affordable through regulation of fees, and another was to reduce the influence of legal professionals, leaving a larger part of adjudication in line with popular understandings of the law. Perhaps common people in New York, New Jersey, and the Carolinas had heard of each other's initiatives. Or perhaps they had separately reached similar conclusions.

If New York's case corresponded with a broad pattern of socio-legal change found in many early modern societies, it also had its peculiarities. By the mid-eighteenth century, New York probably had one of the best organized and self-confident groups of legal professionals in North America. They had a sprawling network ensuring that professionalized law would penetrate into every part of the colony, a more or less clear internal hierarchy, and a leadership with strong commitment to legal professionalism. Most importantly, they had an agenda—a particular vision of legal, social, and political development for the colony. Not all lawyers shared this vision, but enough leading lawyers were passionate about it to justify the public's associating the profession as a whole with that vision. Blending Whig ideology, enlightenment ideas, and legal professionalism, New York's leading lawyers envisioned a rational, balanced, orderly development of society and polity grounded upon professionalized law's stable support. The New York lawyers' socio-legal vision gave them a powerful means both to idealize legal professionalization, and to legitimate the lawyers' social and political leadership.

Many ordinary New Yorkers, however, found it hard to agree with the lawyers' idealization of professionalized law. The more legal professionalization brought the middling and lower sorts into closer touch with the lawyers' practices, in fact, the stronger their antipathy grew. In part, this was simply because many formal doctrines and procedures seemed alien to the commoners, clashing against communal modes of dispute resolution and customary norms of land and credit usage. It was the perception that those alien doctrines and procedures were always invoked in the interest of the few against the many, however, that led to widespread grievances against professionalized law. Overall, that perception was hardly unwarranted. Despite the vast economic opportunities available in the growing colony, small farmers, tenants, artisans, and laborers often found economic competence and security an elusive goal. Quite often, it was the wealthy landowners' and creditors' monopolization of land and capital that left commoners with few opportunities of economic betterment. Professionalized law was almost always behind the economic elite's privileged profit pursuits. In a symbiotic relationship with the elite's expanding commercial ventures, late colonial New York's lawyers developed an impressive arsenal of professional expertise that could effectively support those ventures.

Aggrieved commoners sometimes resorted to extralegal means in order to assert their notions of justice and equity. Neither forceful resistance against the law, or evasion of it, however, was able to significantly alter the unequal socio-economic structure. Whether through prosecution or forceful subjugation, legal professionals and the governing elite would simply not allow that to happen. Clearly, New York's increasingly rigid, exclusive legal and economic order could not be changed from within the legal system. The only possibility of change, then, lay in politics. New York's oligarchic political system was hardly egalitarian either, of course. But the chronic factional competition among the elite occasionally created small openings for popular input, whenever the

factions felt the need of popular support in order to secure power. The Five Pounds Act was a small but not insignificant change in the legal system that was made possible by New York's oligarchic, but occasionally accessible, politics. The lawyers had many reasons to dislike the act from the outset. The lay justices' informal, community-based operations were antithetical to the professionalized legal system promoted by lawyers, and the justices' susceptibility to popular demands undermined the lawyers' vision of firm, immutable law as the foundation of socio-political stability. The common people's strong support of the lay justices' enlarged jurisdiction showed that they did not buy into the lawyers' idealization of professionalized law.

By attempting to quash the Five Pounds Act, the lawyers unwittingly invited an open backlash against their entire agenda of provincial legal and social development. The justices' small claims jurisdiction was of course just one of many pressing issues regarding the future of New York's law and society, but due to its wide usage and the lawyers' strong denigration of it, it briefly became a central campaign issue in one of New York's most contested elections. During the late 1760s electoral campaigns, the DeLancey party brought to surface a fundamental question that had always been latent within the struggle over the Five Pounds Act. The question was not only about what type of laws should be made. As the DeLanceys realized while trying to argue against having lawyers as legislators, the question was also about who should have the power to change the law. Throughout the eighteenth century, New York's lawyers had steadily turned the judiciary into a closed system free from alterations triggered by political or popular demands. They were largely successful in imposing their idea that changes in the legal system could only be made strictly in accordance with the common law and British constitution, as interpreted by provincial judges and lawyers. The creation and continuation of the Five Pounds Act repeatedly challenged this legal

conservativism, by implicitly insisting that legislative action reflecting the people's desire should be allowed to shape the direction of legal change.

