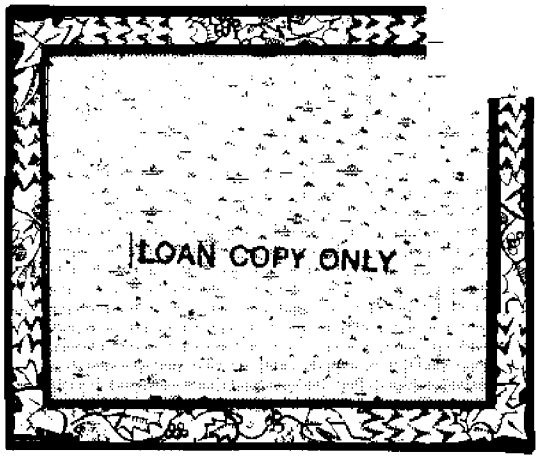

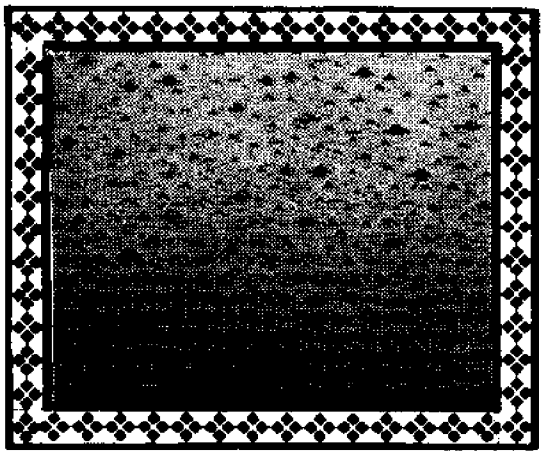

VANISHING TIDELANDS:

Land Use and the Law Suffolk County, NY 1650-1979

W. Keith Kavenagh

VANISHING TIDELANDS

LAND USE AND THE LAW

IN SUFFOLK COUNTY, NY 1650-1979

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The arrangement, description, and analysis of the historical and legal materials is solely the work of the author. Any faults or shortcomings found therein must be blamed on him alone. This also holds true for the maps that accompany the text; they will never win prizes in cartography, but they are sufficient unto the ends desired.

Special thanks to Bruce Kantrowitz for overseeing this project, to Marjory Scarlet Simmons and John Dana for their editorial tenacity in correcting my errors, to illustrator Judith Cornes for reworking and making legible my hand-drawn and traced originals, and to Alice Masella for word processing the manuscript.

W. Keith Kavenagh

Bayport, New York
August, 1980.

INTRODUCTION

Long Island's wetlands have existed for only a brief span of years, geologically speaking. For centuries the waters of the sea advanced too rapidly from their low point some 20,000 years ago to permit the formation of marshes. Only within the last 3,000 years has the rate of sea level rise slowed to approximately 4 inches per 100 years and allowed marshes to develop along the shoreline (1). It is likely, therefore, that the earliest generations of Indians who settled on Long Island witnessed the birth of these marshes, but neither they nor their descendants influenced marsh growth and development. Their aboriginal level of technology and lifestyle precluded any destructive human encroachment on the marshes, except possibly in more recent centuries when those living in the Southampton-Easthampton area occasionally dug a "seapoose" or opening, to drain small landlocked bodies of water adjacent to the ocean.

At one time, then, and for many centuries, Long Island's coastline probably contained many more thousands of acres of marshland than exist today. As recently as 1954, 20,590 acres were counted. Less than 20 years later, in 1971, only 10,834 of them remained--a loss of 47.3 percent. Table 1 clearly shows just how precipitous the decline in acreage has been in recent years, but gives no hint as to the reason. One must look at Table 2 for that: people. At first they numbered a few hundred. Then, as the decades wore on, they could be counted in the thousands. Today it is hundreds of thousands. And tomorrow?

The advance of the human tide over the island's virgin lands and pristine wetlands came slowly at first. The thin trickle of Indians probably amounted to no more than about 5,000 people sparsely scattered throughout the length and breadth of the island. Only with the arrival of English settlers in the seventeenth century did the environment begin to experience the brunt of human technology. Very soon after the first few hundred Englishmen began their small hamlets on the north and south forks of Suffolk County, they cleared woodlands for crops and dammed up streams for power to drive the cumbersome grist mill wheels.

For the first 200 years of English-American occupation, wetlands managed to hold their own against the human tide, which, by the mid-nineteenth century amounted to less than 50,000 inhabitants in Suffolk County. Admittedly, the number of tidal mills had increased and boatyards had been developed on a substantial scale in such ports as Port Jefferson and Sag Harbor. But the resultant loss of wetlands was minimal. Farmers continued to value and conserve the salt marsh for the grass, known to them as sedge or thatch grass, for use on their farms. Only infrequently did anyone attempt to fill a marsh to gain more grazing land or eliminate mosquitos.

The last decade of the nineteenth century witnessed the first major intrusions into wetlands areas in the county. It was then that the westernmost towns, such as Huntington, experienced an influx of weekenders and summer

TABLE 1. Acreage of Salt Meadows and Marshes in Suffolk County, 1954-71

Year	Acreage	Loss	Percent
1954	20,590*	-	-
1959	19,208	1,382	6.7
1964	17,008	2,200	11.4
1968	12,930	4,078	23.9
1971	10,834*	2,096	16.2

Note: Of the original 20,590 acres of wetlands in 1954, 9,756 acres or 47.3% were lost in Suffolk County by 1971

Source: from New York (State). Office of Planning Services Long Island Marine Wetlands (Albany, NY, 1972), using figures from NY State Department of Environmental Conservation reports.

*This figure is lower than the 12,725 acre figure given by Joel S. O'Connor and Orville W. Terry in The Marine Wetlands of Nassau and Suffolk Counties, New York (Stony Brook, NY: Marine Sciences Research Center, State University of New York, 1972). The discrepancy between the two figures very probably is the result of differences in definitions of what constitutes a wetland for purposes of each report and the on-site methodology employed by each in actual identification of wetlands acreage (Long Island Marine Wetlands, p. 8-9; O'Connor and Terry, The Marine Wetlands, p. 2-7).

Table 2. Population Growth in the United States, New York, and Suffolk County, 1698-1970

Year	US	NY	Suffolk	Year	US	NY	Suffolk
1698	-	18,067	2,679	1820	9,618,465	1,372,872	-
1701	262,000	30,000	-	1830	12,901,049	1,918,608	-
1715	434,000	31,000	-	1840	17,120,473	2,428,921	-
1723	-	-	6,241	1850	23,260,638	3,097,394	-
1727	502,000	20,000	-	1860	31,513,114	3,880,735	-
1731	-	-	7,675	1870	39,904,593	4,382,759	-
1749	1,046,000	73,448	9,384	1880	51,262,382	5,082,871	-
1754	1,485,634	-	-	1890	63,056,438	5,997,853	-
1756	-	96,775	10,290	1900	76,094,134	7,268,894	77,582
1760	1,695,000	100,000	-	1910	92,406,536	9,113,614	-
1770	2,312,000	165,007	13,128	1920	106,466,420	10,385,227	-
1774	2,418,000	182,251	-	1930	123,076,741	12,588,066	161,000
1787	2,223,000	238,000	13,793	1940	131,970,224	13,479,142	197,355
1790	3,929,214	340,120	16,440	1950	151,325,798	14,830,192	276,129
1800	5,296,990	589,051	19,464	1960	179,323,175	16,783,304	666,784
1810	7,223,787	959,049	21,113	1970	-	18,751,000	1,180,500

Sources: US Bureau of the Census. Historical Statistics of the United States, 1789-1945 (Washington, DC: US Government Printing Office, 1949); Ellis, David M., et al, A History of New York State (Ithaca, NY: Cornell University Press, 1967); Census of the State of New York for 1855 (Albany, 1857); Spafford, Horatio. A Gazatteer of the State of New York (Albany, 1813); Bayles, R.M. History of Suffolk County, New York (New York: W.W. Munsell & Co., 1882); Greene, Evarts B., and Harrington, V.D. American Population before the Federal Census of 1790 (New York: Columbia University Press, 1932).

vacationers seeking rural simplicity as an escape from New York City. By then the population of the county stood at 77,582. Within 30 years it more than doubled to over 161,000 as the normal population increase was augmented by vacationers who decided to stay. In 1940 the county contained more people than had lived in it during the entire 150-year colonial period. The trickle had not quite reached flood proportions, but it would do so in the decades after World War II.

The human tide took its toll of wetlands. When it became clear to local residents that urbanites sought ocean breezes and waterfront sites, docks for pleasure craft appeared along harbor edges. Soon the small, flimsy docks became extensive bulkhead and filled-in wharves. Keeping pace were the commercial ventures as the local economies expanded and diversified. Importation of coal and lumber and the shipment of farm produce to the city market required substantial dock facilities. All of this boded ill for the wetlands, for the prevailing philosophy of local officials embraced the concept that all land should be converted to maximum private profit wherever possible. Both state legislative action and a number of court decisions favoring private waterfront usage gave additional support to the belief that one must destroy to create.

Only within the past 15 years have voices been raised against the dominant theme of local officials and private landowners that profits preclude preservation. Local boards of trustees, whose origins date back to seventeenth century charters, still had title to all unappropriated lands within town boundaries, including many beaches, marshes, and lands under water. To them, beaches were for recreational purposes; marshes for duck hunting, private docks, or even large marinas. All of this improved business and brought in more tax dollars. Yet, others began to oppose them. Some private citizens insisted that mosquito-infested wetlands served a purpose other than promoting sales of pesticides. They claimed and then proved scientifically that wetlands make up a vital link in the food chain, that they act as storm barriers and absorb flood tides, that they are a vital component of the county's environment.

Soon lines of battle became clear and remain the same today. On one side rank the more numerous traditionalists, the trustees, town board and zoning board members, the construction trades and private property owners, who consider themselves the defenders of the free enterprise system. They firmly believe that each person knows best how to use his own land to maximize profits or for his own enjoyment and that no one can gainsay him. Their position was definitively stated in 1973 by Seymour Schutz, an Easthampton builder, who declared that "a man is entitled to the legal profitable use of his land...a land investor must see the value of his investment grow about 60 percent in five years in order to save his eroding dollar." He is supported by others who resent the attitude that "a land owner doesn't have enough good judgment to control his own land" (2). Opposing them is an increasingly articulate group that looks beyond the past and the present to some vague but increasingly more documented disaster if traditional practice continues unabated. To them, the conservationists, the preservationists, and the environmentalists, "a developer must realize that no longer is his land his castle...As a natural resource, albeit a privately owned resource, land must be used in accord with its capacities and in accord with civic and social concerns" (3).

Polarization has come quickly. It took nature almost 3,000 years to create the wetlands; it has taken man less than 300 years to obliterate most of them, much of it occurring within the last 75 to 100 years and most markedly within the last 10 years. The result has been a sharp division in the community over the question of whether to preserve what is left or continue to use the areas for whatever purpose strikes the owner's fancy--and pocketbook. The unwary caught in the preservation versus people proliferation and profits argument soon finds that obduracy replaces affability as facts are hurled defiantly against counterfacts. The same commandment that warns against discussing religion, politics, and motherhood even with close friends now includes wetlands preservation, especially with friends who own land and particularly with those whose land includes wetlands. In fact, wetlands have almost preempted the other subjects, because religion and politics merely deal with a god or whoever might be occupying the White House at the time; whereas preservation attacks one of the most sacred of sacred cows: the sanctity of private property.

The traditionalist, or proponent of "what was good enough for them is good enough for me" relies heavily on historical precedents and beliefs to bolster his claim. The preservationist relies on history only to point out past errors in judgment and practice, to warn, in apocalyptic phrases, of an environmental Armageddon, and to insist that society stop its wanton destruction of a major natural resource. The question then arises: which one is using history correctly, if in fact either one is.

Before offering an answer, based on historical inquiry into past local practices with respect to wetlands management and use, a few general assumptions can be stated. The subject of inquiry is confined to Suffolk County on Long Island, for this, the easternmost coastal area of New York State, contains the largest remaining extent of wetlands in the state that has experienced European settlements the longest. Prior to the arrival of Europeans, the Indians had an infinitesimal effect on wetlands, so that whatever human activity modified or obliterated them occurred within the last 300 years. Throughout the colonial period ownership of wetlands and lands under water remained vested in either private individuals by grant from towns or colonial governors, or in town boards of trustees who held them in trust for local inhabitants. Decisions as to use were made at the local level and the colonial provincial government did not intrude into such affairs. The same held true during the nineteenth and well into the twentieth centuries except for an occasional legislative act to encourage shellfish cultivation. Then, if one wishes to give credit or lay blame for the current conditions of the wetlands, one must look to the local communities in the county.

One assumption regarding this study must be made. Marine biologists generally divide wetlands into three categories: (1) high marshes or salt meadows, characterized by Spartina patens and associated plants, between mean high tide and the flood limits of storm and peak lunar tides; (2) the intertidal zone or low marshes where Spartina alternaflora predominates, covered by normal high tides but exposed at low tides; and (3) the shallow water zone that extends from mean low tide outward to a depth of 6 feet (4). Since the high marsh and low marsh areas were and are more easily accessible and have provided greater economic incentives for use than zone 3, even during the colonial period, the first two categories will receive the greater attention herein.

To simplify matters somewhat, certain specific areas were selected because they represent characteristic patterns of human use over a 300-year period. To attempt a historical analysis of every known wetland site in the county would have been an endless task bordering on the ridiculous. The criteria of selection, if they can be called that, reduced themselves to the following. The most direct and immediately fruitful approach would be to work backward from the present or from the known to the unknown. Sites would be chosen on the basis of clear evidence of definite characteristics that made them appear to be discrete examples and prototypes. Thus, one would look for present or known former wetlands areas that could be ranked on a scale from complete obliteration and creation of an artificial, man-made condition to one in which the wetlands characteristics dominated despite the presence of humans in the immediate vicinity.

Using this rather unscientific and quite intuitive approach, the following areas were chosen.

1. Huntington Harbor, Huntington. Formerly a shallow, sheltered harbor with extensive marshes at its head; today there is little evidence of wetlands. The harbor has been dredged a number of times; private and town-owned marinas line its shores in boat-clogged cohabitation with yacht clubs and a few private homes.

2. Fresh Pond on the boundary between Huntington and Smithtown. Almost cut off completely from Long Island Sound, it has been in private ownership since the seventeenth century. Although there is evidence of past commercial activity because of the nearby clay deposits, it has remained relatively untouched. Today, it is surrounded by a few private owners.

3. The site of the Long Island Lighting Company nuclear power plant at Shoreham, a marsh-beach area that was left relatively untouched until two or three years ago.

4. Indian Island County Park, Riverhead, consists of wetlands, lake, and upland between Terry and Sawmill creeks. At one time privately owned for agricultural purposes and later a duck farm, it is now a public park insuring some protection of wetland areas.

5. Wickham property in New Suffolk, Southold Township, in private ownership since the seventeenth century, consists of marsh, creek, and meadow areas. Formerly incorporated into a large farm, part is now a golf course and the remainder is bordered by private property and dwellings. It is relatively untouched in some portions.

6. Hayground Creek at the north end of Mecox Bay, Southampton, at one time it was considered part of the common property of the town and used for grazing. More recently it passed into private hands and continued in a general agricultural pattern. Farms have disappeared but one duck farm remains at its head. Currently, it is in dispute over whether to retain the duck farm or convert the area to condominium apartments.

7. Great South Bay, Islip-Brookhaven-Babylon townships area varies in extremes from complete industrial buildup through private

> waterfront property and marinas to unaltered wetlands. Extending over 27 miles across the south shore of the island, it is a classic example of conflicting claims to ownership and use by private individuals and local governments as far back as the seventeenth century. It involves colonial town charters and private land grants, shifting boundaries, and an almost perennial "war" between independent baymen and a single large commercial shellfishing firm over shellfishing rights.

This study is divided into three distinct sections. First, there is a description and analysis of the pattern of settlement by the first English colonists who moved to Long Island in the seventeenth century. Their customary and legal methods of land acquisition, distribution, and use, transplanted from England and modified somewhat in response to a new environment, created a socioeconomic consciousness of relative land use values that persists even today. An understanding of these methods is essential as a frame of reference for the historical analysis of the above listed examples of use of wetlands, that comprises the second section. Third, one cannot fully appreciate the present status of wetlands on Long Island without an understanding of the legal and legislative framework within which the early colonists and their successors functioned, especially with respect to ownership, occupation, and use. Therefore, the third, the final section, deals with English and American court decisions and legislative enactments which in any way circumscribed or extended public or private interests in and use of wetlands.

INTRODUCTION FOOTNOTES

(1) Davies, D.S., Axelrod, E.W., and O'Connor, J.S. Erosion of the North Shore of Long Island (Stony Brook, NY: Marine Sciences Research Center, State University of New York, 1972 Technical Report No. 18), p. 4-7, citing Newman, Walter, "Late Pleistocene Environment of the Western Long Island Area," (unpubl. PhD diss., New York University, 1966), and Shepard, F.F., and Wanless, H.R. Our Changing Coastlines (New York: McGraw-Hill Book Co., 1971).

(2) Delatiner, Barbara, "Battle Over Growth Stirs East Hampton," New York Times, 23 December 1973, Sect. 8, p. 1+.

(3) Ibid.

(4) Davies et al, p. 8; O'Connor, J.S., and Terry, O.W. Marine Wetlands of Nassau and Suffolk Counties, New York (Stony Brook, NY: Marine Sciences Research Center, State University of New York, 1972), p. 7.

CHAPTER I

THE EARLY SETTLEMENT OF LONG ISLAND

It is unlikely that many Europeans ever laid eyes on Long Island during the first full century of exploration of the North American continent. Beyond the probings of Sebastian Cabot in 1509 and Giovanni de Verazzano in 1523 no one seems to have paid much attention to the area until Henry Hudson entered the mouth of the Hudson River in 1609 and carried the Dutch flag a number of miles up the river. Soon Dutch fur traders followed and by 1614 Adraien Block sailed through Long Island Sound on his voyage of discovery which led him up the Connecticut River.

During the next decade the Dutch, the first Europeans to begin systematic exploitation of the area, did little other than trade with Indians for furs. No permanent settlements were established until the Dutch West India Company founded Fort Orange (Albany) in 1624. Two years later they purchased Manhattan from the Indians and began building New Amsterdam. By 1650 the Dutch community had grown to over 1,000 inhabitants and had established six small towns across the East River on Long Island: Brooklyn, Flushing, Gravesend, Newton, Jamaica, and Hempstead, the latter five consisting mainly of English emigrants from New England.

Beginning in 1635 the Dutch claims to Long Island came into conflict with those of the English. In the first charter to the Virginia Company in 1606, James I of England divided the Atlantic seaboard between two groups of promoters; one centered in Plymouth, England, the other in London. The Plymouth group received the exclusive right to colonize between the 41st and 45th parallels, while the London group had the same privileges between the 34th and 38th parallels. The Plymouth company never exercised its rights and in 1620, by a new royal charter, its area was granted to the Council for New England. Over a period of years the council members partitioned this vast estate among themselves in a series of divisions. The last such division took place in 1635, immediately prior to the surrendering of their charter to the Crown. At that time William Alexander, first Earl of Stirling, received Long Island as his portion of the council's holdings. Coincidentally, a number of inhabitants of Lynn, MA, unhappy about the increasing number of newcomers moving into their area, seized upon Long Island as an ideal choice and purchased from James Farrett, the Earl's agent, the right to settle on 8 square miles of land on the South Fork. In the spring of 1640, they founded Southampton, becoming the first English community in eastern Long Island, to be followed a few short weeks later by emigrants from Connecticut who founded Southold on the North Fork (1).

The arrival of the English caused considerable concern among the Dutch on Manhattan, especially after the appearance of an English settlement on the Connecticut River in 1636 followed by another two years later near the mouth of the river. To the consternation of the Dutch, the governor of the new

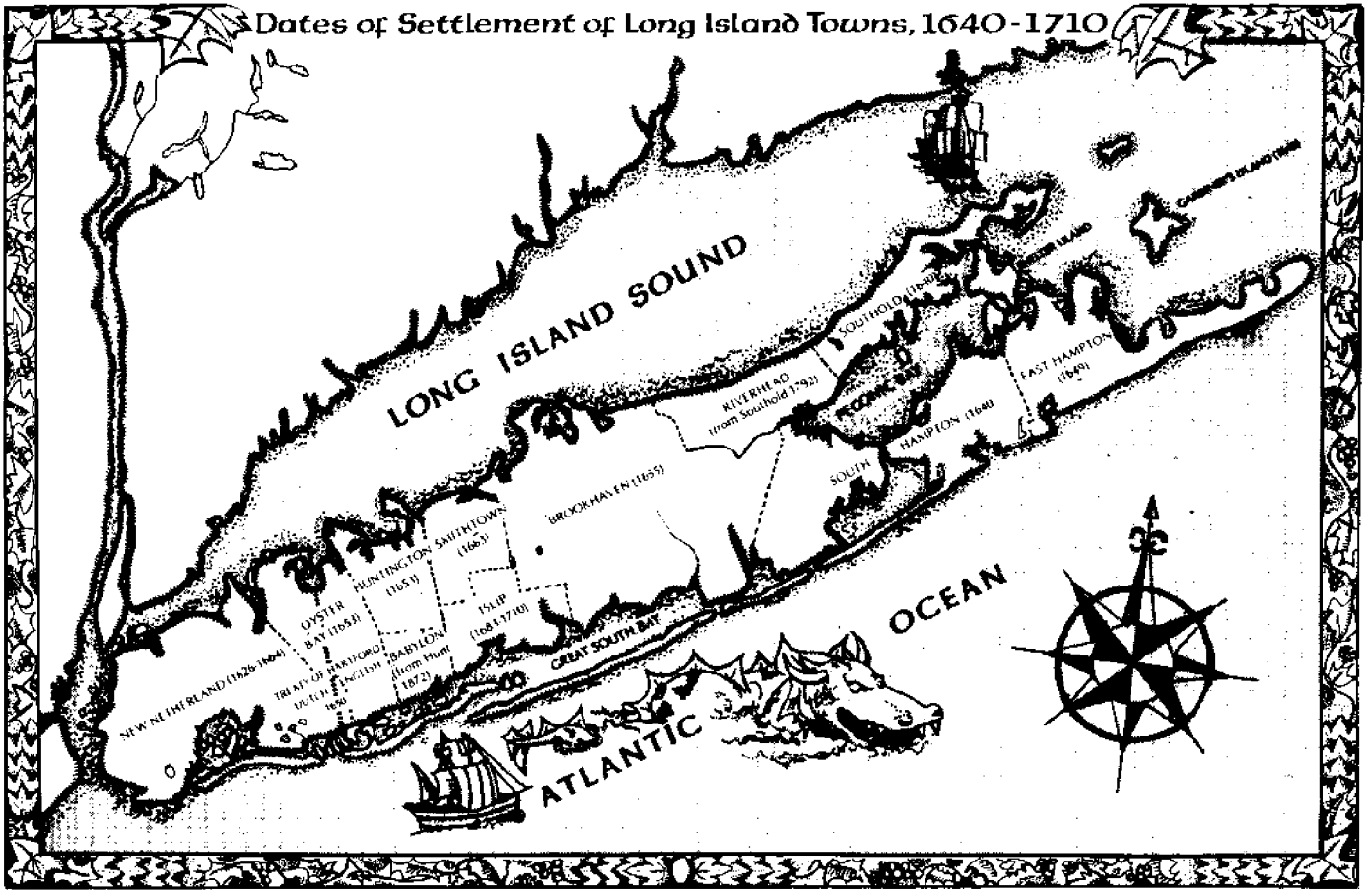
colony not only laid claim to lands as far west as the Hudson River, but also extended his jurisdiction over eastern Long Island in 1644 when he accepted Southampton as a town within his colony. Matters came to a head in 1650 when, on the eve of the first Anglo-Dutch war, Peter Stuyvesant, then governor of New Netherland, and Governor John Winthrop of Connecticut negotiated the Treaty of Hartford that gave to the English all lands west of the Connecticut River as far as 10 miles from the Hudson River and divided Long Island between the two with a line, "drawn from the westernmost part of Oyster Bay and thence in a direct and straight course to the sea shore...the eastern part for the English, and the western part for the Dutch" (2) (see Map 1).

When the Reverend William Leverich and nine others bought land from the Indians in the area of the treaty line in 1653 and founded the community of Oyster Bay, the western boundary was given as the Papaquatuck River (Beaver Brook) and the eastern boundary as Oyster River, the large creek emptying into the head of Cold Spring Harbor. Thus, they straddled the line. Having neglected to obtain the permission of either the Dutch governor or the Earl of Stirling's agent, for the first few years of its existence the new settlement came under no sovereign jurisdiction. Yet, on 2 April 1655, Cornelius van Tienhaven, Fiscal of New Netherland, served notice on the inhabitants that they illegally occupied Dutch territory and warned them to depart within 30 days (3). Needless to say, they did not. Two years later the proprieters of Oyster Bay wrote Governor Stuyvesant in New Amsterdam and demanded that he either prove his title to the area or recognize the claim of Governor Eaton of New Haven, because, "it is not our desire to live from under government" (4). There the matter rested for seven years, during which the Dutch became preoccupied with anxiety over possible Indian uprisings, the incipient rebellions in the five western Long Island towns peopled mainly by English, and deteriorating relations elsewhere with Cromwellian England.

Within a few weeks after the founders of Oyster Bay purchased their land in 1653 they bought additional land to the east and immediately assigned it to three men who became the nucleus of Huntington. This land grant extended from Cold Spring Harbor east to a stream running south from Northport Harbor, north to the sound, and south to the middle of the island. In 1656 the Huntington men expanded their lands by buying from the Indians all the land to the east as far as the Nissequoque River. Later purchases took in land on the south side of the island, so that by the end of the seventeenth century the town of Huntington reached its present-day boundaries (5).

When the Huntington proprietors extended their lands eastward they came into conflict with Richard Smith who alleged that he had title to the same land. Smith had sailed from London to New England in 1635 and then moved on to Southampton in 1641. Prominent in local affairs there he appears to have been a respected member of the community until he made the mistake of shifting his religious allegiance from the dominant Puritan Congregationalism to that band of the Puritan divines, Quakerism, in 1656. Banished in 1658, he moved to Setauket on the north shore, and the following year, as a close friend of Lyon Gardiner, witnessed a deed of gift from the Indian sachem Wyandance to Gardiner for land "between Huntington and Setauket" (6). Smith was so impressed with the area that he took steps to acquire it for himself. In 1663 Gardiner assigned it to him and for the next 12 years the new proprietor spent much of his time solidifying his grant by buying up or clearing titles to the surrounding land from both Indians and Englishmen (7). His search for claimants brought him into direct conflict with Huntington's proprietors who

MAP 1


Dates of Settlement of Long Island Towns, 1640-1710
LONG ISLAND SOUND
ATLANTIC OCEAN
GREAT SOUTH BAY
NEW NETHERLAND (1626-1664)
OYSTER BAY (1653)
HUNTINGTON (1653)
SMITHTOWN (1665)
BROOKHAVEN (1655)
ISLIP (1683-1710)
SOUTHOLD (1640)
RIVERHEAD (from Southold 1792)
SOUTH HAMPTON (1640)
EAST HAMPTON (1649)

pointed out that their deed as far east as the Nissequoque River antedated that of Smith by nine years and even that of Gardiner by three years.

Notwithstanding such legal niceties, Smith challenged the claim and applied for a confirmation patent to Governor Nicolls who had recently ousted the Dutch from New Amsterdam in the name of the English Crown. Obligingly, Nicolls granted him one on 3 March 1665/66, which gave Smith all the land east of the river to Setauket's bounds and west "so far as is at present in the possession of Richard Smith as his proper right and not anyways claimed or in controversy between any other person" (8). This simply confused the issue because Nicolls also granted a patent to Huntington that placed its eastern boundary at the Nissequoque River (9). To perfect its title Huntington laid out the disputed territory into 10 farms in 1671 and proceeded to settle as many families there (10). Not to be outdone, Smith brought suit against the town in the Court of Assizes. In 1675 the court awarded Smith all the land west as far as Bread and Cheese Hollow Road, which marks today's town boundaries, and south to the middle of the island (11).

While Smith was still a resident of Southampton, the proprietors of that town cast their gaze eastward and explored the eastern tip of the South Fork. Finding the soil and meadowlands to their liking they sought and obtained the good offices of Governor Theophilus Eaton of New Haven to arrange to buy it from the four sachems of Southold, Shelter Island, Montauk, and Shinnecock. This was accomplished in 1648 and the first "patentees" began the new settlement of East Hampton the following year. Originally, their town boundaries extended eastward as far as Napeag Harbor, some distance short of Montauk Point, the easternmost point of the island. Aware of the fine grazing land there, a number of town residents acquired title to the remainder of the fork from the Indians. Thereafter, and for many generations, the Montauk Point area served as a common pasture area for all those who contributed to the purchase price. They, their heirs, and assigns used it in proportion to the number of shares they paid for in the venture.

The Town of Setauket to which Smith fled after being banished from Southampton, had been founded by six men, five from Massachusetts and one from Southold, in 1655. These men, acting as agents for others, purchased land from the Seatalcott Indians, and in honor of their Puritan leader called the adjoining bay Cromwell Bay. Brookhaven, as the town later came to be called, extended its boundaries slowly, eventually becoming the largest on Long Island, encompassing 323 square miles, 72 of which are under water (12).

The question of whether the Netherlands or Connecticut would have jurisidiction over Long Island became moot in 1664 when Charles II of England granted to his brother, James, Duke of York "all the land from the west side of Connecticut River to the east side of Delaware Bay" with "power and authority of government and command in and over the inhabitants of the said territories and islands" (13). The Duke commissioned Colonel Richard Nicolls, a groom of his bedchamber, as his deputy governor and sent him to dislodge the Dutch and to "perform and execute all and every one of the powers which are by the said letters patent granted unto me" (14). Nicolls proceeded immediately to New Amsterdam with sufficient military and naval forces to leave no doubt in the minds of the Dutch that New Netherland was now New York. The Dutch capitulated on 29 August 1664 without a struggle and the controversy over who should govern Long Island was settled in favor of the English (15).

The charter for New York that Charles II granted to the Duke of York gave the new proprietor virtually absolute control, at least on paper, of a widely scattered conglomerate of lands extending from northern Maine to Delaware. It included all of Maine from the St. Croix to the St. Lawrence River; Long Island, Martha's Vineyard, and Nantucket; and the entire territory from the Connecticut River mouth to the Delaware River and north beyond Albany (16). Within this area of widely differing climates, soils, and natural resources, lived colonies of the Dutch, English, Swedish, and Finnish nations, each with their own forms of government, national customs, and religious predilections.

How to govern such a territory presented no problem insofar as the right of the Crown, through a proprietor-grantee, to abrogate other nation's laws and impose English law. This had been settled more than 50 years earlier in Calvin's Case, shortly after James VI of Scotland ascended the throne of England as James I. Calvin, a Scots national, initiated a suit of novel disseisin to recover land in England by proving clearer title to it than the then current owner. Since Calvin was a native of Scotland, the real question became whether or not he could claim the protection of English law and initiate legal action to recover real or personal property within the realm of England. The Court of Exchequer held that: (1) if a king conquered a christian kingdom, he could alter the laws as he saw fit, but until he did so, the ancient laws prevailed; (2) if a christian king conquered an infidel kingdom, the laws of that kingdom were immediately abrogated and the king, as well as any judges he might appoint, could rule there until law was established; (3) if a king acquired a kingdom by descent, he could not alter the laws without the consent of Parliament; (4) if a king conquered a kingdom that at one time had been under English law, as was the case with Ireland, then Parliamentary approval was needed before any laws were altered. In the case of conquered christian kingdoms, any subjects of the king, antenati or postnati, whether they served in the conquest or remained at home, were capable of owning lands therein and maintaining any real action, and having the like privileges and benefits as they might have in England (17).

Since the seventeenth century, kings of England claimed they gained their lands in the New World by discovery and conquest, they relied upon this decision to justify exercising the royal prerogative of legislating in them. Lands not of the realm (England) were dominions of the king so that, regardless of what powers Parliament might be able to exercise over them later, decisions with respect to laws were vested in the first instance in the Crown (18).

In the case of New York, Charles II justifiably arrogated to himself the disposition of the former Dutch colony and assumed, quite rightly, that he could delegate the legislative and law making powers to the Duke of York. It became clear from the outset that the Duke had every intention of imposing his own version of English law upon his new colony. Immediately after Colonel Nicolls, the Duke's deputy governor, arrived he issued a proclamation to all the inhabitants promising protection "in his Majesty's laws and justice" to those who would submit. On 12 June 1665 he took the first step to eliminate Dutch law from the colony when he issued a proclamation converting all offices in the town of New York to the English system, "to the end that his Majesty's royal pleasure may be observed and for the more orderly establishment of his Majesty's royal authority as near as may be agreeable to the laws and customs of his Majesty's realm of England" (19).

The Duke's charter vested in him or his deputies the exclusive right to make all laws, ordinances, and directives for the ruling of the colony with no provision that they be passed by and with the consent of an assembly of the freeholders as was the case in most of the other colonial charters (20). Nevertheless, on 8 February 1665 Governor Nicolls issued a call to all the Long Island and Westchester towns to send deputies to Hempstead to consult with him on a code of "good and known laws" for the colony. In preparation for the assembly Nicolls consulted the laws of a number of colonies, principally those of Massachusetts and New Haven. With the help of Mathias Nicolls, the province's secretary who, like the Governor, was a trained lawyer, the Governor wrote a complete code of laws that he later presented to the deputies. The code of laws, known as the Duke's Laws, was a compromise between the New England view of what a body of laws should be, as epitomized in the capital laws as restatements of rules found in the Pentateuch, and English common law and administrative practices. When the assembly convened three weeks later it could do little but accept the laws as written, for it had no power to do otherwise. On 1 March 1665 the Duke's Laws were promulgated and, with a few amendments and additions by petition from the towns but more often by executive order, remained the basic law of the colony until 1691.

The Duke's Laws created a centralized court system, regulated economic activities, itemized capital offenses and their forms of punishment, and reorganized the local governments (21). Whereas formerly each town had elected what local officials they felt to be necessary and desirable, now they must elect a constable, eight overseers, and one or more fenceviewers each year who were directly answerable to the governor (22). Despite such centralization, Nicolls recognized the need for at least some local self rule, and with the concurrence of the Duke, gave the towns more local freedom than they had any right to expect under the terms of the charter (23). The laws provided that sales or alienations of houses and lands be in writing and properly recorded. All purchases of lands from Indians after 1 March 1664/65 had to have prior approval by the governor. Those who claimed to own lands, whether the grantor be an Indian, Dutch, or English, had to submit proof to the governor and receive a confirmation patent from him in the name of the Duke of York.

To complete the process of bringing the colony under the control of the Duke's government, Nicolls demanded that each town and landowner submit evidence of ownership to him for confirmation under a grant from the proprietor (patents) (24). The object was not only to force them to acknowledge the proprietorship of the Duke but also to confer upon each town certain obligations and privileges so that they could become responsible local units of political administration. This constituted the first recognition of the Long Island towns by English authority as legitimate entities. Heretofore, even considering that a few of them had placed themselves within the jurisdiction of Connecticut, each had functioned as a virtual independent entity, accountable only to itself (25).

One of the vital features of both the Duke's Laws and the town patents appears to have been to remove the responsibility for the control of local affairs from the freeholders in general and concentrate it in the hands of a few of them as constables and overseers. Eight overseers (reduced to four in 1666) and one constable were to be elected each year. Those first elected had the responsibility of drawing up a constitution for their town that would outline how the town expected to handle its own peculiar local affairs regarding the disposition and use of land, the election of local officials,

the assessing of local rates, and the management of livestock, hiring of ministers, and similar matters. By law a two-thirds vote decided all issues at town meetings. There is no evidence, however, in the local records that they ever took the time to actually write such a document.

Rather than reduce everything to a written document, the townsmen continued in their established pattern of holding town meetings with some regularity. Superimposed upon their traditional structure, however, were the constables and overseers who promulgated ordinances and saw to it that the townspeople abided by the Duke's Laws and their ordinances. The people submitted to this arrangement, but not without some grumbling. While the constable and overseers selected the times to fire and burn the woods, ordered that no more trees should be cut for staves, determined that it was detrimental for sheep and rams to cohabit out of season, and prohibited geese and ducks from running loose on the common, (26) the voters at the town meetings took it as their prerogative to vote to procure a minister, decide to drain an old mill pond and relocate the mill, restrict the killing of whales and fish to town residents, and contract with blacksmiths and other artisans to move into the town (27). In a few areas the distinction between the two legislative bodies became blurred. The laying out of highways, a function of the officials by law, frequently was voted upon in town meetings (28) and in 1679 the voters of Huntington directed the overseers to select up to five freeholders to assess the local tax rates "as they shall think best for the good of the town" (29).

The Nicolls patents were models of brevity, a far cry from those verbose, repetitive documents that would succeed them in years to come. Essentially, each designated several named patentees, acting, "in the behalf of themselves and their associates, the freeholders and inhabitants," as the proprietors of the town and granted them all the land, which had been or would be purchased from the Indians, within clearly stipulated boundaries. Included in the grant were, "all havens, harbors, creeks, quarries, woodland, meadows, pastures, marshes, lakes, fishing, hawking, hunting and fowling, and all other profits, commodities, emoluments, and hereditaments" belonging or appertaining (30). The patents also erected each group of patentees and their granted land into a town with "all the privileges belonging to a town within this government...rendering and paying such duties and acknowledgements as now are or hereafter shall be constituted and established by the laws of this colony."

Much of the land within each town had not yet been purchased from the Indians and the Duke's Laws prohibited anyone, whether for himself or in the name of a town, from doing so without the prior warrant and approval of the governor (31). Therefore, Nicolls inserted a clause in each patent that restricted the right to buy Indian lands within a town to those who were freeholders and inhabitants of it. The Duke's Laws left each town to its own devices in the division and granting of local lands to inhabitants (32). Consequently, each town developed its own system of land acquisition and distribution but, in general, they varied little, one from the other. It must be remembered that, prior to their stay of a few years in New England, the first arrivals represented the varieties of experiences of having lived in England in an open-field manorial village, an incorporated borough, or an enclosed field East Anglican village. These experiences determined the political, social, and economic outlook of each settler when brought together with others in the New World. They had to adjust to each other's different habits and attempt modifications of basic English institutions and customs. But, English they were, by birth, custom, and inclination, and English they

remained. The town records strongly suggest that they deviated little from traditional patterns of land acquisition, distribution, and use in Old England or the similar practices they found in New England (33).

The first proprietors held the land they purchased from the Indians as tenants in common. The legal status of a tenant in common differs from that of a joint tenant in that in the latter instance all persons must be present and acquire their interests at the same time as all the others; all have possession as if they were a single person, and if one dies the remainder take his share by survivorship. In the case of a tenant in common, he could come into possession of an interest some time after the date of the conveyance. His interests need not be equal to the others. He could acquire his interest by a later conveyance, and could alienate his undivided share by deed or will. This was typical of both New England and Long Island communities where not all the first proprietors were parties to the original conveyance because some joined the venture later, some gave money while others contributed goods or services of varying value, and all did not give in equal proportion to the cost.

Oyster Bay, Huntington, and Brookhaven are cases in point. Although none of the printed records of these towns list the exact number or names of families that settled in each at the outset, invariably, the editors of them state that three or five or six men signed the Indian purchase deed either on their own behalf or for themselves as well as those whom they represented of a company already formed for the purposes (34). Within a few short weeks those "first purchasers," as they came to be called, admitted others to their group. Thereafter, anyone wishing to settle in the town had to obtain the approval of the local leaders and be accepted by majority vote at a town meeting.

One of the first orders of business in any of the new Long Island communities was to select a site for the village, usually referred to as the "town spot," and then lay out home lots on which each family could build a house, outbuildings, and tend a small vegetable garden. The home lot, or "accommodation," consisted of from 2 to 5 acres and the houses were built fairly close together to form a compact village (35). One can see here the prototypes of the modern planners concept of "cluster development." But in the seventeenth century the outlying land remained in a "land bank" for reasons other than esthetic considerations or concern for preservation of the environment.

The proprietors did not immediately divide up and parcel out all the remaining lands within their boundaries. However, they did select a section near the village and lay it out into as many lots as there were proprietors who contributed to the purchase price. These lots they referred to as allotments or shares and their sizes varied from 4 or 5 to as many as 10, 20, or even 40 acres per lot (36). They then assigned each allotment a number and at the appropriate town meeting the proprietors drew a number that gave each full possession and use of that particular lot in the division.

The Duke's Laws specified that all such allotments be fenced in and many towns independently passed a similar ordinance (37). The obvious and quite necessary reason for this was to keep wandering--and destructive--cattle, hogs, and sheep out of cultivated fields. Anyway, the animals had quite enough land for grazing in what was designated the "undivided common," that comprised all the remaining land bought from the Indians. All who held shares or "rights" in the town venture also held rights of use in the undivided commons

for a variety of purposes, among which was the grazing of livestock. More often than not grazing rights were regulated by agreement at a town meeting as to where and when livestock should graze (38) or how many animals a proprietor could put out to graze based on the number of shares he held (39). The townsmen also used the undivided common as a source of firewood, hay, and timber, but these rights, too, as with grazing, were closely regulated to insure that no one cut more than he could use and none went to waste after being cut.

The method of land distribution decided upon for the first division came to be adopted for all subsequent divisions of either town land or of land acquired by groups of individuals on their own account. Elected surveyors laid out as many lots in the division as there were shareholders or proprietors entitled to land in it. In the first division this probably included all the adult males in the town; on rare occasions it included a female or two. At a town meeting the proprietors reached agreement on how much acreage each should have, that is, how much each needed for planting and grazing, out buildings, and the like. For the sake of argument let us assume that a 10-acre lot or allotment was the size agreed upon by the 10 first proprietors, in addition to each one's home lot. They then selected an area near the town containing 100 acres suitable for crops or grazing and surveyors subdivided it into 10-acre pieces. The size of this "first division" only allowed for the number of allotments in it to match exactly the number of proprietors. In other words, given 10 proprietors, each to have 10 acres, the first division plot would be 100 acres so divided. This was the method employed in Oyster Bay (40).

Variations can be found in the cases of Huntington and Southampton. These towns were not quite as equalitarian when it came to granting land. At the outset, each town decided that a proprietor would receive only so much land as he had paid toward the purchase proportionately to the total price. Thus, if the purchase price came to 1,000 pounds, including not only the money and goods paid to the Indians but also the expenses of moving and settling, they would divide it into shares of a stated valuation. This could be 10 pounds, 50 pounds, 100 pounds, or whatever value they wished to assign to each share and was usually determined by the original number of contributors to the purchase price. These shares they labelled "rights," and entitled the owners of them to be given at least that much of the undivided lands in the purchased area. For example, if 10 men paid 100 pounds each then each would receive exactly the same amount of acreage and hold one full or whole right in the common land. The first division took this into account and each of the 10-acre allotments would then be labelled a 100-pound right in the division. Until such time as that division took place, each holder of a right could use the common land concurrently with the others but he had an inchoate right to a parcel in it once it was laid out. In other words, these rights or shares were not in any sense of the word fee titles to a specific parcel of land, but rather were rights to claim, in the future, some parcel somewhere in the division as yet undefined and not laid out. Once the surveyors laid out an area, however, into predetermined sizes, the vague right became a clearly defined reality by metes and bounds and the owner of a 100-pound right could either petition at a town meeting to be assigned an allotment of his choice in terms of location or take his chances in the drawing of lots if the proprietors had agreed upon that as the best and most impartial way whereby an individual could "cash in" his right or share.

This does not mean that once a division had taken place, the holder of rights had no more claims on any of the remaining undivided commons. On the

contrary, he maintained the identical interest, and the same rights in what was left. He might, then, acquire 10 acres in the first division, 20 acres in the second division of another section of the common lands, and so on until it had all been allotted. Such rights were transferable and devisable by will. Thus, an individual could sell his share in a given division, whether it be the second or the tenth, yet retain his share in all other divisions. He could sell fractions of his share to another or bequeath it to his heirs to be divided among them (41).

It became common practice for an individual to come into possession of more than one share. This could be accomplished by contributing more than the value of a single share at the outset (for example, one and a half, or even two or three shares in value) or buying shares from others. Furthermore, a shareholder could convey a home lot or allotment to another, yet retain for himself whatever rights in the common lands attached to that land. If a person wished to move into a town, he had to seek out an inhabitant who would be willing to sell at least a home lot, with or without common rights. Even then, not every passerby and stranger could buy land; first he must obtain permission from the town to become an inhabitant, regardless of whether or not an incumbent inhabitant had agreed to sell land to him (42).

Finally, with regard to land distribution, groups of freeholders (those who owned land) or even nonfreeholders (sometimes designated as inhabitants to differentiate them from the proprietor-freeholders) would combine to purchase Indian lands for themselves to the exclusion of all others in the town. Often they did this to expand their own acreage out of necessity, but just as frequently one can read into the record that they acted as entrepreneurs and speculators in search of a profit. Although such groups might follow the accepted custom of divisions and allotments, only they could benefit. For example, in Oyster Bay five men purchased Musketo Cove (today's Glen Cove) for themselves, divided it, laid out highways, and sold off lots. Only they could participate in the divisions or in the profits from sales (43). This created a second category of rights in commons lands, for in such purchases the proprietors of them not only divided it but held out some of the land as common. They, too, either held their respective rights therein or sold them to others. Therefore, such proprietors had rights not only in the common land of the town, but also acquired rights in the privately purchased lands to which no other townsmen could lay claim. Naturally, such purchases were negotiated and consummated only after permission to do so had been obtained from the governor and the town.