Following Independence, Americans continued to struggle over the question of who should have the power to direct legal change. The creation of new constitutions brought the question to the fore, especially as the legislature's power was greatly enlarged in many states. New Hampshire was one of those states, where the legislature was seemingly given near-unlimited power to shape the judiciary system. The state's legal profession soon challenged that power, however. The challenge was initiated by several lawyers and judges in one of the county courts, against a recently created Ten Pounds Act. When a lawyer appealed against a local justices' decision by questioning the act's legality, the bench of the county court took this bold question into serious consideration. With English common law and the British constitution no longer the central reference points, New Hampshire's legal professionals turned to their state constitution as the grounds for controlling legal change. Assuming a power that would later become known as judicial review, the judges upheld the lawyer's objection, proclaiming that the Ten Pounds Act was "against the express letter & spirit of the said [state] constitution & against the law of the land." The legislature initially tried to protect the act, but with other county courts following suit, overturning local justices' decisions on the grounds that the act was unconstitutional, finally gave in to the legal profession's pressure and repealed it.[159]

The most momentous contest over the power to change the law took place over the creation of the Federal Constitution. Among the "vices" in state governments which James Madison and other nationalists sought to offset by creating a powerful central government, was the "multiplicity"

[159] Richard M. Lambert, "The 'Ten Pound Act' Cases and the Origins of Judicial Review in New Hampshire" (M.A. Thesis, University of New Hampshire, 1985).

and "mutability" of the state laws.[160] The nationalists were well aware, however, that the state legislatures' broad exercise of law-making powers, including the power to shape the judiciary, was based on popular support. Shays' Rebellion had just given them a vivid example. The Shaysites' forceful demands (which included the creation of a small claims jurisdiction run by justices) had compelled the Massachusetts General Court to create new legislation altering their judicial system.[161] New York's legal elite, of course, had already seen such developments before the Revolution. No doubt with the Ten Pounds Acts of New York and New Jersey (where he had relocated to) in mind, William Livingston despaired in 1785 at the increasingly uninhibited power of the people to distort the legal system through their representatives.

> ...For whom this revolution? Alas! Let us consider our late veneration for the laws of England relative to the security of property ... Let us consider our veneration for their government and constitution tho' we reprobated the mere administration of it. Let us consider that in framing our system of government we intended to render perfect security & property if possible, still safer, ... & After this let us consider that we have ... so totally annihilated our late best laws for personal property, that according to our ... operation of them there is little or no security in them, that we have transformed our Courts of Justice from well-calculated interests for recovering our honest debts into engines of chicanery & delay to keep us out of them; & not instead of the virtuous Republican revering law, & being submissive to [its] authority, law is perverted into licentiousness, & obedience to superiors, means universal Levellism.[162]

Livingston and the nationalists would succeed in curbing popular "licentiousness" by creating the powerful federal government they desired. The courts also began to regain independence from legislative influence, rendering the law less mutable, as legal professionals preferred. Both federal and state judiciaries, in fact, would begin to assume greater de-facto law-

[160] James Madison, "Vices of the Political System of the United States," Apr. 1787, Greene, *Colonies to Nation, 1763-1789,* 517.
[161] Claire Priest, "Colonial Courts and Secured Credit: Early American Commercial Litigation and Shays' Rebellion," *The Yale Law Journal* 108, no. 8 (June 1999): 2414-2415.
[162] William Livingston, "For Whom our Revolution?," ca. 1784-85, *The Papers of William Livingston* (Trenton: New Jersey Historical Commission, 1979-1988), ed. Carl E. Prince et al., V: 455-59.

making powers, often in order to facilitate large economic enterprises.[163] New York's small claims jurisdiction of lay justices would remain in force for several more decades, but the controversy and popular energy it once awoke was long forgotten. In new contexts and with new languages, however, people would continue to challenge their legal system's exclusiveness, demanding that the law should be brought closer to their needs and expectations.

[163] Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977).