The common and undivided land had other uses also. As a land bank it could be drawn upon to entice a wanted tradesman, minister, or other desirable individual to settle in the community (44). Or, the proprietors might allocate a small plot to sustain a woman in her widowhood, the land reverting to the town upon her death (45). Frequently, such land grants carried with them certain restrictions, usually in the form of reversion clauses, that clearly defined the role of the grantee and stated that he could use the land only so long as he pursued his calling for his benefit as well as that of the town. If he departed for any reason or failed to fulfill his function, the land reverted to town ownership. If, however, he stayed for a stipulated number of years, such as five or seven, he might, by agreement with the town, come into full possession and ownership of the land in his own right (46). Occasionally, the reversionary clause ran with the land perpetually. The Townsend Mill in Oyster Bay is a case in point. In 1661 the town proprietors granted Henry

Townsend some land surrounding the mill stream (still identifiable today) with the reservation that "if the mill cease for half a year, after it [is] built, and no preparation is made to repair the mill again, that then the Town may lawfully enter on the river again as their own and improve it as they shall see necessary" (47).

The question might now well be asked: What categories of land did they have by Indian deed and proprietary grant from the governors to distribute among themselves? More often than not the earliest Indian deeds did not enumerate such things within the broad and sometimes vague boundaries of the land conveyed. It is likely that the Indians did not fully comprehend all that they had given away, because it was the Englishman who wrote the document and then explained it to them. Even then, the English colonizers used unsophisticated and often pseudo-legal terms in an effort to emulate the accepted legal jargon of trained lawyers in the mother country. The English assumed that the instrument of conveyance included literally everything within the stated boundaries; what the Indians assumed is anyone's guess. Nevertheless, the settlers soon began incorporating into each deed more specific descriptions of the land, so that when the first English governor issued confirmation patents and listed the categories of land as being "all havens, harbors, creeks, quarries, woodland, meadows, pastures, marshes, [and] lakes," the patentees accepted it as an itemization of what they knew they already had de facto (48).

For our purposes, however, it is necessary to be even more precise. It goes without saying that woodland, meadows, and pastures can be taken to mean upland, that is, above the high tide of any body of water. As for havens and harbors, they can be dispensed with easily enough. Both are sheltered areas that offer ships a safe anchorage from the elements, although haven connotes a slightly less protected inlet or recess in the shoreline than harbors. To the seventeenth century patent writer the distinction was probably more semantic in terms of possible quibbling over the legal niceties of refined and exact word usage than practical in anticipating the needs and questions of a navigator. The two words seem to be virtually synonymous and the outward extension of either is usually determined, on a site-by-site basis, by measuring across the outer limit of the mouth where the waters are more open and clearly identifiable with a larger body of water beyond. Similarly, creeks and rivers terminate at that point where their banks and water flow can no longer be clearly associated with their own characteristics but become merged with a larger body of water into which they flow, including other creeks, rivers, harbors, bays, lakes, or the ocean. Again, this terminal point must be designated on a site-by-site basis.

In any event, all the colonial charters on Long Island extended the boundaries of towns only to the outer limits of the mouths of all such waters and no farther, unless an abutting larger body of water was specifically named as being included. Therefore, all boundaries along the north shore ended at the high water mark of Long Island Sound, contrary to the assertion of one writer who asserts that "these grants, in many cases, extend out into Long Island Sound so that title to the underwater lands is held, not by the State, as is customary, but by the towns" (49).

To arrive at an acceptable definition for "marshes" as used in the seventeenth century patents is not quite as simple. It quickly becomes apparent when reading private land conveyances and town grants that, in the

minds of the local proprietors, the word denoted not only marshes in a generic sense, but also salt meadows, swamps, thatch, thatch grass, creek thatch, salt thatch, salt marsh, thatch bed, boggy ground, or meadow. All of these have been encountered at one time or another in the printed town records (50). What did each descriptive term mean to them? There are two approaches to an answer, but not necessarily the answer. One could trace back a land title to the original conveyance and, assuming there still exists on that land one or the other of the above, note the words employed to describe it. Then both visual and scientific observation of the area and its grasses would give the answer. Unfortunately, even though this might be the simplest and best method, it is not the most practical. Over a 300-year period the sands of time have not only passed through hour glasses countless times, they have shifted laterally along shores; water levels have risen or fallen in particular locations so that what was no longer is. For example, the editor of the Brookhaven Town Records made the observation that:

> Up to about the time of the great September gale, September 4, 1821, there were two inlets connecting the Great South Bay and Ocean--one opposite Moriches, called Hallock's Gut, and a larger one opposite Bellport, called Smith's Inlet or New Inlet. This last one closed up during a storm about the year 1827. While these inlets were open, and prior to the breaking open of Fire Island Inlet during the winter of 1890-1, the whole south shore of the Town along the Bay extended much further southward, and there were meadows or marshes, now covered by the waters of the Bay, which were some of the meadows that were allotted to the proprietors of the early Town (51).

Consequently, for purposes here, it would be best to digress for a moment to define such areas in modern terms and then attempt to establish a relationship with the more ancient usage of the seventeenth and eighteenth centuries. Hereinafter the following definitions will be used or assumed to be applied whenever referring to any of the named locations that might be included in today's generic word "wetlands."

Swamp. This is generally used to refer to wet, spongy land saturated with water and sometimes partially covered with water. It is not good for agricultural purposes unless drained, although, occasionally, shrubs and some trees do grow there. The water can be either salt (in which case trees would not grow) or fresh, but it seems that the latter is more often assumed to be the case and thus distinguishes it from marshes as defined below. Also, the records of the seventeenth and eighteenth centuries tend to suggest that swamps, when mentioned, are located inland from salt water and are thus "boggy" low areas easily flooded by rains. It is likely that "boggy ground" or "boggy meadow" meant essentially the same or a similar type of area. Yet Webster's Unabridged Dictionary distinguishes between swamp and bog insofar as the latter has a characteristic of heavy objects sinking into it and the surface covered with a layer of peat. Whether or not such a distinction was made 300 years ago cannot be ascertained from the records; therefore, they will be considered as synonymous.

Marsh. The colonists used this word as frequently as they did "thatch" and "salt meadow," but even though a somewhat generic term, it appears to have been applied to areas very near or in salt water. Therefore, in modern marine biology parlance it would signify a low marsh area, as differentiated from a

high marsh, covered daily by water at high tides but exposed at low tides. This is probably the salt marsh referred to in early conveyances and is characterised by the salt marsh grass known as spartina alternaflora. This is a coarse grass that grows to heights of 3 to 4 feet, is thick stemmed, and could be the "thatch" or "thatch grass" settlers used for roofing or outbuildings or as bedding for livestock and possibly hay. For our purposes, unless the written evidence suggests otherwise, when the word "marsh" is found in a conveyance it will be assumed to mean a low marsh or tidal marsh overflowed daily by the flux of the tide and falling within the foreshore (a term not used by the colonists).

Foreshore. This is the land between high and low water marks, or, more precisely, between the mean high and the mean low tide marks if one wishes to rely upon the generally accepted limits set down by the US Coast and Geodetic Survey which calculates each daily extreme by using the average level of each over a span of 18.5 years. In the words of Sir Mathew Hale, Lord High Chancellor of England under Charles II, it would be where "the tide ebbs and flows," which is the preferred description of most writers of the seventeenth and eighteenth centuries. Today, courts normally will accept the two mean levels established by geodetic survey (52). From this comes the oft-used terms "tidal marsh," "tideland," as well as "shore" and "foreshore". The term "wetlands" applies in the sense that it includes the foreshore and salt marshes, or tidal marshes, but is not restricted to them since its connotation is much broader and encompasses more than lands subject to diurnal tides.

Salt Meadow. Distinct from salt marsh or marsh as defined above, these meadows are actually high marshes. They lie above the mean high water mark but are subject to flooding by spring tides and lunar tides. These areas are characterized by spartina patens or distichlis spicata or both. Spartina patens is a fine stemmed grass that grows about 2 feet at its tallest. Also known as salt hay it must be mowed by June or July otherwise it flattens. This probably explains why the towns on Long Island held public auctions early in the year, usually in April, to rent or "sell the marsh grass or salt hay" to the highest bidder. This practice has given rise to some misconceptions in our own day. When some searchers of town records come across the phrase "Sold to [] the thatch [or salt hay] for this year for five shillings," they immediately assume the individual actually bought the marsh outright. Not so. The town proprietors "sold" the same piece each year, but only the grasses on it, not the land on which the grasses grew. In the nineteenth century the records became more explicit in word usage and used the term "to lease" rather than "to sell" (53).

Thatch. Also thatch grass, creek thatch. These are ubiquitous terms found very frequently in conveyances throughout the seventeenth, eighteenth, and even the early nineteenth centuries. One can deduce from the records that the reference was to a type of grass that grows in salt water even though the word "creek" [crick] was often used adjectively. Most, if not all, of the deeds encountered that use these terms had to do with land bordering harbors and bays. Those farther inland in a stream or creek were (and still are) subject to tidal overflow by salty or brackish water. The belief that the use of the term creek thatch meant thatch grass along a coastal area is borne out by an entry in the Brookhaven town records in 1684:

> At the commissioners' court held at Brookhaven the 6th day of August, 1684, whereas several made their complaint about people

> mowing of creek thatch upon the verges [edges] of their meadows. That they are much damnified thereby in letting seaweed all over their meadows to their damage; therefore, it is ordered at this court that [no] persons whatsoever, without it be the owners of the meadows, shall cut any creek thatch within ten feet of the verges of any man's meadow... (54).

According to some modern marine biologists the grass referred to is probably spartina alternaflora in its tall form. Whether or not the colonial farmers actually used the grass for thatch as roofing is open to debate. Very early in the colonial experience in both Plymouth and Boston the colonists found to their sorrow that thatch grass for roofing quickly dried in this climate, in contrast to Old England with its more moist climate and ability to keep the outer grass damp and less fire-prone. Here wood and mud chimneys caught fire easily, sparks flew, and a dried thatch grass roof did not last very long. Ordinances were soon passed to prohibit them. Therefore, if the colonists used the grass for roofing at all it was undoubtedly on out buildings. Otherwise, its more general use would have been for feed for livestock. According to one observer in 1775:

> In their marshes they get large crops also [in New York], but it is a coarse bad sort; not however to a degree as to make cattle refuse it; on the contrary, the farmers find it of great use in the winter support of their lean cattle, young stock, and cows...Another part of husbandry in which the New York farmers are very defective is the management of their meadows and pastures [and marshes?]: they make it a rule to mow every acre that is possible for hay; and as long as they get a tolerable quantity, they are strangely inattentive to the quality; weeds, rushes, flags, and all sorts of rubbish they call good hay, and suppose their cattle have not more sense in distinguishing than themselves (55).

Unless the documentary evidence suggests otherwise, this category of grasses will be assumed to mean grass beds in the low marsh areas.

Finally, for the sake of completeness, one other type of grass should be mentioned: phragmites communis. This is found today in many of the high marshes, often growing in sections of them where the water table is close to the surface but where the land itself is not necessarily subject to tidal action. It has a hollow reed-like stalk that attains heights of 10 feet, unlike the much shorter flat leafed spartina grasses. Some marine biologists question whether this grass, or reed, is indigenous to Long Island. Although there is clear evidence that it existed in some quantity as recently as 1914, some feel it is a latecomer and might have grown very sparsely if at all during the colonial period (56). Because of this, and at least to this writer, the apparent lack of usefulness of the grass in animal husbandry (neither colonial cow nor farmer has left any record of opinions on its use as food or a mattress) it will not be considered herein whenever any of the above categories are discussed.

To return to our historical account, the towns on Long Island chafed under the authority of the Duke's governors, but, denied a legislative assembly by the Duke, they could do little to counteract the royal proprietor's power. Even the renewal of the Anglo-Dutch conflict in 1673 and the recapture of New York by the Dutch that year did little to affect Long Island directly. Within

a year the English returned and Charles II confirmed the proprietorship of the Duke of York by a new charter in 1674. This charter, new in time but not in content, did nothing to alter conditions of the past 10 years and made no concessions regarding a popular assembly. The new governor, Major Edmund Andros, was subjected to the same pressures as his predecessors to convince the Duke to authorize such assembly. The towns called assemblies at which protests were drawn up complaining they had no voice in the making of laws or levying of taxes (57). Gradually, the Duke and his personal advisors came to realize that the colony could not survive in its present form without an assembly and in 1681 James wrote the acting governor, Brockholls (Andros having left for England earlier in the year), that he had decided "to establish such a form of government at New York as shall have all the advantages and privileges to the inhabitants and traders there which his Majesty's other plantations in America do enjoy, particularly in the choosing of an assembly" (58).

Colonel Thomas Dongan succeeded Andros and, when he arrived in 1683, carried with him instructions that:

> there shall be a general assembly of all the freeholders by the persons who they shall choose to represent them in order to consulting with yourself and the said Council what laws are fit and necessary to be made and established for the good weal and government of the said colony and its dependencies and of all the inhabitants thereof (59).

Laws passed by the Assembly had to receive the assent of both the governor and the Duke, taxes could be levied but not disbursed by it, and the governor could summon, adjourn, and dissolve it as he saw fit. Writs for elections were sent out in September 1683 and in October the first representative assembly in the colony's history met in New York. Until 1691 the colony's laws consisted of the Duke's Laws, those enacted by the General Assembly that sat from 1683 to 1685, and a number of measures passed by the governor and his council, none of which materially affected or circumscribed the power of the towns at the local level.

Political events moved rapidly during the next few years. Governor Dongan frequently complained to the Duke about the loss of the Jerseys and parts of Delaware, and the lack of profits to be made from Long Island and Pemaquid under current economic activities and quit-rent provisions. He succeeded only in firmly implanting in James' mind the determination to have a larger, more centrally administered territory that would produce greater financial returns and be able to pay for its own defenses against Indian attacks. James' opportunity to implement such a scheme came when he ascended the throne of England as James II on 6 February 1695 after the death of Charles II (60). Taking advantage of the fact that the Massachusetts charter had been vacated the previous year and now had a royal governor, James moved to consolidate most of the northern colonies into a single dominion ruled over by his appointed governor. He accomplished this by commissioning Sir Edmund Andros, Governor of Massachusetts, as Governor General of the newly formed Dominion of New England, which brought under his central administration the New England colonies in 1686 and New York in 1688. Later efforts undertaken to include the Jerseys, Delaware, and Maryland through quo warranto proceedings to vacate their charters came to nothing because by 1689 James was without throne or power to enforce his wishes on unwilling colonists.

While James, as Duke and then King, busied himself with formulating plans for the Dominion, he also concerned himself with seeing to the affairs of his colony and the income that might be derived therefrom. Shortly after he assumed the Crown he instructed Governor Dongan to prepare maps of all his holdings to ascertain what land was his and what was held by others. One hoped-for outcome would be an upward revision of the quit-rents levied on land grants to the individuals and towns. During the proprietary period the issuance of many patents which required only a nominal quit-rent payment had produced much less income than James had anticipated. Furthermore, poor collection techniques and laxity in actual collections had generated very little revenue (61).

When Governor Dongan received his new royal commission and instructions in May 1686 he intensified his efforts to collect the quit-rents by virtue of a clause in his commission giving him the power to grant lands to persons "for such terms and under such moderate quit-rents, services, and acknowledgements to be thereupon reserved unto us as you, by and with the advise [of the Council] shall think fit." In addition to the power to erect towns and impose taxes for the support of the government, militia, and forts, he could enter into agreements with planters and inhabitants respecting lands, tenements, and hereditaments, "as are now or hereafter shall be in your power to dispose of" (62). With this as a lever, Dongan quickly set about tightening collections procedures and rewriting patents that were too vague and questionable or carried a too low quit-rent payment. The resultant documents, written between 1686 and 1688, set in motion certain long-term trends that the governor, with his short-term objectives, could not have anticipated.

CHAPTER I FOOTNOTES

(1) Adams, James T. History of the Town of Southampton (Bridgehampton, NY: Hampton Press, 1918), p. 44-50. Of course, Lyon Gardiner can lay claim to being the first Englishman to own and settle land there, having acquired his island in 1639. But his was a private land grant and in no way an English settlement in the sense of a community venture.

(2) Kavenagh, W. Keith, ed. Foundations of Colonial America (New York: Chelsea House - R.R. Bowker, 1973, 3 vols.), II, p. 776. The Dutch States General ratified the treaty on 22 February 1656 but neither the English Crown nor Parliament ever did.

(3) Cox, John Jr., ed. Oyster Bay Town Records (New York: Tobias Wright, 1916-1940, 8 vols.), I, p. 672.

(4) Ibid., p. 672-673.

(5) Street, Charles R., ed. Huntington Town Records, including Babylon, Long Island, NY (Huntington, NY, 1887, 3 vols.), I, p. 1,4,6, 10, 12 et passim.

(6) Smith, Frederick K. The Family of Richard Smith of Smithtown, Long Island (Smithtown, NY: Smithtown Historical Society, 1967), p. 4, 7, 8-9.

(7) Ibid., p. 11, 13.

(8) Ibid., p. 14.

(9) Street, I, p. 92-94.

(10) Ibid., p. 176-177.

(11) Ibid., p. 197, 199, 210, 212.

(12) Shaw, Osborn, ed. Records of the Town of Brookhaven (New York: The Derrydal Press, 1930-1947, 7 vols.), I, Introduction.

(13) "Charter of New York from Charles II to Duke of York, March 12, 1663-64," in Kavenagh, Foundations, II, p. 793-796.

(14) "Commission from the Duke of York to Colonel Richard Nicolls as Deputy Governor of New York, April 2, 1664," in Kavenagh, Foundations, II, p. 796-797.

(15) Andrews, Charles M. The Colonial Period of American History (New Haven, CN: Yale University Press, 1937, 4 vols.), III, p. 45, 58n. Prior to James receiving his charter, he was compelled to extinguish the claims to Long Island of Henry Alexander, fourth Earl of Stirling and grandson of William

Alexander who had acquired title to it from the Council for New England in 1635. In 1662 Alexander sold half his interest to Lord Berkeley for 3,500 pounds, but the latter could not secure a confirmation patent from Charles II. He than approached the Duke of York and negotiated an agreement that called for the Duke paying the money to Alexander in return for which Berkeley renounced his claim to Long Island. The fourth Earl of Stirling never actually received any money because, probably under pressure, he agreed to accept an annuity of 300 pounds a year out of the net profits of New York. Unfortunately, the colony never showed a profit. By this means James acquired the unencumbered title to Long Island.

(16) Most of the granted lands were given away by the Duke (the Jerseys to Berkeley and Cartaret; the Delaware area to William Penn) leaving him New York and its adjacent islands and Pemaquid in Maine.

(17) 7 Coke 2a; Trin. 6 Jac. 1 (1609); reprinted in Goebel, Julius, ed. Cases and Materials on the Development of Legal Institutions (New York: Columbia University, 1931), p. 294-299.

(18) Julius Goebel, Jr., presents an excellent case for the imposition of English law in New York in "The Courts and the Law in Colonial New York," in Flick, Alexander C., ed. History of the State of New York (New York, 1933, 10 vols.), III, p. 3-43.

(19) The Colonial Laws of New York from the year 1644 to the revolution. (Albany, NY: J.B. Lyon, 1894, 5 vols.), I, p. 1-5. In the charter, Charles II reserved the right to hear and determine appeals against any judgment or sentence handed down as a result of the laws. One limitation on the absoluteness of James' authority was the charter stipulation that all law should be agreeable to and not repugnant to the laws of England.

(20) Ibid.,p. 100-101.

(21) Ibid., I, p. 6-82.

(22) Ibid., p. 21-24, 28-30, 55-56.

(23) Ibid., p. 63-64.

(24) Ibid., p. 44; as amended in October, 1665, p. 80-81.

(25) Ibid., p. 65-66; Even though the towns of Brookhaven, Huntington, Southold, and Southampton became affiliated with Connecticut before 1662, they were forced to shift their allegiance to the Duke of York. In 1664 Connecticut asserted its jurisdiction over eastern Long Island, resting its claim in a royal charter it received in 1662 that gave her control over "the islands adjacent." Realizing the futility of arguing against the Duke's power and authority, however, that colony relinquished her claims over the island.

(26) Street, Huntington Town Records, I, p. 112, 131-132, 288-289.

(27) Ibid., I, p. 172-173, 179, 240.

(28) Ibid., I, p. 193.

(29) Ibid., I, p. 242.

(30) Ibid., I, p. 92-96; cf. Shaw, Brookhaven Records, I, p. 65-67.

(31) The Colonial Laws of New York, I, p. 40.

(32) Ibid., p. 63.

(33) For a detailed discussion of such practices see Powell, Sumner C. Puritan Village; the Formation of New England Town (Garden City, NY: Doubleday & Co., 1963), p. xv-xix; Grant, Charles S. Democracy in the Connecticut Frontier Town of Kent (New York: Columbia University Press, 1961); Akagi, R.H. The Town Proprietors of the New England Colonies (Philadelphia, 1924); Sly, J.F., Town Government in Massachusetts, 1620-1930 (Cambridge, MA, 1930); Hill, D.G. The Early Records of the Town of Dedham, Massachusetts, 1620-1706 (Dedham, MA, 1819); Lockridge, Kenneth. A New England Town; the First Hundred Years (New York: W.W. Norton & Co., 1970).

(34) Shaw, Brookhaven Records, I, p. vii; Street, Huntington Town Records, I, p. xi-xii; Cox, Oyster Bay Records, I, p. 692; Adams, History of Southampton, p. 51.

(35) Shaw, Brookhaven Records, I, p. 9 et passim; Cox, Oyster Bay Records, I, p. 2-10 et passim.

(36) Ibid.

(37) The Colonial Laws of New York, I, p. 21-24; Cox, Oyster Bay Records, I, p. 2; Street, Huntington Town Records, I, p. 45, 47.

(38) Street, Huntington Town Records, I, p. 68; Cox, Oyster Bay Records, I, p. 202; Shaw, Brookhaven Records, I, p. 137, 139.

(39) Cox, Oyster Bay Records, I, p. 210; Adams, History of Southampton, p. 62.

(40) Cox, Oyster Bay Records, I, p. 10, 692.

(41) Shaw, Brookhaven Records, I, p. 1, 2-7, 15 et passim; Street, Huntington Town Records, I, p. 45, 48, 52-54, 56-57, 66-67 et passim; Cox, Oyster Bay Records, I, p. 18-19, 20, 21-22, 24, 27, 30 et passim.

(42) Street, Huntington Town Records, I, p. 40-41; Cox, Oyster Bay Records, I, p. 222; Shaw, Brookhaven Records, I, p. 9.

(43) Cox, Oyster Bay Records, I, p. 631-658; Street, Huntington Town Records, I, p. 12, 21-22, 370-371.

(44) Street, Huntington Town Records, I, p. 8-10; 38.

(45) Ibid., p. 22-23.

(46) Cox, Oyster Bay Records, I, p. 40-41.

(47) Ibid.

(48) Supra., p. 24.

(49) "Colonial Patents and Open Beaches," Hofstra Law Review, 1974, vol. 2 no. 1, 1974, p. 303.

(50) To attempt to offer citations for examples of each term would be ridiculous here; there are simply too many of them. Suffice it to say that even a casual perusal of the town records referred to herein will quickly turn up a number of examples. The problem, for the sake of literary thoroughness, is not where they are used, but rather what the grantors meant.

(51) Shaw, Brookhaven Town Records, I, p. v.

(52) "Borax Consolidated, Ltd. v. Los Angeles," United States Reports, vol. 296, 1935, p. 10, 22-23, as cited in Douglas P. Hill, "Coastal Wetlands in New England," Boston University Law Review, fall, 1972, vol. 52 no. 4, p. 725. This was reaffirmed in New York by the Court of Appeals in 1975 when it reversed a lower court decision in (Dolphin Laves v. Southampton (intra) that relied on a more biologically sophisticated delineation between certain types of grasses that thrive below the mean high water mark (spartina alternaflora) and others that normally do not (for example, spartina pateus).

(53) Street, Huntington Town Records, III, p. 125 et passim; of "Island Vendue Book, 1793-1862," Ms, Huntington Town Historian's Office.

(54) Shaw, Brookhaven Town Records, II, p. 196.

(55) Carman, Harry J., ed. American Husbandry (New York: Columbia University Press, 1939, reprint of 1775 edition), p. 74, 94-95.

(56) Burnhan, Stewart and Latham, Ray A., "The Flora of the Town of Southold, Long Island and Gardiner's Island," Torreya, vol. 14 no. 11, 1914, p. 201-205; esp. vol. 17 no. 7, 1917, 111-122. Conversations with Professors Orville Terry and William Walters of the Marine Science Research Center at the State University of New York at Stony Brook form the basis for this observation. They, as well as Long Island Marine Wetlands and The Marine Wetlands of Nassau and Suffolk Counties (supra, p. 1, 2, 8), have been the primary sources of information for this section on wetlands and associated grasses.

(57) Street, Huntington Town Record, I, p. 340.

(58) Quoted in Andrews, III, p. 114.

(59) Ibid.

(60) Once James became King of England the status of New York changed legally from a propriety to a royal province. Its administration was removed from his personal advisors who served him while he was a duke to the Privy Council and various other branches of the royal government.

(61) Bond, Beverley W. Jr. The Quit-rent System in the American Colonies (New Haven, CN: Yale University Press, 1919), p. 110-113, 254-285.

(62) Documents Relative to the Colonial History of the State of New York (Albany, NY: Weeds, Parsons & Co., 1853-1887, 15 vols.), III, p. 377-383; for Dongan's instructions see Bond, p. 369-375.

CHAPTER II

THE DONGAN PATENTS

The questions of why Dongan decided to call in all old charters and issue confirmations of them cannot be answered satisfactorily by simply relying on his desire for increased income from quit-rents. Admittedly, this had been a concern of the governor ever since he arrived in New York. His first instructions from the Duke of York in 1683 made no mention of town charters but admonished him to tighten up on the collection of quit-rents (1). In order to do this efficiently it became necessary to review patents and survey lands to determine what was in private hands and how much remained unappropriated. On 16 March 1685 Dongan dispatched warrants to all the sheriffs in the colony ordering them to make inquiry of the inhabitants within their respective bailiwicks by what right, title, or pretence they enjoyed their possessions and to make a return of their findings to determine if such had been recorded (2). Intentionally or not, this became the prelude to a full-scale revision of town charters by the governor.

When the order went forth the following March from Dongan to all the towns to submit their charters for review some of them resisted. In response to the towns' refusals to comply, the governor applied both legal and political pressure and boasted of his success in a letter to the Committee of Trade and Plantations in December 1686. Pointing out to the committee that heretofore quit-rent collections had been negligible, he explained that although some landowners did comply voluntarily he was forced to take many to court, "where, in a short time, they are easily induced to it" (3). As for those who declined to submit, Dongan used the ploy of finding land in their townships not yet purchased from the local Indians and then threatening to dispose of it as he saw fit in the name of the king. This quickly brought many around to his way of thinking, because, "they were willing rather to submit to a greater quit-rent than have that unpurchased land disposed of to others than themselves" (4).

When Dongan justified his sweeping revisions of existing charters in terms of increased revenues, he voiced only one reason for his actions, for at the same time he erected a number of manors and granted large tracts of land to certain members of New York's aristocracy friendly to his administration. To explain this requires a brief digression to discuss, in general terms, chartered corporations in seventeenth century England and certain incidents that occurred during the reigns of Charles II and James II.

Seventeenth century lawyers generally agreed that the privilege of incorporation, the creation of a fictitious person as a legal entity having perpetual succession such as a municipal body corporate and politic, could be obtained only by grant from the Crown. By the time of James II there existed in England approximately 200 incorporated municipalities, each with its own peculiar privileges, jurisdictions, and rights. Their charters were highly

valued by them because they conveyed not only real estate but also immunities, franchises, jurisdictions, and acquittances. Once the charter had been issued the character of the municipal corporation was left largely to shape itself according to the concessions it had been granted and the powers it possessed. Some had many jurisdictions such as local courts, freedom from county justices, powers of taxation, and the right to make by-laws; others had but one or two. The only feature common to all of them was the possession of corporate magistracy (5).

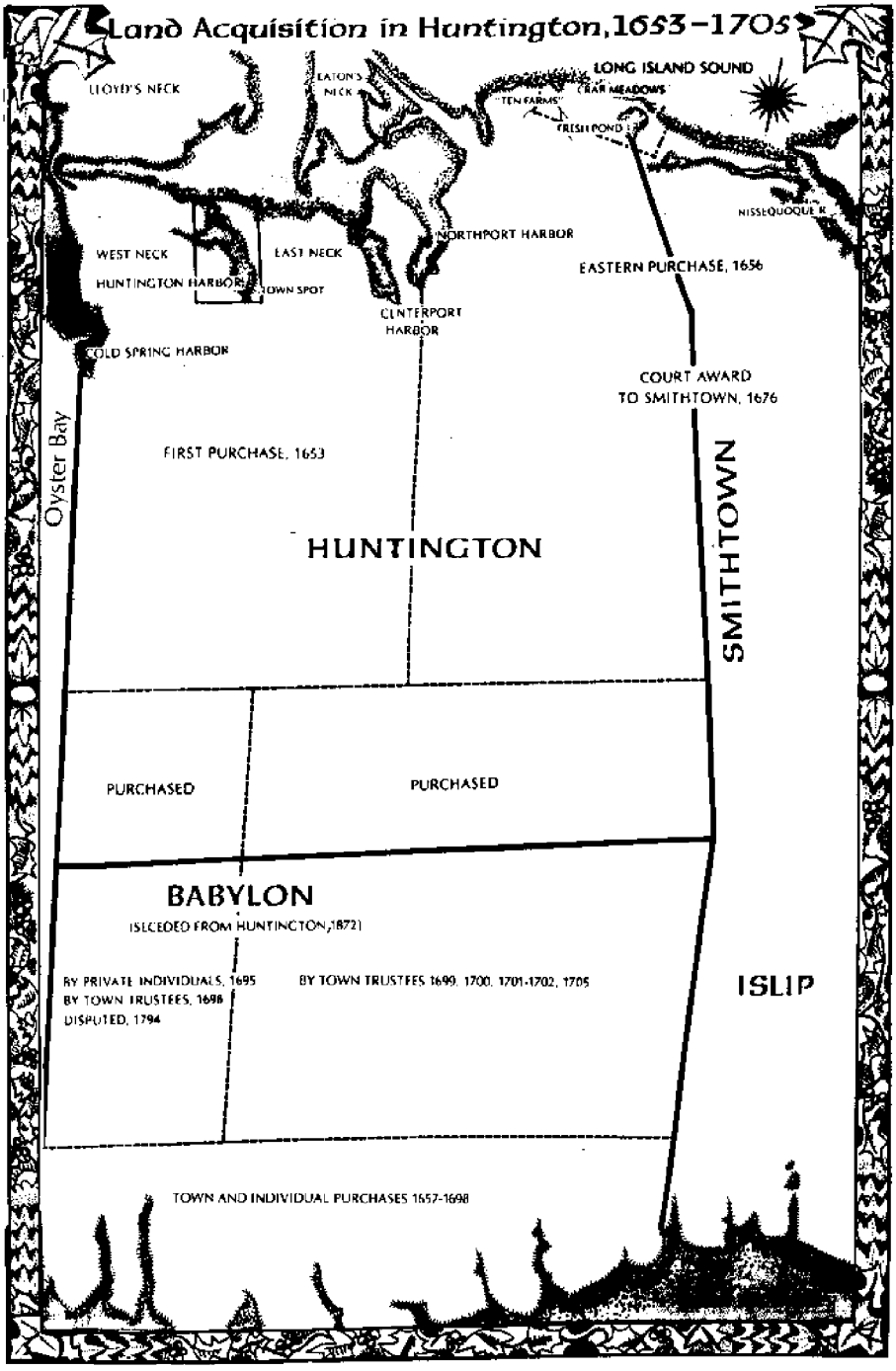
An important power of most municipal corporations was that connected with real estate, which consisted of rights over land both within and outside the borough amounting to complete ownership in fee simple. Occasionally, a borough might pay a fixed quit-rent in the form of a vestigial burgage tenure harkening back to an earlier seignorial commutation of villein services into money payments, with accountability for such quit-rents to the Crown or other superior lord. Among the concessions obtained by many boroughs were certain rights associated with manorial customs such as administration of common fields, stinting of pastures, use of waste, rights to estrays, and escheats. These chartered corporations might also control real property acquired from religious houses, purchased from the Crown, or inherited from some public spirited individual for the fulfillment of a trust or for the common good. For these reasons the charters frequently expessly granted the corporations the right to hold, administer, and sell real property.

Originally, in most chartered boroughs the predominant interest was in agriculture, but many evolved into communities of traders, craftsmen, and shopkeepers so that the association of producers in agriculture gradually became transformed into an association of producers in commerce and manufacturing. Because of this, corporate jurisdiction over land gradually expanded to include control over trade. A great many boroughs became a "bundle of jurisdictions" relating not only to widely scattered territories but also to persons within the scope of their magistracy not necessarily associated with a specific geographic center. According to one authority on English local government:

> It follows from our account of the acquittances, franchises, liberties, and immunities which comprised the total jurisdiction of a municipal corporation that the areas over which authority was exercised might differ widely for the different powers and might in some cases be susceptible of no geographical definition whatever (6).

Throughout Europe and in England during the sixteenth and seventeenth centuries there existed a tendency toward absolute monarchies. It met with resistance from two main sources: the aristocracy and the chartered corporations. In England the latter proved to be the more vigorous opponent as they strove to retain their independence from state control. For a time they succeeded in obstructing Crown policies in the latter seventeenth century through their control of parliamentary elections and by their judicial functions. After the restoration, Parliament frequently found itself in opposition to royal policy as, for example, in the case of Charles II attempting to gain recognition for his right to grant exemptions from the Act of Uniformity of 1662 and 10 years later in his efforts to establish religious toleration on his own authority (7). Later, James II claimed far-reaching

MAP 2


Land Acquisition in Huntington, 1653-1705
LLOYD'S NECK
EATON'S NECK
LONG ISLAND SOUND
CRAB MEADOWS
TEN FARMS
FRESH POND
NISSEQUOGUE R.
NORTHPORT HARBOR
WEST NECK
EAST NECK
HUNTINGTON HARBOR
TOWN SPOT
CENTERPORT HARBOR
EASTERN PURCHASE, 1656
COLD SPRING HARBOR
COURT AWARD TO SMITHTOWN, 1676
Oyster Bay
FIRST PURCHASE, 1653
HUNTINGTON
SMITHTOWN
PURCHASED
PURCHASED
BABYLON
(SECEDED FROM HUNTINGTON, 1872)
BY PRIVATE INDIVIDUALS, 1695
BY TOWN TRUSTEES, 1698
DISPUTED, 1794
BY TOWN TRUSTEES 1699, 1700, 1701-1702, 1705
ISLIP
TOWN AND INDIVIDUAL PURCHASES 1657-1698

dispensing and suspending power even beyond ecclesiastical affairs and pursued a policy of toleration vehemently. In both instances Parliament resisted strenuously.

Parliamentary forces recognized that the two monarchs would use every device at their commands to insure a loyal following. The first did so in the expectation of placing loyal supporters in important positions of power; the second to gain control of Parliament so that, through a policy of toleration, he could place Catholics in key positions of authority. Both kings were frustrated by a Parliament that could harken back to having gained new powers by deposing one king and restoring another, and in which there was an inbred fear of a return to papal authority through the increasing catholicism of the Stuarts.

The position of the incorporated boroughs had one weakness: their privileges had been granted by charter and charters could be revoked by the same royal authority from which they came. To be revoked a charter, franchise, privilege, or liberty had to be proven to have been exceeded. Human failing suggests that at one time or another every chartered municipality probably overstepped its authority if only on some minor technical point. Normally such actions could be overlooked as a pardonable error. In the context of the seventeenth century of the later Stuarts it was almost inevitable that the Crown lawyers would assiduously seek for and uncover such transgressions in order to invalidate the charters of those boroughs that stood in opposition to Crown policies. They could then rewrite them and incorporate stricter controls over local offices, thereby insuring a favorable representation in Parliament.

A case in point is the revocation of the London charter in 1683. Quo warranto proceedings were brought against the city based on the alleged misuse and neglect of the powers of the mayor (8). The city forfeited its charter thereby and the new one issued permitted the king to remove local officials and subjected the appointment of new ones to his scrutiny. In this way Charles II could control the selection of London's parliamentary representatives. The forfeiture of London's charter so upset most other corporations that they voluntarily surrendered their charters on the assumption that they were in some way negligent and thus open to a similar attack. During the last decade of Stuart rule a number of charters were thus renewed. In 1683 and 1684 Charles had many rewritten for boroughs which, by their actions, expressed dislike of his court; in 1686 and 1687 James II repeated the process for those who proved to be hostile to the return of Roman Catholics to favor and objected to the dispersing power of the Crown (9).

Given these circumstances, one does not have to look too far for reasons why Governor Dongan, a Catholic and friend of James II, initiated such sweeping changes in the colony of New York. By inclination he favored the upper classes and indicated this by granting large tracts of land to wealthy individuals, some of which were erected into manors such as Lloyd's Manor in the northwest corner of Huntington. He also favored the fur trading interest by granting Albany a new charter that gave that town a monopoly of the fur trade. At the same time he permitted the passage of a regulation in 1683 that all flour must be bolted or sifted in the town of New York, thus granting an exclusive monopoly to that town's flour merchants and forcing Long Island's farmers to market all their wheat and flour through a single channel. He further antagonized the island in 1686 when he imposed a 10 percent ad valorem duty on all European goods imported from Boston. This especially affected the eastern

towns of Southold, Southampton, and Easthampton which fell within the Boston trading sphere. They had found it more economical and expedient to ship their products to the New England port in exchange for European goods rather than to New York. Thus, Dongan probably fully expected to bring into existence a strong group of aristocratic landholders and merchants favorable to his administration and, through reissuance of local charters, force the recalcitrant Long Island puritan-oriented towns into submission.

Unfortunately, Dongan's legal and political manipulations, however well-intended, did not produce the desired results. Brookhaven, Southampton, and Easthampton dutifully submitted their charters for renewal. Southold did not respond to the demand and continued to function under its Andros patent. Smith of Smithtown followed a similar course of action. At that time the Islip area had recently been acquired by William Nicolls and, like Smithtown and Shelter Island, was considered to be a private proprietary grant and not a town. Of these three, only Smithtown had been erected into a town by its Andros patent, but not incorporated (10). Although Dongan issued land grants in these areas, they did not contain the important legal and political features found in the town patents. Therefore, they remained outside the pale of those towns that can be designated "Dongan charter towns," with their legal complexities which make them unique even today. Oyster Bay undertook to have its patent confirmed but, for whatever reason, never received one and continued to rely on its Andros patent (11).

Huntington proved to be the most obdurate of them all, but it too finally capitulated. Upon receiving the governor's orders, the townsmen met in April 1686 and voted not to surrender their patent (12). To protect themselves as best they knew how they entered into negotiations with the Indians during the next few months to establish the boundaries of the town and thus avoid questions of legal title. By October the governor lost his patience and sent two men to view the town's and the Indians' lands with an accompanying order that the town should proceed to purchase all unbought lands within its limits (13). Of course, the town would have to pay the governor a fee for these purchases. Pleading poverty and the general infertility of the soil, the town offered Dongan 20 pounds for purchase rights and suggested a quit-rent of 20 shillings. At the same time they remained adamant in refusing to hand over their patent. The controversy dragged on for more than a year, but by March 1687 the townsmen realized that their limited powers could not withstand those of the governor who could, if he wished, apply sufficient legal and executive pressure to make their position untenable (14). Reluctantly, the freeholders agreed to send these delegates to New York, hat in hand, to bargain for as favorable terms as could be gotten. After protracted negotiations a patent was issued to Huntington on 2 August 1688. The town did not receive a properly recorded confirmation, however, until three years later. Swiftly moving events in England and in the colony intervened and before the year's end the Glorious Revolution had unseated James and enthroned William and Mary.

News of the revolt arrived in the colonies by way of a proclamation, dated in London February 16, requiring all subjects to declare their allegiance to King William and Queen Mary. The Massachusetts Bay Colony reacted by arresting and imprisoning Governor Andros and dissolving the Dominion of New England; New York reacted with a revolt of its own. News of the overthrow of Andros arrived in New York on April 25, whereupon the provincial council held a series of meetings at which they determined to remain steadfast under Deputy Governor Nicholson (15). However, a number of towns in Westchester and on Long

Island thought otherwise. The abolition of the assembly and the granting of commercial and trading monopolies to New York town had so embittered the small farmers and the commercial interests in the fledgeling seaports that they were ready for revolt.

On Long Island the eastend towns immediately dismissed the local officials appointed by the central government and elected others in their place. Huntington held a town meeting on May 3, electing a representative to discuss with Oyster Bay and the Connecticut communities what course to take (16). Shortly thereafter the towns joined in a declaration disavowing the recent government, (17) but were saved the trouble of further independent action when, on 31 May 1689, Jacob Leisler, an officer in the militia of New York, took possession of the fort in New York harbor and confronted the council with the demand that it relinquish the government to him until such time as proper authority was established by instructions from England. Nicholson fled to England on June 11 to plead his cause, thus permitting Leisler to justify his actions by deriving his own authority from a letter of instructions to Nicholson that said, in part, that, "in his absence such as for the time being take care of preserving the peace and administering the laws" (18).

The Leisler Rebellion actually had its roots in an internal struggle for control of the provincial government and should not be interpreted as a democratic revolt against tyranny even though Leisler had wide support among merchants, artisans, and small farmers. Rather, it should be looked upon as a violent reaction against a few who became entrenched in positions of special advantage by those who simply wished to have similar advantages (19). The new monarch in England quickly took steps to end the violence and disorder that had spread from Boston to New York. By appointing a new governor, Colonel Henry Sloughter, with instructions to call a general assembly and to confirm all land grants, he hoped to restore order. Although Sloughter did not arrive in the colony until March 1691, he dispatched Major Richard Ingoldsby immediately with two companies of soldiers to reassert royal authority. Arriving in New York in January 1691, Ingoldsby issued a proclamation calling upon the people to recognize Governor Sloughter as the rightfully appointed authority and to disavow all rebellious elements. He called upon Leisler to surrender the city to him, but the latter refused, declaring that the major did not have proper authorization. The rebel leader vowed to continue governing New York until either the new governor arrived with proper credentials or until he received instructions from the king. Like Stuyvesant 30 years before, Leisler blustered and threatened but because of disaffection with his rule, the people failed to support him. Instead, they welcomed Ingoldsby into the city, whereupon he promptly charged Leisler with high treason and threw him into prison. Just as promptly his trial followed in a matter of days. With dispatch he was found guilty and sentenced to be hung, drawn, and quartered (that is, publicly hanged until not quite dead, disembowelled, and cut into four pieces, the pieces to be prominently displayed in as many parts of the town). On 16 May 1691 the executioner carried out the sentence.

The new governor immediately set about restoring order and confidence in the royal government. In quick succession he had enacted by the general assembly, called into session earlier that spring, a number of acts that established his government, defined the rights of his Majesty's subjects, and pardoned all those who had been active in the "late disorders" (20). To quiet the peoples' fears concerning land grants made or recorded during the unsettled times, the

assembly on 6 May 1691 enacted An Act for Settling, Quieting, and Confirming unto the Cities, Towns, Manors, and Freeholders Within This Province Their Several Grants, Patents, and Rights Respectively (21). Thus, the Dongan patents to Brookhaven, Southampton, and Easthamton were secured to them; Oyster Bay and Southold could continue to trust in their Andros patents as could Smith of Smithtown and the private lands patentees in what would later be Islip.

Huntington, however, remained uneasy and rightly so. Their Dongan patent had been recorded during the Leislerian administration, all acts of which had later been nullified by Sloughter. The townsmen believed they were in a weak if not untenable position regarding their land titles since the Dongan patent superceded that from Nicolls and, although recorded by Leisler on 5 February 1691 the town had never received a confirmation copy. Therefore, they applied once again for a written confirmation of their most recent patent. Finally, on 5 October 1694 the town received its last royal charter from a new governor, Benjamin Fletcher. Consequently, although three towns on Long Island can claim to be "Dongan Patent" towns, and two must rely upon their Andros patents, Huntington stands alone as being a "Fletcher Patent" town. Admittedly, their patent reiterated all the terms of the Dongan document, but it came eight years after the others over the signature of a later governor (22).

The Dongan patents differed in a number of respects from their predecessors, the Nicolls and Andros patents. Whereas the earlier patents described the boundaries as they existed then, the Dongan patents gave those that, with only a few minor alterations, exist today. All the patents granted the patentees the right to purchase all remaining Indian lands within those boundaries. The first two patents only vested the towns with "all the privileges belonging to a town within this government"; that is to say, each town must guide itself by the Duke's Laws as amended and supplemented by governors' proclamations and orders. In that sense, their legal responsibilities and privileges were relatively simple and rather limited. In contrast, the Dongan patents erected the towns into bodies "corporate and politic" with all the duties, obligations, and privileges of such a status. In effect, this imposed on each town responsibilities and privileges almost equal to many towns and boroughs in England. As corporations, they became able and capable in law of owning and disposing of real and personal property of any kind; they could sue and be sued; and:

> plead and be impleaded, answer and be answered unto, defend and be defended...before whatsoever judges and justices or other persons or officials...in all...manner of accounts, plaints, suits, complaints, causes, matters, and demands whatsoever...in manner and form as any other of his Majesty's liege people within this province (23).

But, far more important to those interested in the question of ownership of wetlands in these towns, is the clause in each patent that created trustees to hold and manage all the unappropriated lands "to the use, benefit, and behoof [profit, service, or advantage]" of the freeholders of the town. The real property intended to be vested in the trustees was enumerated in what can only be described as an "umbrella" clause, since it left nothing outside the purview of the trustees, and comprised:

> all and singular the houses, messuages, tenements, buildings, mills, mill dams, fencing, enclosures, gardens, orchards, fields, pastures,

> woods, underwoods, trees, timbers, feedings and common pasture, meadows, marshes, swamps, plains, rivers, rivulets, waters, lakes, ponds, brooks, streams, beaches, quarries, creeks, harbors, highways and easements, fishing, hawking, hunting and fowling, mines and minerals (silver and gold mines excepted), and all franchises, profits, commodities, and hereditaments whatsoever to the said tract of land and premises belonging... (24).

With a scratch of his quill Governor Dongan thus created a trust obligation, vis-a-vis the land, in at least four towns on Long Island (25). The trust that the governor created, or "use" as it was known prior to the end of the sixteenth century, has an ancient and generally honorable history. This will be gone into in detail in a later chapter, but for now a brief description of what it means is in order.

A trust or use occurs when one person gives some real or personal property to another for the benefit of the giver (donor or feoffor) or third parties designated by him (26). Definitions, more acceptable to those in the legal profession but somewhat abstruse and oblique to the layman, would be, "When a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have these rights in trust for that other or for that purpose and he is called a trustee," (27) or "an equitable estate...involves in every case the holding of the legal title to the land by a trustee who has not beneficial interest of his own, but who holds solely for the benefit of the beneficial or equitable owner, called the cestui que trust" (28). Sir Edward Coke, renowned jurist of the seventeenth century, described it thus,

> An use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land...cestui que use had neither jus in re nor jus in rem, but only a confidence and trust (29).

In simple terms, each authority is attempting to convey the legal concept that a trust arises or is created when a person (grantor, donor, feoffer, settlor of the trust) conveys legal title to real or personal property to a second person or group of persons (grantee, donee, feoffee) to manage, use, or dispose of for the sole benefit of either the grantor or a third party, either of which is then called and becomes the cestui que trust, or beneficiary (they are synonymous terms). In other words, the nine individuals named and designated in each patent as trustees held the legal title to all the unappropriated real property within the town boundaries, specifically all that was enumerated in the "all and singular" clause, with Dongan acting as grantor. Two sides of the trust triangle are thus accounted for. The third side is made up of all the freeholders and commonalty (taxpayers and residents in today's parlance) of the town. They immediately became the cestui que trust , the beneficiaries, and acquired an equitable estate in the land. No person in the town could lay claim to a given parcel of land under the trust as long as the land remained unappropriated. Only after the trustees and townsmen, in customary fashion, made divisions of the land and allotted them out to individuals could any participant in the division, after receiving his allotment, claim ownership rights to his allotted portion exclusive of the other members of the community.

Governor Dongan had created a trust in all the unappropriated real property within the charter towns, but was it in the nature of a private trust or a public (charitable) trust? At first glance this might appear to be a technical question of interest only to those in the legal profession and of little or no concern to the layman (for example, the freeholders and commonalty of those towns). Not so, for the answer determines what legal remedies the townspeople might have even today in the event the trustees in one way or another fail to discharge their duties or act adversely to the trust.

The distinction between the two is found not in the property held in trust, nor in general in the objectives of the trust, but rather in the designation of the beneficiaries of the trust. A private trust is not considered valid unless there is a beneficiary who is definitely ascertainable at the time of the creation of the trust or within a period of time covered by the rule against perpetuities (30). In the case of a public or charitable trust, the benefits thereof are not given to individual beneficiaries, rather the property is devoted to the accomplishment of purposes beneficial to the community. The persons to receive such benefits need not be specifically designated. With private trusts, no one except a beneficiary or one suing on his behalf can maintain a suit to enforce the trust; whereas with a charitable trust it is enforceable at the suit of the attorney-general and not at the suit of any individual beneficiary (31).

Charitable trusts have been defined as being created for the relief of poverty, the promotion of education, the advancement of religion, the promotion of health, and for governmental or municipal purposes such as the erection of public buildings, the laying out of highways, the building of bridges, and "other purposes the accomplishment of which is beneficial to the community" (32). "Other purposes" has been interpreted to mean the promotion of the happiness and enjoyment of the members of a community, the common element being that the purposes are of a character sufficiently beneficial to the community to justify allowing the property held in trust to be devoted for an indefinite period to its accomplishment, thus exempting it from the rule against perpetuities (33).

Although a whole body of rules of law has grown up around trusts, only a few of a general character need be noted here. A trustee can safely do anything that he is expressly authorized to do under the instrument creating the trust. In fact, he is bound to do anything that instrument requires him to do. Conversely, he must refrain from doing anything expressly forbidden by the trust instrument. A trustee cannot benefit from the trust nor receive any remuneration as a result of it. If he purchases property in his capacity as trustee, then that property automatically becomes part of the trust; if he wishes to acquire any of the trust property for himself he must disclose fully to the cestui que trust all facts about it and display the epitome of good faith. The office of trustee cannot be delegated to another nor can trustees shift their responsibilities to another. If this happens, the trustee assumes full responsibility for all actions of the third party. However, a trustee may, if he wishes, seek advice and assistance in the management of the trust and even permit the trust property to come under the control of another agency if no needless risk is involved. The trustee owes a duty of loyalty and due diligence to the beneficiaries in the administration of the trust. The duties of the trustee of a charitable trust are similar to those of a private trust, as just enumerated, the fundamental difference between the two being that the

duties of the former are not ordinarily owed to a specific beneficiary and are enforceable only at the suit of the attorney-general.

Finally, a trustee can terminate the trust by conveying all the trust property legally to others if the instrument creating the trust permits such acts. In fact, he can even sell the property if not allowed by the instrument if such sale would further the purposes of the trust. A court would have to authorize such a sale (34). If all the beneficiaries of a trust, being of full age and under no disability, request the trustee to take some action divesting him of all the trust property, the trust comes to an end. A trustee can appoint a new trustee or pass the property to another designated as a trustee only by legislative act (New York has done so in a number of instances with respect to the charter towns); in such a case the trust is in no way altered or affected (35).

What of the cestui que trust? What rights and remedies has he since he has an equitable estate (interest) and the trustee the legal estate? First, in the case of a private trust it can be enforced against the heirs, successors, executors, and administrators of the original trustee. This is so because, given the time limitation placed on such a trust by the rule against perpetuities, the trust follows the land and does not die with its creator or first administrator so long as the trust remains valid. Those who succeed the first trustee assume his persona for the duration of the trust and are bound by his obligations. The trust can also be enforced against those who gain legal title to the trust property, even after having paid a valuable consideraton, if they had notice of or ought to have known of the trust. This does not apply, however, when the land is conveyed to a bone fide purchaser who has no notice or could not have known of the trust, or in the event it is done with the knowledge and consent of both trustee and beneficiary. In the latter instance the intent is to extinguish the trust by such conveyance. If the beneficiary is damaged, usually financially, by the actions of the trustee, he can hail him into court and seek relief either through financial compensation or by court order forcing the trustee to act in conformity with his legal role for the benefit and enjoyment of the beneficiary. A beneficiary may bring an action to have a trustee removed for serious breaches of the trust, for unfitness, for long continued absence, and where it can be proven that the views of the trustee are hostile to the purposes of the trust.

With a few variations a charitable or public trust is the same as a private trust with respect to remedies. The fundamental difference between the two, of course, is that only a beneficiary of a private trust is able to bring an action; whereas the beneficiary of a charitable trust may not. It is for the attorney-general to do so. In certain instances a third party who can show a special interest in the performance of the trust may bring an action, in which case the attorney-general, whose duty it is to protect the community interest in the charitable trust, is a necessary party to the suit (36). Conversely, a person who cannot show such a special interest, that is, one who is but a member of the community even though a general beneficiary of the trust, cannot bring an action in his own name. He must induce the attorney-general to act in his behalf. Frequently, the attorney-general will then demand that that person assume the role of a relator (informer) and bear court costs (37). The failure of the attorney-general to enforce the trust at one point in time does not bar him from doing so later on the ground of laches (neglect to do for an unreasonable length of time what in law should have been done, an inexcuseable delay) of the statute of limitations.

Semantically and legally speaking, one should probably use the term "charitable trust" to describe the charter towns, for they seem to fall into this category. However, recently it has become popular to refer to them as "public trusts." Possibly, this is because the cestui que trust is indefinite. It is, in fact, the public and the trust administered for the benefit of the public. Therefore, the latter term will be employed herein.

One must now consider the reasons why Governor Dongan imposed a trust obligation on the towns. Although there is little factual evidence to document his reasons, there had developed in England by his time a sufficient body of rules of equity, more particularly charitable trusts, to warrant their serious consideration by him in furthering his political purposes (38). Dongan was quite familiar with recent events in England and with the local customs and charters of English buroughs. In addition, he had access to sound legal advice in the person of Mathias Nicolls, a lawyer by training and former speaker of the Assembly, who held the office of secretary of the province under Governor Nicolls, was twice mayor of New York, and had been a judge in the Court of Assizes.

When Dongan incorporated the trust into the town charters he concentrated control of town property, and accountability for it, in the hands of nine individuals. In so doing he avoided the possibility of a few accumulating large land holdings against his wishes, since the trustees were bound by law to act in the interests of the entire community and not just one or two in it. It is inconceivable that the beneficiaries of the trust, the freeholders, would allow the trustees to grant large tracts of land to a few among them to the exclusion of the others. This would tend to work in favor of the governor who did not necessarily want to be confronted with a few powerful landholders on Long Island who might oppose his policies. The trust as created in the charters insured the perpetuation of a number of small landholders.

If, perchance, the trustees in some way acted contrary to the policies of the governor, whether it be in the form of local ordinances obnoxious to him or misappropriation of land, he could have the attorney-general of the province take the necessary legal steps to "perfect" the trust. The suit would be one to force the trustees to perform or not to perform a specific act. In the same vein, he could, through the attorney-general, have a trustee removed for cause, that is to say, for breach of the trust, unfitness for office, or for acts hostile to the purposes of the trust. Although in all these instances the burden of proof would rest with the governor, nevertheless, it probably posed a sufficient threat to the towns and enough of a guarantee in the mind of Dongan to justify the creation of the trusts.

A far more practical and immediate justification might have been the greater success with which Dongan could collect quit-rents or taxes under a trust arrangement. If, for example, an individual, or a town itself, was in arrears on payments of either account, the governor could distrain the real or personal property of the taxpayer or town to secure payment. If the amount collected in this manner proved to be inadequate to discharge the debt, action could be taken against any property held in trust. In earlier centuries, as the concept of the trust gained acceptance and came under the jurisdication of courts of equity, the trustee had the legal ownership of property held in trust while the beneficiary had only an equitable interest and, in essence, but a moral claim against the trustee. Lord Nottingham, chancellor from 1675 to 1682 and known as the father of modern equity, modeled trusts on property

rights at common law. One result was that claims against the beneficiary could be satisfied from the lands that others held in trust for him since they were then being considered, at least to some extent, as his own (39).

Before giving control of all the unappropriated real property to a group of trustees, it was necessary to dispose of the rights individuals had in lands already granted to them by the towns. This the charter did by recognizing that the trustees held all the lands in the towns "for the several and respective uses following and to no other use, intent, and purpose whatsoever," and dividing the said land into two categories:

> concerning all and singular the several respective parcels of land and meadow, part of the granted premises, in any ways taken up and appropriated before the day of the date hereof, unto the several and respective freeholders and inhabitants of the said town...by virtue of the aforerecited deed or patent [Nicolls patent], to the only use, benefit, and behoof of the said respective freeholders and inhabitants and to their several and respective heirs and assigns, forever; and as for and concerning all and every such parcel or parcels, tract or tracts of land, remainder of the granted premises not yet taken up or appropriated to any particular person or persons by virtue of the aforesaid deed or patent, to the use, benefit, and behoof of such as have been purchasers thereof and their heirs and assigns, forever, in proportion to their several and respective purchases thereof made as tenants in common, without any let, hindrance, or molestation to be had or reserved upon pretence of joint tenancy or survivorship... (40).

Even though the trustees thus acquired legal title to the real property in the towns and could "give, grant, release, alien, and assign and dispose of [any of it]," and make orders for the "more orderly doing of the premises as they...shall and may think convenient," they had to act in accordance not only with the laws of the province, such acts not being repugnant to those of England, but also within the restrictions imposed by traditional local methods of land distribution and use. They did not have carte blanche to do as they wished with the unoccupied land of the towns. Yet another restraint on possible arbitrary or capricious acts of the trustees was the provision that, though they were made perpetual as a legal entity, the townsmen elected new trustees annually.

The type of tenure by which the trustees held the land was vital since it determined the extent to which they could dispose of it. In their minds it was imperative that they receive the legal title in as complete a form as possible so that they could then grant to their associates lands unencumbered with feudal restrictions.

All land in England and the proprietary rights to it were held by a formula established in the eleventh century by William I. The king held land that was in every sense his own. Exclusive of this royal desmesne all land was held of the king and was in the nature of a private contract conditional upon services rendered or duties performed. The nature of these determined the type of tenure. When William I conquered England in 1066 all of the land became his royal desmesne. To insure continued support and military aid he parcelled out the land to certain earls, bishops, rich abbeys, and the like who held it in capite as tenants-in-chief holding immediately of the king. They in turn did

what the king had done to them and subinfeudated their holdings. What they retained for themselves they held in desmesne; what they enfeoffed (gave as a gift in return for a service) they became mesne lords of and the tenant held by mesne tenure. By 1086 the whole country was thus divided among more than 1,500 tenants-in-chief with innumerable subtenants holding by knight service tenure or some lesser form of tenure arrangement. Necessity and custom combined to make men become accustomed to thinking that every occupant of land had to have a tenure defined by some form of service (41).

By the end of the thirteenth century English law recognized four kinds of free tenure: frank-almoin, knight service, serjeanty, and socage. Frank-almoin was a tenure by which a religious organization held its lands, its main feature being that no secular services were due. Only service of a religious nature, such as saying of masses and prayers, could be required of such a tenant. Indiscriminate grants of land to religious houses were limited by the Statute of Mortmain in 1279. Tenure by knight service typified the feudal system and usually carried with it some form of military service to be performed for the mesne lord. Henry II (1154-1189) accepted money payments (scutage) in lieu of such service, but Magna Carta limited the royal right to take scutage and eventually it died out and was abolished by act of Parliament in 1660. The same act consigned tenure by serjeanty to a similar fate. Originally a service tenure, primarily in the nature of personal services such as sword-bearer, butler, seneschal, it became more or less a position of dignity while the actual service was taken over by hired servants. It actually fell into disuse except for a few categories that carried with them an honorific quality. Socage tenants held freehold land not involving any of the previous three types of tenure. Neither military service nor scutage was due and the lord's right of wardship of an heir in his or her minority, with the privilege of selecting a proper marriage partner, did not apply. Socage tenants paid their rent or "farm" in money, kind, or certain labor, and suit (soc) to the lord's court. Quite often this form of tenure was hardly distinguishable from villein tenure because of the nature of the certain services, but gradually it became freer and as perpetual and hereditable as a knight's tenure came to be. Eventually, socage tenure became the least encumbered of all the free tenures and superceded them. Money rents due from socage tenants were either substantive and of real value (a pound of pepper, a lamb) or nominal (a peppercorn, a rose, two arrows). Sometimes no rent was demanded and only fealty was due to the lord.

In 1290 the Statute of Quia Emptores severely weakened the hold of the feudal system over the land. It banned the creation of new perpetual fees, or gifts of land, by subinfeudation (42). Thereafter, a purchaser of land took the place of the seller in the feudal hierarchy and assumed all his feudal obligations to the superior lord. Consequently, a man could dispose of his land as he pleased as long as it was not an entailed estate, and would no longer be bound to a lord by a grant of land. Actually, this did not occur as instant freedom of alienation for all because superior landowners resisted it. Nevertheless, feudalism gradually gave way to the desires of men in general to dispose of their own property as they thought fit.

One method of acquiring land from the Crown without being encumbered with feudal restrictions was to resort to a legal fiction which, by the end of the sixteenth century, had become acceptable in courts of law. Persons receiving grants of land from the Crown were permitted to hold the land "as of his Majesty's Manor of East Greenwich in the County of Kent, in free and common

socage and not in capite nor by knight service, yielding and paying (quit-rent of either substantive or nominal value)" (43), thus making it a freehold in the form of a socage tenure. This type of tenure was incorporated into and became an essential feature of most colonial charters.

The selection of a part of the royal desmesne in the County of Kent as the basis of the tenure of colonial charters was neither a casual nor a haphazard choice. The origins of the Manor of East Greenwich go back at least to 918 when Elfrida, wife of Baldwin II, Count of Flanders, granted to the abbot of Ghent the property of "estegrenewiche." Edward the Confessor reaffirmed the gift in 1006 and issued a new charter to the abbot giving him extensive powers and exempting the property from all feudal exactions. In later years a number of manors were created out of Lewisham and Greenwich and the Crown reoccupied the entire grant briefly in the fourteenth century. In 1348 Edward II restored the lands to the priory and an abbot remained in residence until 1370 when the king purchased the Manor of East Greenwich outright for 500 pounds. Between that time and 1414 a prolonged legal struggle ensued over the extent of the rights of the tenants on the manor as a consequence of its being converted from ecclesiastical to royal ownership. The customary form of tenure peculiar to the County of Kent prevailed and it is likely that out of this controversy English lawyers were able to construct a legal fiction applicable to a wide area but based on the tenure arrangements in Kent.

In the case of Kent the form of tenure and the ability to alienate land was governed by gavelkind, which subjected land only to a fixed and certain rent or service. Lands held by this tenure could descend equally to all sons of the tenant if he left no will. Primogeniture, the practice of descent to the eldest son only in the event a tenant left no will, did not apply. Land was partible and could be subdivided for sale. Lands were not liable to escheat (automatic reversion to the lord) for felony. In other parts of England these customs became submerged by the common law, but William the Conquerer did not disturb the system nor did his successors, possibly because its geographical location gave it economic and social advantages not enjoyed by most of the realm, for Kent was one of the main arteries of trade with the continent.

English lawyers used the system in Kent and the existence of a royal manor there to circumvent feudal restrictions elsewhere and gradually developed a legal fiction by analogy whereby it could be expanded to cover other parts of England. When land grants could be held as of the manner of holding land in Kent and this concept was coupled with "free and common socage" and the provisions of the Statute of Quia Emptores what resulted was a bridging of the whole period of feudal land ownership. This was true of those New England colonies that had such a feature in their charters, thus making it relatively easier for their inhabitants to acquire, alienate, and devise land than their peers in England. It was also true of the charter granted by Charles II to James Duke of York and the freeholders of the Long Island towns benefited from it by having it made an integral part of their own patents.

To all intents and purposes, by the terms of the patents, the trustees seem to have acquired control of all the power in the towns. Nevertheless, the town meetings persisted as a major vehicle of control and expression of the wishes of the freeholders and commonalty. This political mechanism received reinforcement in 1691 when the General Assembly empowered the freeholders in town meeting assembled to pass such local ordinances as they deemed necessary

for the use and improvement of "their respective lands in tillage, pasturage, or any other reasonable purpose" (44).

Throughout the colonial period the trustees continued to govern many of the affairs of the towns, including the management and disposition of town property, albeit frequently directed to act in a certain manner by vote at town meetings. Gradually, some of the functions of the early trustees were taken over by officials whose duties were legislated by acts of the General Assembly. One of the first of these removed from the trustees was the duty of laying out and maintaining local highways. By the latter part of the eighteenth century these powers were vested in three surveyors and a commissioner of highways for each town. Other local officials came into being as the need for them arose, so that by the end of the colonial period there were supervisors, tax assessors, overseers of the poor, overseers of highways, constables, fenceviewers, and sheriffs who frequently derived their authority from provincial legislation. Nevertheless, the trustees maintained firm control over the land and, as often instructed at town meetings, continued to convey portions of it by deed or by lease to individuals, prescribing rules and regulations for the latter type of conveyance and use of such property. Throughout the entire period they jealously guarded the towns' interests and rights in any remaining unappropriated lands, seeing to it that not one took land to his own use without permission, and excluding nonresidents from the use of town waters.

CHAPTER II FOOTNOTES

(1) Documents Relative to the Colonial History of the State of New York, (Albany, NY: Weeds, Parsons, & Co., 1853-1887, 15 vols.), III, p. 331-334.

(2) O'Callaghan, Edmund B., ed. Calendar of British Historical Manuscripts in the Office of the Secretary of State, Albany, New York, 1664-1776 (Albany, NY: Weed, Parsons, and Co., 1866), p. 135.

(3) Documents Relative to the Colonial History of the State of New York, III, p. 397.

(4) Ibid.

(5) Webb, Sidney, and Webb, Beatrice. English Local Government (London: Longman, Green, and Co., 1908, 11 vols.), II, p. 275-276.

(6) Ibid., p. 288.

(7) 14 Car. 2, c. 4. This act abolished Presbyterianism as the de facto state religion and substituted the Anglican Church of England with its Book of Common Prayer. Over 2,000 nonconformist clergymen lost their posts as a result. The act reflected the policy of a strong royalist Parliament at the time, but Charles, sympathetic to Catholicism and wishing to curry favor with dissenters to gain additional support in Parliament, strove to exempt many of them from the act. See Plucknett, Theodore F.T., ed. Taswell-Langmead's English Constitutional History (Boston: MA: Houghton Mifflin Co., 1960), p. 424; Trevelyan, G.M. History of England (Boston, MA: Longman, Green & Co., 1926, 2 vols.), II, p. 240-244; Keir, Sir David L. The Constitutional History of Modern Britain Since 1485 (New York: W.W. Norton & Co., 1966), p. 240-242.

(8) A writ of quo warranto is one of the most ancient of common law writs issued by the Crown against an individual or corporation claiming a franchise or privilege, to inquire by what authority is the claim supported (for example, a royal charter granting a specific liberty or franchise, since all such flow from the king who is the chief franchise holder in the realm). The writ is used to initiate legal proceedings to determine by what right a franchise is exercised, or, if granted and not used, is used to force the defendant to prove why he had neglected or abused it. In either case, the charter is liable to forfeiture. A somewhat similar legal action, used against the Massachusetts Bay Colony in 1683, is the scire facias writ, which is either a continuation of a prior action or an original proceeding and must issue out of a court of record. It is based on a known record of activity of the defendant, and, in cases in the seventeenth century, were used to prove invasion of the royal prerogative. See, Mack, William and Kiser, Donald, ed. Corpus Juris (New York: The American Law Book Co., 1932), LVI, p. 865-883; LI, p. 307-365.

(9) For a fuller discussion of this period in English history, see Clark, Sir George. The Later Stuarts, 1660-1714. 2nd ed. (Oxford, Eng.: Clarendon Press, 1955), chap. IV; Webb and Webb, vols. II, III.

(10) Sleight, Harry D., ed. Town Records of the Town of Smithtown, Long Island, NY with other documents of historical value (Smithtown, NY: Town of Smithtown, 1929-1930, 2 vols.), II, p. 751-757.

(11) Cox, John Jr., ed. Oyster Bay Town Records (New York: Tobias Wright, 1916-1940, 8 vols.), II, p. 324. The townsmen continued to pay their old quit-rent and might have argued against a new patent using similar reasons as those employed initially against Andros in 1676-77 (for example, they already had one from Nicolls; they distrusted a new one; they would not take an oath), I, p. 33, 679; II, p. 337, 362.

(12) Street, Charles R., ed. Huntington Town Records including Babylon, Long Island, New York (Huntington, NY, 1887, 3 vols.) I, p. 440.

(13) Ibid., I, p. 468, 472-473. This maneuvering over Indian lands came about as the result of the governor's power to grant unappropriated lands in the town to strangers unacceptable to the townsmen.

(14) Ibid., p. 483-484.

(15) New York Historical Society Collections... for the Year 1868 (New York: Printed for the Society, 1869), p. 272-290.

(16) Street, Huntington Town Records, II, p. 29-31.

(17) Ibid., p. 60.

(18) New York (City). Common Council. Minutes for the Common Council of the City of New York 1675-1776. (New York: Dodd, Mead and Co., 1905, 8 vols.), p. 207-213.

(19) Detailed accounts of the rebellion can be found in Andrews, Charles M. The Colonial Period of American History, (New Haven, CN: Yale University Press, 1937, 4 vols.) III, p. 124-137; Andrews, Charles M. Narratives of the Insurrections 1675-1690 (New York, 1915), p. 167; Hall, Michael G., Leder Lawrence H., and Kammen, Michael G. The Glorious Revolution in America (Chapel Hill, NC: University of North Carolina Press, 1964), p. 9-79; The Colonial Laws of New York from the year 1644 to the revolution (Albany, NY: J.B. Lyon, 1894, 5 vols.), I, p. 219-220. Reich, Jerome R. Leisler's Rebellion: A Study of Democracy in New York, 1664-1720 (Chicago: University of Chicago Press, 1953).

(20) The Colonial Laws of New York, I, p. 223-248, 255-257. The law pardoning the rebels was passed on the day of Leisler's execution; it specifically excluded him and his son-in-law from its provisions.

(21) Ibid., p. 224-225. The Assembly passed an amplification of the Duke's Laws having to do with recording deeds in 1710 entitled An Act for the Better Settlement and Assurance of Lands in this Colony. The act stated that all deeds, conveyances, and writings having to do with title to real property

would be good and effectual in law if duly acknowledged and recorded in the office of the secretary of the colony or in the county records.

(22) Street, Huntington Town Records, II, p. 73-74, 84-85, 89-90, 140-151. Actually, Huntington could have claimed protection under the act of 6 May 1691 that declared that all deeds and patents were "forever deemed, esteemed, and reputed good and effectual charters, patents, and grants authentic in the law against their Majesties, their heirs and successors, forever, notwithstanding of the want of form in the law, or the nonfeasance of any right, privilege, or custom which ought to have been done heretofore by the constitutions and directions contained in the respective charters, patents, and grants..."

(23) Southampton, NY. Board of Trustees. The Board of Trustees of the Freeholders and Commonalty of the Town of Southampton (Southampton, NY, 1968), p. 8-17. With the exception of boundary descriptions and clauses dealing with minor land distribution problems peculiar to a particular town, all the Dongan patents are virtually identical in form. Cf. Street, Huntington Town Records, I, p. 65-79; "Letters Patent from Thomas Dongan to the Inhabitants of Easthampton," in New York (State). Secretary of State. "Land patents" (Albany, NY: at the New York State Archives, 1664-), 6, p. 48-57.

(24) Ibid. The excerpt is from the Huntington patent and conforms to the others.

(25) It cannot be repeated too often that only Brookhaven, Easthampton, Southampton, and Huntington fall within this category. Babylon does so only because it seceded from Huntington in 1872 and automatically acquired the same trust obligation with respect to the land there that had been imposed on the parent town. Shelter Island and Islip, both private proprietary grants, have no such obligation; Oyster Bay and Southold do only if one wishes to argue that an implied trust exists in their Andros patents. Riverhead, severed from Southold in 1792, has no more nor less than the latter town. Oddly enough, Hempstead also received a patent from Dongan but without the trust clause or the creation of trustees included.

(26) Donor is found in many English documents and means donator or giver, the recipient, then, being the donee; feoffor derives from fee or feof, a gift, so a feoffor is the gift giver and the feoffee the recipient.

(27) Maitland, Frederick W. Equity, also the Forms of Action at Common Law (Cambridge, Eng.: Cambridge University Press, 1909), p. 44.

(28) Walsh, William F. A Treatise on the Law of Property (New York: Baker, Voorhis, and Co., 2nd ed., 1927), p. 422.

(29) Quoted in Maitland, Equity, p. 116.

(30) Scott, Austin W. The Law of Trusts (Boston, MA: Little, Brown, and Co., 1967, 6 vols.), IV, p. 364, 375. According to Walsh, p. 539, the rule is that "every future interest must vest, if at all, within a period measured by the lives of definite persons in existence at the time of the creation of the future interest, and twenty-one years thereafter, and every such interest is void in its creation if it may by any possibility vest at a more remote time." The object of such a rule is to prevent the tying up of interests in property so that the property cannot be alienated because of future remote interests

far beyond the lives of those immediately involved in the present as well as distant future generations. The danger, of course, of anyone acquiring property with a remote future interest in another party is that he might find that suddenly he has lost the property many years after acquisition because of a future contingent interest. Walsh further states, p. 540, that after the future interest becomes vested, within the time limit of the rule, it may be freely alienated since it now has a definite value and becomes a part of the fee free of any uncertainty.

(31) Scott, IV, p. 364. The author noted, however, that in the case of some charitable trusts there may be beneficiaries having such a special interest in the performance of the trust as to entitle them to maintain a suit to enforce it.

(32) Ibid., p. 368.

(33) Ibid., p. 374.1, 374.10. The author cites the case of Goodman v. Mayor of Saltash, an 1881 English case before the House of Lords in which prescriptive rights of inhabitants of a borough to dredge for oysters were upheld, the court noting that appropriately enough for this study, if there had been a grant in trust for the same purpose to a particular class of inhabitants it would be a charitable trust that could not be invalidated as a perpetuity. Cf. Walsh, p. 441-442.

(34) Scott, IV, p. 380, 381. The Dongan charters allowed the sale, the alienation, of the land. Yet, times change as do tastes and values. What was good at one time might not be so today. Purposes once laudable may later be regarded as serving no useful purpose or even as not legal. What is considered beneficial in one age may in another be looked upon as wasteful, even detrimental to the community. It is possible, although not necessarily likely, that a court today might interpret Dongan's trust as forbidding any further sales of wetlands or despoliation of the foreshore and lands under water held in trust even though former ages permitted it, based on the "use, benefit, and behoof" clause creating the trust.

(35) Maitland, Equity, p. 76, 121, 94-97, 106-107; cf. Walsh, Ch. XIII.

(36) Scott, IV, p. 391. An example of a special interest would be an individual who leased land from the trustees and thus stood to gain a direct benefit. If the trustees acted adversely to his interest, he would have adequate grounds to bring an action to enforce the trust.

(37) Ibid; of New York Jurisprudence, VII, Charities, p. 7.

(38) The Statute of Charitable Uses, 43 Eliz. C. 4, was enacted by Parliament in 1601, placing the enforcement of such trusts under the care of the attorney-general to remedy past sporadic and often ineffectual enforcement.

(39) Harding, Alan. A Social History of English Law (Baltimore, MD: Penguin Books, 1966), p. 279-282.

(40) The Board of Trustees of...Southampton, p. 12; cf. Street, Huntington Town Records, I, p. 536; Shaw, Osborn, ed. Records of the Town of Brookhaven (New York: The Derrydal Press, 1930-1947, 7 vols.), I, p. 69.

(41) For a full discussion of this entire subject of tenure see Holdsworth, Sir William. A History of the English Law (Oxford, Eng.: University Press, 1903-1927, 16 vols.), I-III; and Harding, p. 31-32 et passim. The concept of tenure in England involved different sets of relationships and various types of service were attached to each type. The test to determine if the tenure was free and could entertain a real action in a court of law in contrast to unfree with no recourse to a court was based on the nature and certainty of the services due. An unfree tenant was normally a person occupying a lord's desmesne lands earning his right to the land by agricultural services and other duties considered to be uncertain and not fixed. In this case a lord could order a tenant to do one or several different things. A free tenant's duties, in contrast, were certain (a specific thing done such as a money payment) and he was in full control of his own work.

(42) This statute also doomed frank-almoin tenure because of the provision that with every alienation for an estate in fee simple the grantee held not of the grantor but of the grantor's lord. Since frank-almoin tenure existed only between a grantor and grantee directly no new grants of this type could be made except by the king to whom the statute did not apply.

(43) An entailed estate is one which, by will or other legal act, must descend as a single piece to the eldest male heir lawfully begotten.

(44) The Colonial Laws of New York, I, p. 225-226.

CHAPTER III

THE USES AND ABUSES OF A HARBOR, 1653-1973

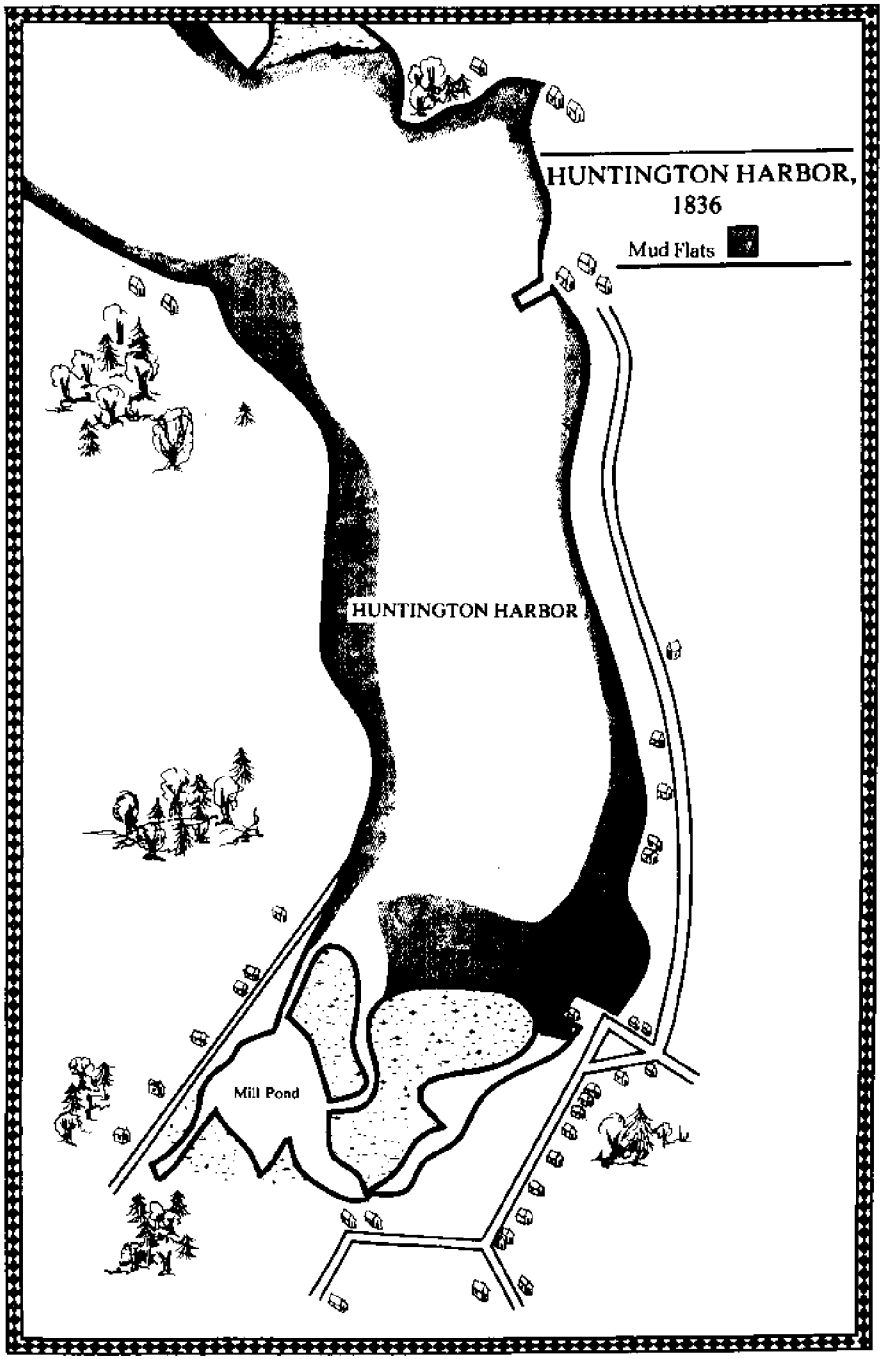
When Huntington's first proprietors received from three Oyster Bay men the deed from Raseokan, Sachem of the Matinecocks, they acquired fee title to approximately 6 square miles of the northwesternmost corner of today's Suffolk County. The area contained gently rolling hills, tolerably good farm land, innumerable small streams that fed into three navigable harbors, and a broad bay that opened into Long Island Sound (1). Three years later, in 1656, the proprietors extended their holdings eastward as far as the Nissequogue River (2). Unknown to them, Richard Smith included the eastern half of that purchase in his deed from Lyon Gardiner in 1663. He was able to sustain his title against that of Huntington and in 1675, by court order, the town's eastern boundary was pushed back westward to Unthememuck or Fresh Pond (3). Thus, expolitation of two of the prototype areas, Huntington Harbor and Fresh Pond, was begun by English settlers well over 300 years ago.

The first order of business for the new landowners, owners of more land than they ever could have hoped to have come into possession of in old England, was to select a site for their village. Prerequisites of choice must have been, of course, flatness of the land for farming and an adequate water supply. Despite the presence of some flat meadows around Cold Spring Harbor, the existence of hills rising abruptly to the east eliminated that area from consideration. Crossing the hills they came upon a low line of east-west hills broken by three valleys descending to the head of Huntington Harbor (4). The easternmost of these proved to be ideal. A stone's throw from the southeast corner of the harbor, its gently sloping hills on either side broadened into flat meadows through which a wide, shallow stream carried rains and winter snows to the marshy edge of the harbor.

One might assume that the proprietors would want to cluster around the harbor itself. A glance at Map 3 will quickly dispel that assumption. Hills on either side push almost to the water's edge and the large marsh at its head made it unsuitable for either building houses or farming (5). If they had been fishing and shipping oriented, they might have overcome these natural obstacles. But they were not. Their primary interests and concerns lie in the direction of agriculture and for many years the harbor would play a secondary, albeit important role in the growth of the community.

As soon as they selected the town spot the Huntington men set about dividing the little valley into home lots. Immediately afterward they made the first division or allotments of land for crops and grazing. True to their New and Old England habits, they concentrated the first homes in the chosen valley near to the stream that provided precious drinking water, washing water, and, later, the wherewithal to launder sheep prior to shearing. Soon, however, this pattern was broken as settlers moved farther east and west into outlying farms. Others leapfrogged the middle of the island and journeyed south to buy

MAP 3


HUNTINGTON HARBOR,
1836
Mud Flats
HUNTINGTON HARBOR
Mill Pond

from the Indians necks of land stretching into the Great South Bay. Although the settlement scattered, its pulse remained in the original town spot where all the social, political, and religious goings-on took place for generations.

As soon as the first proprietors acquired the title to the Old Purchase they became not only the fee owners of the land but also the keepers of law and order in the independent little community. They exercised these dual functions at their frequently held town meetings where they passed ordinances for the well-being and orderly functioning of the community, sat as a court to judge civil and criminal offenses, and parcelled out the unappropriated lands among themselves and to newcomers they voted acceptable to live with them. All those in possession of any real property automatically became freeholders, gained the franchise, and could hold office, such offices created as needed to handle the daily affairs of Huntington subject to the majority decision of all freeholders in town meeting assembled (6).

The Nicolls patent of 1666 did little other than formalize and legalize the situation under English law (7). In the case of Huntington, Nicolls granted to the proprietors all the lands they claimed to have purchased from the Indians as of 1665. The Duke's Laws of 1665 were the legal instrument whereby the town government became formalized and the "privileges" of each town defined. Whereas formerly three magistrates and the town meetings ordered town affairs, now the offices of constable, overseer, fenceviewer, church warden, militia officer, viewer of pipe staves, viewer of casks, and justice of the peace for the county began to assume control, all but the first two appointive positions (8). Actually, the town's "privileges" can only be construed by implication from the laws as consisting of the legislated duties and powers of the various elected or appointed officials, the right to pass purely local ordinances (subject to review by the Court of Assizes), and the rights of the proprietors to control the use and distribution of their lands. Yet both town meetings and town courts continued to regulate the affairs of the town. The former, presided over by the constable and overseers, concerned itself with local government and land distribution; the latter, made up of the constable and at least three of the overseers, sat as a civil and criminal court in petty causes (9).

Only after Governor Fletcher issued a patent to Huntington in 1694 did the local government and land management assume the form it would retain throughout the colonial period. One could argue that the intermediate patent, that from Thomas Dongan in 1688, set the trend. However, the town records show that the Dongan patent was only belatedly recorded and even then it was done so by the renegade governor Leisler who had little or no status under either the Duke's charters of 1664 and 1674, or for that matter, subsequent royal instructions from James II. There is an element of confusion in the town records as to laws to follow and patents to abide by during the period of Leisler's rebellion (10). Keeping in mind that the townsmen had voluntarily submitted their Nicolls patent which the Governor failed to record before departing for England in 1688, then it becomes clear why, during the unsettled years of the rebellion, they reverted to earlier laws, vacillated about supporting Leisler, and eventually petitioned the new royal governor, Benjamin Fletcher, for a confirmatory charter (11).

By the following spring negotiations for the new patent had progressed to the point where the townsmen felt they could function under its provisions, even though the patent was not officially recorded until October (12). On

April 9 they elected seven trustees to "have the ordering and managing of all town business till the town does receive the patent if it be within the year" (13). In addition, they elected a constable, a tax collector, two assessors, and a supervisor, indicating that some of the older offices under the Duke's Laws had been abolished and that the townsmen accepted the fact that they would now be governed by the new board of trustees rather than the old form of the constable (now a strictly law inforcement officer), and overseers.

Specifically, the Fletcher patent recognized that seven of the freeholders and inhabitants of Huntington, "in behalf of themselves and the rest of our loving subjects, the freeholders and inhabitants of our said town of Huntington," had petitioned for a grant and confirmation of the premises of the Nicolls patent in which was to be included a redefinition of the town boundaries consistent with the 1676 Court of Assizes decision granting certain eastern lands to Smithtown (14). The governor, recognizing the request as reasonable, erected the town into a body corporate and politic and designated seven of the proprietors as town trustees, thus repeating this vital feature of the Dongan patent. For all practical purposes, the trustees were given control of the governing of the town, including the collecting of taxes, thus displacing the older constable-overseers form.

The patent distinguishes between all lands actually appropriated and divided, those lands bought from the Indians as of the date of the patent yet not appropriated to individuals, and lands yet to be bought from the Indians. The first category was, by inference, recognized as being held in fee by the individuals to whom they had been allocated in the town; the second appears to have been the remainder of all land previously acquired by the townsmen as proprietors in the name of the town and not yet parcelled out based on hundred rights; while the final category encompassed all that which would be bought after the date of the patent in the name of the town (15). Because of this patent distinction, the trustees had to differentiate between two categories of rights: those of the original purchases and those of later settlers. It is questionable whether the first purchasers or their heirs and assigns could convey any of the remaining common and undivided lands in the Old Purchase of 1653-56 without the approval and permission of the trustees, although as a group they probably claim exclusive rights therein. Despite the lack of sufficient evidence in the town records, it is likely that the proprietors of the Old Purchase, in disregard of this legal nicety, did in fact occasionally meet as a group and convey land (16).

The practice of keeping the Old Purchase lands distinct from other lands persisted into the nineteenth century, even to the point of income from thatch grass leases being kept in a separate account book (17). The first attempt to resolve the question of ownership occurred in 1810, presumably because the trustees had conveyed large quantities of Old Purchase lands and it was becoming more difficult to keep records of all the heirs and assigns eligible to receive any of the profits from the sales. In that year those holding rights in the undivided lands, meadows, and marshes quit-claimed their rights, titles, and interests in all the lands sold by the trustees in which they might have had any claim (18).

Nevertheless, occasional disputes undoubtedly continued to arise over who controlled the division of such lands because in 1865 both parties took steps to settle their differences. Earlier, in 1850, at the request of the Committee

of the Proprietors of the Old Purchase, the trustees quit-claimed to a Jarvis R. Rolph, evidently a member of the committee, all their interests and those of the proprietors of the Old Purchase in the original grant of land (19). Then, in 1866, Rolph released and quit-claimed to the town trustees all his right, title, and interest in what remained of all the undivided lands of the Old Purchase, which included a sizable quantity of thatch beds at the head of Huntington Harbor (20).

Even though the first election of trustees took place on 9 April 1694, the first official act of the board of trustees is not recorded until almost a year later. Finding that stray swine in the woods, marshes, and corn fields proved to be too destructive, on 27 February 1695 the trustees ordered that all swine had to be kept confined and that the owners of those left to run loose would be liable for damages done by his swine to the property of others. The following month the order was extended to include rams and cattle. They also saw fit to pass an ordinance prohibiting the cutting of timber on common lands or peeling bark off trees, adding that firing the woods on any man's property must have prior approval of the trustees (21). Apparently, the trustees moved quickly to assume their new duties and responsibilities under the new patent in taking over the functions formerly reserved to the town meeting. In years past the townspeople at their frequent town meetings passed all such orders and regulations; hereafter such meetings would be in the nature of advising the trustees and instructing them as to the desires of the people in the management of local affairs and the common lands. Under the new charter it is questionable whether town meeting resolutions had any legal binding force (22).