CONCLUSION

Legal professionalization in late colonial New York was a contested social process. It was driven by lawyers and wealthy clients who saw professionalized law as an effective means to secure privileged status and private economic gain. Predictably, other New Yorkers were less enthusiastic about the direction of legal change pursued by trained lawyers and judges. For those who did not welcome the growing dominance of formal doctrines and procedures in provincial courts, the individual justice's court stood out as one of the last remaining areas of provincial adjudication untouched by professionalization. The perception was shared by the colony's lawyers, although they were less sanguine about the distinctive informality of local justices' courts. Condemning most justices as utterly incompetent, lawyers tirelessly warned about the far-reaching pernicious effects of their irregular proceedings. New York's justices of the peace did incur numerous complaints of arbitrariness, ignorance, and partiality from litigants. Close examination of the complaints, however, suggests that the justices' difficulties were primarily due to the social context of the disputes and the limitations of the overall legal system. Litigants brought deep-set disputes stemming from competing property claims and ethnic and religious rivalries, many of which were not only difficult to resolve to the disputants' satisfaction, but strictly speaking, also lay beyond the jurisdiction of individual justices. Many justices nonetheless strove to find equitable resolutions to such thorny disputes.

The most important contribution of lay justices to New York's legal system, however, was in the small claims jurisdiction. New York's middling and lower sorts especially made strong use of justices' courts for litigation on small book debts. Creditors preferred justices' courts over county courts for the formers' proximity, ready availability, and speedy processes. Justices gave

creditors affordable and accessible legal recourse, thereby enhancing the security of informal book debt transactions. The act was beneficial to most debtors too, as justices' courts incurred much less cost than the higher tribunals, and were typically more lenient toward debtors. To a large extent, the lay justices' successful handling of small claims owed to their distinctively informal and flexible proceedings. Justices helped litigants avoid unnecessary court fees, encouraged them to reach out-of-court settlements, and collected and relayed money on behalf of litigants dispersed in remote towns.

Closely intertwined with the New York justices' enlarged role in small debt litigation was a shift in their social composition during the mid-eighteenth century. The haphazard process of New York's provincial commissions enabled the emergence of numerous plebeian justices of the peace—men lacking in education and socio-economic standing, and far removed from the traditional Anglo-American ideal of weighty local figures as magistrates. The justices' enlarged civil jurisdiction under the Five Pounds Act, as the colony's lawyers correctly perceived, furthered the dominance of plebeian justices by making the office burdensome to men of wealth and status. Due to the straightforward and personal nature of local credit transactions underlying most small claims, however, plebeian justices were in fact well-suited to handle them. Conscious of their unstable positions and economic standing, plebeian justices served these myriad small debt cases with particular attentiveness to the people's legal needs.

The strong persistence of informal practices in the small claims jurisdiction did not mirror developments in other areas of New York's legal practice. In higher tribunals including the county courts and provincial Supreme Court, formal doctrines and procedures based on English common law played an increasingly central role in court proceedings. The transition was led by legal professionals. In the early eighteenth century, a handful of trained lawyers and judges based in New York City began to centralize the colony's legal practice. Having regularized the practice of

the highest courts in New York City, their next mission was to bring local courts to similar standards of professionalized practice. Significantly boosting that initiative was the emergence of numerous local attorneys in the mid-eighteenth century. Typically young, aspiring men who had recently entered the profession, local attorneys were instrumental to the gradual professionalization of local courts throughout the colony. The active networking and collaborations between local attorneys and New York City's legal elite solidified the professional community of provincial lawyers and enhanced their collective influence. New York's lawyers were thereby empowered to push forward their vision of provincial legal development, in which they would assume a leading role in creating provincial legal knowledge and shaping the court's practices.

By the last decades of the colonial period, the impact of legal professionalization was felt in every area of New York's local adjudication, including those that traditionally functioned as communal modes of dispute resolution. Aside from their handling of small claims, justices of the peace were under mounting pressure from legal professionals to conform to uniform procedures and rules. Lawyers, moreover, helped litigants circumvent or challenge local justices' rulings, thereby undermining the justices' legal authority. Jury trials were also heavily affected by lawyers, who were adept at altering the composition of juries and restricting their autonomy in forming decisions. Under the lawyers' influence, jury trials gradually lost their community orientation. So did arbitration. No longer grounded in personal relationships and communal sanction, arbitration in late colonial New York became highly formalized affairs which processes and outcomes were dictated by professionalized law. Legal professionalization also undermined the town corporations' power to manage communal resources. With lawyers insisting on the preeminence of uniform legal rules over communal decisions, townships lost the ability to regulate the self-interested behavior of inhabitants or protect common resources from outsiders. By circumscribing

irregular, localized practices, lawyers purported that professionalized law conferred uniformity and predictability on the province's overall legal practice. For many ordinary New Yorkers, however, legal professionalization only engendered confusion and dissension. Disrupting the local communities' means of equitable dispute resolution, professionalized law determined cases with doctrines and procedures alien to most laypeople, and aroused widespread suspicion that it solely benefited those who could hire lawyers.