To return to an earlier period, it is likely that the first settlers made use of Huntington Harbor both for the salt hay its marshes provided and, of course, as a means of access to the outside world. The colony of Connecticut lay not far to the north across the sound and could be seen on a clear day through unpolluted skies. There lived friends and family, business associates, and a possible market for surplus production of the farms. Small sloops of shallow draft could make the voyage in a matter of hours. There is some evidence that the townsmen may have inaugurated trade with the West Indies as early as 1658. Court records for that year contain the deposition of Mark Meggs who testified about the ownership of some rum and wine, typically West Indian commodities, that had been off-loaded in the harbor. Even though these goods could have found their way to the town via trans-shipment from a Connecticut port, it is proof that human encroachment upon the harbor and its resources took place almost immediately after the first Europeans arrived, and has continued unabated ever since (23). It should be borne in mind that during this period, given the size of the population and the level of development of the community, Huntington's "fleet" consisted of but one or two vessels and use of the harbor remained minimal for years (24).

This is not to say that the townspeople turned their backs to the harbor. On the contrary, use of it as an entrepot increased slowly but steadily over the years; sufficiently enough for Governor Andros to issue a warrant in 1679 to seize one Richard Betts, "(who) with a sloop several times traded in your parts and carried away goods and passengers contrary to acts of Parliament as well as laws and customs of these parts, and is now in your harbor" (25).

Emotional and economic ties to Connecticut produced a steady flow of vessels back and forth across the sound. However, the town trustees did not take it

upon themselves to establish a public ferry to Norwalk until 1765 (26). Cargo and passenger vessels need docks, yet there is no mention of one in existence until 1715 when, by order of the trustees, the highway surveyors laid out a highway four rods wide "along by Mr. Jones' lot at the harbor" with a road of similar width extending from it "down to the dock." The road paralleled the dock, "round the northwest corner of the meadow for the conveniency of coming at the creek thatch." They also laid out a road from that dock "to Widow Fleet's for a landing place" (27).

By law and custom only the trustees, as fee owners of the land under water, could authorize the construction of docks. This they did for the first time, at least insofar as the records indicate, by granting "liberty to build a dock" in 1769 to six men, including John Brush the miller. The dock was to be located on the west side of the harbor, "against the point northwest of John Brush his mill, near where the clay is," and was to be 60 feet long and extend from above the high water mark to the channel, "leaving room for a highway between that and the bank" (28).

Grist mills were virtually a necessity for Long Island towns. Without them farmers could not have their grain ground into flour in sufficient quantities for their own consumption and for export. Communities would turn their attention to finding an appropriate site for a mill almost immediately after laying out the town spot, the criterion of selection being a continuously flowing stream through a flat or slightly depressed area which could be dammed to create the water power necessary to drive the cumbersome wheel by means of sluices that directed the impounded water against it (29). Although many mills came and went in the town, the one at the head of the harbor is of importance because of its location in the area being analyzed and because of current conflicting claims between today's board of trustees of the town and private individuals over who holds the fee ownership of the mill site.

Huntington was no exception to this pattern of settlement. The proprietors chose a location considerably south of the present-day Mill Dam Lane and then sought for a miller. Sometime before 1660 the townsmen convinced a Presbyterian minister from Oyster Bay, the Reverend William Leverich, apparently as adept at grinding corn as he was at grinding out soul-saving sermons, to serve them in both capacities (30). Leverich remained as minister until 1670, having disposed of the mill to William Ludlam over three years earlier, at which time he left for other parts (31). Ludlam, in turn, conveyed it to Mark Meggs in 1667, who, possibly because of his advanced years, transferred ownership to the town in 1672 (32).

The reason for the transfer to the town came about because of the mill pond that, according to one local historian, developed the unwelcome habit of expanding and spreading almost into the small village during heavy rains (33). In order to rid themselves of the menace the town leaders negotiated with Meggs for the purchase of the mill, with a view to removing it to a more acceptable location. They had already indicated this to be the wish of the town at a meeting the previous year in which it was voted to "let out" the mill pond and relocate the mill. In the conveyance Meggs reserved to himself his rights in the drained pond area as did all others with undivided hundred rights in the old purchase. The division of the old pond area took place four years later, in 1676 (34). Gradual filling in of the old pond can probably be dated from about 1681 when the town instructed Joseph Wood to "make and maintain a good and sufficient foot and horse way over the water that runs

through the old mill dam," in return for which he did not have to work on any other highways in the town (35). Nevertheless, as late as 1684 those who conveyed their rights in the old mill pond still referred to it as a swamp or boggy meadow" (36).

The center of milling activity moved to Cold Spring Harbor and Centerport Harbor. Whether or not another mill was built in the general vicinity of the first one is open to question. Two local historians, Charles Street who edited the town records in 1872 and Romanah Sammis who published a history of the town in 1937, disagree on this point. Street avers that the Leverich mill stood on the southwest corner of a lot on the north side of today's Mill Dam Lane, which would probably be somewhere near the southwestern corner of the head of today's harbor (37). The inference in his commentaries on the records is that a mill of one kind or another existed there almost continuously. Sammis, in contrast, places the original mill dam a considerable distance farther south than today's Mill Dam Lane (which would explain how the proprietors were able to divide the pond after the Leverich mill was moved) and suggests that it was many years before another mill was constructed on a site farther north where Street claims it was (38). Sammis is probably closer to the actual location of the first mill, based on the division of the old mill pond years later. Regardless of such historical nitpicking, the fact remains that a dam was built while the settlement was still young and a pond created from the marshes there. In other words, the first fundamental alteration of the natural features of the harbor, including a slow obliteration of its wetlands (as indicated by the many conveyances over the years descriptively citing them), took place shortly after the arrival of the settlers.

There is a question whether or not the first miller, Leverich, or his successors, Ludlam and Meggs, actually obtained fee title to the mill site, dam, and pond. The early colonists considered certain economic activities, like milling to be a public utility, an essential service to the community (39). This belief manifested itself in the type of grant that local proprietors bestowed upon millers they had persuaded to build and operate a mill in their town. These grants took the form of an agreement between the town and the miller in which the town granted the miller the privilege, or license, of damming up a preselected stream, and the use of land upon which to build the mill. More often than not they included adjacent marshes and meadows for the miller's use and sometimes threw in one or more hundred pound rights in nearby fields. In return, the miller agreed to construct the mill within a stated period of time, usually two to three years, grind all local grain brought to him, and charge a predetermined toll for his services. The proprietors also agreed to furnish labor to build the dam, but stipulated that if the mill were not built within the allotted time and if the mill ever ceased grinding for the town, all the granted lands and privileges would revert to the town (40).

The agreement with Leverich, although not extant, was undoubtedly of this type as suggested by the later assignments to Ludlam and Meggs. Ludlam conveyed to Meggs "all my right in and unto my mill...bought of Mr. William Leverich...with all the right thereunto belonging... and all privileges whatsoever" (41). And, of course, Meggs himself deeded it all back to the town in 1672, specifically, the mill and whatever rights he might have in the dam, reserving to himself his hundred pound rights in the pond and swamp to the south (42).

The next mention of a mill in the same area is in 1752 when Dr. Zophar Platt acquired the right to build one at the head of the harbor. The question again arises as to whether or not the conveyance was one of use or of possession. The conveyance from the trustees to Platt granted, released, conveyed, assured, enfeoffed, and confirmed "unto him the said Zophar Platt, his heirs and assigns forever the rights, liberties, and privileges... of building, making, and running of a dam to dam the water at the head or near the head of Huntington Harbor." The dam was to begin from the thatch point of a salt marsh on the east side of the creek and extend across to the shore on the west side of the creek at a place to be selected by Platt. He had free liberty to erect a mill or mills on the dam or below it and to confine the waters above the mill dam itself. If it chanced that oysters grew in the pond, he and his successors had the right to harvest them. In return, Platt, "for and in consideration of the above granted privileges," covenanted to grind the town's corn and grain, taking one-fourth of the toll, to build and maintain the dam and to dig a ditch to turn the current of water into the cove below Benijah Jarvis' house (43). He also agreed to allow the town's inhabitants to fish and gather oysters in the mill pond. Finally, in case he did not build a mill, all rights reverted to the town. In other words, this was a license to operate a mill for the benefit of the townspeople rather than a fee simple conveyance for the exclusive use and profit of the grantee.

In their efforts to serve the public interest the trustees recognized that local natural resources were limited and, by virtue of their patent rights, their exploitation restricted to the inhabitants of the town. Chief among the patent rights in this respect was that of fishing, hawking, hunting, and fowling. By the middle of the eighteenth century it came to the attention of the trustees that outsiders freely made use of these resources for their own needs and beside reducing the available supply, encroached upon purely local rights. In 1757 and periodically thereafter the trustees passed ordinances imposing a fine on any outsider who fished or hunted within town limits (44). Beyond this, they did not regulate such activities for their own people.

Beginning May 1730 the trustees decided to lease the town's extensive thatch grass beds to the highest bidders on a yearly basis, an indication that livestock herds had grown considerably and husbandmen needed to supplement their own fields' production with that from the marshes (45). Thereafter, in the spring of each year they auctioned off the use of the beds at a vendue sale (public auction). Usually, the successful bidder cut the grass once or twice during the lease period and used it for mulch, feed, or bedding. The rental prices ranged from a few pence to as high as three or four shillings, depending upon the size and location of the marsh. Table 3 suggests that there were choice beds in the vicinity of Huntington Harbor, much in demand. Later, as that demand increased, other areas found their way into the list until much of the accessible thatch beds along Huntington's shores fell to the farmers' sickles each year.

The terms used by the recorders to enter the yearly leases into the thatch books are somewhat misleading. As the successful bidder came forward to pay, the recorder entered the location in the book, next to which he wrote "sold to" so-and-so. A number of individuals today have interpreted this to mean, when taken out of context, that the thatch bed itself was conveyed. This is simply not so; rather the reference is to the sale of the grass with the title to the bed remaining with the trustees.

Private encroachment on thatch beds did occur, but the trustees guarded their rights as best they could. More than once they called to account individuals like John Rogers who illegally fenced this valuable land (46). Possibly, Rogers followed what he considered to be a precedent set 15 years earlier when the trustees allowed Benjamin Scudder to run a fence into the harbor on the south side of a sandy point on the east shore if he promised to maintain "a good pair of slip rails convenient for the passing and repassing of teams and carts" (47).

On three occasions the trustees deeded away other thatch areas in the town, but this time they were torn between keeping them for the use of the people or selling them to raise money for new parsonage land for the Presbyterian Church. They chose the latter course, probably assuring themseles that a large enough quantity of thatch still remained in public hands to satisfy the needs of the town (48).

Despite these sales the trustees were well aware of the public nature of such areas. A letter from William Nicolls, Sr., sent from Islip on 12 September 1764 to Cornelius Hartt, outlined the conditions on which the Huntington trustees could lease part of the South Bay.

> This must be done at a meeting of the trustees and that meeting entered in the books and a record made that the bay was then leased to these men and a trust reposed in them to hinder foreigners from fishing there, etc., but to permit the townsmen to use it for their own use unless they abuse that liberty by making sale, in which case even they may be debarred (49).

In addition to ordinances against strangers clamming or fishing within the town limits, the trustees saw fit in 1775 to enact that no foreigners could cut marsh grass in the town, especially in those portions of South Bay owned by Huntington (50).

The eighteenth century witnessed a slow but steady growth in the town's population accompanied by an increased need for more officials to watch over local affairs. With the exception of the trustees, who managed the town, all the officials derived their authority from the provincial legislature that created them as the need arose to handle administrative affairs at the local level. In the decade prior to the granting of the Fletcher patent, Huntington had 112 property owners on the assessment rolls who elected one constable, three overseers, a tax collector, and two surveyors to handle their affairs (51). In 1694, the patent year, 84 freeholders contributed to the costs of the patent, and the town had seven trustees, one constable, a tax collector, two assessors, and a supervisor (52). By 1716 the town had added a town clerk, two more surveyors, two persons to take care of intestate estates, a pound keeper, and a shepherd (53) as regularly elected officers. During the next 20 years the town alternately combined and separated these offices as the efficiency of administration suggested. By 1764 the town offices had assumed the form they would retain for a number of years. At that time the assessment rolls had swelled to include 362 property owners who each year elected the seven trustees, a constable-tax collector, a treasurer-clerk, two assessors, one supervisor, three commissioners of highways, four surveyors, eight fenceviewers--two to handle intestate estates, twenty-seven overseers of highways, two overseers of the poor, and a committee of five to care for the school house (54).

Table 3. Thatch Grass Leases, 1730-94

Location of Thatch Grass	Year First Leased	Number Times Leased to 1776
Head of the Harbor	1730	53
East Side Harbor to Pear Point	1730	32
Sammis Cove	1730	45
West Side of Harbor and in Sammis Cove	1732	1
Horse Neck (word beach added later)	1732	43
Cow Harbor (called head of, 1770)	1732	33
Duck Island	1738	1
North of Old Brick Kiln, Head of Harbor	1738	5
Clam Point to the Gut	1739	43
Page's Cove	1739	5
"Use of Piece of marsh which John Rogers fenced in at harbor which does not belong to him - leased to Samuel Stratton"	1740	2
Cold Spring (called head of, 1770)	1744	39
Crab Meadow (called small island at first, then gut, then beach)	1744	6
Udall's Mill to Munger's Point	1744	4
Head of Cove to Cow Harbor Brook	1745	1
Little Neck	1745	5
Head of Harbor both sides	1745	1
Town meadow "within Joseph Ridgway's fence"	1749	1
Stony Brook Harbor	1753	6
Round Hole (called beach in, 1774)	1757	16
Soper's Cove	1764	1
New Landing at Cow Harbor	1765	1
Mill Harbor	1766	7
"Parsonage" land in West Neck (24 acres) (To plant English hay)	1768	1
Squid Pond	1768	1
Abraham Jarvis Cove	1768	1
Great Lot at East Neck	1768	1
Reuben Point	1774	1
Below mill dam of Captain Van Wycks	1794	4

Source: Street, Huntington Town Records, II, III. Two manuscript books of the accounts of thatch grass leases on a year-to-year basis are kept in the office of the town historian. The data in them covering this early period are included in this table. It should be noted that some of the above locations probably overlap. To avoid trying to locate each thatch bed (an impossible job in the twentieth century), the original designations were relied upon, if only to show the extent of the yearly leases, the continuity of the practice, and the varieties of designations. I believe few if any leases of beds on the south shore are included here; there appears to be a separate book kept of them and is more related to Babylon than to Huntington.

Huntington underwent a series of convolutions because of the American Revolution. At first the majority of inhabitants seem to have been ardent supporters of the rebel cause, and on 21 June 1774 passed a "Declaration of Rights" in which many declaimed against the recent closing of the port of Boston, the "unconstitutional" imposition of taxes and duties by Parliament as "a plain violation of the most essential rights of British subjects" (55), and indicated a willingness to abide by the decisions of the Continental Congress and to support the Articles of Association that called for an embargo on trade with England. Their patriotic fervor, however, proved to be short-lived. By December 1775 Gilbert Potter wrote to John Sloss Hobart, a delegate to the Continental Congress, concerning the "state of the town as to their slackness in military preparations, as also that we have great reason to believe all methods are used by our neighbors to make them indifferent in this great contest." Seven months later the early successes of American forces at Ticonderoga, Crown Point, and Boston, and the issuance of the Declaration of Independence, induced the citizens to burn George III in effigy. But, by the end of August 1776 with the capture of Long Island by British forces and the retreat of General Washington, Huntington disbanded its militia and on October 21 a committee of the town publicly revoked all acts and resolves in support of the rebel cause.

With the coming of peace in 1783 Huntington resumed its normal life as best it could. Feeling they were now part of a new nation, Huntington inhabitants set about finding out how to participate in the political affairs of the new state by requesting information from Governor George Clinton on how to take part in upcoming gubernatorial elections, petitioning for return of their church bell taken by the British army, and submitting a long list of war claims (56).

Actually, discounting the aberrations of the war years, the American Revolution did little to change either the people of Huntington or their local political center of authority (57). By custom and tradition, when a nation is conquered or experiences a successful revolution, the laws and customs of the people remain in force only until the new sovereign sees fit to change or abrogate them (with or without the consent of the people depending on the type of revolution). Thus, after 1776 the new State of New York had every opportunity to completely wipe out its colonial past. It did not choose to do so. This is in keeping with the view of some historians that in a number of colonies the revolution was a conservative movement, a struggle to maintain the political and economic status quo against pressures from England to alter them. What radicalization took place occurred many years after 1776.

The new State of New York retained many of its colonial laws by reaffirming their validity in the first and subsequent state constitutions. Article 35 of the Constitution of 1777 retained "such parts of the common law and of the acts of the legislature of the colony of New York as together did form the law of the said colony," as of 19 April 1775, subject to future legislative alterations (58). Article 36 preserved and fully protected all grants of land and charters to bodies corporate and politic made under British rule prior to 14 October 1775 (59). The trustees of the freeholders and commonalty of the Town of Huntington could, therefore, continue as they had been authorized to do ever since 1694 without fear of loss of power or property.

Apparently, the Revolution did nothing to affect the activities of the trustees for they continued to act for many years thereafter as they had throughout the colonial period. Of continuing concern to the trustees, in

addition to managing a large but dwindling supply of common lands, was the use of the salt meadows or thatch beds. As time went on and an expanding population more actively exploited local natural resources, they also found it necessary to take an increasing interest in regulating shellfishing.

The first post-revolutionary record entry having to do with the yearly leasing of thatch grass appeared in 1785 (60). Thereafter, a vendue sale was held annually to auction off the right to cut the grass. But, because of changing economic activities in the community, the location of the leased areas shifted from the north shore harbors to the Great South Bay and adjacent islands (61). There are three basic reasons for this. First, within 10 years after the founding of Huntington, the proprietors allotted substantial quantities of land adjacent to the harbor to individuals. A partial compilation of these allotments over the years reads like an urban planner's nightmare: land for a house at the mill pond, 1663; two allotments at the harbor, 1665; two at the mill pond, 1666, 1667; the swamp below the mill, 1667, and a fence through that swamp; land on the east side of the harbor, 1668; land for a brick maker "near the head of the harbor," 1668; four allotments in 1669 for land on the East Neck near the harbor; land at the mill pond and swamp, 1672; land on West Neck, 1675; a brick kiln on the West Neck, 1676; grant of a meadow at the harbor with a roadway, 1676; land for an iron smith at the harbor, 1679; land on West Neck near the cove swamp, 1679; land at the cove, 1681; permission to construct a fence into the harbor, 1681; two grants of land at the harbor's mouth in 1681 and 1686; one for land at West Neck cove in 1688 and another the same year for land on the east side of the harbor (62). In 1689 the proprietors undertook to allot more land all around the harbor, adding to it two more grants in 1690 and 1692. Another grant to a brickmaker took place in 1693 and yet another fence allowed to be run into the harbor in 1725. In 1758 they began selling, in fee, sections of the harbor marsh between high and low water and did so again in 1775 (63). Second, as early as 1805 the trustees began leasing shorefront property to individuals who wished to build docks either for personal or commercial use; and, finally, they actually sold some of the thatch beds to persons whose property abutted the shore.

Table 4 summarizes the number of leases granted by the trustees during the nineteenth century for use of the foreshore and lands under water at various locations (the four harbors at Cold Spring, Huntington, Centerport, and Northport in Huntington Bay and at Eaton's Neck Beach) along the north shore. Of the 161 leases, 93 permitted dock construction, 34 of them located in Huntington Harbor. The latter figure includes 16 renewals, so that by the end of the century at least 18 docks existed along the shores of that harbor. One can only guess as to how these docks were constructed, probably they consisted of long platforms parallel to the shoreline resting on pilings. Not until 1856 does one find a lease that grants permission to build a seawall and specific reference to a bulkhead does not appear until 1866 when George R. Johnson built one for his dock under the terms of his lease from the trustees. Undoubtedly, those who owned harbor frontage erected small jetties for their private use, but virtually all of the trustees' leases for docks appear to have been for commercial ventures, at least until 1882 when a lease to Mary T. Kane mentioned the existence of a private boathouse from which she planned to extend a dock 100 feet into the harbor.

Table 4. Trustees Leases, Huntington Harbor, 1786-1899*

Year	Total leases	Foreshore; Under water	Other
1786	2	1	1
1789	1	1	
1791	1		1
1802	1		1
1805	2	1	1
1806	1	1	
1810	1	1	
1817	1	1	
1820	1		1
1822	1		1
1824	3	2	1
1825	1	1	
1827	2	1	1
1828	1	1	
1830	3		3
1831	1		1
1832	1		1
1833	1		1
1835	2	1	1
1837	2	1	1
1839	1		1
1840	2	1	1
1841	2	2	
1844	3	1	2
1846	2		2
1852	1		1
1854	1		1
1856	3	2	1
1859	5	1	4
1860	4	1	3
1861	3	2	1
1863	1	1	
1864	1		1
1866	3	1	2
1868	1		1
1869	3	1	2
1870	1		1
1871	2	1	1
1874	2		2
1875	5		5
1876	1		1
1878	2	2	
1879	1		1
1880	1		1
1881	8	4	4
1882	8	4	4
1883	9	4	5
1884	5	2	3
1885	5	1	4
1886	4	1	3
1887	9	4	5
1888	6	3	3
1889	5	2	3
1890	5		5
1891	5	2	3
1892	7	6	1
1893	3	3	
1894	3	2	1
1895	1	1	
1896	4	3	1
1897	2	2	
1898	1	1	
1899	3		3

*Excludes leases for land under water for shellfishing. Most leases extended for periods of 10 to 40 years and in later years some of the leases enumerated are renewals of earlier leases. "Other" denotes upland or leases in other harbors.

Sources: "Trustees Records," 1872-1893, 1893-1914; Lease File.

Even though there is little factual evidence to support such an assumption, it could be said that commercial activity in the harbor expanded to keep pace with increased economic activity, primarily the shipment of farm produce to New York City and elsewhere and, of course, to receive produce and merchandise from other areas. Probably all of the docks, including those built by clammers and fishermen, served an economic need. People in the nineteenth century, especially in a rural town, were not given to dallying on the beach or taking leisurely cruises in small pleasure craft. Only in the last two decades of the century did such activity intrude into the local life-style, at least insofar as the evidence found in leases and town records suggests.

A majority of the leases granted by the trustees contained a clause that preserved the rights of the public to carry on certain activities within the leased area, activities the trustees felt had traditionally been the prerogative of the public and, therefore, were paramount to private interests. Invariably, they reserved the right to cross and recross the leased property if it involved lands under water or the foreshore over which carts could pass. Frequently, the lessee was required to build his dock or building so as not to obstruct a road paralleling the shore. The leases retained for the public the right to fish and shellfish in the leased premises. Such clauses appeared consistently throughout the nineteenth century and the trustees safeguarded the public's interests by stipulating that they could reenter the property and evict the lessee if he failed to abide by the terms of the lease or neglected to pay the rent.

During the nineteenth century the trustees also conveyed the fee title to thatch beds and portions of the foreshore in Huntington Harbor to individuals. By allotments, their predecessors, 200 years earlier, had granted land along the harbor's shores to those who claimed them by hundred rights. Included in some of these were thatch beds or salt marshes. Of the 29 conveyances of land by the trustees in the nineteenth century, 9 of them were located at the harbor. All of them encompassed thatch beds of lands under docks. Yet the trustees, faithful to local tradition, occasionally followed the practice of reserving to the public the rights of fishing, shellfishing, and passage over the areas conveyed. Nevertheless, by their actions the trustees severely reduced not only the thatch beds and their grasses available to the public, but also restricted public access to the harbor itself. In the following century, successive boards of trustees did little to halt this trend.

During the colonial period fishing and shellfishing in local waters came to be regarded as a means of supplementing the family diet. Accordingly, the trustees restricted all forms of fishing rights to town inhabitants (64). But, as the years wore on into the nineteenth century, the emphasis shifted from diet supplement to commercial exploitation for profit as New York City developed as a market for shellfish. By 1842 some people employed dredges, a practice others objected to because of its effect on the land under water and its rapid depletion of the crop. Responding to a petition signed by 15 residents, the trustees not only put a halt to dredging but went a step further and prohibited the taking of oysters during the summer months (65). Some 30 years later the state gave belated support to this ordinance by banning dredges or dragging devices in the Great South Bay (66).

By mid-century both the trustees and the state legislature had taken an increased interest in local shellfishing. When, in 1858, individuals initiated the practice of marking off oyster beds with stakes, the trustees forebade

such measures as detrimental to those fishing with nets, thus maintaining their policy of encouraging and regulating both fishing and shellfishing for the benefit of all (67). The state stepped into the picture in 1866 when the legislature established a residency requirement in Islip and Huntington of six months before anyone could plant and harvest oysters on a lot not to exceed two acres. Huntington protested that its colonial charter give it jurisdiction over such matters and in 1880 the state amended the act to apply to Islip only (68).

Once shellfishing became sufficiently important, and after a certain amount of chaos developed, the trustees decided to systematize it. Exercising their rights as proprietors of the land under water, they adopted a resolution in 1875 to lease oyster beds with a minimum fee of $2 for less than 4 acres (69). Most leases were of short duration, five years or less, but proved to be unprofitable to the lessee due to the amount of time necessary to seed and harvest a bed. To remedy this the trustees extended all leases to a 15-year term in 1879. Within three weeks of the decision, 76 individuals applied for either renewals or new leases, very probably motivated in part by a state law enacted in May that authorized the formation in Suffolk County of corporations of five or more persons to plant and cultivate oysters (70).

A predictable, almost inevitable, consequence of the trustees' efforts to systematize shellfishing through leases soon surfaced in town waters. Human greed being what it is, some commercial lessees ignored the terms of the leases that stipulated the acreage was exclusively for oystering and also used them for clams and scallops, yet they prevented others from encroaching on the beds to harvest the clams and scallops. Others extended their leased areas far into shallow waters whether the lease bounded them so or not. Still others let their leased beds lie fallow and went elsewhere for their shellfish, yet stopped others from harvesting the acreage under lease. These mini-monopolies of much of the land under water conflicted with the traditional habits of the more casual shellfishers who were wont to wade offshore and harvest where they pleased, convinced that shellfish had been and should be free for the taking.

In a local referendum on 13 July 1883, the voters approved a resolution calling upon the trustees to reclaim all leased land because they considered many of the leases illegal, misused, and overextended into too shallow water. The voters took the position that the leased areas traditionally had been free to all local residents and should remain so (71). The trustees bowed to the "will of the people" and refused to issue any more oyster leases. The following year they went one step farther and resolved that "fishing, clamming, and scalloping of natural growth shall be free to all citizens of Huntington," and prohibited dumping of gravel and rocks wherever oysters grew naturally (72).

The right of the trustees to lease lands under water did not go unchallenged. The state asserted its alleged proprietary rights in lands under water in 1840 when the legislature passed an act granting John H. Jones the right to erect and maintain a dock and wharf at Cold Spring Harbor, "subject to the permission of the Trustees of the Town of Huntington" (73). In 1850 the legislature expanded the powers of the commissioners of the Land Office to include the granting in perpetuity or otherwise "so much of the land under water of navigable rivers or lakes as they deem necessary to promote commerce or for the beneficial enjoyment of the same by adjacent owners," and extended

their powers also to include, "lands under water, and between high and low water mark in and adjacent to and surrounding Long Island" (74).

Somewhat belately, that is, almost 40 years later, the trustees awoke to the implications of the act and petitioned the legislature to amend it to exclude the colonial charter towns that had acquired the fee title to all lands under water within their town limits by colonial patents (75). Ignoring the petition, the legislature reenacted the 1850 statute in 1894, provisions in both the state and federal constitutions against taking property without due process of law notwithstanding (76).

One reason for the trustees' apparent lack of concern over state encroachment into their chartered proprietorship might have been the legal controversies they found themselves enmeshed in during the latter years of the century. After passage of the act of 1850, the trustees' proprietary edifice of ownership and management of Huntington's land and water resources, constructed over 200 years of custom on the base of colonial charter rights, became a shambles of conflicting trustees' claims, state laws, and court decisions.

The first challenge to trustees' power came in the form of a town resident questioning their authority to grant or deny leases. In 1857 Alexander Sammis, as riparian owner of land directly behind the old dock in Huntington Harbor, demanded that the trustees grant him a 21 year lease to the dock as his legal and exclusive right. The trustees rejected his claim and he sued. The Supreme Court of the state decided in favor of the trustees, holding that title to lands under water in Huntington was vested in the trustees by colonial charter and that "the Trustees had the power to make a lease of the premises for dock or other purposes, notwithstanding the claim of the upland owner" (77).

Twenty-four years later the trustees were in a quandary over what to do after that court decided that the lands under the waters of Northport Harbor fell outside the jurisdiction of the trustees. Lowndes, a resident of Connecticut, had seeded a small area there with oysters; Dickerson, a Huntington resident, harvested some of the crop. Lowndes brought a trespass action against Dickerson and the court held that the harbor was in fact an arm of the high seas and, therefore, not inside the boundaries of the town. According to the decision, the right to fish was a common right of all the people by common law and the British Crown did not have the power to confer upon an individual or group the exclusive right to take fish in the sea or an arm thereof (78).

Fearful that they might lose all, the trustees undertook an investigation of their title to land under water because "some doubts exist in the minds of the Board as to its powers in regard to the right to lease (for planting oysters)" (79). After a year of research, two local attorneys submitted a report late in 1871 in which they concluded that the trustees held the fee title to the lands under water of the bays and harbors within the town and that the court had erred (80). Heartened by this report, the trustees resumed issuing leases. Their position was strengthened in 1875 by the decision of the state's Court of Appeals in Trustees of Brookhaven et al v. Charles T. Strong. Strong had been arrested by the Brookhaven trustees for shellfishing in the Great South Bay, an area over which the trustees claimed proprietary ownership by virtue of their Dongan patent of 1686. Strong contended the bay was public by common right and open to all. The Court of Appeals held for the trustees,

stating that, since the court concluded that the bay in question was included within the boundaries of the grant "when a patent or grant conveys a tract of land by metes and bounds the land under water, as well as other land, will pass if the land under water lies within the bounds of the grant...and confers the right of a several fishery" (81).

Slowly but surely the importance of that decision filtered through the boards of trustees that held office between 1875 and 1887. Having reviewed their title to lands under water in 1871, they went a step further in 1874 and voted to hire a surveyor to map the waters of Huntington Bay, adding Huntington Harbor four years later, as a means of clearly marking off oyster lots (82). Based on the work of the surveyor, an oyster lots map was drawn and filed in the town clerk's office on 29 August 1887. On the same map appeared a line running from the northwest point of Eaton's Neck southwesterly to a monument set at high water mark on the east shore of Lloyd's Neck. At a November meeting the board of trustees resolved that the line was "declared to be the line of title between the Town of Huntington and lands under water belonging to the State of New York and that all lands under water in Huntington Bay and an exclusive right of fishery therein, southerly from said line..., is claimed by this Board of Trustees in behalf of the Town of Huntington" (83).

Unilaterally defining their northern boundary did not make life easier for the trustees. Both private citizens and the state continued to challenge their proprietary claims to the foreshore and lands under water. In 1875, W. Wilton Wood, lessee of a dock in the southwest corner of Huntington Harbor, refused to pay the rent, claiming the trustees had neither rights in nor jurisdiction over the property. However, he did admit that this was but an unanswered question in his own mind and agreed to enter into a lease agreement if someone could probe the trustees' position to his satisfaction. Evidently someone did, because the following year he signed a 10-year lease (84). Toward the end of the next decade two individuals had cause to complain about leasing policies, but for different reasons. Hewlett Scudder protested the leasing of land under water immediately south of his dock, asserting that a bulkhead and dock there would be an infringement on his own lease. The trustees ignored him and leased it anyway (85). Another member of the Scudder family ran afoul of the trustees when he petitioned to lease all the shore in front of his property so that it would not be given to a private individual and be a bar to the public using the area. The trustees denied his request (86). Not to be turned aside, he tried again eight years later in 1899 to lease "a little piece of ground mostly under water" in order to clean out the rubbish and old boats people had been in the habit of dumping there. He hoped to bulkhead and beautify the spot. The trustees once again turned him down, claiming that the dock to the north, the Brush dock, required access from all sides since it was open to the public (87).

The state continued to insist that it owned the land under water and could grant leases of patents to individuals owning the adjacent upland. In 1880 the commissioners of the Land Office entertained two requests for grants of land under water to local residents. In both instances the trustees objected vigorously and at a hearing before the attorney-general based their argument on the Fletcher patent. The attorney-general reserved decision, at which point the trustees negotiated a lease with one of the individuals for land under water in Cold Spring Harbor (88). Upon hearing in 1887 that Theodore and John Lowndes, two Connecticut residents, had applied to the state for patents for

oyster grounds, the trustees retained counsel to begin legal action to recover possession of their lands under water (89). Thus began, finally, the long process of litigation that would take the trustees to the US Supreme Court.

During this period, the state legislature did little to reduce the confusion over ownership; if anything, it compounded it. In 1881 the legislature passed an act extending the jurisdictional boundaries of towns in Queens and Suffolk counties to the Connecticut-New York line established in 1875 (90). Five years later the state ceded the lands under the waters of Huntington Bay to the trustees for the cultivation of shellfish. Yet, in granting "all the right, title and interest which the people of the State of New York have, if any," in the area, the state, despite accepting the 1875 boundary line of the trustees, reserved the right of the commissioners of the Land Office to grant lands under water there to the owners of adjacent upland, "for purposes of commerce or beneficial enjoyment." The act went on to state that "nothing herein contained shall be construed as interfering with the rights of riparian owners" (91).

At this time, Huntington Harbor could not be considered one of the better navigable harbors on Long Island. Much of its original marsh continued to survive along its edges and mud flats predominated at the head of the harbor at low tides. Vessels encountered deeper water only near the mouth, so it is no wonder that the townspeople complained about oyster leases in shallow water and that the trustees chose the bay, which was more productive of shellfish, for their legal battle.

In 1881, the Lowndes brothers from Connecticut, having planted and harvested oysters in the bay during the Civil War, applied to the town for a lease. The trustees rejected the request on the grounds that the applicants did not recognize that ownership rested in the trustees as evidenced by their application for a grant from the state (92). In 1888 the issue was joined in the state supreme court and proceeded through the many stages of appeals to the US Supreme Court in 1893.

The Supreme Court disposed of the contention that Huntington Bay could only be a part of the sound, and therefore an arm of the sea, by pointing out that in the seventeenth century all charters referred to the sound as a northern boundary line and that even though it opens into the Atlantic Ocean it is separate and distinct from it. Therefore, it followed that even though bays and harbors emptied into the sound they were not a part of it and, "if Huntington Bay was then known as an independent body of water, by whatsoever name called, that is enough to eliminate it in tracing the boundary of the grant. That it was so known is not open to question; it was not, therefore, a part of the sound, and the boundary ran on the north of it" (93). The court then recognized the colonial grants and stated that "no question exists as to the validity of these ancient grants, or that they were broad enough to include oyster rights in the waters within them" (94). The trustees were finally vindicated, but only temporarily. The following century witnessed continued attacks on their powers and encroachments on their lands.

Early in the twentieth century the trustees undertook to establish a bulkhead line along the east side of Huntington Harbor, beyond which none could install new bulkheading or retaining walls. The rapid expansion of private and commercial facilities in the harbor evidently reached the point where some form of regulation became necessary to halt indiscriminate

extension into the harbor (95). A glance at Map 4 will provide an illustration of why the trustees became concerned during this period. Although a composite of two maps, the one shown here can be considered fairly accurate, since later maps still show very shallow water and marshy areas in approximately the same locations. It is impossible to indicate all small jetties and docks; therefore, only the larger, known structures are shown.

For the next two decades the board of trustees went about its business of granting leases for use of land under water. Then, in 1930, both the board and certain private citizens again began to worry about the encroachments into the harbors and bays of the town that had been going on for some time. In January the trustees passed a resolution taking note of the fact that improvements to the harbors and bays were planned, but that a number of bulkheads and docks had already been built without permission. They resolved to engage an engineer to assess the extent of such unauthorized use of the trustees' lands (96).

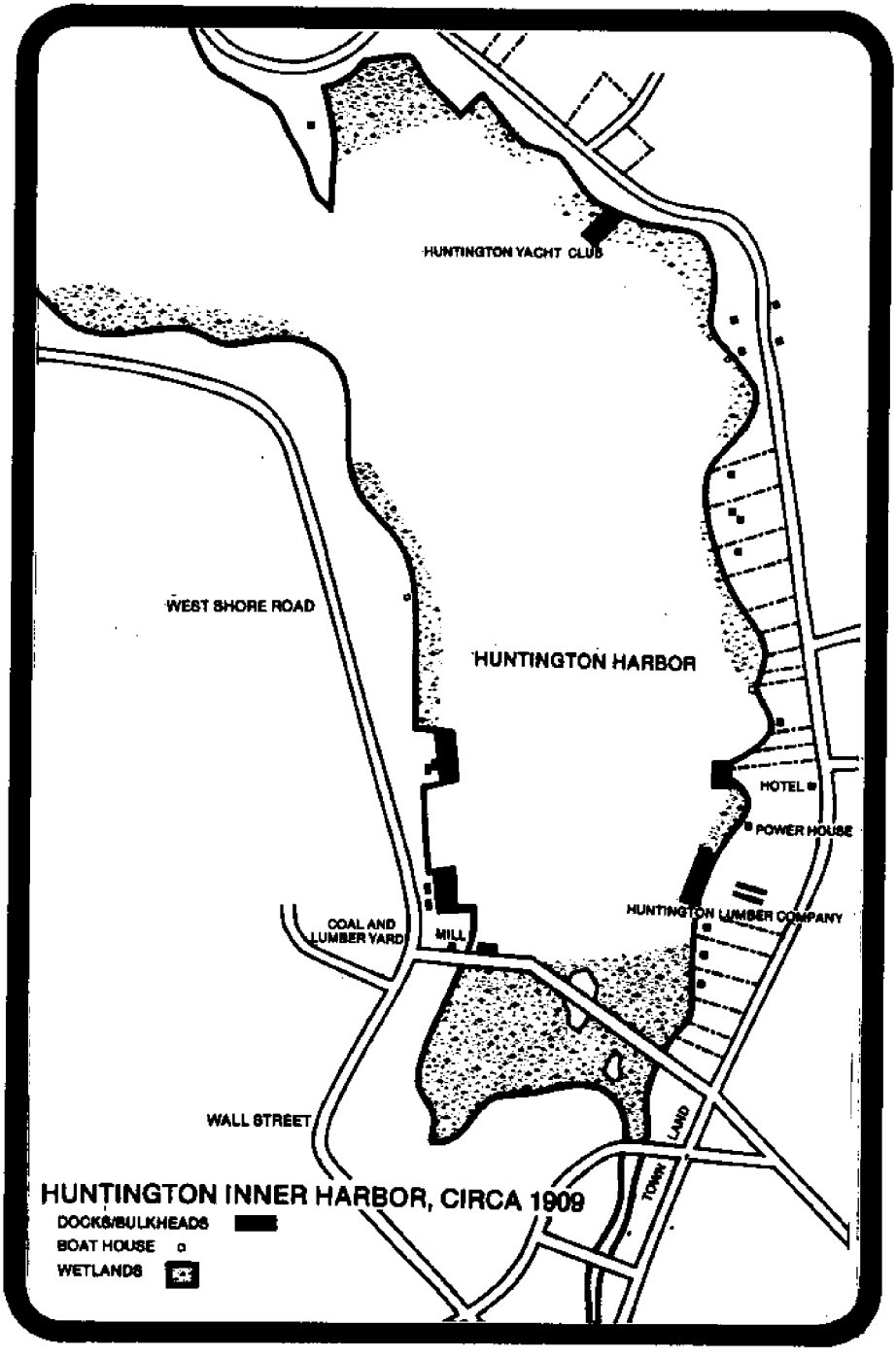
A year later a number of residents along the shore of Huntington Harbor petitioned to have the lease of the Marine Oil Company cancelled because of the carelessness of the firm in allowing oil to saturate the shore and run off into the harbor. The Town Board took action on the latter to the extent of inspecting the area and reporting that the company had complied with all regulations. Apparently, a barge from another oil company had been the cause of the oil spill (97). They pointed out that the public had full use of the docking area when barges were not tied to it--and let the matter drop.

At this time a group of concerned citizens formed the Huntington Township Harbors Committee and outlined a number of proposals to improve local conditions. Among their recommendations were plans to improve West Shore Road with spoil from dredging a channel in the harbor, the construction of a new town dock, the filling in of the wetlands on the west side of the harbor, the restriction of any further commercial activities in the harbor, and the elimination of all sources of pollution in the harbors to make them safe for bathers (98). There is no suggestion in the records that the board of trustees gave serious consideration to these proposals.

Later, in the 1950s, the board of trustees acquired a town marina on the east side of the harbor. The area had been leased to Piping Rock Petroleum Company, which occupied it for many years and built an impressive array of storage tanks, docks, and related facilities. A local citizen, Sam Albicocco, questioned the use of the leased area and pointed out the need for improvements, but the trustees had to admit they had given little thought to the problem. Public pressure mounted to get rid of the company, primarily because of the rundown condition of the leased land, and 10 years later the trustees terminated the lease. Subsequently, they passed a resolution permitting the town to improve it for public use as a marina (99).

Other areas in Huntington Harbor proved not to be as amenable to such a simple solution. In the southeast corner of the harbor extending outward into its waters from Mill Dam Road, a continuation of the old mill dam itself, is the Knutson marina. Consisting of a sprawling complex of retail stores, shipyards for pleasure craft of all sizes and descriptions, and a number of wharves, it is built on what was once marsh and occupies, by means of fill and a forest of pilings supporting a maze of docks and ramps, the foreshore and lands under water. All this without benefit of lease but with questionable title to at least a portion of the land so used.

MAP 4


HUNTINGTON YACHT CLUB
WEST SHORE ROAD
HUNTINGTON HARBOR
HOTEL
POWER HOUSE
HUNTINGTON LUMBER COMPANY
COAL AND LUMBER YARD
MILL
WALL STREET
TOWN LAND
HUNTINGTON INNER HARBOR, CIRCA 1909
DOCKS/BULKHEADS
BOAT HOUSE
WETLANDS

Knutson's chain of title to the upland traces back to 1870 when the Wilton Wood, Sr., family acquired it from Jarvis R. Rolph (100). The conveyance uses the "main creek" as the eastern boundary. At that time the creek lay farther west than its remnants do today so that the discrepency between the old creek and the new one, which has been shoved steadily farther eastward, is in the neighborhood of 150 feet. When Wood, Sr., conveyed title to Anoatok, Inc., now a local private club, in 1926, the old creek was the boundary; when the club conveyed the land to Jean F. Mesritz in 1946, by survey, the new main creek became the boundary (101). Of course, one could further compound the problem of ownership by introducing the quit-claim of 1866 from Rolph to the trustees for all remaining land in the Old Purchase. Some of the conveyed land and thatch beds possibly lay within this area (102). Regardless of these legal niceties, the marina has dominated this corner of the harbor for a number of years and each spring puts out a large enough number of anchorage buoys in a wide arc in the water fronting it, giving it the appearance of a watery mushroom forest, virtually to the exclusion of all but its own customers.

Opposite the Knutson marina are the W. Wilton Wood docks that cover the site of the old mill in the southwest corner of the harbor and extend northward along the west shore a considerable distance. Even though this was once trustees' land and very probably still is, based on a substantial amount of evidence, it has been used by commercial establishments of one kind or another ever since 1752 when Zophar Platt received permission to build a mill there. During the two centuries of use, exchanges of land took place by means of grants and leases, highways were built and altered, docks constructed, and assumptions as to who owned what firmly engrained in the minds and habits of successive conveyees or lessees. Through the many generations, the trustees acted as if they owned all or part of the area; although equally as many generations of private individuals who became occupants of the site came to feel they owned it (103). By 1833 when Henry Brush sold the mill to Richard Holder, 80 years passed since the trustee franchise was awarded to Platt and the conveyances incorporated legal terms that spoke of fee ownership (104). Holden transferred ownership to John Wood in 1838, who operated it until 1881 when Daniel Smith acquired it. Daniel Smith, Jr., ran the mill until it had to be dismantled in 1930 (105).

The docks and the land on or adjacent to the mill site came into the possession of the Wood family early in the nineteenth century. In 1769 the trustees gave permission to six men, including Platt and John Brush, to construct a dock "against the point northward of John Brush, his mill," and two years later, for whatever reason, Brush obtained the right to build a dock "between the mill and the shore...not hindering the highway" (106). Just how substantial or permanent the dock was cannot be determined, but by 1840 John Wood had to apply to the trustees for a lease of land under water to construct one "twenty-four feet from the northwest corner of the mill and running northeasterly ninety feet and then northerly one hundred and sixty feet, and then westerly to highwater mark" (107). The following year the trustees deeded a strip of thatch meadow to George W. Conklin that stretched across the head of the harbor "to the spring on the opposite side of the harbor below John Wood's mill," and either the same or an abutting piece to Jacob Scudder, which recites essentially the same description (108). Each of these conveyances reserved to the inhabitants of the town "the privileges of sailing, fishing, and such as are common to harbors, creeks, etc." At the request of the Committee of the Proprietors of the Old Purchase, the trustees also divested themselves of a narrow strip of thatch bed along the west shore north of the

mill and docks to Solomon Ketcham, who sold it to Platt Conklin, who sold it to John Wood (109). By selling that amount of wetlands, the trustees effectively excluded the public from direct access to the entire head of the harbor and a substantial portion of its west side.

Successively, over the years the heirs and descendants of John Wood have renewed the lease to the land under water where the docks now are (110). During the 1930s questions of ownership of the mill site, docks, and a strip along the west shore arose sporadically, partly because of plans to rehabilitate West Shore Road. At that time W. Wilton Wood produced an 1841 deed that allegedly gave him fee title to some of the area. Little was done, however, until 1953 when an attorney for Wood began negotiations for a renewal of the old leases to the docks (111). The board of trustees at this time did not seem prone to act hastily and a year later requested Henry Wood to meet with it to discuss the lease. At the meeting the board voted to continue discussions on "conflicting interests in the Wood docks" (112), and two years later found it necessary to tell an applicant for a lease to the docks, LoBasso Oil Company, that they were "still trying to ascertain title to the...docks and were not prepared...to enter into any negotiations" (113). In 1956 the board voted to return Wood's rent checks and notify him to vacate the premises. He did not and in 1960 his attorney offered to exchange title to the West Shore Road allegedly owned by Wood for a fee title to the northernmost of the docks. The response of the board of trustees, that the "situation is very complex. There is more to it than meets the eye in terms of who owns what," is a classic understatement of firm indecision, undoubtedly born of a deep-seated desire that the matter would somehow go away and not bother them anymore (114).

It did not disappear and continues to plague the board today. Recently, the present alleged owner applied to the town for permission to operate a marina between the two docks. The town denied the request, basing its decision on the belief that it and not Wood owned the land and land under water there. This resurrected the whole issue and it is now taking its tortuous course through lawyers' offices and the courts; the trustees claiming fee title and the right to manage the disputed area, Wood now claiming his riparian rights and fee title give him the right, regardless of past leases, to make use of the land under water for his own purposes. The proprietary rights of the trustees and their power to manage the harbor's foreshore and lands under water in the public interest is again under attack (115).

Within a year after the old Platt mill ceased functioning in 1930 the trustees found themselves in a controversy over ownership of the mill pond. In December 1931 the Ludlam family alleged that they owned most of the pond, having bought all the Scudder rights in it, and negotiated with the trustees for a purchase price. Immediately, the question of title arose and the trustees retained counsel. The Ludlams objected vehemently, claiming they had negotiated in good faith and had title to the area and had even offered to spend $20,000 to dredge a portion of the harbor if the town eventually decided to fill in the old mill pond for a park. A citizens' group, the Huntington Township Harbors Committee, supported the trustees and pointed out to them that there were tax arrearages on the property of $327.01 from 1931. The trustees immediately paid the bill, plus interest, to protect their position, and their counsel proceeded to prepare a lengthy brief (116).

In the brief, counsel established the validity of the colonial patents and the existence of the board of trustees as successor to the trustees of the freeholders and commonalty of the Town of Huntington (117). He then considered the Platt grant and concluded it was a grant of rights in the nature of a franchise rather than a conveyance of fee title because it dealt with tide marshes, citing Trustees of Southampton v. Jessup in support.

> It would fall under the definition of an easement if it had been granted by an ordinary landowner and not by a body holding lands under water in trust for the public. We think it is a franchise because it was granted in the exercise of a governmental power conferred by the royal charter in colonial days...In construing this franchise we are not to lose sight of the principle that a grant from the public, so far as it is ambiguous, is to be construed in the interest of the public, and hence in favor of the grantor, and not, as in ordinary cases, in favor of the grantee (Syracuse Water Co. v. City of Syracuse, 116 NY, 178; Mayr v. Starin, 106 NY I, 19; Wells v. Carbutt, 132 NY 430, 435). This principle, however, is to be applied only when doubt arises, for when the meaning is clear there is no room for construction (118).

The court also stated that in the instrument of conveyance certain words generally found in a conveyance of fee title were used, but when read carefully as a whole there was no evidence of intention to convey fee title. Therefore, counsel concluded, it was clear that the sole purpose was to grant and convey to Platt certain rights, liberties, and privileges specifically enumerated in the instrument itself (119).

Speaking of the mill pond, he asserted that the purposes of the grant were merely a right to impound and use the waters of the pond, thus leaving the fee title in the public. Huntington, as owner of the legal title under the colonial patents, was actually in constructive possession (Civil Practices Act, Section 35), and Platt acted only with the permission of the town. Consequently, any acts of his successors could not give rise to any claim of title by adverse possession (120).

Turning to the payment of taxes as supportive of a claim of ownership, counsel averred that it could not be accepted as evidence of possession either actual or constructive. Such payments could not estop the town from claiming title to land. Title is held by a municipal corporation in trust for the public, which, as the real owner, could not be estopped by acts or commissions of officers whose duty it was to protect the public interests (121). Pointing out that successive title transfers between private individuals, even though properly recorded, could not estop the town from its claim, counsel stated that none of the transfers purported to convey anything other than the original franchise. Therefore, as long as the franchise was not abandoned no other parties could claim fee title.

Actually, the dispute became moot in 1936 when the town held a special election to allow the voters to decide if they wished to purchase the property, included in which was the pond, the mill site, and the mill dam, for $18,250. The voters granted their consent by a wide margin of 219 to 55. Shortly thereafter the town received a quit-claim from the Ludlams turning over all their right, title, and interest (if any?) in the area (122).

For the past 75 years two interrelated activities, shellfishing and dredging, have occupied the time of the trustees intermittently and, in addition to their leasing practices and associated frustrations, are illustrative of what can only be considered in the loosest sense of the term a water resources management policy. In all fairness, however, it must be said that no matter what course the trustees took in either sphere they antagonized some group.

Toward the end of the nineteenth century the shellfish industry was in trouble. Indiscriminate exploitation of the beds and an invasion of starfish seriously endangered the local supply. Prior to the crisis many baymen obtained leases and worked their areas as they saw fit; others farmed the unleased portions of the harbors and bays. More than a few overharvested with little regard for per unit size and neglected to reseed or toss back undersized shellfish. A starfish onslaught made many realize that such individualism did not work to the benefit of all, consequently, many began combining into larger commercial firms or voluntary organizations that made a concerted effort to combat the predators that threatened the extinction of the industry.

During the next 40 years little mention is made of the shellfish industry in local records. Then, in 1939 and again in 1954, the town finally updated its shellfish ordinance of 1884 (123). In the spring of 1958 increased interest, especially among private baymen, as to the future of the shellfishing industry in Huntington waters produced a series of meetings with the trustees. The first meeting began amicably, but soon developed, as did later meetings, into an acrimonious debate over dredging operations, leases to large commercial firms of lands under water, the rapid increase in the number of small pleasure craft in the harbors, and the rights of baymen as individual entrepreneurs. Baymen accused commercial firms of employing power dredges and high pressure hoses to harvest oysters to the detriment of individuals using the same area with more primitive equipment. They complained that some of their own group who held leases abused the lease privileges. Many demanded that dredging of the harbor channel by a sand and gravel firm be halted because it adversely affected shellfish beds (124). Generally, those at the meetings agreed that a starfish menace existed, but long-standing animosities quickly shifted the discussion to alleged and real abuses, which prompted many to lecture their fellow baymen on the correct use of shellfish areas. And, finally, the baymen took the trustees to task for allowing indiscriminate growth of dock space, slips, and moorings for pleasure craft.

One result of these meetings was that they provided a public forum for a number of people who had harbored grudges for years against others. They also brought to light the classic struggle between disorganized individuals who insisted on going their own way and those who combined into commercial ventures with more efficient methods of operation. The meetings unwittingly were also a reaction to what had been taking place in Huntington for over 70 years, that is, the gradual suburbanization of the town that produced a steady and subtle expansion of private docks, summer homes, and pleasure craft, which, like flies on a horse, became an accepted fact of life for the "locals" until they became too numerous for the tail to swat away. This trend, accompanied by an influx of commercial establishments along the water's edge and large shellfishing concerns, considered a cancerous growth by only a few over the years, persisted with little resistance because it raised property values, kept up employment, and brought in much needed money. Now, the town

was reaping one of its rewards, or, to be trite, paying the piper for the cash registers' sounds it had been dancing to for so long.

It is incomprehensible, but sadly true, that the trustees at this time felt the need to consult the state comptroller's office to see if they had the right to regulate the shellfish industry (125). With almost 300 years of recorded history behind them in their own records and a number of legal decisions in their favor, as well as state laws, it is almost ludicrous that they would even question this right. Either they were singularly naive and uninformed or overly cautious beyond the point of being effective in fulfilling their role. Nevertheless, they galvanized themselves into action in 1959 by appointing a Harbors and Waterways Committee with a mandate to make recommendations to improve boating facilities, suggest steps to insure shellfish conservation, and review the status of town-owned lands and shorefront use in order to present recommendations for "proper" community use (126).

Between 1962 and 1969 a new board of trustees took steps to counteract the continuing deterioration of the shellfish population. In April 1962 they voted to pay up to $3,000 to transplant clams to an unpolluted area in Northport Harbor. And in 1966 the trustees combined with the State Conservation Department, the US Fish and Wildlife Service, and two local businessmen, George Vanderborgh of the Long Island Oyster Farms and Fred Schieferstein of the Baymen's Association, to experiment in planting clams in different types of areas to determine the best environment for their propagation. During the next three years the trustees financed the experiment through contributions from trustees' funds of $6,000 each year to purchase a total of 9,000 bushels of clams that were planted in trustees' land under water in designated locations (127). Thus, the trustees fulfilled their responsibilities to use the lands under their trusteeship for the use and benefit of the people of Huntington.

During the twentieth century dredging became another concern of the trustees because it related directly to the management of use of lands under water. The dredging they condoned had two presumed advantages: it cleared and deepened channels to improve harbor navigability for commercial and pleasure craft; some of the dredged material was sold by the firm under contract as sand and gravel, for which the trustees received a royalty per cubic yard. As might be expected, the net result seldom pleased all those affected and the trustees again found themselves caught in the middle between the contending pro- and anti-dredging forces.

The US War Department became the first one to undertake major dredging in 1915 when it received permission to create a channel in Huntington Harbor. This and subsequent dredging over the years slowly and subtly altered the harbor's shoreline, because the dredged up material had to be dumped somewhere. In this instance the trustees authorized that the spoil be deposited on the east side of the harbor on an acre they owned just north of the causeway below the mill dam and on a 2.5 acre plot south of the causeway, also trustee owned but currently under lease (128).

Trustees' approval or rejection of dredging operations was carried out on a selective basis, their judgment apparently based on whether or not such an activity would destroy beaches and bluff areas adjacent to residences and the impact it would have on shellfishing areas. In 1916 they refused to permit

dredging in Lloyd Harbor because of potential damage to an oyster lot, not forgetting, of course, that they had been presented with three petitions signed by 348 voters protesting the dredging (129). In 1918 they again halted another dredging operation that had begun without their express consent, claiming it would destroy the shellfish industry in Lloyd Harbor and also make it unsafe as an anchorage for pleasure craft. Yet six years later the trustees approved the request of the Henry Steers Company to build a dock at Bluff Point in Northport to facilitate the removal of sand to their Eaton's Neck plant and leased land under water in the bay for sand and gravel mining despite the objections from oyster lot leaseholders that it would damage their areas. The trustees reasoned that the area was devoid of residences and only a few oyster lots would be affected (130).

Probably the largest single dredging operation that took place in the town had its antecedents in 1935 when a voter referendum rejected a proposal to dredge channels in all the harbors. Efforts to enter into a contract continued intermittently until 1951 when the trustees awarded a contract to the US Dredging Company, a commercial sand and gravel firm, to deepen, widen, and "improve the waters" within the town by selectively mining the lands under water. At irregular intervals thereafter the contract was extended to scoop out large chunks of harbor and bay bottom (131).

Once dredging operations began on a large scale, a number of individuals and clubs in Huntington grasped the opportunity to improve their own shorefront conditions gratuitously. The year 1955 saw a flurry of requests to use the dredging company's equipment to clear away silt and open up channels near docks. Harbor Boating Club and Ketewomoke Yacht Club, situated next to each other on the west side of Huntington Harbor, petitioned to have this done in front of their leased property. The trustees directed the company to do so and within a matter of weeks they received a letter of thanks from the two clubs for such prompt action (132). The local shipyard, Knutson Shipbuilding Company, received favorable treatment in 1957 after Thomas Knutson complained that silting and filling in of the harbor in front of his shipyard had covered the marine railways (133).

Certain benefits accrued to the town and the trustees as a result of dredging. In a one-month period the latter received in royalties from the company, at nine cents per cubic yard, $2,896.02 for 32,178 cubic yards of gravel removed (134). Supervisor Flynn, also president of the board of trustees, reported in 1963 that use of the county dredge to remove over 1.25 million cubic yards of material from Northport Harbor saved the town $5 million. Shunting aside the complaint of a Mr. Goldthwaite that the real result had been a raising of the water by 3 feet so that some upland owners could no longer swim off their property, he casually observed that "with a large dredging job of this nature, there would quite likely be a few aggrieved persons" (135).

The trustees, proud of their achievement, publicized that a few years previously the harbor had been a mess with a narrow winding 2.5 mile long channel through "vast beds of deep oozy mud," used by only two yacht clubs and a small shipyard. Pointing out that 10,800 feet of the channel had been improved along with 2,200 feet added to it, that the harbor mouth had been widened and reduced tidal currents from 6 to 2 miles per hour, and that new public and private beaches had been created, they also boasted that increased flushing action had cleared up pollution and restored the shellfish industry (136).

Regardless of the benefits, alleged or real, many residents and organizations opposed dredging as early as 1954. During the next 10 years, resentment of and resistance to its continuation became more vocal. The complaints, some justified, ranged from accusations that no one paid any attention to the effect on shellfish to the belief that it created greater hazards to navigation and beaches than then existed. Frequently, they accused the dredgers of actually creating new, dangerous mud flats and lamented that the operation was so noisy that it ruined recreational activity and the peace and quiet of the area (137). Again responding to public pressure from the beneficiaries of the trust they administered, and noting obvious signs of harbor deterioration instead of improvement, the trustees ceased dredging activities by the end of the 1960s.

One might have gained the impression by now that the political and economic life of Huntington depended upon the trustees as they went about performing their duties and exercising their powers. This may have been true in the seventeenth century, but, as one moves closer to the present, it becomes much less so. From the moment of their genesis, they were the political hub of the town and, as proprietors of all unappropriated natural resources, were the managers and determiners of local land use. Gradually, however, by legislative enactments of the colonial assemblies and later the state legislatures, their political powers became vested in other appointed or elected local officials. Consequently, at times, the trustees appeared to act as any normal private proprietor might; at other times, they performed their land management function as if what might otherwise be interpreted as a private trust was in reality a public trust, that is, one not confined to a few individuals acting in their own interests but rather one that blanketed the entire community in the public interest.

By the end of the eighteenth century the trustees lost to other officials control over highways (unless, of course, they passed over their lands), supervision of the destinies of the local poor, assessing tax rates, and the like (138). No longer did the trustees serve the dual functions of governmental agency and managers of a public trust, for the former had eroded away. One hundred years after the Revolution the state legislature took this into account when it abolished the trustees as seven distinct individuals and merged the trustee obligation with the other duties of local officials, making them, in addition to their offices of supervisor, town clerk, and assessors, ex officio a board of trustees, "with all the rights, privileges, powers, duties, and jurisdictions heretofore enjoyed and exercised" by the trustees created by the Fletcher patent in 1694 (139). Chapter 816 of the Laws of New York of 1952 did nothing more than reiterate and again confirm the power and duties of the board of trustees "to acquire, hold, manage, lease, control, convey, grant and dispose of property both real and personal for the benefit of the residents and taxpayers of...Huntington."

Ever since 1872 the town officials have worn two hats. Prior to that, they existed as separate entities from the trustees, thus, perpetuating overlapping and duplication of functions in some instances, particularly with respect to land management and use. After that date the two offices merged into one group of officials. Nevertheless, they remained discrete in that when town board members considered affairs of political administration, they acted (and kept records) in that fashion; when trustees' matters came before them, they adjourned the town board meeting and reconvened as a board of trustees, maintaining separate records and accounts.

The act of 1952 clarified, once again, the duties of the trustees when the town board sat in that capacity. But, when the town voted by referendum in 1953 to become a town of the first class, the result was a separation of the town board members, now councilmen, from board of trustees members, who remained the justices of the peace. A dispute soon developed in the town, along partisan political lines, over whether to retain the board of trustees or abolish it and merge its powers and duties with those of the town board. Those who supported the continued existence of the trustees asserted that if town and trustees' funds were commingled there would be no assurance that the latter would be used specifically to preserve and manage local natural resources under the trust. They argued that a merger of functions would create confusion on the town board which might not be able to distinguish under what circumstances it should wear which hat. And the town's assemblyman, Prescott Huntington, tried to alert the public to the dangers inherent in such a proposal, cautioning the voters "to safeguard their rights [over lands held in public trust] lest the State of New York and the State Park Commission gain a power to take away public lands which they cannot now condemn" (140). Proponents of abolition and merger claimed that, outside of a few lawyers and politicians, there was a general lack of understanding of the powers and duties of the trustees as distinguished from the town board; that the board of trustees operated as a private trust even though it dealt with matters of public concern; that the trustees were handicapped by uncertainty as to their voting procedures; that it would eliminate confusion in consideration of certain local ordinances such as the shellfish ordinance passed by the town board without a direct request from the trustees who owned the waters and the land under them; and that administratively the board of trustees was virtually helpless to perform its duties because it lacked a staff (141).

If the subcommitte had undertaken even cursory research into the history of the trustees and their present status, they would have discovered that, even taking into account a few errors in judgment here and there, the trustees, even since the seventeenth century, acted as if they administered a public trust for the benefit of the town and its residents. Lack of knowledge of the powers and duties of the trustees should not have been blamed on the trustees; rather, it should have simply underlined public apathy and the subcommittee's own intellectual laziness in not being able to produce a better argument. The only realistic fault publicized happens to have been the lack of staff, for the board of trustees had neither its own secretarial staff nor legal counsel. It had to rely on town employees on a sometime basis.

Somehow, the opponents of the board carried the day, at least partially. In 1962 the state legislature abolished the board as then constituted and merged its duties with those of the town board to the extent that the supervisor and councilmen would sit as a town board in all but trustees matters, at which point they would convene as a board of trustees with the supervisor as its president. Now the board of trustees became subject to the provisions of the civil service law, general municipal law, town law, and local finance law; yet they must maintain separate financial accounts, subject to the jurisdiction of the state's supreme court under article 79 of the Civil Practices Act, and pass their own resolutions. The legislature saw fit to protect ancient rights when it inserted in the act a clause declaring that nothing in the act or previous acts curtailed or impaired "the proprietary rights, title, and interests derived by the board of trustees from colonial charters or subsequently acquired by them, and the same shall remain vested as heretofore

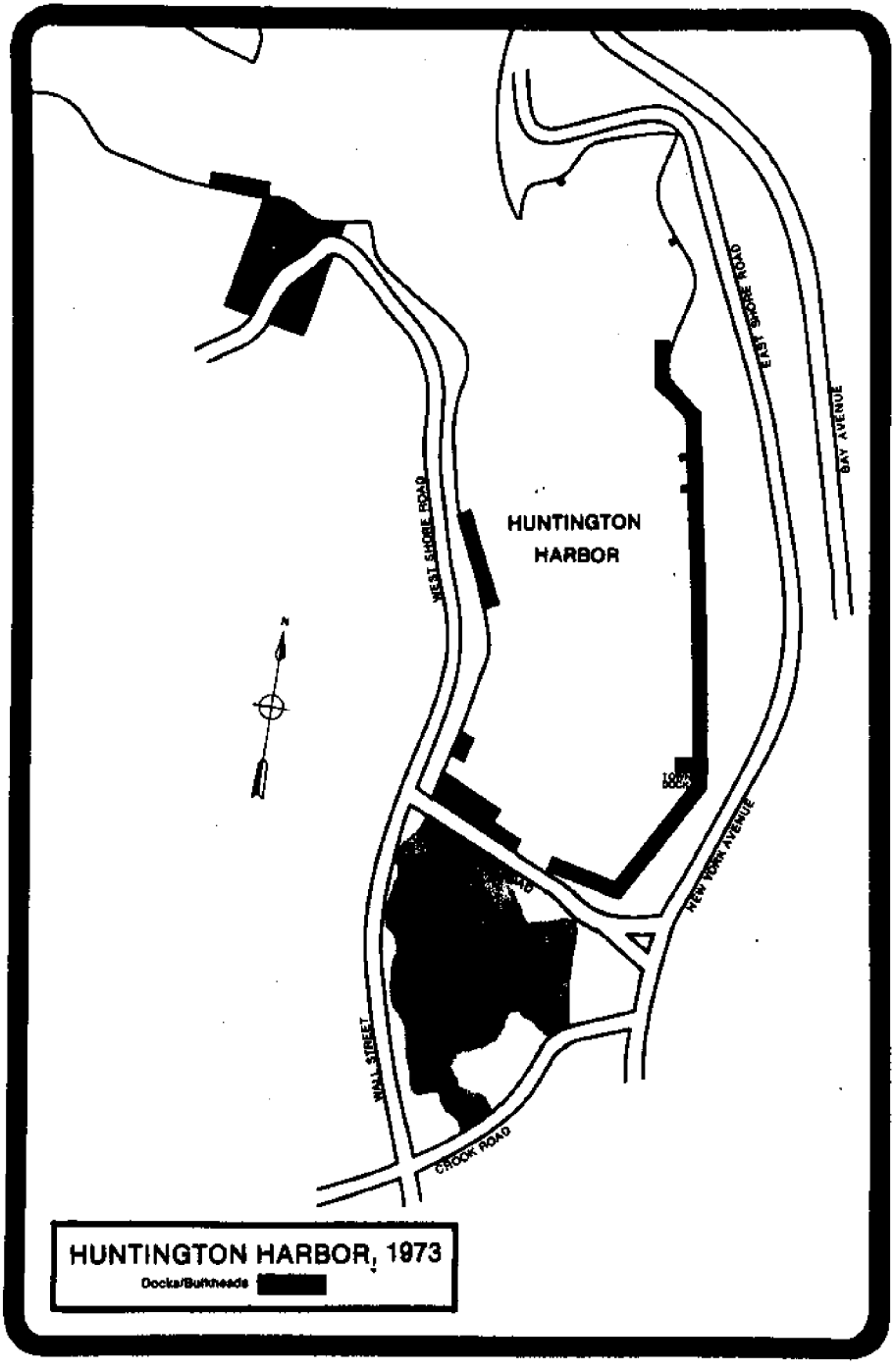
for the benefit of the residents and taxpayers of the town of Huntington" (142). If nothing else, this act gave recognition to the fact that the trust created by the Fletcher charter in 1694 was indeed a public trust.

Thirty years before the trustees evolved to their present status, the town took some steps to regulate its growth. In 1930 the first zoning ordinance was imposed on the town, which divided it into residential, business, and industrial districts. The ordinance gave its blessing to what had become an almost irreversible trend by that time and designated the head of Huntington Harbor as industrial with a small section along the old mill dam as business. To its credit, the zoning ordinance prohibited, even in the industrial districts, "any use which may be noxious or offensive by reason of the emission of odor, dust, fumes, smoke, gas, vibration or noise" (143). Closely on the heels of this the town adopted a master plan on 7 June 1933, that urged the acquisition of lands at selected sites around the town's harbors for parks. The planners urged the purchase of the western part of the old mill pond, by then mostly filled in, and a narrow stretch along the west shore north of the Wood docks to avoid their becoming slum areas cluttered with small businesses and cheap houses (144). Eventually the town obtained quit-claims from the alleged owners of the first site and a park of sorts has been made there; the second parcel remains today a long narrow strip of rubble-strewn shoreline.

In recent years, under the able and foresighted administration of Supervisor Jerome A. Ambro, the town has come full circle, at least in some respects, back to the original frame of government under the first trustees, yet it has also moved ahead of other towns on Long Island in adopting ordinances specifically designed to protect and preserve local natural resources. The merger of 1962 accomplished just what the staunchest proponents of trustee abolition sought to avoid: it gave to the board of trustees, when acting as councilmen, the political and police power to carry out their public trust obligation as intended in 1694. In 1967 Huntington became one of the first towns in the state to form a Conservation Advisory Council. This council contributed materially to one of the most stringent marine conversation laws in the state. This local ordinance, enacted in 1970, regulates dredging, filling, construction of piers, and other activities with the express intent of protecting wetlands, foreshore, and lands under water. A 1971 ordinance requires that all development plans and requests for zoning changes be accompanied by an environmental impact statement. The following year the town board created the Department of Environmental Protection as a watchdog agency over air, noise, chemical, and water pollution with a number of town departments, including Harbors and Waterways, reporting to it (145).

A glance at Map 5 might suggest that the recent flurry of official activity to protect the harbor is nothing more than a last-ditch effort--and a futile one at that. The east side of the harbor is host to at least five marinas and yacht clubs, a municipal dock, a large trap rock firm and oil storage facility, two or more commercial boat sales shops, a US Navy Reserve station, an American Legion Post hall, and the sprawling Knutson marina complex. Somewhat north of the town dock all property abutting the shore is owned by private individuals, most of whom have small jetties extending into the water, many of which are supported by some form of bulkheading. On the west shore, north of the Wood (now Albicocco) docks is a long narrow strip of rubble-strewn foreshore, beyond which lie at least five private yacht and/or beach clubs. Near the Wood docks, also, are two small restaurants and a boat

MAP 5


HUNTINGTON
HARBOR
WEST SHORE ROAD
EAST SHORE ROAD
BAY AVENUE
NEW YORK AVENUE
WALL STREET
CROOK ROAD
HUNTINGTON HARBOR, 1973
Docks/Bulkheads

shop. Such sequestering of the foreshore by private interests has left the general public with little or no access, except for the town dock, to the trust *res* created for them 300 years ago; that is, of course, unless individually they pay the price of admission through some private yacht club or marina.

Today's trustees cannot be blamed for this proliferation of activity. Nor can those of the seventeenth and eighteenth centuries, for they regulate the harbor in the public interest. Admittedly, they allotted shorefront property to individuals and distributed the wetlands among them but they did not permit, nor could they foresee, the construction of so many docks and bulkheads that the entire inner harbor no longer retains any of its natural features beyond one or two isolated spots. One must look to the record of the trustees in the nineteenth and early twentieth centuries if one wishes to praise or blame. Those in the latter nineteenth century, imbued with that century's libertarian economic philosophy that extolled the maxims of freedom of economic expression, turned their attention to managing shellfishing and lands under water for that purpose, letting the foreshore take care of itself except for a lease here and there. Their twentieth century successors did no more. Both reacted to bulkheading usually after it became a *fait accompli* and too late to do much about it. If that can be called management, so be it.

In all fairness to them, however, it must be said that the state courts frustrated them in the discharge of their duties as much as did the individuals who blithely ignored them. Since the latter nineteenth century court decisions have interpreted the concept of riparian rights so favorably for the individual that most, no, all of them use it as a shield to protect their indiscriminate bulkheading and docking out to navigable waters in the harbor. Consequently, the trustees have had to fight a rear guard action to maintain a minimum of control over the property they hold in trust for the community. This might explain why today's trustees, rather than rely solely on their proprietary rights, have turned to the political and police power they can exercise as councilmen to manage the trust *res*, the wetlands, foreshore, and lands under water in Huntington Harbor.

CHAPTER III FOOTNOTES

(1) Street, Charles R., ed. Huntington Town Records, including Babylon, Long Island, New York (Huntington, NY, 1887, 3 vols.), I, p. 1-4.

(2) Ibid., p. 6. The 1653 and 1656 purchases originally included both Lloyd's (Horse) Neck and Eaton's Neck. However, Samuel Mayo of Oyster Bay bought Lloyd's Neck from the Indians in 1654. In 1664, John Richbell, who had purchased it from Mayo, successfully defended his title against the claims of Huntington. By order of Governor Nicolls it was granted to him. Subsequently, Nathaniel Sylvester acquired it and in 1667 Nicolls, by letters patent, confirmed under the ownership of John Lloyd in 1685 (Ibid., p. 59-60, 74-80, 105-107, 419-425). Similarly, Eaton's Neck, purchased from the Indians by Theophilus Eaton, Governor of New Haven, in 1646, came into the possession of Robert Seely in 1662. In 1666 the Court of Assizes confirmed his title against the claims of Huntington (Ibid., p. 86-89). Politically, the neck was never severed from the town except for an ineffectual manor grant of it in 1686 to Alexander and Richard Bryant (Ibid., p. 451-456). Lloyd's Neck was returned under the jurisdiction of the town in 1886 (Laws of New York, 1886, Chapter 667).

(3) Ibid., p. 209-214. See also, infra, section on Fresh Pond.

(4) Sammis, Romanah. Huntington-Babylon Town History (Huntington, NY: Huntington Historical Society, 1937), p. 26-30. Actually, these hills constituted the western beginning of a glacial moraine, known as the Huntington moraine, laid down by the Wisconsin Glacier 20,000 years ago, which extends in a southeasterly direction across the Island to Montauk Point. A second line of hills of similar origin traverses the north shore to form its bluffs as far east as Orient Point. See Bowman, Isaiah. Forest Physiography: Physiography of the United States and Principles of Soils in Relation to Forestry (New York: John Wiley and Sons, 1911), p. 155, 506-514; Fuller, Myron L. The Geology of Long Island, New York (Washington, DC: Government Printing Office, 1914 [US Geological Survey. Professional Paper No. 82]).

(5) Admittedly, this map, drawn in 1836, cannot be interpreted as depicting exact topographical conditions almost 200 years earlier. Nevertheless, even in the nineteenth century basic natural features had not been altered that much so that it can in fact be used as a general representation of an earlier time.

(6) The terms "freeholder" and "proprietor" are construed as being synonymous during the early years, since the number of nonproperty holders was negligible and one could not live in the town without being accepted and given property, holding it in the same status as the original purchasers.

(7) The Colonial Laws of New York from the year 1644 to the revolution, (Albany, NY: J.B. Lyon, 1894, 5 vols.), I, p. 1-5, 100-101.

(8) Ibid., p. 21, 24-25, 43, 50, 56, 58.

(9) Ibid., p. 63, 74.

(10) On 3 May 1689 the town voted full power to Captain Epenetus Platt "to act as civil and military head officer...he applying himself for his rule to such of Governor Nicolls' laws as he...shall see cause to make use of...as to the administration of civil justice he is to apply himself to the English laws" (Street, Huntington Town Records, II, p. 30-31). In 1690 they sent representatives to confer with other towns about whether or not to submit to Leisler, but eventually did not do so (Ibid., p. 60, 73-74). Support for the contention that the town did not consider itself bound by the Dongan charter is found in a petition to Leisler on 16 December 1690 requesting the return of the Nicolls charter and confirmation of it (Ibid., p. 84-86). Further doubt can be cast upon the legal status of the Dongan patent. On 5 February 1691, a few days before Leisler was unseated, he issued an order-in-council stating that, "Ordered that the said patents does remain in the Secretary's office and that it be recorded, if it is desired by the town" (Ibid., p. 89-90). Whether he meant the Dongan patent or that of Nicolls (which is the one the town had in mind) is not known, but because of this order both patents are on record today in the New York State Secretary of State Office. Evidently, this simply confused the issue in the minds of the Huntington proprietors so they chose to ignore the Dongan patent and continued to act as if the earlier patent remained in force.

(11) Street, Huntington Town Records, II, p. 121-126.

(12) Ibid., p. 134-135.

(13) The Fletcher patent repeated the terms of the Nicolls patent as its legal antecedent and not those of the Dongan patent. Law and customs dictated that the preamble of such conveyances contain the origins of title and the rationale for issuance, and the legality of Dongan's patent, as recorded by Leisler, was in question at the time. Nevertheless, the Dongan patent is preserved virtually intact in the 1694 patent since it reiterates almost verbatim the wording of the 1688 grant, except for minor variations in wording which in no way alter the meaning of its immediate predecessor.

(14) Street, Huntington Town Records, II, p. 142-143. The complete Fletcher patent is reproduced in Ibid., p. 140-151.

(15) The Nicolls patent also recognized the claims of the first purchasers and their associates to lands already bought as well as those that would be bought in the future "for and in the behalf of the town of Huntington." All land within the patent limits belonged to the town, "as also all havens, harbors, creeks, quarries, woodland, meadow, pastures, marshes, lakes, fishing, hawking, hunting, and fowling, and all other profits, commodities, emoluments, and hereditaments...to the proper use and behoof of the said patentees and their associates, their heirs, successors, and assigns forever."

(16) Street, Huntington Town Records, III, p. 159-160. On 14 February 1791 "at a meeting of the Original Proprietors of the Town of Huntington legally notified and held..." at which time they granted a gore of land south and east of Commack to John Hart.

(17) Ibid., p. 220-221. "Thatch draw, April 6, 1805, belonging to the proprietors of the Old Purchase."

(18) Ibid., p. 250-251. Support for the contention that all individual claims in the Old Purchase were extinguished and vested in the trustees by the patent can be found in deeds of land in the Old Purchase area, to Prusil Woodward in 1810 and to Selah Wood in 1811, for example, and in the many leases of marshes, thatch beds, and dock rights along the shore line of the Old Purchase harbors executed by the trustees (Ibid., p. 251-254 et passim).

(19) Ibid., p. 541, 544, 547.

(20) Ibid., p. 549-551. In earlier years the trustees acquired other marsh land in the general area of the head of Huntington Harbor. In 1824 Moses Scudder deeded to them a piece of thatch bed on the east side of the harbor and 10 years later Selah Carll, James Nostram, and Cavid Carll gave them "a parcel of salt meadow" on the east side of the main creek (Ibid., p. 315-316, 350-352).

(21) Street, Huntington Town Records, II, p. 169-171.

(22) Ibid., p. 169n. Among the duties of the trustees can be numbered the laying out of new roads, since it necessarily involved common lands, and the regulation of local natural resources. Roadways often developed by the simple process of the people constantly using certain convenient paths for their everyday comings and goings. After long usage they were assumed to be public ways and the trustees then formally ordered the surveyor of highways to lay out a clearly defined road (Ibid., p. 350).

(23) Street, Huntington Town Records, I, p. 13-14. Mr. Street makes a number of errors in commenting on this deposition. He designates the origin of the merchandise as the East Indies, the islands in the western Pacific which he confuses with those in the Caribbean. He also assumes that the town trafficked directly with the islands. There is some evidence that by 1662 direct trading might have taken place, barrel staves and produce for liquor, but, again, it could have been done in partnership with shipowners in Connecticut, a condition that would normally obtain until local traders accumulated sufficient excess capital themselves (Ibid., p. 27f, 42). Mr. Street's efforts can be faulted not only in similar minor errors scattered throughout the three volumes, but also in the fact that he arbitrarily chose to print only examples of court records, wills, and highway records. Many of the original manuscripts have probably been lost since and thus he has done a disservice to the town as well as to the professional historian (see, Ibid., p. 26f).

(24) Ibid., p. 38. On 10 February 1662/1663 the townsmen voted that "the boat should be sent to Connecticut River's mouth to fetch Captain Sealey to this town..." (emphasis added), suggesting that only one locally owned boat existed at the time.

(25) Ibid., p. 245.

(26) Ibid., p. 484, 490, 510. Elisha Gillet operated the ferry in that year, but was forced to relinquish his franchise to Shobal Smith two years later. One would guess that by then a jetty of substantial size existed, although its exact location cannot be determined.

(27) Ibid., II, p. 327-328.

(28) Ibid., p. 502. The grantees seem not to have exercised their franchise because in 1771 Brush acquired a separate grant for himself to provide water access to his mill (Ibid., p. 510). This grant can be interpreted as a license by virtue of the use of the word "liberty." It could also be considered a fee simple grant because of the statement, "granted unto them and their heirs and assigns forever." But the regranting of the same privilege to Brush two years later, supports the contention it was a license and is in keeping with the practice of generations of trustees of retaining title to lands (commons, foreshore, lands under water) they considered to be vested with paramount public rights of use.

(29) Jaray, Cornell. The Mills of Long Island (Port Washington, NY: Ira J. Friedman, Inc., 1962). Whether they were overshot wheels (water striking the top of the wheel) or undershot (water pushing against the bottom) was a secondary consideration and depended on local topography. Wind and tidal mills were also built both in Huntington and in other Long Island towns.

(30) Street, Huntington Town Records, I, p. 19; Sammis, p. 30-33, 44-45. The difference between grist and flour mills is one of purpose. The former ground grain for local use; the latter did so commercially for export. In all other respects they were identical.

(31) Street, Huntington Town Records, I, p. 101-103.

(32) Ibid., p. 101-103, 182-184.

(33) Sammis, p. 32. Sudden and dramatic increases in the mosquito population also contributed to the decision to buy the mill in order to remove it and the pond elsewhere.

(34) Street, Huntington Town Records, I, p. 219, 299, 391. Other mills in the town included the corn and saw mill at Cold Spring Harbor, the rights to which were granted to John Robeson on 23 October 1680, and later given over to John Adams 1 April 1682 because Robeson failed to complete construction (Ibid., I, p. 272, 334). On 16 October 1686 the town granted the right to build a mill, but the site is not mentioned (Ibid., p. 469); on 3 May 1726 Jonathan Whitaker received permission to build a mill at Higbee's Cove (Ibid, II, p. 356); and Pallatiah and Henry Soper were allowed to build one at Page's Cove, not hindering grass mowing of any kind, 1 May 1733 (Ibid., II, p. 370).

(35) Ibid., p. 296.

(36) Ibid., p. 363, 367, 391. By then much less of the area was probably swampy and some now high ground. In that year a conveyance from John Betts to Edward Higbee described his east boundary as "the highway that was formerly a mill pond" (Ibid., p. 388). There is no indication that the land conveyed is anywhere other than near the head of Huntington Harbor, although it is possible it might refer to an old mill pond in another harbor. Without other proof, it is assumed it means the first mill pond.

(37) Ibid., p. 101.

(38) Sammis, p. 32.

(39) For an example of this in the grant from a town other than Huntington to a miller to perform his function locally, see Cox, Oyster Bay Records, I, p. 9, 11, 40-41, 212.

(40) For examples of such agreements in Huntington Harbor and in other local harbors, see Street, Huntington Town Records, II, p. 14, 87, 98-99, 370, 395, 448, 523-528. These can only be interpreted as licenses to use land and not as grants in fee.

(41) Ibid., I, p. 101-103.

(42) Ibid., p. 182-184.

(43) Ibid., III, p. 112-116, 10 April 1752. This deed appears out of its normal place in volume II because, according to the editor, it was not available at the time that volume was compiled by Mr. Street. All references here to portions of the conveyance are taken from this citation.

(44) Ibid., II, p. 434, 436, 484, 505.

(45) Ibid., p. 362.

(46) Ibid., p. 391

(47) Ibid., p. 355-356.

(48) Ibid., p. 440-442; 539-541; 541-543. The first, to Thomas Brush, conveyed 67 square rods of "thatch or salt marsh" at the northeast corner of his property between the high and low water marks, reserving to the trustees the privilege of fishing, oystering, and fowling at all times forever; the second, to Jonathan Scudder, contained a salt marsh bordering his land as far south as it ran, extending west by the channel and north by thatch beds sold earlier to Thomas Scudder with no reservations; the third, to Joseph Conklin, was located near a place called the "Round" and bounded northerly by a beach, and contained no reservations of public rights.

(49) Ibid., p. 481.

(50) Ibid., p. 544-545.

(51) Ibid., p. 18-23.

(52) Ibid., p. 134-135.

(53) Ibid., p. 329-330.

(54) Ibid., p. 380-381, 385, 390, 466-467.

(55) Ibid., p. 535-536, III, 3. The neighbors referred to were probably residents of Oyster Bay and other communities in Queens County. By the end of 1776 the town submitted to British authority and even raised two companies of militia to serve in His Majesty's forces, which were led by Thomas Conklin and Zophar Platt, two men prominent in local affairs. Two years later, 569

residents of Hungtinton took an oath of loyalty to the king (Ibid., p. 21, 35). Whether or not this is an indication of the true sympathies of the townspeople can, of course, be questioned. The British commanding officers, Generals Erskine and Delancy, issued threatening proclamations that promised to lay waste the area and drive out the inhabitants if they continued their resistance to His Majesty's rule (Ibid., p. 13-14). One is left with the impression that the majority of inhabitants weather-vaned back and forth as the political winds blew first from one quarter, then another. Apparently, they felt the preservation of their homes and life style was of greater importance than active support of the rebels, since it can be assumed that some of the supplies that found their way into British warehouses were sold voluntarily and there is little or no evidence of guerrilla activity on the part of those who chose to remain in Huntington.

(56) Ibid., p. 104-111.

(57) Local politics had not been seriously disrupted by the war at least insofar as certain individuals elected to office is concerned. Neither was there any vindictiveness on the part of the electorate against those who held office during the prerevolutionary years. For example, Zophar Platt served as a trustee in 1769, as justice of the peace during the war, and again as a trustee from 1786 to 1793; Timothy Conkling, a captain of militia under British General Delancy, had been a trustee from 1768 to 1771, during the war, and between 1786 and 1793.

(58) Laws of New York, 1969. This article became Article 1, Section 17, in the Constitution of 1846; Article 1, Section 16 in 1894; and Article 1, Section 14 in 1938.

(59) Ibid. This became Article 1, Section 18 of the Constitution of 1846; Article 1, Section 17 in 1894; and Article 1, Section 15 in 1938. By popular referendum it was repealed November 1962.

(60) Ibid., p. 125.

(61) Huntington, NY. Town Historian's Office. "Island Vendue Book, 1793-1862" (Huntington, NY [a manuscript]). Even though the farmers cut the thatch grass along the north shore less and less, leases there existed as recently as 1889 when A.H. Daily rented the thatch grass at Huntington Harbor for an annual rent of $5, "the same as in the year 1888." Huntington, NY. Town Clerk's Office. "Trustees' Records, 1872-1893" (Huntington, NY [a manuscript]), p. 246.

(62) Street, Huntington Town Records, I, p. 44, 64, 71, 86, 97, 109, 110, 123, 130, 145, 146, 147, 150, 180, 216, 223, 240, 241, 288-289, 296, 297, 298, 444, 520, 521.

(63) Ibid., II, p. 24-25 and 64-65, 59, 100-101, 144, 355, 440-441, 458-459, 538.

(64) Beginning in 1785, and yearly thereafter, the trustees reenacted earlier ordinances prohibiting foreigners from hunting, fishing, and hawking within the town. By 1793 they began regulating clamming as a separate activity (Street, Huntington Town Records, III, p. 126, 199, 298 et passim).

(65) Ibid., p. 384-385. See also Huntington, NY. Town Historian's Office. "Huntington Lease File" (Huntington, NY).

(66) Laws of New York, 1870. Chapter 234. Some years earlier Hempstead and Islip received legislative aid in restricting shellfishing to local residents to further strengthen their own local ordinances (Ibid., 1849, Chapter 435; 1857, Chapter 167).

(67) Street, Huntington Town Records, III, p. 442.

(68) Laws of New York, 1866, Chapter 306; Ibid., 1872, Chapter 666; Ibid., 1880, Chapter 240.

(69) "Huntington Lease File," entry for 6 April 1875; Huntington, NY. "Trustees' Records, 1872-1893," p. 42-49. Immediately, 10 persons applied for and received leases and at the following meeting 42 others received leases.

(70) Huntington, NY. "Trustees' Records, 1872-1893," p. 59-70; Laws of New York, 1879, Chapter 251. A corporation could create a board of trustees of from three to nine members to manage all its lots "for the purpose of promoting the planting, cultivation, taking up, and protection of oysters, upon the said several lots leased, occupied, or held by said persons..."

(71) Huntington, NY. "Trustees' Records, 1872-1893," p. 122-126.

(72) Ibid., p. 139-141. Six years later the trustees had a change of heart and voted to permit the federal government to dredge to improve Huntington Harbor beside the town dock so that farmers could receive shipments of fertilizer and export their produce. The town was to put up $30,000, the government $10,000. In 1892 they gave the government permission to dump dredged material on lots 54 through 59, leased to N.S. and I.M. Brush, in Huntington Bay (Ibid., p. 287-288; 319).

(73) Laws of New York, 1840, Chapter 283. There is no evidence in the records that the trustees ever questioned this act.

(74) Ibid., 1850, Chapter 183.

(75) Huntington, NY. "Trustees' Records, 1872-1893," p. 242-243.

(76) McKinney's Consolidated Laws of New York; vol. 45: Public Lands, section 75, (1894). It could be argued that the act was due process of law procedurally. This, then, raises the question of procedural versus substantive due process; a question I am not prepared to answered.

(77) Street, Huntington Town Records, III, p. 435-436.

(78) Lowndes v. Dickerson, 34 Barb. 586.

(79) Street, Huntington Town Records, III, p. 603-604.