Those suspicions were well grounded. The bulk of the provincial lawyers' business was in supporting the commercial enterprises of wealthy clients. Lawyers helped land speculators in every step of their contentious land grabs. They assessed the value of land and the validity of conflicting land titles; helped clients obtain patents and protected their claims from other speculators; interpreted a variety of land documents in ways that would bolster their clients' claims; and strategically manipulated court processes to give clients advantages in legal contests. For wealthy landowners and merchants with the capacity to lend money, lawyers helped them do so for profit. They devised and enforced legally binding terms that secured the creditors' recovery of debts along with interest, penalties, and mortgaged property. Whenever they were involved in lawsuits, lawyers' procedural manipulations on behalf of clients escalated the already substantial court fees and attorney's fees. The prohibitively high legal expenses, however, only made professionalized law more attractive to wealthy landowners, speculators, and creditors seeking to monopolize opportunities for economic gain. The law's exclusiveness ensured that they would enjoy a significant competitive advantage over anyone else seeking to profit from the same opportunities.

By no coincidence, professionalized law frequently clashed with ordinary New Yorkers' uses of land and credit. Many small farmers, tenants, artisans, and laborers expected the legal system to uphold popular notions of equitable land and credit usage. They believed that

interpersonal obligations, communal customs, long residence, and improvement of land through labor gave entitlement to landownership or stable tenancy. They also held that debtors reputed to be stable, productive, and trustworthy members of the community deserved some degree of leniency. Lawyers were frequently hired by wealthy landowners and creditors for the very purpose of circumventing communal norms regarding the use of land and credit. With the support of professionalized law, landlords could impose stricter and more exploitative lease terms upon tenants; land speculators could push out small farmers with competing claims by defining them as squatters; and wealthy creditors could employ harsher methods such as distraint to profit from their loans. Some New Yorkers fought back by forcefully resisting eviction and distraint, assaulting surveyors and law officers, and helping rioters evade law enforcement. Such defiant extralegal actions were spurred by a widespread perception that legal professionalization had turned the law into an exclusive and oppressive tool of the wealthy. Ordinary New Yorkers were aggrieved against a legal system which, in order to facilitate the economic elite's privileged appropriation and profitable use of land and credit, deprived the people from opportunities of economic betterment and exposed them to further economic insecurity.

New York's oligarchic political system was also an exclusive domain of the wealthy and powerful, but it was less rigid compared to the colony's professionalized legal system. Competition between political factions occasionally allowed popular demands to surface into public discourse and even affect provincial legislation. The Five Pounds Act, which greatly enlarged the civil jurisdiction of lay justices, was a product of the political factions' competition for popular favor. Lawyers, however, staunchly opposed the act from the outset. Not only did they detest the lay justices' unprofessional practices, but they were also deeply troubled by the plebeian justices' willingness to pander to popular demands. Both the justices' compliance with popular legal ideas and the legislation that bolstered that propensity of the justices, the lawyers understood,

had broad implications beyond their immediate impact on the legal system. New York's leading lawyers had developed a conservative vision of legal and social development, in which the law would serve as a stabilizing force for the steady maturation of the colony's social and political order. In order to realize that vision, the provincial legal system had to be insulated from political influence, instead carefully managed by legal professionals with a deep understanding of English common law and its applicability in the province. The popular support of the Five Pounds Act and the strong response to the DeLancey party's anti-lawyer electoral campaign in the late 1760s showed that many ordinary New Yorkers repudiated the lawyers' vision of legal and social development. They desired, instead, a more inclusive legal system in which ordinary people would have a larger say in shaping the laws that affected their daily economic lives. For the most part, that dream was not realized. Its legacy lived on, however, in the enlarged jurisdiction of lay justices, and in the continuing debates about who should have the power to change the law.

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