(80) Street, Charles R., and Platt, H.C.,"An Opinion Upon the Powers and Duties of the Trustees of the Freeholders and Commonalty of the Town of Huntington, especially with reference to lands under tide waters..." (Huntington, NY: Town Historian's Office). See also Street, Huntington Town Records, p. 610-611.

(81) Trustees of Brookhaven et al v. Charles T. Strong. 60 NY 56, 71-72 (1875); quoted with approval from an 1828 decision in Rogers v. Jones 1 Wend. 273. A "several fishery" is "a fishery of which the owner is also the owner of the soil, or derives his right from the owner of the soil. One by which the party claiming it has the right of fishing, independently of all others, so that no person can have a co-extensive right with him..." (Black, Henry C. Black's Law Dictionary. 4th ed. [St. Paul, MN, 1951])).

(82) Huntington, NY. "Trustees' Records, 1872-1893," p. 19, 118-119, 181-183. A number of meetings in 1887 were wasted haggling over who should be awarded the $250 contract. Oscar Darling finally agreed to do it at that figure.

(83) Ibid., p. 202-204. The line ran south 69 degrees 20 minutes 25 seconds west from the northwest point of Eaton's Neck to the Lloyd's Neck shore, thus establishing in the eyes of the trustees the outer limit of the bay and the beginning of the sound.

(84) Ibid., p. 25-27, 36.

(85) Letter from Hewlett Scudder to trustees, 30 June 1887, "Huntington Lease File."

(86) Letters from Moses L. Scudder to trustees, 3 and 28 July 1891, "Huntington Lease File"; Huntington, NY. "Trustees' Records, 1872-1893," p. 296-297.

(87) Huntington, NY. "Trustees' Records, 1872-1893," p. 116-117.

(88) Ibid., p. 74-75, 76-82.

(89) Ibid., p. 204-212, 216. Strangely enough, a month after they retained counsel, the trustees authorized Richard H. Poillon to petition the state for a grant of land under water in front of his property "for beneficial purposes" (Ibid., p. 220, 222-223). In the Lowndes controversy, the commissioners rejected the trustees' argument that the applicants were nonresidents and said the issue should be tried on the merits of ownership of the land under water.

(90) Laws of New York, 1881, Chapter 695.

(91) Laws of New York, 1888. Chapter 279.

(92) Huntington, NY. "Trustees' Records, 1872-1893," p. 84-85. The trustees relied heavily on Robins v. Ackerly, 91 NY 98, in which the court, citing Brookhaven v. Strong and pointing out that the Lowndes v. Dickerson decision was faulty and rested on incomplete data, declared that the trustees were in fact and in law proprietors of the land under the waters of Northport Harbor, which was not an arm of the sea, but a haven or harbor and thus fell within the wording of the Fletcher grant of 1694.

(93) Lowndes v. Huntington, 153 US 22-23.

(94) Ibid., p. 26-27. An additional reason why the trustees finally decided to fight this to the bitter end was probably because in 1872 the Town of Babylon was created out of the southern third of Huntington, thus divesting them of all of their rights in the Great South Bay that they had to deed over to the

new town (Laws of New York, 1872, Chapter 105; Street, Huntington Town Records, III, p. 624). In the same year the legislature abolished the trustees of the freeholders and commonalty of the Town of Huntington as a separate entity. Their powers were vested in the elected officials who served as supervisor, town clerk, and the assessors, thus merging the trust function with those political offices. This in no way affected the Fletcher patent or the trust obligation created by it (Laws of New York, 1872, Chapter 492).

(95) Huntington, NY. "Trustees' Records, 1893-1914," p. 219-220. The bulkhead line began at the northwest corner of the old town dock and ran northerly to a point on the south side of the dock or bulkhead of the Huntington Yacht Club. In 1914 two individuals in Centerport Harbor challenged the right of the trustees to do this, but under pressure and confronted with possible legal action, the two ceased construction of a dock and removed all spilings (Huntington, NY. "Trustees' Records, 1914-1928," p. 5-7, 10-12).

(96) Huntington, NY. Town Clerk's Office. "Town Board Minutes, 1929-1933" (Huntington, NY), p. 44. This sudden awareness after so long is not surprising, since it appears to have recurred in cycles approximately every 20 to 30 years. In 1850 the trustees moved against nonresidents shellfishing; in the 1870s they commenced legal action against those who ignored them; in the 1890s they, at the prodding of the baymen, took an interest in regulating the oyster industry more closely. After a spate of interest in bulkheading prior to World War I and a brief flurry of activity in dredging after 1915, they remained complaisant until the 1930s.

(97) Ibid., p. 281-282. Incidently, in 1929 the board of trustees underwent another modification. The legislature amended the law of 1872 to make the supervisor, town clerk, and five justices of the peace the new board, eliminating the assessors, with "the same rights...as the Trustees of the Freeholders and Commonalty of the Town of Huntington" (Laws of New York, 1929, I, p. 323).

(98) Ibid., 1935.

(99) Huntington, NY. Town Clerk's Office. "Trustees' Minutes, 1946-1961" (Huntington, NY), p. 65; Huntington, NY. Town Clerk's Office. "Trustees' Minutes, 1962-1971" (Huntington, NY), II, p. 77, 80, 96-97. Public pressure also caused the board to initiate a complete study of their ownership of leased lands and lands under water.

(100) Suffolk Co., NY. County Clerk's Office. "Deed Liber" (Riverhead, NY), 170 cp. 69.

(101) "Wood to Anoatok, Inc." in Suffolk Co., NY. County Clerk's Office. "Deed Liber" (Riverhead, NY), 1236, cp. 386; "Anoatok, Inc. to Mesritz" in Ibid., 2559, cp. 70.

(102) Street, Huntington Town Records, III, p. 549-551. Interviews with members of the American Legion Post, which has a building on town land abutting Knutson to the east, have produced the information (which can only be labelled well-founded "hearsay" at this time) that the marina was bulkheaded and filled along the creek, pushing it eastward, and extended its docks sufficiently far out in a northerly direction, to completely cut the Legion off from water frontage that they had at one time. They claim their site was

once a rubbish-filled marsh that they cleaned up and filled in. The question arises here, why did not these public spirited citizens, operating for the public and leasing property valued in the hundreds of thousands of dollars from the trustees at one dollar a year, bring this to the attention of local authorities?

(103) Platt, a wealthy merchant and physician, bought the mill rights from the trustees as a business investment, as mentioned earlier in this chapter, the quid pro quo being the performance of public services to the townspeople associated with a gristmill. Platt sold it to John Brush for $2,400 in 1763. In 1795 he willed it to his son and in 1805 Joseph Tremain seems to have acquired it even though it is mentioned a year later in the will of Ichabod Brush as his. See Hall, Martha K. "The Heart of Huntington" (Huntington, NY: Huntington Historical Society, 1958), p. 14-15; Street, Huntington Town Records, III, p. 112-116; "Platt to Brush, 1763" in Suffolk Co., NY. County Clerk's Office. "Deed Liber" (Riverhead, NY), 1015, cp. 379; "Brush to Tremain, 1805," in Ibid., 1416, cp. 542; "Tremain to I. Brush, 1806," in Ibid., 5 of unacknowledged deeds, cp. 373; "I. Brush to H.N. Brush," in Ibid., Liber C of wills, p. 31.

(104) Suffolk Co., NY. County Clerk's Office. Liber U (Riverhead, NY), cp. 243.

(105) Hall, p. 15.

(106) Street, Huntington Town Records, II, p. 502, 510; See also Suffolk Co., NY. County Clerk's Office. Deeds (Riverhead, NY), vol. III, p. 431, 465.

(107) Ibid., III, 375; Huntington, NY. Town Clerk's Office. "Lease Book, 1805-1871" (Huntington, NY), p. 84-86.

(108) Ibid., p. 377, 379. The descriptions are almost identical and each comprised two acres. Yet, Conklin paid $67, while Scudder paid only $26.

(109) Suffolk Co., NY. County Clerk's Office. "Deed Liber" (Riverhead, NY), 63, cp. 82; Ibid., Liber 37 of Deeds, p. 431-432.

(110) Huntington, NY. "Lease Book 1805-1871," p. 138-143 (1861); "Lease Book B," p. 68 (1882); Ibid., "Lease Book C," p. 119-121 (1903); Ibid., "Trustees' Records, 1893-1914," p. 308-309 (1911); Ibid., "Lease Book D," 17-21 (1924).

(111) Huntington, NY. "Town Board Minutes, 1929-1933," p. 81, 109, 131, 202, 495. See also Huntington, NY. Town Historian's Office, "Huntington Harbor File" (Huntington, NY), letter from Frederick E. Koster to supervisor and board members, 15 August 1933, in which it is claimed Wood gave a quit-claim to the town for "part of what is now West Shore Road which was built over old thatch right grants which are claimed by the present owner."

(112) Huntington, NY. "Trustees' Minutes, 1946-1961," p. 36.

(113) Ibid., p. 39.

(114) Ibid., p. 123, 132.

(115) Recently this case has taken a new turn. Sam Albicocco, owner of Nick Brothers, and president of Gotham Sand and Gravel, purchased the docks and upland from Wood who had used it for years to import coal and later oil (there are two large oil storage tanks directly behind the docks). Albicocco intends to expand his traprock importing business, over which he, according to a newspaper, has a monopoly and use the docks as an additional site for his business to complement his existing facilities on the east side of the harbor just south of the town dock. He, too, is now claiming fee title and riparian rights. On his east side location he proceeded to repair the old bulkhead by constructing a new one of steel some 15 feet farther out in the harbor. He did so over the objections of the town board, the board of trustees, the county, and the US Army Corps of Engineers, none of whom issued him a permit to do so nor authorized the work in any form other than permitting temporary stiffeners to hold the old bulkhead in place. The town obtained a temporary injunction from one court, but when it was shifted to another the judge there lifted it after hearing testimony from some local political leaders (Albicocco himself is allegedly a "powerful Republican businessman"), and a few business associates of Albicocco who are involved in work on roads and a local sewer construction project. Clearly, Albicocco has trespassed on land that is not his; and just as clearly he has flouted local, county, and federal agencies in doing so. In capsule form, this situation epitomizes the reasons why the town trustees have gradually lost much of their control over their foreshores and lands under water. They are ignored until after the deed is done, and then it is too late to undo it. At times the trustees, too, have been very lax and have not always pursued their role diligently. See Newsday, 19 April 1974, p. 3.

(116) Huntington, NY. "Town Board Minutes, 1929-1931," p. 312-313, 319-322; "Huntington Harbor File," letter to town board from Howard Schow, 8 May 1935; Huntington, NY. Town Historian's Office. "Litigation File" (Huntington, NY), letter to town board from F.A. Ludlam, 7 August 1933, and deposition of William Watt, town supervisor (no date), circa autumn 1935.

(117) "Huntington Litigation File," circa 1935. Cases cited in support of the first point included Lowndes v. Huntington, 153 US I (lands under water belong to the town); Robins v. Ackerly, 91 NE 98 (Northport Harbor included in town trustee lands); People ex rel. Howell v. Jessup, 160 NY 250 (Southampton) Hand v. Newton, 92 NY 88 (Brookhaven); Southampton v. Mecox Bay Oyster Co. 116 NY I (Southampton); Brookhaven v. Strong 60 NY 56 (Brookhaven); Sammis v. Huntington, 186 App. Div. 466; Chapter 492 of Laws of 1872.

(118) Trustees of Southampton v. Jessup, 162 NY 126.

(119) According to the brief the Court of Appeals in Matter of Brookfield (176 NY, 138) held that "when we find provisions in a deed which are inconsistent, the rule is well settled that those provisions which are written or are unusual, or those which have received special attention, will be deemed to express the intention of the parties rather than the printed or formal portions of the instrument." In Nostrand v. Durland, 21 Barb. 478, essentially the same principle was stated.

(120) Cases cited were City of New York v. New York Central Railway Company, 234 NY, 113; Hinkley v. State of New York, 234, NY, 309; and White v. Sheldon, 35 Hun. 197.

(121) Cases cited included Greenleaf v. Brooklyn Railway Company, 141, NY 395; Archibald v. New York Central Railway Company, 157 NY, 583; City of Cayuga Oil Company 135 Misc 673, 238 NY Suppl., 187; Consolidated Ice Company v. Mayor, 166 NY, 92; Harway Improvement Company v. Partridge, 203 App. Div. 174.

(122) Suffolk Co., NY. County Clerk's Office. "Deed Liber," 1868, cp. 485.

(123) Huntington, NY. "Trustees' Minutes, 1946-1961," p. 33, 42. In 1938 the state amended its shellfish cultivation law to prohibit the use of dredges and scrapes on lands other than those leased to individuals, although the amended law did not apply in incorporated villages. Laws of New York, 1938, Chapter 402; McKinney, Consolidated Town Laws, Art. 9, sec. 130, sub. 18; Village Laws, Sec. 89, sub. 63.

(124) Ibid., p. 80-85, 93, 116-117, 128-129; "Trustees Hold Up Bay Lease Renewals; Await State Report," Long Islander (Huntington, NY), 9 January 1958.

(125) Opinions of the State Comptroller, vol. 12, opinion 8250 (1956).

(126) "Report of the Harbors and Waterways Committee to the Board of Trustees," "Huntington Lease File," 1 October 1959.

(127) Huntington, NY. "Trustees' Minutes, 1946-1961," p. 10; Ibid., 1962-1971, p. 98, 111, 120; "Shellfish Project Under Way on Long Island," Long Island Press, 25 June 1966.

(128) Huntington, NY. "Trustees' Records, 1914-1928," p. 12-13.

(129) Ibid., p. 25-26.

(130) Ibid., p. 41-44, 61-63, 104-107.

(131) "Huntington Harbor File" Notice of Special Town Meeting, 10 September 1935; Huntington, NY. "Trustees' Minutes, 1946-1961," p. 13-14, 41; 52-53, 63. Letter, Corps of Engineers to board of trustees, 10 March 1959, in "Huntington Harbor File." In this way sandspits and a narrow finger of bluffs disappeared at the southwest corner of Eaton's Neck, new beaches came into existence on both private and public lands, and a new island appeared, as a result of spoil deposit, at the head of Northport Harbor (one of the few items large enough to become stable). Local residents planted appropriate flora on it and it is now a small bird sanctuary.

(132) "Trustees Minutes. 1946-1961", p. 52-53.

(133) Huntington, NY. "Trustees' Minutes, 1946-1961," p. 78. Trustee President Cermak observed that the fill might have come from the upland and the town beach and thought that the trustees "should do everything possible to relieve the situation and keep any industry like Knutson's, which is a credit to the town, going."

(134) Ibid., p. 87.

(135) Huntington, NY. "Trustees' Minutes, 1962-1971," p. 30, 17 September 1963. The Suffolk County dredge was used for some harbor dredging partly because the state legislature amended the county laws in 1959 to allow the

county to widen, deepen, or dredge bays, harbors, inlets, and channels "for the construction of bulkheads, groins, jetties, docks, or other...improvements...at the expense of the county..." Laws of New York, 1959, 46, Chapter 25, 24 February 1959.

(136) New York Times, 17 January 1965, p. 28. The statement on pollution and tidal flow can be challenged. If anything, it proved to be a temporary respite. Their boast that mooring areas increased from 28 to 78 acres, although beneficial to boaters, did little to aid the baymen and would become the cause in part of increased pollution along with the industrial and commercial activity in the harbor. Much of the harbor is now closed to shellfishing because of contamination.

(137) Huntington, NY. Town Attorney's Office. "US Dredging Company File, 1965" (Huntington, NY).

(138) Street, Huntington Town Records, III, p. 122-123.

(139) Laws of New York, 1872, Chapter 492. Chapter 101 of the laws of 1929 simply substituted the justices of the peace for the tax assessors and reconfirmed legal title to all real and personal property under the trust in the board of trustees.

(140) "Abolish Trustees McCarthy Urges in G.O.P. Address," Long Islander (Huntington, NY), 2 March 1961; letter to the editor from Titus, Ibid., 2 January 1962; letter to the editor from Weidner, Ibid., 8 January 1962; "Assemblyman Huntington Cautions Town Not to Lose Proprietary Rights," Ibid., 18 January 1962.

(141) "Report of the Subcommittee on Town Affairs of the Huntington Republican Committee," Huntington, NY. Town Historian's Office. "Supervisor's Files" (Huntington, NY), 1961; Huntington, NY. "Trustees' Minutes, 1962-1971," p. 2-3. See also Ibid., p. 55-56, 68, 77, 97, for a record $230,000 transferred from trustees to town funds for general town use by board of trustees resolution, the legality of which can be questioned. This might be an additional reason why some in town hall government wanted the merger. It should be pointed out that the subcommittee complained about possible ineffectiveness of the board of trustees, composed of four individuals at the time, if a number of two-two votes occurred. This speaks to the basic defect of having an even number of persons on any committee, yet the subcommittee itself was made up of an even number, 10 Republicans. Undoubtedly, they convinced themselves that the fault they found in the board could not possibly apply to them.

(142) Laws of New York, 1962. Chapter 865. In the same year, by referendum, the voters of the state repealed Article I, Section 15, of the state constitution that gave constitutional recognition to colonial charters. Legally, this had no effect on any of the colonial charters. Other provisions of the federal and state constitutions, as well as recent state legislation and court decisions, continue to protect them.

(143) Huntington, NY. Supervisor's Office. Building Zone Ordinance, Town of Huntington, Suffolk County, adopted 26 June 1931. Included in the list of prohibited manufactures were oil cloth, lampblack, acid, fertilizer, dyestuff, creosote, fat, stockyards, explosive, ore reduction, and a variety of other singularly unpleasant--but I suppose necessary--activities.

(144) Huntington, NY. Town Historian's Office. Master Plan Report, Town of Huntington, Suffolk County, NY, 7 June 1933, (Huntington, NY: Town Historian's Office), p. 6-8.

(145) Huntington, NY. Supervisor's Office. "Proposal for the Support of the Development of an Ecologically Based Zoning Ordinance for the Town of Huntington, LI, NY," 15 March 1971 (Huntington, NY: Supervisor's Office); Local Law No. 1-70, 30 June 1970; Local Law No. 1-72, 18 January 1972. The town now has an impressive code of laws for environmental protection, many of which deal with wetlands and lands under water. Despite strict regulation of shellfishing (Huntington, NY. Supervisor's Office. Huntington Town Code, Chapter 40) and recent efforts to halt harbor pollution, the New York State Department of Environmental Conservation declared the entire southern half of Huntington Harbor, as well as substantial sections of the other three harbors, closed to shellfishing due to the high level of pollution.

CHAPTER IV

THE GREAT SOUTH BAY: A QUESTION OF OWNERSHIP

The preceding historical analysis centered on the effect that public and private management had on a relatively small harbor and its wetlands. There are, of course, much larger bodies of water with their associated wetlands that should not be ignored if one is to "cover the waterfront" of historical examples of such management. The Great South Bay is just such an example. It is the largest single water mass in the county, with the possible exception of Peconic Bay, and has a history of ownership, management, and jurisdiction peculiarly its own. To appreciate the complexity of the question of who owns the bay and thus controls its resources, one must understand the extent of the colonial land grants in the area that precipitated a controversy persisting for almost 300 years, involving the towns of Brookhaven, Islip, and Huntington.

The original proprietors of Brookhaven, the first settlers on Long Island to acquire title to a substantial portion of Great South Bay, bought land around Setauket from local Indians in 1655. There they began their town on the north shore of the island. In succeeding years the proprietors purchased more Indian lands so that by 1664 they had extended the town's boundaries from Smithtown on the west to Southold on the east and southward across the island to, but not including, the Great South Bay. The southeast corner of present day Brookhaven remained unoccupied until Colonel William Smith came into possession of it in 1693 and had it erected into the Manor of St. George two years later. The Smith purchase, however, is incidental here except insofar as his manor grant included most of the Great South Bay. That feature of his patent and its ramifications will be taken into account in due course. The southeast corner, known as the Winthrop Purchase, can be disposed of quickly because it only served to establish the eastern land boundary of the town of Islip and had no bearing directly on ownership and use of the bay.

On 9 June 1666 John Winthrop, then governor of Connecticut, bought from the Indian chief Tobaccus all the land north of the Great South Bay to the middle of the island between the western boundary of Namkee Creek and the eastern limit in the western part of Bellport. He did nothing to settle the land and it remained in the Winthrop family until 1752 when it was sold to Humphrey Avery of Boston who proceeded to dispose of most of it by lottery in 1758. Until 1773 the area was looked upon as being outside the jurisdiction of any town, but in February of that year the provincial assembly formally annexed it to Brookhaven, thus establishing that town's western boundary as Namkee Creek (1). Because the Winthrop Purchase consisted of upland only, its primary importance here is to clearly define the origins of Islip's eastern boundary with Brookhaven, exclusive of the Great South Bay.

To Winthrop's consternation, he learned that he had actually purchased land in another colony, for Governor Nicolls, agent of James Duke of York, was able

to make good his claim that Long Island fell within the Duke's patent. Furthermore, on 7 March 1666, Nicolls issued a patent to the Setauket proprietors, granting them:

> All that tract of land which already has been or that hereafter shall be purchased for and on behalf of the said town, whether from the native Indian proprietors or other, with the bounds and limits hereafter set forth and expressed; that is to say, the west bounds to begin at the line run by the inhabitants of said the town of Brookhaven between them and Mr. Smith's lands of Nissequogue, as in his patent is set forth, and to go east to the head of Wading River or Red Creek, from whence, as also from their west bounds, to stretch north to the Sound and south to the sea or main ocean...together with all havens, harbors, creeks, quarries, woodlands, meadows, marshes, waters, rivers, lakes, fishing, hawking, hunting and fowling and all other profits, commodities, emoluments, and hereditaments to the said land and premises within the limits and bounds aforementioned and described belonging or in anywise appertaining (2).

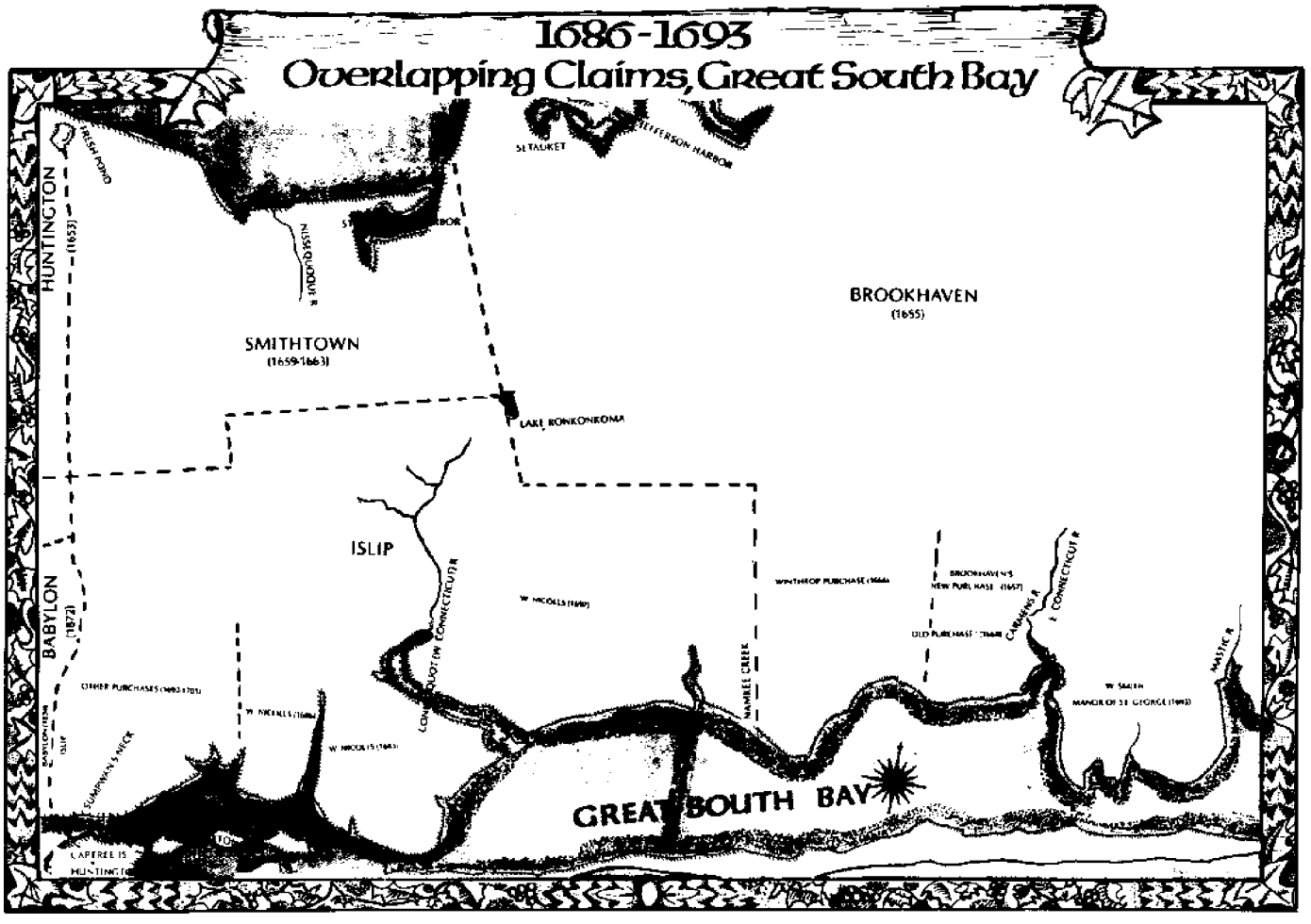
There is no evidence that they then turned upon Winthrop and disputed his purchase from the Indians even though it postdated their patent and fell well within their boundaries. In fact, they seemed to ignore it and assume that his had been a rightful purchase.

The land to the west of Winthrop's remained unoccupied by other than Indians until 1683, three years before Governor Dongan issued his famous patent to Brookhaven. In that year, Winnaquaheagh, Sachem of Connetquot, sold to William Nicolls all the land between the west side of Connetquot River and Contassquitab River, extending from the bay north to the head of each river (3). A year later Governor Dongan ratified and confirmed Nicolls' purchase, adding that it included all the woods, underwoods, waters, runs, streams, ponds, meadows, marshes, fishing, hawking, hunting, and fowling, and all the other liberties, privileges, hereditaments, and appurtenances belonging to such a grant (4). The form of tenure was as of the Manor of East Greenwich in the County of Kent in England and the yearly quit-rent five bushels of "good winter wheat" or 25 shillings.

Not content with the amount of land he received, Nicolls applied for a new grant two years later. His desire to do this probably stemmed from a simple wish to expand his estate. Undoubtedly, he was also motivated by the fact that the Duke of York, proprietor of the province, had become James II, King of England, in 1685, making it necessary for him to reconfirm his land grants to guarantee title. The grant he received 1 November 1686 again confirmed the original purchase from the Indians and added to it a substantial area immediately to the west of his first purchase extending from the Great South Bay almost to the center of the island (5). The form of tenure remained the same, but the quit-rent on the second parcel was a paltry one bushel of good winter wheat per year, for a total yearly quit-rent on both parcels of six bushels. Not much, when one considers that the average yield per acre at that time was probably in the neighorhood of 15 or more bushels.

It is not surprising that Nicolls received such large grants of land. Family connections made it almost inevitable that he would not be left out when it came to dividing up Indian lands in the new province. The son of Mathias

MAP 6


1686-1693
Overlapping Claims, Great South Bay
SETAUKET
JEFFERSON HARBOR
FRESH POND
NISSEQUOGUE R.
HUNTINGTON
(1653)
SMITHTOWN
(1659-1663)
BROOKHAVEN
(1655)
LAKE RONKONKOMA
ISLIP
BABYLON
(1872)
LONG SWAMP
CONNETQUOT R.
W. NICOLLS (1680)
WINTHROP PURCHASE (1666)
BROOKHAVEN'S NEW PURCHASE (1657)
OLD PURCHASE (1666)
CARMANS R.
E. CONNECTICUT R.
MASTIC R.
NAMEE CREEK
SUMPWAMS NECK
W. NICOLLS (1683)
W. SMITH MANOR OF ST. GEORGE (1693)
GREAT SOUTH BAY
LAPETREE IS.
HUNTINGTON

Nicolls, he came to New York with his father in 1664 in the company of Mathias' uncle, Colonel Richard Nicolls, who had been commissioned by the Duke of York to oust the Dutch from New Netherland. When William grew up and became an educated man his connections and name gained him not only land but also official position. In 1683 he was appointed clerk of Queens County and in 1687 received a commission as attorney-general of the province.

A year after he became attorney-general Nicolls set about extending his holdings in the Islip area, which by this time he had named "Islip Grange" in honor of his birthplace and the home of an ancestor in Northampshire, England. This time he turned his attention toward the bay and petitioned for a grant of island there. In due course Governor Dongan granted Nicolls, on 4 June 1688, all the island in the bay east of Huntington Gut (Fire Island Inlet) and west of the Connetquot River (6). Like the previous grants, the tenure was as of the Manor of East Greenwich and the quit-rent low, four shillings.

In slow but steady succession other individuals arrived to buy up the remainder of the Indian land along the Great South Bay in Islip. In 1692, Andrew Gibbs received a grant from Governor Ingoldesby for the neck of land called Winganhappague between today's Champlin and Orowoc creeks (7). In the same year Stephanus van Cortlandt obtained a license from the governor to buy lands and immediately did so, selecting a neck of land the Indians called Saghtekos. Although he built a manor house there the following year and renamed the area Appletree Neckwick Manor, he did not receive an official confirming grant until 1697 (8). Three years after van Cortlandt bought his tract from the Indians, Thomas and Richard Willets received a grant from Governor Benjamin Fletcher for the far western portion of Islip, consisting of two necks of land called Fort Neck and George's Neck (9).

It took over 10 more years for the remainder of Islip's shore front to be acquired by private individuals. The far eastern end of the town was granted to William Nicolls by Governor Benjamin Fletcher on 20 September 1697. This completed his control over all the lands from the Connetquot River on the west to the Town of Brookhaven on the east and encompassed not only Lake Ronkonkoma, but also:

> all and singular the messuages, tenements, buildings, barns, houses, outhouses, stables, edifices, orchards, gardens, enclosures, fences, pastures, fields, feedings, woods, underwoods, trees, timber, swamps, meadows, marshes, pools, ponds, lakes, fountains, waters, watercourses, rivers, rivulets, runs, streams, brooks, creeks, harbors, coves, inlets, outlets, islands of land and meadow, necks of land and meadow, peninsulas of land and meadow, fishing, fowling, hunting, and hawking, and the beach as far as the said land extends upon the sea, quarries, mines, minerals (silver and gold mines only excepted), and all other the rights, members, liberties, privileges, jurisdictions, preheminences, emoluments, royalties, profits, benefits, advantages, hereditaments, and appurtenances whatsoever to the aforementioned certain tract of land and pond within the limits and bounds aforesaid belonging or in any ways appertaining or accepted, reputed, taken, known, or occupied as part, parcel, or member thereof (10).

All this cost Nicolls the insignificant sum of six shillings a year quit-rent, and, as in the case of his other land grants, he held it as of the Manor of East Greenwich.

Between the time of his first Indian purchase in 1683 and his last acquisition in 1697, William Nicolls became the owner of all the land from the present-day Brookhaven-Islip town line (the center of Namkee Creek) westward at least as far as what is now known as the Champlin Creek. To this he added all the island in the bay from Huntington Gut (Fire Island Inlet) to the Connetquot River between the firm land of Long Island and the beach.

To the west of the Nicolls purchases other Indian lands were acquired by John Moubray and the van Cortlandt brothers, Johannes and Olof in 1701 (11). Four years later the van Cortlandts sold some of their land to Moubray (12) and in 1708 he received a patent for lands west of Orewake (Orowoc) River from Governor Cornbury (13). Each encompassed one or two necks of land along the shore and extended inland as far as the head of a stream, with the exception of the 1701 purchase by the van Cortlandts that designated Huntington as the northerly limit.

One distinguishing feature of all the above land grants is that they pertain to land only, with the possible exception of the governor's grant to William Nicolls of island in the Great South Bay. Admittedly, most, if not all, of them recited the inclusion of such areas as marshes, swamps, harbors, rivers, and creeks, but these had to be within the outmost limits of each grant. That is to say, along the south shore the limit of each extended only to the high water mark of the bay. Since marshes and swamps were specifically enumerated, one must assume that, with no legal evidence to the contrary, the normal procedure to establish fee title would be to run a line from the east side of any marsh to its outer limit to the west side.

Because no grantee other than William Nicolls acquired anything below the high water mark of the north side of the Great South Bay, one must look elsewhere for claims of ownership to any lands or lands under water south of that line. Any search for the fee owner will ultimately lead one to two grants: the patents to the Town of Brookhaven and the first owner of the Manor of St. George. This brings us back to Brookhaven and a further consideration of what that town received under its third and final charter renewal shortly after the colony's proprietor became King of England (14).

Both the Nicolls Patent of 1666 and the Dongan Patent of 1686 recited the bounds of Brookhaven as being "the west bounds to begin at the line run by the inhabitants of said the town between them and Mr. Smith's lands of Nesaquake, as in his patent is set forth, and to go east to the head of Wading River or Red Creek, from whence, as also from their west bounds, to stretch north to the Sound and south to the sea or main ocean" (15). Because of prior purchases of land by Winthrop and Nicolls, the western boundary line could not be continuous from the north to the south shore of the island. Although it paralleled Richard Smith's eastern boundary as far south as Lake Ronkonkoma, it had to circumvent the two private purchases in the southwest corner. To do so the line was run from the southeastern edge of the lake due east to the northeast corner of Winthrop's land and thence south to the Great South Bay. It then returned westward along the high water mark of the north shore of the bay until it met the extension of the Smithtown-Brookhaven line that had to skip over the lands of Winthrop and Nicolls beginning at the Lake Ronkonkoma

terminus. From that point on the north shore of the bay, by charter description, the boundary continued as a due north-south line across the barrier beach of Fire Island to the high water mark of the Atlantic Ocean. Such a line, when plotted on a map, should begin its northern terminus on the north shore of the bay on the east side of Connetquot River, if it is to conform to and continue the Brookhaven north-south charter line, and not begin at either Timber Point or Nicoll's Point as more recent maps indicate.

The Brookhaven boundary line, which takes the form of the north, east, and south sides of a rectangle boxing in Islip, has important ramifications for Islip. It precludes any control by that town's government of any of the waters or bay bottom below the high water mark of the Great South Bay from Nankee Creek to the Connetquot River. Islip property owners along the shore must seek the permission of the Town of Brookhaven to construct docks or bulkheads below the high water mark in the bay. By the same token, Islip cannot control its own residents' activities, at least with respect to use of the bay and bay bottom fronting over one-third of the length of the town, except through local laws and zoning ordinances having to do solely with the upland.

To compound this historical inequity in the establishment of boundary lines, the interests of William Smith, first lord of the Manor of St. George, must be added to the list of those who claim title to the Great South Bay and the valuable shellfish lands beneath it. Colonel William Smith (1655-1705) arrived in New York in 1683 from Tangier where he had been the Crown's appointed governor. Immediately, he commenced buying land along the south shore in the vicinity of Brookhaven, including in his purchases parts of the Great South Bay and a stretch of the barrier beach (known then as South Beach).

By law, Smith had to obtain permission from the governor prior to any purchases of lands he might make from the local Indians. This he did 15 May 1688. Governor Dongan granted him a license to purchase two necks of land along the south shore; one east of the land of William Nicolls and the other at a place then called Seabaumuck at the mouth of the East Connecticut River (Carmen's River) (16). Eager to expand his holdings, Smith set about buying land from some of the inhabitants of Brookhaven and in 1693 petitioned the governor to erect his south shore acquisitions into a manor and to grant him additional lands on the north shore because "the said tract of land so purchases (by license of 1688) is very poor, barren land and not capable of improvement but by great expense, charge and trouble" (17).

On 9 October 1693 William Smith received from Governor Benjamin Fletcher a patent for the manor of St. George and various lands on the north shore. The patent recited that, in conformity with the law, the patentee had already purchased the areas from the Indians by virtue of a warrant issued to him for that purpose by the late governor, Colonel Sloughter, on 14 May 1691 and that the land had been surveyed. Included in this extensive grant was an area of beach, meadow, islands, and bay, described as:

> one tract of beach, meadow, and bay lying along the south side of the island aforesaid, with all the islands in the said bay between the main island aforesaid and the beach aforesaid, from a certain gut or inlet westward, commonly called Huntington East Gut, to a certain stake on the beach eastward, to a place called Coptwange (Cupswauge) being the Town of Southampton westernmost bounds

twenty-four miles and seven chains, as by the return of our said surveyor relation being thereunto had may more fully and at large appear (18).

In order to further secure his claims to this area, Smith paid Tobaccus and other Indians 10 pounds on 10 April 1694 for a deed to as much as the Indians could allegedly claim as being theirs proprietarily (19). Thus, did William Smith add his claim to Great South Bay, its islands, and Fire Island to those of William Nicolls and the Town of Brookhaven and begin a controversy that would take almost a century and a half to settle.

William Nicolls' grant of the island in the bay can be dispensed with first, and actually has little to do with any proprietary rights the town of Islip might have acquired in the bay at any time thereafter. His grant only encompassed the islands in the bay between Huntington East Gut (now Fire Island Inlet, although it has shifted over the centuries) to the west and Connetquot River to the east, "together with all and singular the lands, meadows, marshes, moors, (waters?), ponds, hunting, hawking, fishing and fowling, and all other the rights, profits, hereditaments, and appurtenances to the said islands, isles, and premises belonging" (20). It stands as a simple upland grant and cannot be construed as conveying any lands under water below the ordinary (mean) high water mark, with the exception, of course, of lands under any creeks, marshes, or rivers within the patent boundaries. Even the words "with the appurtenances" cannot be so taken. Land cannot be appurtenant to land.

The duplicate claims of Brookhaven and Colonel William Smith to the Great South Bay remained a vexatious problem for over two centuries. As early as 28 March 1693, Smith warned the town at a public meeting that he had a license from the governor to purchase land within the town's patent line, "unpurchased of the Indian natives by the Town and within the limits of their patent and reserved to their Majesties by their said patent" (21). He then bargained for some thatch beds and a "certain tract of land...the Indian land at the Old Man's which the Town did lay some claim to, but in regard the said Colonel Smith has bought it of the Indians they agree he shall enjoy the same" (22). In spring 1730, many years after the Colonel's death, the question of the 1693 meeting arose. A number of residents disputed the contention that Smith had then acquired large tracts of land and averred that, although he was granted voting privileges at the meetings, the town excepted out from his patent all that they felt they had purchased and that the meeting really reduced itself to an agreement that Smith would pay the regular rates on his manor land as far as it infringed upon the lands of the town (23).

Ten years after acquiring his manor, Colonel Smith died. In his will, dated 20 April 1704, he bequeathed to his eldest son Henry a number of pieces of property including "all that part of my South Beach from the head of Long Cove to the westernmost gut"; to his second son William, half of the manor "with an entire moity of my beach from Cupswoge Gut eastward to the head of Long Cove westward; "and to his youngest son Charles Jeffery, eastward to the head of Long Cove westward" (24). Thus, all later conveyances of land or land under water in the Great South Bay from Fire Island Inlet to the western boundary of Southampton can be traced either to Colonel Smith's patent of 1693 and his will of 1704, or the Brookhaven patent of 1686.

A number of years passed before anyone challenged the proprietary claims of the descendants of Smith to the bay. Brookhaven ignored such claims and soon began to regulate the use of the bay for fishing and shellfishing by virtue of its patent of 1686. As the population along the south shore increased the town became concerned over the presence of "foreigners" in local waters, who removed the products of the bay for their own use. To combat such intrusions, in 1742 the town residents voted that Richard Floyd of Brookhaven and John Smith of Islip be overseers of the "fishery and oystering within the limits of our patent on Long Island" (25). The following year the two overseers were directed to purchase from the local Indians all the fishing rights in the bay (26). Later the same year, the town voted to secure the services of an attorney to determine the extent of its rights in the bay, based on its charter, and then to take steps to exclude all "foreigners" from the area who might wish to fish (27).

It is apparent from the records that Brookhaven residents felt they had all the necessary proprietary rights in the bay upon which to base any regulations of its use. Nevertheless, a nagging doubt kept them in a state of uneasiness, very probably because of the Smith patent of 1693. In 1755 representatives of the town sought out some Indians and obtained from them a confirmation of the town's title to the lands under the bay "between the South Beach and the firm land, bounded eastward by the mouth of Connecticut River and westward by the west line of the said township of Brookhaven" (28). Two years previous, the town's trustees had reached an agreement with William Smith, namesake of the patentee and then proprietor of the Manor of St. George, in which the town acquired some upland and parts of the South Beach from the head of Long Cove eastward. In return, Smith was given one-fourth of the beach joining to the east bounds of the town (29). This left the western portion of the beach in private hands and the ownership of the bay itself unsettled, despite the Indian deed of 1755. After 1760 the town continued to pass ordinances to regulate not only outsiders but also residents in their use of the bay (30).

The steps taken by the town failed to quiet the controversy and in 1767 the trustees appointed a committee to repair to New York to consult attorneys about the conflicting titles (31). This resulted in an exchange of deeds between the two contending parties. Smith evidently convinced the trustees that his patent was valid even though it had not been signed or sealed by Governor Fletcher back in 1693. The trustees, of course, stood on their own patent rights but agreed to purchase from Smith, for five pounds, his rights in the bay. A quick exchange of conveyances then took place. On 3 March 1767 Smith gave the trustees a deed for the lands under the bay, whereupon the trustees agreed with Smith to share the profits and losses from the bay as partners. The following day the trustees deeded back to Smith one-half of the bay for five pounds. In point of fact, the exchange of conveyances did not physically divide the bay, rather it gave each party an undivided equal moiety of the bay and its islands between a north line run from Huntington East Gut and a south line run from Richard Woodhull's Point (now Long Point) on the west side of the mouth of the East Connecticut (Sebomuck, now Carmen's) River (32). Furthermore, this did not alter the town's jurisdiction line of 1686. In effect, Brookhaven's trustees had both proprietary and jurisdiction rights to that boundary; beyond it westward to Smith's patent line they had only proprietary rights but no governmental jurisdiction.

On the basis of these conveyances and agreements, the Brookhaven trustees, beginning in 1784 commenced full and open regulation of fishing in the Great

South Bay (33). Until 1790 this was done in concert with Smith, but by agreement in that year, the trustees assumed exclusive management of the area (34).

In 1789, 20 Brookhaven residents bought the South Beach from Henry Smith and his wife Elizabeth, then living in Boston, for 200 pounds. The purchased land comprised all the beach between the ocean and the bay from Huntington East Gut eastward as far as the "meadow of Henry Hulse at a place commonly called or known by the [name of] Head of Long Cove" (35). Thus, did the western portion of the barrier beach, held by the Smith family since 1704, pass out of their hands into other private ownership.

Whether or not the governor's patents to Smith and Brookhaven stopped Islip residents from fishing and shellfishing in the bay cannot be determined from the records available. As a matter of fact, Islip was not even a town in its own right until after the American Revolution. In the same year that William Nicolls first purchased land in the Islip area, the provincial legislature passed an act to divide New York into shires and counties (36). Suffolk County was created and the towns within it designated: Huntington, Smithfield (Smithtown), Brookhaven, Southampton, Southold, Easthampton, to Montauk Point, Shelter Island, the Isle of Wight, Fishers Island, and Plumb Island, "with the several out farms, settlments, and plantations adjacent." Islip fell into the latter category and remained essentially a political nonentity for the next 30 years. During those years Nicolls added to his holdings and other settlers moved into the area. The patent lines of Huntington and Smithtown skirted the area: Brookhaven was separated from it by the Winthrop Purchase until 1773 when the provincial legislature gave that township full jurisidiction over it (37). Because the early purchases of land in Islip tended to be closer to Brookhaven than to the other two towns, the area became loosely affiliated with its eastern neighbor by habit and proximity.

Such a situation could not persist for long; the political mentality of the English of that day could not conceive of any of their fellow Englishmen living outside the pale of their corporate society. In due course Islip residents became concerned about their rather inchoate political status as did the provincial government. To remedy the situation, the legislature passed "an act to enable the Precincts of Islip, in the County of Suffolk, to Elect Two Assessors, a Collector, Constable, and Supervisor" on 25 November 1710 (38). No other mention is made of Islip in the colonial laws of the province except for its inclusion as the "precinct of Islip" in a 1732 law regulating and laying out highways in the county (39).

Not until 1765 is there any mention in the records of use of the bay by Islip residents. In that year, by majority vote, the townspeople passed an ordinance fining anyone who gave permission to a "foreigner" to fish in the bay or creeks (40). What their reactions were to the dispute between the Smith family and Brookhaven over the bay is not recorded, although it can be assumed that they felt they had as much right as anyone to freely navigate in the bay and enjoy the products thereof as of common right in such a large body of water.

The period of the American Revolution did little to alter the customs and habits of the people of Islip. Islip, still a precinct aspiring to town

status, had to wait until 1788 when the new state legislature passed an act for dividing the counties of the state into towns, providing:

> that all that part of the said county of Suffolk called Huntington, including Eaton's Neck and Crab Meadow, shall be and hereby is erected into a town by the name of Huntington.
>
> And that all that part of the said county of Suffolk, bounded southerly by the Atlantic Ocean, westerly by Huntington, northerly by Smithtown and Winecomic, and easterly by the east bounds of the lands formerly belonging to William Nicolls near Blue-Point, shall be and hereby is erected into a town by the name of Islip.
>
> And that all that part of the said county of Suffolk, bounded southerly by Islip, westerly by Huntington, northerly by the Sound, and easterly by the patent of Brook-haven, including Winne Commick, shall be and hereby is erected into a town by the name of Smith-Town.
>
> And all that part of the said county of Suffolk bounded westerly by Smith-Town and Islip, northerly by the Sound, easterly by South-Hold and South Hampton, and southerly by the Atlantic Ocean, shall be and hereby is erected into a town by the name of Brookhaven (41).

These were general boundaries, and as delineated by the legislature, produced a number of problems. First, Islip's south boundary became the Atlantic Ocean, thus depriving Brookhaven of the western half of the Great South Bay that had always been considered to be within that town's patent line; second, Smithtown acquired the Winecomac area in the center of the island, portions of which were claimed by both Huntington and Islip. The legislature rectified the first error in 1790 when it attached to an act dividing two upstate towns an amendment to the act of 1788 declaring that all the beach and bay within the limits of Islip actually included in the patent of Brookhaven were to be a part of the latter (42).

The second "error" involved the definitions of the western lines of Smithtown and Islip as they affected the eastern boundary of Huntington. As is to be expected, the boundary claims of each of the towns had their origins in seventeenth century purchases and patents. The first colonial patent to Huntington in 1666 cited its eastern boundary as running from the head of the Nissequigue on a due south course to the Atlantic Ocean, but based on a court decision in 1675 in which the Court of Assizes awarded Smith the land between the river and Whitman's Hollow, the town's patent of 1694 established the eastern boundary as "a line running from the west side of a pond called and known by the name of Fresh Pond to the west side of a neck called Sampawams, and from the said river running to the said south sea."

However, this did not settle that portion of Huntington's boundary south of Smithtown's southern extent which would define the western limit of Islip. The original Huntington line of 1666 extended south from the Nissequigue River to the ocean; the patent alteration in 1694 shifted it westward to its present location. In between these two lines lay land that Huntington claimed under its Indian deeds and the Nicolls patent; Islip residents also claimed it because of the westward shift to what came to be called the Confirmation Line as established by Huntington's Fletcher patent. A compromise solution was

reached by the two towns exclusive of the islands in the bay. Huntington acquiesced in Islip's jurisdiction over the area; certain Islip residents quit-claimed all their rights, titles, and interest in the upland to the trustees of Huntington (43). This left unsettled the question of islands in the bay.

On its face the Nicolls grant did not carry with it any private and exclusive rights to lands under water adjacent to the islands in the bay. At most, Nicolls could have claimed ownership of Cedar Island, Oak Island, Captree Island, Sexton Island, and West and East Fire Island under his grant. However, a court decision in 1818 divested his heirs of at least the first three, which happen to be the largest in the group. Beginning in 1792 a question arose between Huntington and Islip over which town actually owned the islands west of Huntington East Gut. Much of the controversy reduced itself not only to the original 1688 grant, but also to the exact name of the gut and its actual location as it shifted over the years. According to some witnesses, depending on their ages and recollections, it wandered from west of Cedar Island to the east of Captree Island (44).

The contest dragged through the courts for years and eventually involved a descendant and namesake of William Nicolls, an infant represented by his guardian Selah Strong. It finally reached the Court of Chancery and on 29 August 1814 Chancellor James Kent handed down a decision that stated: "neither the complainant nor defendents...who have respectively claimed title thereto have any right or title to the said Islands in the pleadings mentioned, called Captree Island, Oak Island, and Grass Island, or to either of them" (45). This does not mean that the descendants of Nicolls lost their claim to any other island in the area. Chancellor Kent relied partly upon a map, dated 1666, in the Lloyd Papers, that showed no inlet at all; yet by 1688, assuming the possibility of no inlet 20 years previous, it is likely that one was formed. Furthermore, irrespective of Huntington's claims, the Nicolls grant predated the Smith grant in the same area as a properly recorded conveyance, even in the opinion of a later William Smith, contemporary of the nineteenth century litigants and descendent of the first Smith who so notified the Town of Huntington (46).

This in no way settled the matter in the minds of Islip residents who insisted they owned the bay islands and could regulate fishing and shellfishing in the bay opposite the town. In 1815 Islip passed an ordinance prohibiting nonresidents from shellfishing in the bay and proceeded to lease grass cutting rights on the islands annually to individuals (47). To secure its claims, the town petitioned the state legislature for a grant to all unappropriated land within the town's boundaries. A committee of the state legislature attempted to settle the matter four years later in response to a petition submitted by the Town of Huntington for a state grant to the controversial island (48). The committee also considered a counter petition from Islip and concluded that the proof of ownership submitted by each was inconclusive. Reasoning that a state grant would in effect grant one of the towns a firm basis for proprietary claims where none had existed theretofore, the committee rejected both petitions (49).

Receiving no satisfaction in this quarter, the residents, on 21 March 1818, voted to create a committee of five residents to meet with the trustees of Huntington and negotiate for ownership of the islands, conferring on them authorization "to act in behalf of this town without further authority in all

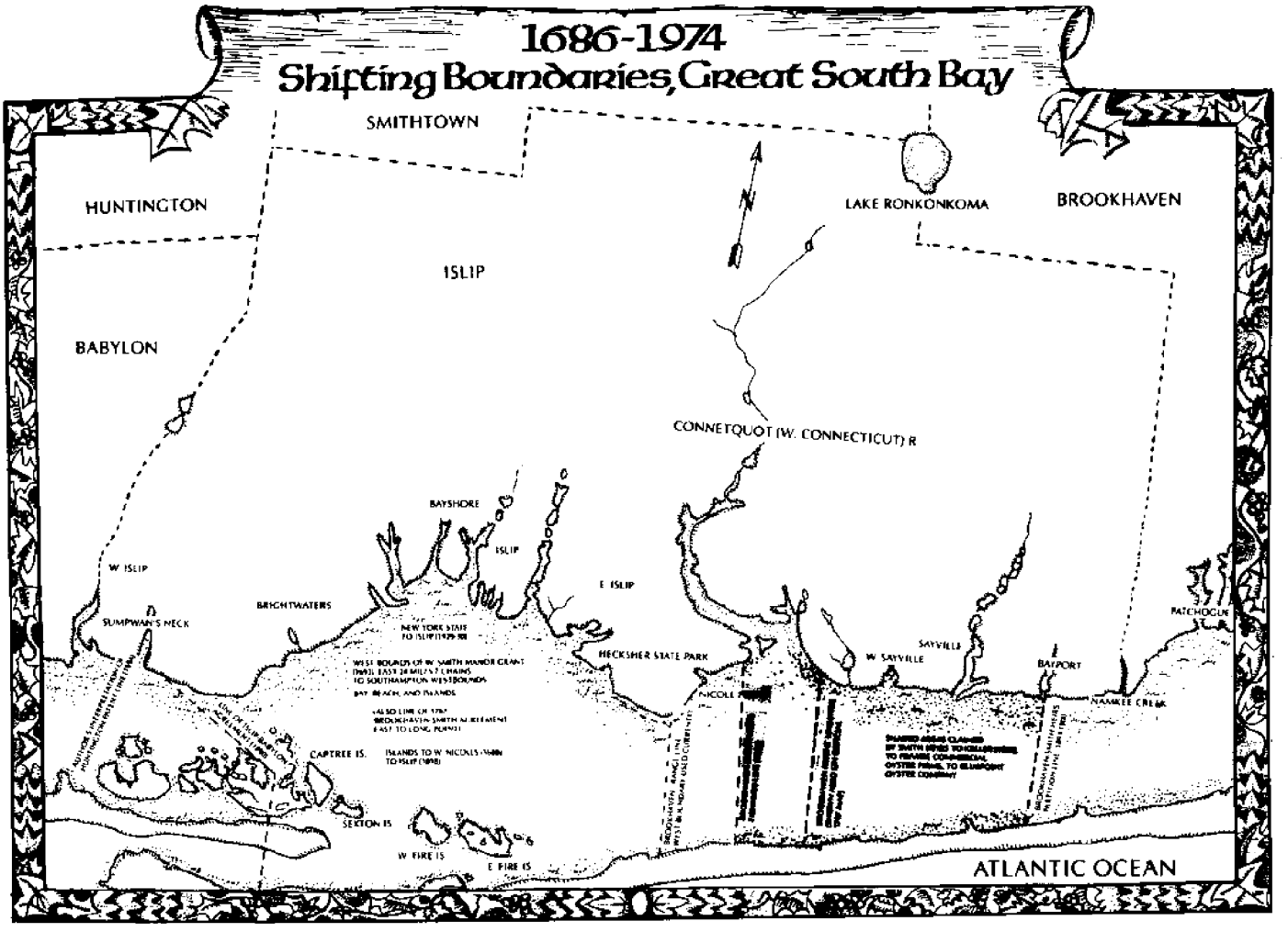
matters relative to the unappropriated lands and possessions until the first Tuesday in April 1819" (50). Four months later on July 13, the committee quit-claimed to the trustees of Huntington all islands and beaches west of a line running through the middle of Brook Creek on Captree Island for $1,000, returning the smaller islands to the east of the line for Islip (51).

As a consequence of these agreements, Islip found itself with some upland and islands that it owned and had to manage in the public interest. In 1819 the voters directed "the committee appointed at a former town meeting and who hold in trust for the freeholders and inhabitants of the town of Islip certain pine plains conveyed to them by...Huntington" to sell the plains for the benefit of the town (52). This action left the town with the island and it continued to lease out the thatch grass there yearly. The town also persisted in its alleged rights to regulate fishing and shellfishing in the waters of the bay and west of what is presumed to be the limits of Brookhaven's jurisdiction.

By 1833 the bay area produced so many conflicting claims and minor lawsuits based on trespass actions that Huntington, Islip, and Brookhaven again met to resolve their differences. In that year Islip appointed yet another committee with "full power to act for the town" to settle the dispute. In 1834 four Islip residents were defendants in a trespass action in the Court of Common Pleas over who owned and controlled the fishing rights in the waters off Islip. The case was discontinued after commissioners from the three towns arrived at an out-of-court agreement on 15 December 1834, and established the west boundary line of the fisheries of Brookhaven and the Smiths, presumed by them to be the original patent lines, beginning "at the northernmost range pole on the south Beach and shall run from thence a due north course polar direction across the South Bay to the main shore of the Island" (53).

In reality, such agreements as this put Islip squarely in the middle of a dilemma. By patent, Brookhaven's western boundary terminated at the east side of Connetquot River; Huntington's eastern limit had been settled by agreement. What, then, was the status of the land, islands, and lands under water between these two lines? Prior to the American Revolution, by English common and decisional law, all land and land under water not specifically granted by Crown charter belonged to the Crown. After 1777, at least in New York, all land of any kind not included in a colonial grant became the property of the new state. Islip's only claim to the area was based on misconceptions by the local inhabitants of the seventeenth century Nicolls patent and, by inference, the patents of Huntington and Brookhaven. The only conclusion one can deduce from the records is that the people of Islip reasoned that since the other two towns had, by patent right, acquired proprietary rights in the bay and the lands under it, then Islip too had the same rights in the area between those two patent lines. Their only legal foundation lay in the 1688 grant to Nicolls of the islands in the bay west of the Connetquot River and east of the Huntington East Gut. This in itself was a tenuous fact to latch onto, for the Nicolls grant was one of upland and a grant to an individual. In contrast, the patents to the other two towns were to corporate entities in which a public trust over sections of the bay had been vested. This could not be said of Islip. Nevertheless, the inhabitants insisted on pursuing their pseudo-legal rights. Both jealousy and frustration may have played major roles.

In 1841 the town residents voted that Rubin Edwards be a committee to confer with the trustees of Huntington respecting the "vacant lands" in the bay,


1686-1974
Shifting Boundaries, Great South Bay
SMITHTOWN
HUNTINGTON
ISLIP
BABYLON
LAKE RONKONKOMA
BROOKHAVEN
CONNETQUOT (W. CONNECTICUT) R
BAYSHORE
ISLIP
W ISLIP
E ISLIP
BRIGHTWATERS
SUMPWAM'S NECK
HECKSHER STATE PARK
W SAYVILLE
SAYVILLE
BAYPORT
PATCHOGUE
NICOLL
NAMKEE CREEK
CAPTREE IS.
SECTION IS
W FIRE IS
E FIRE IS
ATLANTIC OCEAN

meaning those islands between the 1818 line and the Brookhaven line. The following year they voted that a committee of five should take any action necessary to secure the town's title to such vacant lands (54). Taking the bull by the horns, in 1855 the Islip electors, citing a state law that allowed a town to dispose of or regulate its corporate property, passed a resolution that created a board of three trustees to manage their public land. They then authorized the trustees to sell the marsh grass on the bay islands annually, protect the islands and beaches from illegal trespass by outsiders, and lease any part of the east beach and Short Beach, insuring that the lessees did not obstruct public passage over the land (55).

Such resolutions, as companion pieces to those regulating fishing and shellfishing, more firmly entrenched in the minds of many in Islip that the town owned and could control large segments of the Great South Bay in the same manner as did Huntington and Brookhaven. In pursuit of this dream they searched for and found a number of old maps made 60 years earlier that they interpreted as proving their claims to portions of the bay as against those of Brookhaven (56). Encouraged by the evidence accumulated and their faith in the rightness of their position recently buttressed by their own resolutions, in 1856 the townspeople voted to confer upon the recently appointed trustees full power and authority to act for the town "in settling, determining, or compromising all matters in difference between the town of Islip and Brookhaven respecting boundaries, rights, and jurisdiction" (57). Lengthy correspondence with the trustees of Brookhaven produced the expected stalemate with the blunt response from Brookhaven that "Islip has no color or title to any of the premises or privileges over any part of the land or water lying south of the north shore of the South Bay" (58).

The Islip trustees, of course, refused to accept this pronouncement and sought help from the state legislature. Their efforts to enlist the lawmakers on their side came about partly from their own uncertainty of their claims and partly because of past state laws concerning title to lands under water within the state. As early as 1801 the legislature passed "An Act Concerning the Commissioners of the Land Office, and the Settlement of Lands" (59). Although the act dealt primarily with the unoccupied lands in the interior of the state, one section covered lands under waters of navigable rivers. In 1835 the act was revised to include lands under water, and between high and low water mark "in and adjacent to and surrounding Long-Island, and to all that part of the county of Westchester lying on the East River or Long Island Sound," restricting the Land Office to granting lands only to proprietors of adjacent upland, and then only for the purpose of promoting commerce through the constructing of docks. The legislature amended the act again in 1850, at which time it broadened its purposes to include not only commerce but also "for the purpose of beneficial enjoyment of the same by the adjacent owner, but no such grant shall be made to any person other than the proprietor of the adjacent upland" (60). Thus, the state, as successor to the Crown and proprietary owner holding such lands in trust for all the people of the state, quite justifiably could pass laws regulating the use or disposal of it to the best advantage possible.

The state legislature responded favorably to Islip's trustees and in 1857 passed an act authorizing the people at their annual town meetings "to make such prudential rules and regulations for the planting and taking of oysters and the time and manner of using the fisheries in the Great South Bay, within the limits of said town...to encourage the increase and prevent the

destruction of the fisheries" (61). The act also permitted the town to exclude all but local residents from shellfishing in town waters. By such laws the state superimposed its own regulations on those of the various colonial charter towns as early as 1784 when the legislature passed an act restricting sheep, hogs, horses, and cattle from grazing on the islands and beach between Mastic Gut and Huntington West Gut, areas clearly within town patent limits (62). In 1801 another law forbade the cutting of timber in that area, and beginning in 1868 the legislature began enacting laws placing restraints on those who wished to drain marshes and swamps, although in some instances encouragement was given to do so to promote more healthy local conditions (63). During the latter nineteenth century the state passed laws governing the time of taking of shellfish and gave legal recognition to private individuals' exclusive rights in underwater lots they had seeded. Laws also restricted the types of devises to be used in shellfishing (64).

Immediately after Islip received word of the passage of the 1857 act, the electors passed an ordinance implementing the state's mandate (65). The ordinance dealt with the method of marking off oyster beds, applications, the times of harvesting oysters, and penalties to be imposed for infractions of the law. One interesting feature of Section I is the designation of Nicoll's Point as the western limit of Brookhaven. Evidently this was decided upon in the boundary settlement of 1834 however much it might conflict with the bounds as described in Brookhaven's colonial charter and with the 1797 boundary descriptions of Brookhaven in that town's records (66).

Less than a month after Islip received the state's blessing on its efforts to control at least some of the bay's shellfish wealth, it became the recipient of legislative largess in the form of a cession by the state of all its title and interest in any lands "lying within the boundaries of the town of Islip...ceded by the trustees of the town of Huntington to said town of Islip" on 13 July 1818 (67). Thus did the legislature, 40 years after the fact, approve the agreement reached between the two towns as a result of their prolonged dispute over ownership of the islands in the western end of the Great South Bay as well as some upland in the Winnecomac area. This act also gave legal recognition to Islip's board of trustees, which now was to consist of three town residents to be elected annually and "have the charge of the lands of said town, under such legal rules and regulations as may from time to time be made by said electors."

The trustees served for almost 60 years before they were abolished on 6 April 1916. For whatever reason, it was determined at that time that they had outlived their usefulness to the town. It is likely, as in the case of Babylon, and later Brookhaven and Huntington, that the functions and duties of the trustees had become so intertwined with those of the town board that to perpetuate their existence would lead to confusion and duplication of activities and responsibilities. The act of 1916 transferred all the powers and duties of the trustees to the town board which could, if it wished, appoint one of its members to perform the trustee duties (68).

One of the first duties of the original three trustees came about as the result of yet another legislative act having to do with that old perennial--the Islip-Brookhaven boundary dispute in the Great South Bay. In 1857 the state legislature authorized the supervisors of the two towns to agree upon a line of division between the two towns within one year, stipulating that it "shall not be contrued so as to affect the rights of

property of any individual or corporation in either town" (69). In other words, it was to be a jurisdictional line only. The electors of Islip dutifully responded to this by voting full power and authority to their supervisor and the three trustees to act for the town in settling all differences between themselves and Brookhaven, with the caveat that they "shall not consent to any agreement whereby the residents of this town east of Great River shall be deprived of any former privileges allowed by Brookhaven" (70). In addition, the town meeting of 1858 also confirmed the power and authority of their trustees to regulate shellfishing and the cutting of grass in the Great South Bay that had been conferred on them at the three preceding annual meetings (71). In the following year the town's electors put teeth in the latter regulation by passing a resolution directing the supervisor and trustees to initiate law suits in the name of the town against anyone found violating it (72).

Between 1858 and 1860 the supervisor and trustees negotiated with their counterparts in Brookhaven in what by now had become an almost obsessive effort to resolve the boundary dispute. They managed to settle at least a portion of the boundary in 1860, but with the express exception that "so far as said boundary refers to the South Bay and beaches," but no final agreement had been reached (73).

Quite rightly the citizens of Islip had, over many years, developed an inferiority complex with respect to Huntington and Brookhaven which had clear title to most if not all of the bay because of their seventeenth century charters. Frustrated by the fact that their town bordered a large segment of the bay, as did the other two towns, yet unable to exploit the bay's resources as could the others, Islip residents became tenacious in their claims to the right to use the bay as fully as their peers to the east and west. Their sensitivity to this situation found an outlet in 1867 when William S. Smith, descendant of the first lord of the Manor of St. George and partner with Brookhaven in the ownership of the bay, antagonized Islip's citizens by openly declaring his proprietary rights to the exclusion of any claims they might think they had. Quick to respond to such challenges, the electors authorized their supervisor to raise $500 by taxation to combat Smith's allegations, which they decried as being "contrary to every well established precedent and in bitter defiance of every natural law" (74). They vowed to challenge the validity of Smith's claims by provoking a court test. This took the form of sending a resident into the bay who would clam without having paid the usual fees demanded by Smith and Brookhaven. In due course, the sacrificial clammer, Charles T. Strong, took the necessary steps to have himself arrested for violations of Smith's alleged proprietary rights to the exclusive fisheries in the bay. The case initiated by Islip made its way through the courts of the state and eventually came before the Court of Appeals, the highest court in the state, in the autumn of 1874.

The New York Supreme Court, in its decision, reviewed the facts of the case beginning with the 1666 charter to Brookhaven from Governor Nicolls that established the first boundaries of the town under English law, noting that the charter also granted Brookhaven "all havens, harbors, creeks, waters, fishing" as a confirmation of the inhabitants' Indian purchases. Citing the Indian deed of 11 November 1685, of the south beach to Brookhaven and the Dongan patent of 1686, the court noted that William Nicolls received an upland grant within the general limits of Brookhaven in 1684 and that the grant of the Manor of St. George, which included the bay and beach already belonging to

Brookhaven, was not issued until 1693. The court pointed out that a controversy had developed between Smith and Brookhaven over ownership of the bay, resolved in 1767 by an exchange of deeds between the contending parties that gave each a moiety of the bay. By this agreement, the court said, Smith and the town had covenanted that the bay between Huntington East Gut and the west side of East Connecticut River should be held by the two "in equal partnership between the trustees and Smith, never to be divided" (75). Furthermore, the town acquired the right to control the liberty of fishing and shellfishing in that portion of the bay, and that Smith had the same liberty from west of the easternmost bounds of his manor only as far as the East Connecticut River, but could not sell any of it.

The court then went on to state that, since the bay was divided in 1767 so that the town acquired full, undisputed title to all of it west of the East Connecticut River as far as the Huntington East Gut, the only reservation that it had to share in the profits therefrom with Smith, then Strong, was in fact and in law in violation of Brookhaven's regulation. The Court of Appeals, in a unanimous decision, accepted the decision of the lower court (76).

In its decision, the court erred on one fundamental point. The Brookhaven patent line of 1666-86 was both a jurisdictional and a proprietary line in that both coincided. When Smith and the town reached an agreement in 1767 that gave each an equal undivided share of the Great South Bay, only the proprietary line of the Brookhaven trustees shifted westward; the jurisdictional line remained where it had been since 1686. It is settled law that changes in ownership of private property do not alter jurisdictional lines and alterations of jurisdictional lines do not change private property ownership. The trustees, acting in their proprietary capacity, made the agreement with Smith, therefore, although the extent of their ownership of the bay expanded westward and they could claim a several fishery there, the patent line that marked the westward extension of the town's jurisdiction did not move west. Unfortunately, this decision solidified in the minds of all concerned the belief that the proprietary line of 1767, reinforced by the 1834 Range Line defining the limits of the fisheries of Smith-Brookhaven, was also the jurisdictional line of 1686, which it was not. Because of this, the Town of Brookhaven has continued to exercise jurisdiction over more than 1 square mile of valuable shellfishing land in the bay even though the trustees were divested of all proprietary rights therein by court order in 1900.

When the residents of Islip learned of the adverse decision they took steps to salvage what they could from the wreckage of their dreams of legal conquest of the bay. Remembering that all Islip residents east of Great River (Connetquot or West Connecticut River) traditionally enjoyed the privilege of fishing and shellfishing in the bay east of that point, the electors who attended the town meeting in 1877 appointed a committee "to treat with the authorities of the Town of Brookhaven and agree on some plan of compromise or settlement" (77). Three years later the committee reached an agreement with Brookhaven, calling for a payment of $1,500 by Islip for a continuation of the privilege of residents east of Connetquot River being treated equally in all respects as the residents of Brookhaven were with regard to rules and regulations passed by that town concerning the fisheries in the bay (78).

The rather hackneyed French saying that everything changes yet everything remains the same applies with force to Islip. Beginning in 1875, the year of the Brookhaven v. Strong decision, the residents of the new Town of Babylon

entered the picture to question the privileges of Islip in the far western portion of the bay. This boundary dispute developed partly as a consequence of state legislation in 1874 granting to Islip residents certain privileges in the planting of oysters in the bay where clams had proven to be unprofitable (79). Even though the legislature included Babylon in the act's provisions in 1878, the controversy persisted. Babylon, severed from Huntington as a separate town in 1872, insisted that the colonial grants to the parent town had encompassed all the bay east as far as Brookhaven's line. Again, Islip was threatened with loss of use of the bay. Having been forced to entreat Brookhaven, hat in one hand while the other held out $1,500 to buy use of the bay, Islip evidently vowed not to give in (80).

The dispute with Babylon dragged on for 15 years until 1890 when the Board of Supervisors of Suffolk County, under the authority of a state law of 1870 (81), fixed the southern portion of the boundary line between the two contending towns (82).

After a century of struggle it seemed that Islip finally reached a time when the Huntington/Babylon-Islip-Brookhaven boundaries in the bay were settled. The residents bought protection of their fishing rights in the bay east of Great River and the new Babylon boundary presumably left open to them the area east of it to the Brookhaven line. In the minds of Islip's residents the town should or did own that watery wedge, but in reality whatever remained clear of dispute actually was held in fee by the state. Under the circumstances, Islip's residents should have gained some peace of mind, but as one might suspect, this was not to be the case.

In 1900 the word filtered through to Islip that Brookhaven and the heirs of Smith planned to divide the Great South Bay. This decision had its origins as far back as 1767 when the town and William Smith exchanged deeds to the bay, giving each an equal moiety of it and agreeing to share as partners in the profits from the entire bay. By 1893 it dawned on the Smith heirs that things were a bit confused. Both they and the town had been leasing land under water lots without always notifying the other partner and the town had not divided the income from leases as it should have been doing. In that year the town voted to divide the bay by the eastern land boundary between Islip and Brookhaven, leasing the lots west of this "established line" while leaving all those east of it unleased (83). The Brookhaven trustees called in all leases of either partner so that each could countersign those issued by the other, and resolved that all future leases to any of the common property be issued in the joint names of themselves, Cornelia T. Smith, and herself and Thomas S. Strong as guardians of certain Smith minors. They then entered into a detailed agreement with the Smiths in which the two parties confirmed that the 1893 division line between leased and unleased lands would remain in force until the Smith minors arrived at the age of 21 or until revised by mutual agreement (84). Their own history should have cautioned the trustees that such agreements did not resolve differences. And so it was in this case also. Because its terms were not strictly adhered to regarding mutual action in issuing leases, the Smith heirs initiated an action to partition the bay in 1899 (85). In response, the trustees passed a resolution in December of that year ordering their counsel to "assist in the speedy, immediate and actual partition of the Bay," in direct contradiction of the 1767 agreement that declared that the bay was never to be divided.

Whatever steps Islip might have taken to protect its interests in the bay in the pending division probably would have been of no avail. By order of the state's Supreme Court on 30 November 1900, which remained uncontested by Brookhaven, the bay was divided between that town and the Smith heirs:

> on the east by a line running across said Great South Bay commencing at a granite monument upon one side of which is engraved the letter "B," and on the opposite side the letter "S," set on the beach and meadow a few feet above ordinary high water mark in the North Shore of said Great South Bay, near Hawkin's Point, and at a point due South from the apex of the tower of the Fireman's Truck House in the village of Bayport, Long Island, and running thence due South across said Bay to another granite monument marked with the letters "B" and "S" in like manner as said first mentioned monument, set upon the bluff or high ground on the Great South Beach, a few feet to the South of ordinary high water on the shore of said Great South Bay; South by the Great South Beach, and on the West by the line known as "The Ranges," and formerly known as a North and South line from Huntington East Gut (86).

Ten years later the Smiths divested themselves of their portion to Josephine J. Keller who, upon acquiring it, immediately deeded it to a commercial oyster firm. Ever since 1910 the bay between Bayport and what is now Hecksher State Park has been held by private commercial interests who have systematically excluded the town's residents from shellfishing in the area. By court decree almost 150 years of use, frustration, legal maneuvering, and compromises had been wiped out.

In an attempt to pick up the pieces of their shattered hopes of gaining unrestricted access to all of the bay off the town, Islip's Fisherman's Protective Association called upon the town to clearly establish the western jurisdictional boundary of Brookhaven in 1901. Accompanied by a surveyor, the Town Board reviewed the boundary and located one monument "near the ranges in front of the old Comstock Fish Factory," and another "new monument on the North Shore about half a mile west of Nicoll's Point" (emphasis added) (87).

As an added precaution against further loss, those present at the town meeting in 1902 voted to request their assemblyman, G.A. Robinson, to introduce a bill to cede to Islip any rights of the State of New York to any of the bay bottom off Islip not owned by other parties. Further steps were taken the following year to insure public access to the bay in the form of a resolution to spend $4,000 to buy a dock at the foot of Maple Avenue and a like sum to purchase another at the foot of Ocean Avenue. A second resolution set aside $2,000 to purchase a 200 foot long strip of land fronting on Brown's River (88).

The state lent its support to such acquisitions in 1903 when the legislature passed an act authorizing such purchases for public purposes, stipulating that a sum not to exceed $30,000 could be expended for them as well as any additional funds voted at a regular town meeting "for the purpose of purchasing, constructing and maintaining such docks, bulkheads and landing places." The title to these and later purchases was vested in the trustees as was the management of them and the power to lease adjacent lands under water for use by the public (89).

For over 100 years Islip tried vainly to prove it had a legitimate title to the bay off its shores. Now it was reduced to buying docking facilities over a foreshore and bay bottom owned by another town to guarantee public access. Having been bay oriented for generations, the town's traditional preoccupation, tantamount almost to an obsession, had been to act the role of a bastard child seeking legitimacy so it too could share equally in the colonial legacy of fee title to at least a part of the bay. The poor child lost. But, as in all fairy tales, a godmother in the guise of the state appeared to recoup the town's dignity and some of its water fortune, at least somewhat.

The State of New York held title to the bay bottom between lines running southeast from Sumpwan's (Sampawam's) Point through Captree Island and due south from Nicoll's Point to the Atlantic Ocean. Beginning in 1929 title to some of that area was transferred to Islip by the state legislature to add to that which the town received by its agreement with Huntington in 1818 as ratified by the state in 1857. This brought to a partially successful conclusion efforts by the town to acquire title to parts of the bay ever since the early nineteenth century (90). The state could, of course, grant such lands to municipalities, and according to its thinking, private individuals, if it so desired, subject to certain self-imposed restrictions (91).

Whereas the Huntington agreement of 1818 as ratified by the state in 1857 granted to Islip only islands and beaches in the Great South Bay, in 1929, in exchange for certain lands and lands under water to be used for Fire Island State Park, the state gave to Islip all the remaining lands under water between the Babylon and Brookhaven lines with express power and authority to regulate all shellfishing activites therein. The following year the state amended the grant to include "all of the lands of the State of New York lying under water in such town not hereinbeforegranted or conveyed, and excepting lands under water within one thousand feet of upland owned by the State of New York" (92).

It took Islip almost 100 years to acquire a few paltry islands in the western third of the bay east of the Huntington line and another 100 years more to get full control of the bay bottom in the same area. Yet even then the town did not get all it had been seeking, because the state reserved out an area of bay bottom extending 1,000 feet off the shores of its park lands. Furthermore, others claimed ownership of the bay bottom between the Range Line and the Smith Heirs Line, deriving their ownership from the sale by the Smiths to Josephine Keller of that area.

Since that exchange a number of maps have appeared portraying differing opinions as to who owns what, particularly off the eastern shore of what is now Heckscher State Park. A map dated September 1935, filed in the Town of Islip's Engineers Office, clearly shows an Islip-Brookhaven boundary line considerably to the east of the traditional Range Line. It also indicates that two private, commercial oyster firms, Nantanset and Pauchogue, laid claim to portions of the bay bottom immediately offshore from the park. Another map, dated 1930 and drawn for the Long Island State Park Commission, also indicates that at least as far as the State of New York was concerned at that time the Islip-Brookhaven line lay considerably east of the Range Line. Recently, the company that has been retained to draw the tax maps of the county, after some research into the subject, drew the west boundary of Brookhaven across the bay using the east side of the Connetquot River as the northern terminus (93).

Naturally, one cannot accept these maps as the final word on the subject of boundaries, yet they may be prophetic. Many baymen in Islip have accepted them, but whether they do so out of a firm conviction of their truthfulness or out of a personal desire to regard as gospel anything that would expand their shellfishing areas in the bay as against the claims of the town of Brookhaven and Bluepoint Oyster Company, the present owner of all the Smith claims to the western bay bottom, is another question. Counsel for the oyster company has, of course, protested against such maps and as recently as 1969 carried on extensive correspondence with the Long Island State Park Commission and others in an effort to explain his client's claims, which are based firmly on the 1693 manor grant to William Smith and the later 1767 agreement between the Smiths and Brookhaven over mutual ownership of the bay. All titles of the company originate out of those two documents and the final division by the Smith descendants at the end of the nineteenth century with the subsequent sale of the Smith bay holdings in 1911 to a commercial oyster firm via an intermediate conveyance to Josephine Keller (94).

Any attempt to clarify descriptions of alleged ownership and of jurisdiction in the Great South Bay will immediately bring to light certain anomalies. For example, in recent years private shellfishing firms have claimed fee title to all the bay bottom between the partition line of 1900 which runs due south from Bayport on the east and the Range Line, or current boundary of the jurisdiction of Brookhaven, on the west. How the Range Line itself came to be where it is presents another disparity, this time between that line and the original patent line of William Smith in 1693 that lies far to the west at Huntington East Gut. The shifting of the line probably came about during the 1834 dispute over its location, yet the official records give no hint as to the reasons. In any event, in 1930 the State of New York conveyed to Islip all the bay and bay bottom west of the Range Line, which now runs due south from Nicoll's Point.

To compound the problem, a case can be made for the contention that the original Smith grant of 1693 is not only invalid because it was not signed by Governor Fletcher, but also illegal in that he granted to Smith what he had already granted to Brookhaven seven years earlier. One weak point in this approach is that if the 1693 deed was recorded and its legality given recognition by both the courts and the legislature over the past 200 years, then that might suffice to override any shortcomings of Governor Fletcher in not signing the original conveyance (95). But, as a counterpoint to that, it must be remembered that the Brookhaven trustees claimed they owned the bay based on the 1686 Dongan charter, and the government could not grant nor Smith acquire any of it.

To further confuse the issue, it could be argued that Governor Fletcher was well within his rights in awarding the bay to Smith despite the Dongan patent. Did not Dongan reserve to his Majesty all lands as yet unpurchased from the Indians at the time of his grant? True, but a careful reading of the appropriate clause makes clear that Dongan reserved out only "all the tracts of land that lie to the south...that remain unpurchased from the native Indians"; yet granted to the town's trustees, within their limits and bounds "all and singular the...marshes, swamps...rivers, rivulets, waters, lakes, ponds, brooks, streams, beaches...creeks, harbors." It is apparent that the colonial governor reserved only upland for his own use unless and until the trustees themselves bought it from the Indians. Nevertheless, one might aver

Table 5. Great South Bay Wetlands: Babylon, Islip, and Brookhaven, 1972

Town	Total Acres	Ownership			
		US/County/Town	Private	Public & Private	Unclassified
Babylon	2,525 (2,322)	2,040 (563)	365 (335)	- -	120 (1,424)
Islip	1,318 (1,414)	773 (775)	545 (273)	- (240)	- (126)
Brookhaven	1,859 (2,280)	1,592 (1,688)	267 (546)	- (16)	- (30)
	5,702 (6,016)	4,405 (3,026)	1,177 (1,154)	- (256)	120 (1,580)

This table has been compiled from figures given in New York (State). Office of Planning Services. Long Island Marine Wetlands (Albany, NY, 1972), p. 55, 57; O'Connor, J.S., and Terry, O.W. Marine Wetlands of Nassau and Suffolk Counties, New York (Stony Brook, NY: Marine Sciences Research Center, State University of New York, 1972), p. 8-9, 11. Both publications have appropriate maps illustrating the exact locations of the wetlands and they should be referred to for that purpose. The O'Connor-Terry survey is shown in parentheses. Differences in working definitions of wetlands and associated grasses probably accounts for the disparities between the two reports, which amounts to 686 acres.

that since the word "bays" was not included in the above list the Great South Bay was also excluded from the grant. The counterpoint to that would be that the earlier grant from Nicolls recited "all havens, harbors, creeks...marshes, waters, rivers, lakes..." and that the word "havens" covered the bay, especially since the Dongan charter was a confirmation and amplification of its predecessor and the absence of that word was an oversight, therefore irrelevant to the issue. Generally, courts have come down firmly on the side of the trustees of the town and private shellfishing companies owning the bay based on the 1767 agreement and the 1900 partition (96).

One difficulty in challenging Smith's grant, and a quite obvious one, is that it is possible a court would be reluctant to impeach an ancient grant that has stood the test of time for almost 300 years. That line of reasoning would probably force the court to reach the conclusion that long use and a series of mutual agreements between the parties involved in long-dead disputes have made the question of ownership moot. This is the underlying theme of the Brookhaven v. Strong decision of 1875.

Between the eastern 1900 line and the western Nicoll's Point line the situation reduces itself to a private shellfishing business firmly alleging control and ownership over the bay bottom and all land under water and marshes to the high water mark, the Town of Brookhaven asserting jurisdiction over the same area, and the Town of Islip or certain of its residents having fee title to marshes along the shores above the high water mark. When the Town of Islip or a shorefront resident wishes to construct a dock, build a bulkhead, or use land under water below high water, the permission of the shellfish company by means of a deed of sale or a lease and the approval of Brookhaven town authorities must first be obtained (97).

As for wetlands and lands under water not only in the above controversial area but in the entire Great South Bay, it seems obvious that management of those natural resources has been fractionalized and responsibility for their use distributed among the towns bordering the bay, a few private shellfishing companies, and innumerable individuals who, in one way or another, beginning in 1683, acquired some color or title therein. Over the centuries much of the wetlands acreage, particularly along the north shore of the bay, has been filled in and obliterated for human use; a few have disappeared as a consequence of higher water levels produced by natural causes. All that remains, at least as far as two scientific surveys taken in 1972 are concerned, is presented in Table 5 (98).

All of the Babylon acreage is located along the barrier beach and adjacent islands, with the exception of very small segments along the edges of creeks flowing out from the necks along the northern shore. Contrarily, with the exception of the small marsh areas on Captree, Sexton, and West Fire Island, Islip's wetlands are confined to the northern shore of the bay, mostly in the Hecksher State Park--Connetquot River region. Brookhaven's wetlands are scattered along both the north and south shores of the bay.

Management of these wetlands has been sporadic. Until the nineteenth century few entered them other than farmers to cut thatch grass. The only standardized management policy that existed in any of the towns abutting the bay was oriented toward agriculture and the needs of local farmers; shellfishing policy took that same general form and pattern as described in the chapter on

Huntington Harbor. One gets the impression that massive land-fill and bulkheading operations did not take place then simply because of technological limitations, for docks appeared in the colonial period and limited bulkheading took place during much of the nineteenth century. By the end of that 100-year span, technology and population caught up with the wetlands and towns developed a policy of permissiveness with respect to use of their own and private marshes along the shores of the bay. Preservation for the sake of preservation of a natural resource did not dominate the thinking of the town fathers--if it entered their minds at all.

In the past, towns along the bay have confined their regulations to shellfishing and channel dredging. More recently they have begun to pass local ordinances dealing with environmental conservation, specifically the filling of wetlands. In 1972 Islip created an environmental council to advise the town board on matters affecting the environment. Purely an advisory council, it has no enforcement powers. Three years earlier the town adopted ordinances to restrict the removal or deposit of fill in any navigable water or land in the town to protect aquatic and other natural resources, whether the lands be publicly or privately owned, and to control the filling or diversion of streams, creeks, and watercourses. Both carry enforcement provisions in the nature of fines and possible imprisonment. And in 1972 the town passed a local wetlands ordinance that required a permit prior to dredging, filling, or removing materials, diverting water courses, or placing structures in water courses, coastal wetlands and tidal marshes, with a penalty of $1,000 for violation (99). The Town of Brookhaven has similar ordinances on the books beginning with the creation of a board of waterways and natural resources in 1964 (100). Babylon has one ordinance on dredging (101).

To rephrase a trite but true observation, these local laws are only as strong as the people who staff the enforcement agencies and as weak as those members of the general public, whether they be commercial firms seeking profit or individuals with personal motives, who, intentionally or otherwise, successfully evade their provisions. A case in point is the property of the Good Samaritan Hospital in West Islip, Town of Islip. Its land consists of over 500 feet of bay frontage and extends inland over 4,000 feet to Montauk Highway. Beyond a narrow strip of sandy beach there is a wide stand of salt marsh grasses backed by an equally wide sand area that acts as a barrier to the tide. Inland from that point there existed a freshwater marsh, with expanses of open, shallow water, covering about half of the entire hospital property. Some time between 1972 and early 1974 part of the freshwater marsh was filled in to accommodate a new building complex; approximately half of it, the bay side half, remained untouched. During the winter and spring of 1973-74 hospital authorities saw fit to fill in the remainder, using spoil from a sewer project in Nassau County, stopping 300 to 400 feet short of the water. The company that brought in the fill and graded the area avers that they did it sometime in 1972 or early 1973; local residents abutting the west side of the property swear this is not so, that the recent filling took place during the winter of 1973. Hospital officials disclaim any immediate plans to use the filled-in area, stating that they might not do anything with it for 10 years--an odd reason, if it can be called that, obliterating a wetland that had served as a sanctuary for Canadian geese, varieties of ducks, assorted saltwater fowl, and the many small animals that inhabit its fringes.

Some local residents complained to town officials about the filling; the town responded that it had no jurisdiction, despite the existence of Chapter

67 of the town code, passed in 1972, which prohibits the filling of coastal wetlands without a permit. Hospital authorities neither applied for nor received a permit from any authority and proceeded to fill at their pleasure. The regional office of the New York State Department of Environmental Conservation sent an inspector who reported back that no salt marsh was involved, whereupon the department professed to have no jurisdiction. There the matter rests.

Although an isolated example, this is not atypical. It highlights what has been taking place in the Great South Bay area for many generations. Three towns, by colonial grants or later state deeds, own segments of the bay, so, too, does a private shellfishing company. The towns exercise jurisdiction over their respective parcels, but this has been subjected to the vicissitudes of wandering boundary lines. The ordinances of the three towns have been neither concurrent, and thus not complementary, nor enforced with equal vigor if enforced at all. Wetlands have disappeared to be replaced by marketable real estate for homes, roads, public facilities, and refuse dumps. Dredging for marinas and channels has resulted in more than 25 million cubic yards of bay bottom being removed from the Great South Bay and many acres of productive shellfish producing land destroyed (102). This bodes ill for an industry that officially reports an annual value of over $15 million and unofficially admits it is more nearly $35 million.

At some point the case of the elusive boundaries must be solved, for the towns of Brookhaven and Islip, at this writing, are once again attempting to resolve that hoary puzzle. The proprietary claims of Bluepoint Oyster Company to a large piece of the bay bottom must be resolved, because continuation of the status quo will only perpetuate poaching and ill-will on the part of independent baymen. Many thousands of acres are involved and there is a definite suspicion among some that not only has Brookhaven taken advantage of Islip's traditionally weak legal-historical position vis-a-vis boundaries to maximize its own area, but also that commercial oyster firms have profited from the situation by alleging ownership of and exploiting the lands under water off the east side of Hecksher State Park; land that probably belongs to either the state or the Town of Islip. Finally, serious thought must be given to the private owners of wetlands and shore frontage whose personal desires to profit handsomely on their real estate investments, improve their living space by filling and landscaping, or dock and exercise our riparian rights, frequently, in these days of environmental awareness, run counter to, in fact, are sometimes diametrically opposed to, accumulated scientific data on the consequences of their action.

CHAPTER IV FOOTNOTES

(1) Shaw, Osborn, ed. Records of the Town of Brookhaven (New York: The Derrydal Press, 1930-1947, 7 vols.), Book A, ix-xv, 10.

(2) Ibid., p. 65-66.

(3) New York (State). Secretary of State. "Deeds to State Owned Real Estate" (Albany, NY: at the New York State Archives, 1652-1855, 43 vols.), 7, p. 78. Contassquitab River is probably today's Quintuck Creek, formerly Widow's Brook, in East Islip. The Indian Sachem was shrewd enough to include the reservation that he and his heirs retained the privilege of planting, hunting, fishing, and fowling on any part of the area not farmed and improved by Nicolls, his heirs, and assigns "at all times hereafter freely and without molestation."

(4) New York (State). Secretary of State. "Land Patents" (Albany, NY: at the New York State Archives, 1664-), 5, p. 161-163.

(5) Ibid., 5, p. 603-607.

(6) Ibid., 6, p. 314-316.

(7) Ibid., 6, p. 372-374.

(8) Ibid., 7, p. 112-114. Even though he called it a manor it did not have, nor was it legally granted, traditional manorial privileges such as court leet, court baron, and other manorial jurisdictions and prerogatives. Furthermore, as a manor-like estate, it did not have within it both free and unfree tenants, the presence of which, by customs and laws, had to be clearly evident before a landowner could aspire to manor status. The designation, then, by the owner was a misnomer and probably an affectation of his and future owners.

(9) Ibid., 7 p. 7-9.

(10) Ibid., 7 p. 151-153.

(11) Mss, Office of the Town Clerk, Islip, NY.

(12) Ibid.

(13) New York (State) Secretary of State. "Land Patents," 7, p. 354-355.

(14) Like Huntington, the Town of Brookhaven's charter created trustees of the unappropriated land for the benefit of the freeholders and commonalty. For a full discussion of this, and the motivations for this charter issuance refer to chapters II and III.

(15) Shaw, Brookhaven Records, Book A, p. 65-79.

(16) Manor of St. George. "Museum Collection" (Westhampton, NY [doc. TSPAF 89]), typescript.

(17) Ibid., typescript.

(18) Manor of St. George. "Museum Collection," typescript of patent and abstract of patent. In 1697 Smith also received a patent that included much of the Moriches area, but settlers there protested so vehemently that he was forced to give up that claim. The Manor of St. George remained in the Smith family until 1954, at which time it was conveyed to the Town of Brookhaven. It is now a historical site and museum.

(19) Manor of St. George. "Museum Collection," typescript. Attached to this is Smith's account of a survey taken of "my beach," dated 1694.

(20) Jackson v. Hathaway, 15 Johns 447; Ogden v. Jennings, 62 NY 526; Armstrong v. Dubois, 90 NY 102; Lawrence v. Whitney, 115 NY 410. In Woodhull v. Rosenthal (61 NY 382), the court stated that "A thing 'appurtenant'" is defined to be a thing used with and related to or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or 'appurtenant.' It results from this definition that land can never be appurtenant to other land, or pass with it as belonging to it (Jackson v. Hathaway, 15 Johns, JR 447-454; Matter of NY Central RR Co., 49 Barb. 501, 505; Harris v. Elliott, 10 Pet. 54; Leonard v. White, 7 MA 8, 9). All that could be reasonably claimed is that the word 'appurtenances' will carry with it easements and servitudes used and enjoyed with the lands for whose benefit they were created. Even an easement will not pass unless it is necessary to the enjoyment of the thing granted (Gayety v. Bethune, 14 MA 49; Wash. on Easements, 161; 3 Washburn on Real Property, 3 ed., p. 340, 341.) Justice Story reiterated this principle in US v. Harris (1 Somn. [US] 37). But it has been modified in the State of New York to the extent of the decision in Archibald v. NYC & H.R. RR Co. (157 NY 579), in which the court held that if the upland owner had received a grant of land from the state, the use of the words "with the appurtenances" conveyed the land under water also even in the absence of specific words describing the land under water. For other references citing the earlier principle, see NY Cent. RR v. Buff. & Erie, 49 Barb. 501 aff'd, 6 Albany Law Journal 173; Lawrence v. Delano, 3 Sand. 333; Parsons v. Johnson, 68 NY 62; Jackson v. White, 8 Johnson 47; Jarman on Wills, I, 6 ed., p. 754-756; Otis v. Smith, 9 Pick., Buck v. Newton, 1. Bos & p. 53.

(21) Shaw, Brookhaven Records, Book B, p. 304-305. The specific clause referred to reads: "saving to his most sacred Majesty...his heirs and successors, all the tracts and necks of land that lie to the south within the limits and bounds aforesaid that remain unpurchased from the native Indians anything herein to the contrary in any wise notwithstanding." Ibid., Book A, p. 70.

(22) Ibid.

(23) Ibid., p. 477-478.

(24) "Last Will and Testament of Colonel William Smith, April 20, 1704," Manor of St. George. "Museum Collection," typescript.

(25) Shaw, Brookhaven Records, C, p. 223-224.

(26) Ibid., p. 226.

(27) Ibid., p. 235.

(28) New York (State). Commissioner of Fisheries. Report of the Commissioner of Fisheries of the State of New York in charge of the Oyster Investigation (Albany, NY, 1885 [New York (State). Legislature. Assembly Doc. No. 85, 1885, vol. 6]), p. 51.

(29) Shaw, Brookhaven Records, Book C, p. 274.

(30) Ibid., p. 298.

(31) Ibid., p. 325.

(32) Shaw, Osborn, ed. Documents of the Town of Brookhaven, 1693-1947 (Patchogue, NY: The Patchogue Advance, 1947), p. 155, for the March 4 deed; for the agreements of March 3, see Micknas, "General Report on Harbors and Bays"; Shaw, Brookhaven Records, Book C, p. 325; for the agreement on mutual use of the bay, see Shaw, Brookhaven Town Documents, p. 354-355.

(33) Shaw, Brookhaven Records, Book C, p. 399, 401, 403, 409, 412, 413.

(34) Ibid., Book A, p. 86, 108, 114, 118-119, 120-121, 132.

(35) Ibid., Book C, p. 415-416.

(36) The Colonial Laws of New York from the year 1644 to the revolution, (Albany, NY: J.B. Lyon, 1894, 5 vols.), I, p. 121-122.

(37) Ibid., V, Chapter 1593.

(38) Ibid., I, Chapter 223.

(39) Ibid., II, Chapter 575.

(40) Islip, NY. Town Clerk's Office. "Islip Town Records" (Islip, NY). Despite its status as a precinct, the recording clerk began using the word "town" in 1737 to describe local meetings and ordinances passed. The only other reference to Islip residents using the bay, or being allowed to use it, appears in the Brookhaven records in December 1742 when Richard Floyd of that town and John Smith of Islip were elected as overseers "of the fishery and oystering within the limits of our patent on Long Island" (Shaw, Brookhaven Records, Book C, p. 224).

(41) Laws of the State of New York... (1777-1801) (Albany, NY: Weed, Parsons, and Co., [1886-1887], 5 vols.), II, p. 748-769 (1785-1788).

(42) Ibid., III, Chapter 19 (1789-1796). The legislature reenacted the provision returning the bay and beach to Brookhaven in 1801, Chapter 163, and again in 1813, Chapter 101.

(43) Jacob Harned and Elias Smith to Huntington trustees, Street, Huntington Town Records, III, p. 258, 259; Anning Moubray to Huntington trustees, Ibid., p. 266-267.

(44) Street, Huntington Town Records, III, p. 163-164, 230-239, 261-264.

(45) Ibid., p. 269-271.

(46) Ibid., p. 273-274.

(47) "Islip Town Records," 1815, 1817, 1818 meetings.

(48) Street, Huntington Town Records, III p. 284-290.

(49) Ibid., p. 289-290.

(50) "Islip Town Records," 1818.

(51) Street, Huntington Town Records, III, p. 295-296.

(52) "Islip Town Records," 1819, 1821, et seq.

(53) Ibid., September 1835; see also Street, Huntington Town Records, III, p. 355-356.

(54) "Islip Town Records," 1841, 1842.

(55) Ibid., 1855.

(56) These maps were undoubtedly the ones drawn by each township toward the end of the eighteenth century as mandated by a state law of 1796. Ibid., 1856.

(57) Ibid., 1856.

(58) Ibid.

(59) Laws of the State of New York... (1777-1801), V, Chapter 69 (1801).

(60) Laws of New York, 1835, Chapter 232; Ibid., 1850, 621, Chapter 283. Successively thereafter this law was reenacted, updated, and broadened to include other areas in 1894 (chapter 317, 1895 (chapter 208), 1917 (chapter 308), 1917 (chapter 657), 1928 (chapter 578), 1935 (chapter 323), 1935 (chapter 392), 1936 (chapter 662).

(61) Ibid., 1857, I, Chapter 167.

(62) Laws of the State of New York... (1777-1801), I, Chapter 42 (1777-1784), amended 1800, Chapter 43.

(63) Ibid., IV Chapter 109 (1801); Laws of New York, 1868, II, 2052-2060, Chapter 864; Ibid., 1872, II 1394, Chapter 574; Ibid 1882, 391, Chapter 326; Ibid., 1886, 907-914, Chapter 636; Ibid., 1888, 450, Chapter 259; Ibid., 1890, 984-988, Chapter 557; Ibid., 1892, I, 652-657, Chapter 321; Ibid., 1897, I, 115-117, Chapter 249 (amended 1901, 1906, 1908, 1910); Ibid., 1909, II, 1808-1809, Concurrent Resolution. In contrast, during the colonial period the assembly paid little or no attention to such matters.

(64) Ibid., 1870, chapter 234; Ibid., 1872, chapter 666; Ibid, 1874, chapter 549; Ibid., 1879, chapter 251; Ibid., 1888, chapter 526; Ibid., 1890, chapter 99; Ibid., 1890, chapter 308, Ibid., 1892, chapter 488; Ibid., 1893, chapter 572; Ibid., 1894, Supervisors' Laws 97; Ibid., 1895, II, part II, resolution III; Ibid., 1910, chapter 368; Ibid., 1913 chapter 508, Ibid., 1917, chapter 32; Ibid., 1920, chapter 24; Ibid., 1940, chapter 651; Ibid., 1946, chapter 150; Ibid., 1947, chapter 760; Ibid., 1951, chapter 242; Ibid., 1959, chapter 25; Ibid., 1961, chapter 864.

(65) Islip, NY. Town Clerk's Office, "Town Board Minutes and Highway Records, 1850-1905" (Islip, NY), p. 20-21.

(66) Shaw, Brookhaven Records, Book Am 147. A field book survey of the "strand north side of the bay between Brookhaven and Islip from the mouth of Namkee Creek to Connetquit River," gives a measured distance of 415 chains between the two points and says nothing about points farther west such as Nicoll's Point.

(67) Laws of New York, 1857, II, Chapter 503.

(68) Ibid., 1916, I Chapter 131.

(69) Ibid., 1857, II, Chapter 724.

(70) Islip, "Town Board Minutes," p. 19-20.

(71) Ibid., p. 23-24 et passim as renewed for the years 1859, 1860-1864, 1867, 1869-1871.

(72) Ibid., p. 26 et passim. Reaffirmed in 1861, 1862.

(73) Ibid., p. 509.

(74) Ibid., p. 56.

(75) Trustees of Brookhaven et al v. Charles T. Strong, 60 NY 60.

(76) Ibid., p. 65-67. In its decision the Court of Appeals not only reaffirmed the reasoning of the Supreme Court, it also dismissed as without substance the contention that the Crown had no right to grant such a large body of water and the soil under it ever since Magna Carta. The court held that that ancient document only prevented the king from sequestering bodies of water and the land under them in defenso, that is, for his own personal pleasure and use, but did not estop him from granting such areas to corporate entities or individuals.

(77) Islip, "Town Board Minutes," p. 91; cf p. 77-78 for a similar earlier resolution in 1875.

(78) One point of confusion exists in this agreement. In setting forth the grievances of Islip residents that they were being charged more than Brookhaven residents "for the enjoyment of the privilege of oystering," the agreement does not use the word "oystering" or "shellfishing" when extending equal treatment to all. Instead, it substitutes "fishing." One can only assume that the intent of the document overrides any strict construction of the use

of words. Thus, "fishing" should be taken to include all forms of fishing, including shellfishing, otherwise the preamble of the agreement would be irrelevant to the remainder. The records of Brookhaven bear out this interpretation. In 1889 a notice of leases for docks, bulkheads, and oyster lots was ordered published in both Sayville and Patchogue. Three years later the Brookhaven town board voted to exclude all nonresidents from the bay except those of Riverhead, Islip, and Smithtown, and in 1907, Charles Smith, president of the Baymen's Association of Sayville, formed to act in conjunction with a similar organization in Patchogue, said his group would do all it could to protect the oysters in the "free bay" section of the Great South Bay (Shaw, Brookhaven Records, 1886-1900, p. 91, 187; Ibid., 1901-1911, 129; Shaw, Brookhaven Town Documents, p. 359-360). Feeling uneasy about the legality of their agreement, the two towns sought and obtained state legislative approval in 1881. The state ratified the agreement "as if made between the said 'trustees of the freeholders and commonalty of the Town of Brookhaven' and the individual residents of the Town of Islip residing east of Great River" (Laws of New York, 1881, I, Chapter 322).

(79) Laws of New York 1874, 739-742, Chapter 549.

(80) Islip "Town Board Minutes," p. 77-80, 83-86, 88-89, 100.

(81) Laws of New York, 1870, Chapter 361.

(82) Ibid., 1891, 743-744, Resolution No. 86.

(83) Shaw, Brookhaven Records, 1886-1900, p. 206-208.

(84) Ibid., p. 209-214. Helen Tangier Smith, born 22 August 1880, came of age in 1901 and William Sidney Smith, born 21 February 1883, arrived at his majority in 1904.

(85) Ibid., p. 447-448.

(86) Kavenagh, W. Keith. "Wetlands, Bay Bottom, and Boundaries; the Town of Islip as a Case Study, 1683-1973" (Islip, NY: Supervisor's Office). A copy of the officially recorded title chain of the Bluepoint Oyster Company in which this division is printed is reproduced in the appendix of this special report commissioned by the Town of Islip in 1972.

(87) Islip, "Town Board Minutes," p. 336, 338. The 1910 conveyance from the Smiths to Keller, (Suffolk Co., NY. County Clerk's Office. "Deed Liber," 719, cp 430) defined the boundary as "west, by the line known as the Ranges, and formerly known as a north and south line from Huntington East Cut..."

(88) Ibid., p. 341-342, 363. The owner of the Brown's River parcel was Mrs. C. N. Riessler.

(89) Laws of New York, 1903, II, Chapter 455. This act was designed to ratify and confirm the town's actions, to eliminate any irregularities in purchase procedures, by Chapter 461 of the laws of 1911. Subsequently, in 1934, the legislature extended this power to all towns in both Nassau and Suffolk counties. Chapter 407 of the laws of 1934 made it lawful for town boards to vote money, subject to permissive referendum, for the purpose of dredging creeks, streams, harbors, bays, and inlets to make them navigable and monies

to construct jetties, seawalls, bulkheads, drains, and other devised for "improving the coast and seashore." By the act, towns could also acquire title to real property for public use (a privilege charter towns had had since the seventeenth century) or obtain an easement over private property. In the case of disagreements with private property owners over acquisition or the granting of easement rights, the towns could condemn the property for any of the above purposes and "protect the property within the town from floods, freshets, and high water." In 1955, even though the act of 1916 had abolished Islip's trustees, the legislature, by Chapter 572 of the laws of that year, again abolished them and turned over trustee powers and duties to the town board, which could, as in the earlier act, appoint one of its own members to serve as trustee of town property. Exactly why this more recent law was enacted is not clear.

(90) The use of the lines from Sumpwan's and Nicoll's points in the text are for the sake of convenience here, for they are the ones usually depicted on today's maps. Even though they have been given the color of law and factual acceptance in a number of documents and transactions, their validity is very much open to question and this writer cannot at this time accept either line as the true boundaries. The Babylon-Huntington line has its derivation in that town's colonial patent of 1694 which expressly stated that the east boundary runs on the west side of Sumpwam's Neck and thence to the ocean. How it managed to take its tangential course southeastward from the original line and through Captree Island apparently is a quirk of negotiations and misunderstandings generations ago. The same holds true for the western Brookhaven line, which, by patent and eighteenth century maps, lies far to the east of its present location.

(91) Public Lands Law, 1928, c. 578, sect. 5, effective 24 March 1928; Book 45, Art. 6. Section 75, art. 6, subdiv. 7. Added: L. 1917, c. 657; amended L. 1926, c. 93, sect. 1, 2; L. 1928, c. 578, Sect. 5; L. 1937, c. 543; L. 1941, c. 847, Sect. 1, 2; L. 1949, c. 595, Sect. 1-3, eff. 16 April 1949. Subdivision 7 was formerly part of subdiv. 6, renumbered 7 by L. 1937, c. 543; amended by L. 1941, c. 847, Sec. 1; L. 1949, c. 595, Sect. 1. Subdivision 9 (Private rights or rights of property of individuals, if any, of any nature or description, shall not be taken away, nor impaired, nor impeded without due process of law) was formerly part of subdiv. 6, renumbered 9 by L. 1937, c. 543, eff. 22 May 1937. Section 75 derived from the Public Lands Law of 1894, c. 317, Sect. 70 as amended by L. 1895, c. 208, Sect. 70 was from R.S., pt. 1, c. 9, tit. 5, Sec. 67-69; L. 1835, c. 232, Sect. 1, 2; L. 1850, c. 283, Sect. 2. See also state constitution on Eminent Domain, Art. 1, Sect. 7. Such state grants were restricted to commercial and agricultural uses; parks, beaches, highways, recreational and conservation purposes; and only to adjacent land owners.

(92) Laws of New York, 1929, I, Chapter 206; Ibid., 1930, II Chapter 535; Suffolk Co., NY. County Clerk's Office. "Deed Liber," 1534, cp 265.

(93) These maps are on file in the Islip Town Engineer's Office, Baker and Company, Suffolk County Clerk's Office, Riverhead, and in the office of the Long Island State Park Commission.

(94) Kavenagh, "Wetlands, Bay Bottoms, and Boundaries...," correspondence between John J. McInerney, counsel for Bluepoint Oyster Company and the Long Island State Park Commission, May 1969-January 1970, p. 73-91.

(95) The lack of an official signature has been attested to by Chester Osborn, curator of the archives of the Manor of St. George, to the author in 1973.

(96) For example, Trustees of Brookhaven et al v. Strong, 60 NY 56; Town of Brookhaven v. Smith, 188 NY 74. The attorney for Bluepoint Oyster Company relies heavily on Lewis Bluepoint Oyster Cultivation Co. v. Briggs, 198 NY 287, Smith v. Odell, 234 NY 267, and People v. Johnson, 7 Misc. 2d 385, 166 NYS 2d 732, p. 736-739. See Kavenagh, "Wetlands, Bay Bottoms, and Boundaries...," appendix.

(97) Islip, "Town Board Minutes," Bluepoint Oyster Company agrees to deed land under water off West Sayville for construction of a basin, 7 December 1927; town seeks permission from company to dredge at West Sayville dock, 30 December 1932.

(98) This table has been compiled from figures given in New York (State). Office of Planning Services. Long Island Marine Wetlands (Albany, NY, 1972), p. 55, 57; O'Connor, J.S., and Terry, O.W. Marine Wetlands of Nassau and Suffolk Counties, New York (Stony Brook, NY: Marine Sciences Research Center, State University of New York, 1972), p. 8-9, 11. Both publications have appropriate maps illustrating the exact locations of the wetlands and they should be referred to for that purpose. The O'Connor-Terry survey is shown in parentheses. Differences in working definitions of wetlands and associated grasses probably accounts for the disparities between the two reports, which amounts to 686 acres.

(99) Islip, NY. Town Clerk's Office. Code of the Town of Islip (Islip, NY), Local Law No. 1, 1972; Chapter 13, Local Law No. 2, 1969; Local Law No. 1, 1969; Chapter 67.

(100) Brookhaven Town Law, Chapter 97, Local Law No. 2, 1967; Chapter 98, Local Law No. 3, 1967; Local Law No. 3, 1964, and No. 1, 1967; Chapter 75, Chapter 53; Chapter 8.

(101) Babylon Town Code, Art. IV. The summary of local legislation has been taken from "Government Regulations and Organizations in Environmental Health" compiled by D. Goodkins, K. Babito, and E. Ferillo of the Suffolk County Planning Board, October 1972.

(102) In 1972, the supervisor of the Town of Brookhaven stood four-square behind the belief that local private enterprise can best cure all local ills without outside interference from the state or federal governments, whether it be in the form of proffered tax dollars for housing and renewal or a threat to home rule through state regulation of wetlands. Either is, in his estimation, creeping communism, to be abhorred and avoided. The figures on dredging are from Long Island Marine Wetlands, p. 2.

CHAPTER V

THREE CENTURIES OF PRIVATE AND PUBLIC WETLANDS MANAGEMENT

Most major harbors in Suffolk County have historical characteristics similar to Huntington Harbor (1). They have evolved to their present state of maritime Babels during almost 300 years of continuous human use, first by English colonists and later by their Americanized descendants, with little discipline and even less planning. That these harbors were imbued with a community interest and public rights of use did not deter some individuals from working their will on them. Yet, local officials have never fully relinquished their control, so that the harbors are now an admixture of private and public use vying for dominance.

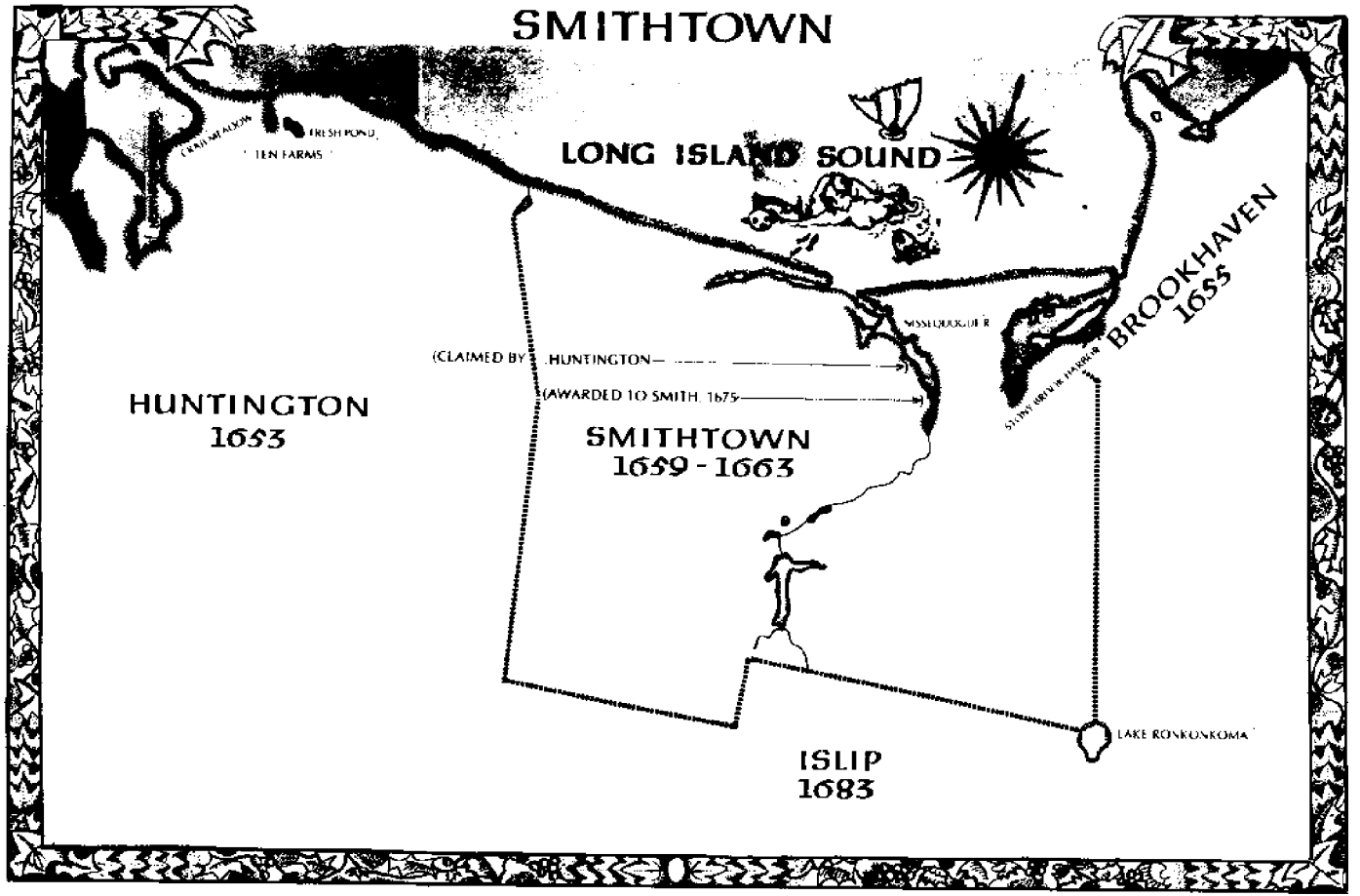
The history of these harbors can be traced with a fair degree of accuracy in the public records of each town, because at least some of their shores were not parcelled out to individuals and thus retained in the records of towns' original unappropriated lands. What, then, of those areas of small lakes or ponds, foreshore and wetlands that the local proprietors saw fit to grant to one or more persons? Immediately upon being so granted these lands became vested with a paramount private interest, subject only to the laws of real property (at least the owners allege). Thus removed from the rolls of unappropriated lands, public lands, more often than not they disappear from the public records and generally follow a different historical pattern of use from their public harbor cousins. Consequently, their development and use depended almost exclusively on the whims of successive owners, restricted only by the limits of their imaginations and financial resources. Public management became private management. Therefore, they are equally worthy of analysis as a reflection of private management of a local natural resource.

Five areas that came under private control will be examined here: Fresh Pond in Smithtown, the Long Island Lighting Company site in Brookhaven, a private marsh in Southold, Indian Island County Park in Riverhead, and Hayground Creek at the head of Mecox Bay in Southampton. Each has its peculiarities of use in terms of topographical limitations, yet each also has, with the possible exception of the LILCO site, certain common characteristics of use.

Smithtown: Fresh Pond

Smithtown, which takes in Fresh Pond in its northwest corner, came into the possession of an Englishman first in 1659 when the Indian Sachem Wyandance gave it as a free gift to Lyon Gardiner as a tangible sign of gratitude for Gardiner's having rescued the Sachem's daughter from the clutches of a hostile tribe. In 1663 Gardiner conveyed the entire parcel to Richard Smith, a close personal friend, which comprised approximately 10 square miles of north central Long Island (2) (Map 8). After Smith took possession of this sizable tract he came into conflict with the proprietors of Huntington and Brookhaven

MAP 8


SMITHTOWN
LONG ISLAND SOUND
FRESH POND
TEN FARMS
BROOKHAVEN
1655
(CLAIMED BY HUNTINGTON
(AWARDED TO SMITH) 1675
HUNTINGTON
1653
SMITHTOWN
1659 - 1663
LAKE RONKONKOMA
ISLIP
1683

over its western and eastern boundaries. The controversy with Brookhaven he settled quickly enough by agreeing to pay the taxes levied by that town on his "estate at Nesquake" up to the year he received his patent from the English governor in 1667. Also, somewhat reluctantly, for he seems to have been litigious as well as grasping, he quit-claimed to the men of Setauket all lands they claimed east of today's Smithtown-Brookhaven boundary.

Having cleared up that dispute he turned his attention to the claims of Huntington on his western flank. By Indian deed of 1656 and Governor Nicolls' patent of 1666, that town claimed all the land to the Nissequogue River. Smith, by virtue of the Wyandance-Gardiner deed of gift, alleged title to as far west as Northport Harbor. That grant of 1659, sandwiched as it was in time between the two Huntington conveyances, lent credibility to Smith's claim since he could assert that the Montauk Sachem was the only one who could convey those lands and, therefore, the deed to Huntington from Asharokan was spurious. He undoubtedly argued that his Indian deed antedated the Nicolls grant by four years. Furthermore, as soon as an English governor settled in New York, Smith hastened to secure a patent from him confirming his lands. The governor obliged and issued him a patent on 3 March 1666, citing his western boundary as "so far as is at this present in the possession of Richard Smith as his proper right and not any ways claimed or in controversy between any other persons" (3). Having thus indicated to Smith that he thought little of his claims, Nicolls recited Huntington's east boundary on 30 November 1666 as being the Nissequogue River.

Smith refused to accept such a solution and persisted in his claims. Legal maneuvering and occasional bitter exchanges of communications dragged on for 10 years. Finally, on 24 September 1675, the Court of Assizes, finding that neither claimant could prove clear title to the territory, hit upon a compromise solution: the two parties would divide the land between themselves, with Huntington retaining all west of Fresh Pond and Smith receiving recognition of his claims as far west as the west side of that pond (4).

Three years before the court decision, Huntington's proprietors took steps to secure the area. Believing that possession was nine-tenths of the law, at a town meeting on 15 February 1671/1672 the proprietors authorized a division of the disputed tract into 10 farms and in April selected by lot the 38 men and 2 widows who had agreed to settle there. The farms, extending westward from Nissequogue River, were laid out so that the first one began at the river. This positioned farm four between today's Sunken Meadow Park and Fresh Pond while farms five and six lie immediately to the west of the pond on the neck (5).

Prior to that time the Fresh Pond area probably was visited by Europeans only rarely, and then only within the previous few years to ascertain its feasibility for agriculture and timber products. Other than that, the only sounds to disrupt the natural quiet would have been the padding of Indian feet as local tribe members found some business there or a turn of mind drew them to the spot. Regardless, it is unlikely that the new owners did much, if anything, to disturb the land. Clearing it then for crops was a slow, tedious, muscle-aching process, to say nothing of having to build first temporary and then permanent shelters. By the time Smith's perserverence gained him legal title three years later to all land east of the pond, little could have been accomplished by the Ten Farm owners.

Richard Smith, eager to take full possession, gave the Huntington settlers until May 1676 to remove themselves. At that time the boundary line was agreed to as being on the "west most part of Joseph Whitman's Hollow and west side of the Leading Hollow to fresh pond Unthemamuck and the west side of this pond at high water mark" (6). Smith received additional confirmation of this line in his patent from Governor Andros in 1677, and although Dongan's 1688 patent to Huntington continued to refer to the older disputed boundary, the Fletcher patent of 1694 to the town corrected it to conform to Smith's line (7). The Andros patent to Smith erected his holding into a town and the residents of the town, of whom the majority happen to have been Smith relatives, later quit-claimed to Huntington all their rights, title, and interest in any lands west of the new line (8). Thereafter, the two towns paid little attention to the settled boundary until the middle of the following century when some descendents of the earlier inhabitants again questioned the ownership of land in the area, particularly around the Winecommack Purchase to the south (9).

In 1768 the two towns again tried to quiet any differences. Six heirs of Richard Smith "to settle all disputes covenant and agree in consideration of 1500" with the Huntington trustees that the bounds between the town should be the high water mark on the west shore of the pond north to the sound and south through agreed upon geographical points to the extent of Smith's grant (10). Finally, in 1885, the state legislature defined the boundary line as agreed upon by the Suffolk County Board of Supervisors the previous year. Marble monuments were set, beginning at Fresh Pond, running generally south to the conjunction of the boundary lines of Huntington, Smithtown, and Islip (11). Consequently, the west shore of Fresh Pond, above highwater mark, lies in Huntington, while the remainder falls within the territory and jurisdiction of Smithtown.

Once the boundary dispute had been settled, the Huntington proprietors felt free to allot the lands that fell to them on the west side of Fresh Pond. Those inhabitants who had been partners in the first four farms of the Ten Farms venture received allotments elsewhere; many of those who had been fortunate enough to hold land on Fresh Pond Neck, however, reverted to common land, especially those acres that lay next to the pond itself and for a number of years thereafter conveyances of land in the immediate vicinity of the pond frequently mentioned commonage rights there (12).

One gets the impression from the records that for many years the upland portions of the low lying hills on either side of the pond provided tolerably good soil for crops, but that the pond area itself offered little. The Indians had named it Unshemamuck, a fishing place for eels, and it is quite possible that nearby farmers added that gastronome's delight to their daily fare. Cattle probably appreciated it more for its water, supplied mainly from a spring-fed stream at its head, and the marsh hay (13). That the pond was almost completely surrounded by marsh cannot be denied, for most of the conveyances pertaining to land around its periphery make use of such descriptions as "the hassokie meadow or swamp at the head of the said pond," "the boggy meadow near the fresh pond," and "six acres of low land at the head of the fresh pond" (14).

Unlike Huntington with its many proprietors and later a board of trustees, Smithtown had only one proprietary owner at its founding. Richard Smith came into possession of all the land within the town's limits by deeds from Lyon Gardiner and various Indians, but that is all. He could not, as could

Huntington, Brookhaven, Southampton, and East Hampton, claim ownership of any harbors or rivers within those limits. The Indian Sachem gave Gardiner only land; Gardiner could convey no more to Smith. When it came time for Governor Nicolls to issue a patent to Smith in 1666, he simply confirmed what he knew the patentee had by right of the former conveyances. Although he could have granted more, he did not. Nevertheless, the governor enumerated in the Smith patent, as dictated by legal formalities, that the grant included "all the lands, woods, meadows, pastures, marshes, waters, lakes, fishings, hunting and fowling, and all other profits, commodities, and emolument of the said parcel of tract of land and premises belonging." In 1677 Governor Andros issued a confirmation of the Smith patent, adding nothing but the word "soils" to the list of inclusions. However, in reiterating that it was to be a town within his government he amplified upon the earlier patent, by stipulating that Smith, his heirs, and assigns conform to any local as well as provincial laws (15).

Of all the conveyances and patents, that from Andros was the only one indicating a northern boundary, by inference, as being "bounded eastward by a certain run of water called Stony Brook, stretching north to the Sound." In other words, Smith did not acquire the harbor, nor could he even include the Nissequogue River in his vast estate. Both fell outside the granted territory and remained the property of the Crown. Nevertheless, the residents of the town exercised control over the uses of the rivers and harbors they presumed to be within their township limits. Rightly or wrongly, this has been the settled situation for almost 300 years, so much so that the judge in Town of Smithtown v. St. James Oyster Company and Arthur E. Halsey in 1913 ruled that the town of Smithtown and not Smith, his heirs, and assigns had been in "exclusive, open and notorious possession" of the harbors continuously for over 100 years and, therefore, had full rights and title in them by presumed grant or prescription (16). Thus, Smith was reduced to the ordinary status, albeit an enviable one, of town resident. As the largest landowner, however, he could dominate the town despite the fact that he must abide by all local ordinances.

Fresh Pond, not being a river or harbor, fell within the patent category of "marshes, waters, lakes," and, therefore, could be sold or given away by Smith. As such it was not vested with a public interest, a jus publicum, as would be the case with large, open waterways. Smith did not wait long to dispose of the land around the pond. On 17 March 1688 he conveyed to Robert Arthur of Smithtown:

> one hundred acres of land on the east side of the fresh pond Unshemamuck, four score pole(s) long by the pond side and sixty pole(s) by the cleft, taking in all the meadows, marshes, and swamps within that compass to the main run of water that runs out of the pond and into the pond, and to take up the residue of woodland within three quarters of a mile of the same in a piece where Robert shall choose, it not entrenching on my daughter's farm (17).

Whatever land remained unsold around the pond, or anywhere in the town for that matter, passed into the hands of Smith's children after his death in 1692. Unlike other towns in the county wherein a number of unrelated individuals held rights or shares in the undivided common lands, such lands in Smithtown belonged to a single family, the members of whom could be termed the proprietors. Rights in the undivided lands, actually labelled "proprietors'

rights" in the local records, were held first by Richard Smith and then by his seven devisees, six sons and a daughter. Jonathan, the eldest son, claimed it all by right of primogeniture, but agreed to share with his brothers and sister. Consequently, all chains of title to lands in the town must, or should, trace back to them (18).

For many years agricultural pursuits dominated the Fresh Pond region, with alterations to the landscape taking the form of clearing and cultivating nearby fields and the construction of an occasional house in the general vicinity. Huntington continued to allot land in the area until 1739 when the trustees voted to divide the land between Northport Harbor and the Smithtown line into 4 acre plots. As late as 1774 the trustees regulated cattle grazing near the beaches and few remaining marsh areas that had not been allotted (19). The Smithtown side followed the same general pattern, but had no public commons because of the nature of the original proprietorship.

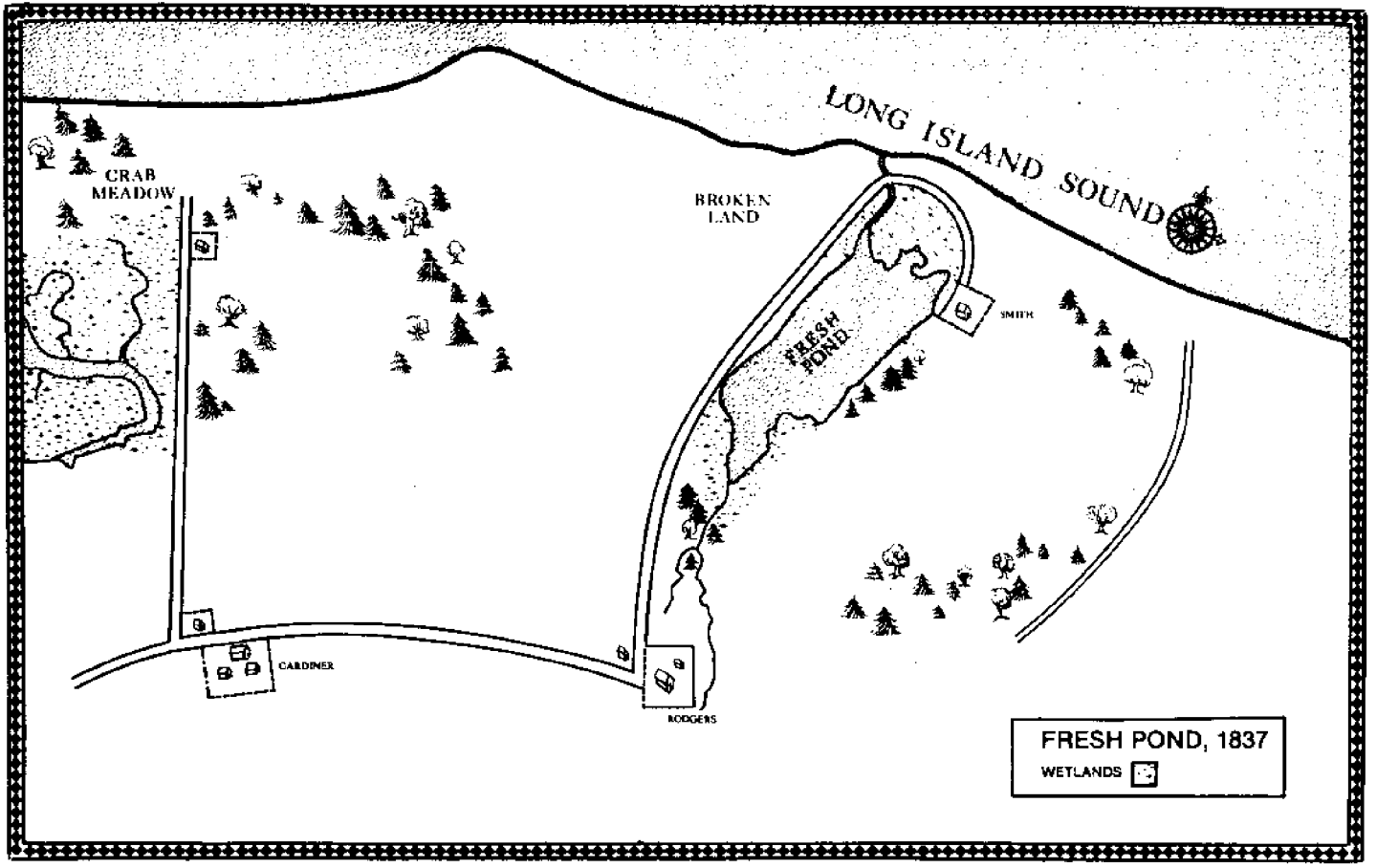
Exactly when brickmaking began as the only other major activity at the pond cannot be determined from the records. Nevertheless, there is evidence that it started before 1713. In that year John Ketcham had 10 acres laid out "southward from the pond where Jonas Wood formerly made bricks," and in 1717 Joseph Wood, Jr., acquired 25 acres, 15 of which lay on the south "of a pond to the eastward of where Josiah Smith made bricks" (20). The brickyards were located at first on the east side of Fresh Pond neck, but later others came into existence on the west side of the neck as well, close to the sound for convenience of shipping by boat (21).

Brickmaking persisted at the pond until just prior to World War I. Despite the presence of extensive marsh areas surrounding much of the pond, clay and sufficient upland were available nearby for such an enterprise. Although Map 9 does not show the locations of the brickyards, it illustrates the topography in a general sense as known in the early nineteenth century. Sometime before this 1837 map was drawn a road was projected north from Bread and Cheese Hollow Road to "Fresh Pond Landing," to be worked by the town of Huntington (22). Thus, by 1871, when the Provost brothers obtained a lease from the Huntington trustees for land for a brickyard, access along the west shore to the sound had existed for many years. The trustees leased all their lands "east of the premises of [the Provosts] and west of the lands of Dr. Cheeseman, together with the lands under water of the sound in front thereof," and stipulated that if a canal or excavation be made in connection with the brick business a bridge over it must be constructed so as not to impair the public easement along the sound shore.

When the Long Island Brick Company at the south end of the pond went out of business is not known, but the Provost yard continued to function until about 1910. Sometime during the last years of the nineteenth century Brown bought the brickyards from Provost and continued to operate them until about 1910 when he went out of the brick business (23). Either he or Provost built stone jetties out into the sound to accommodate the schooners that lay in the mud at low tide for loading and floated off at high tide.

Through the centuries the character of the pond has been altered considerably by both human and natural means. Early records suggest that the pond remained as such, but those of the nineteenth and twentieth centuries indicate that it had a Cheshire cat existence. Deeds executed during the mid-nineteenth century refer specifically to a pond or to swamp and timber

MAP 9


LONG ISLAND SOUND
CRAB MEADOW
BROKEN LAND
FRESH POND
SMITH
GARDINER
RODGERS
FRESH POND, 1837
WETLANDS

around it, yet those of a more recent date indicate a drastic change (24). By 1887, records of the intestate estate of one Samuel E. Rogers speaks of his 31 acres, which straddled the town line, as being "west the main brook," and "what was formerly the main brook leading to the sound" (25). According to Harry D. Sleight, editor of some of the Smithtown public records, the Provost brickyard caused the filling in of the creek which led to the sound and forced it farther eastward. And Sammis, writing in 1937, observed that "weeds and bushes...have flourished till the pond, in its main length had become a swamp" (26). Yet an aerial photograph of the following year shows an easily recognizable pond. Undoubtedly, it was sufficiently deep to photograph as a water body.

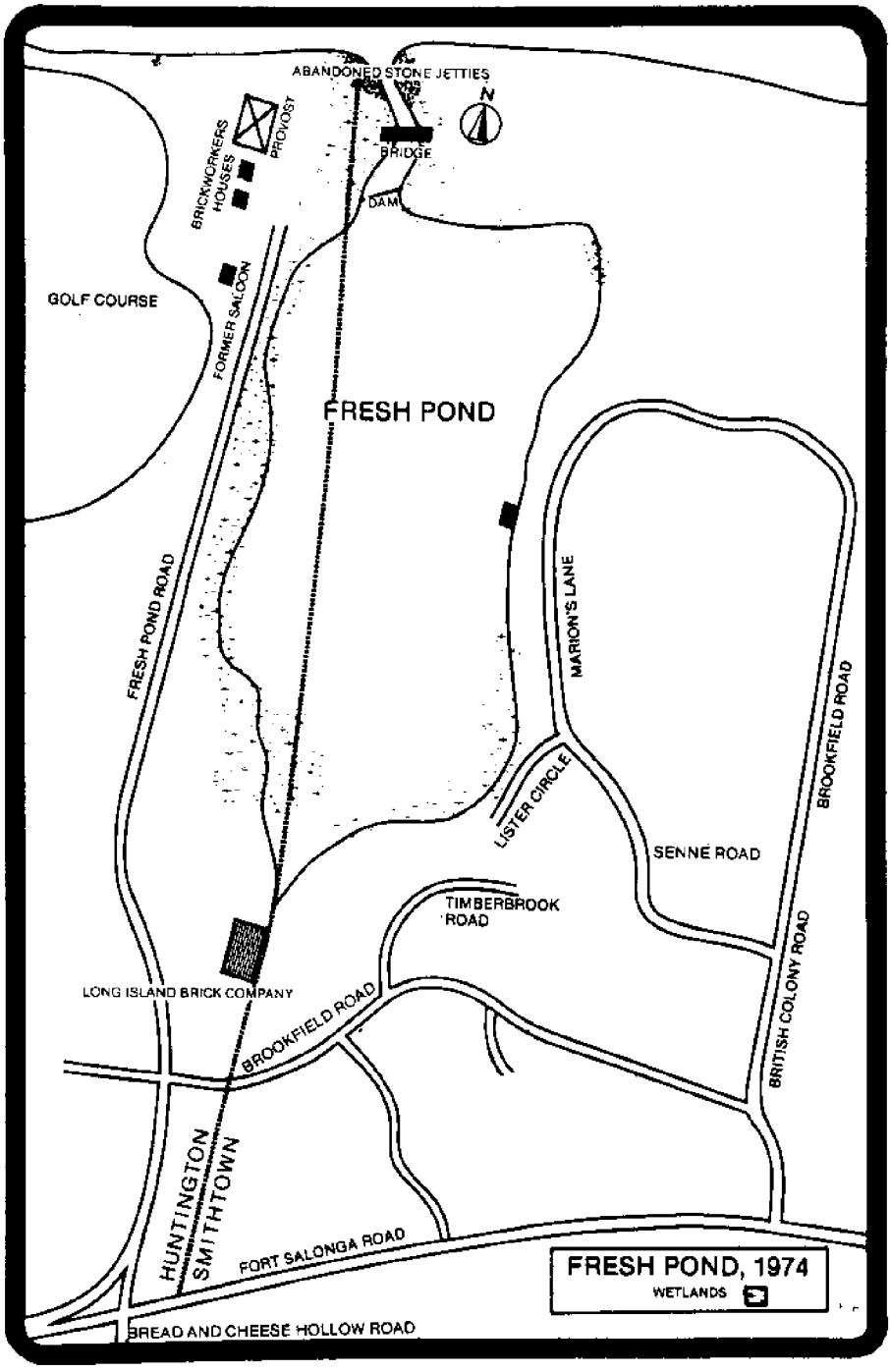
It is likely that the water began to disappear from the pond long before Lawrence Smith, who wrote a history of Smithtown in 1882, pointed out that, "[Fresh Pond] is no longer a pond, it has all grown up to meadow" (27). This might explain why the US Coast and Geodetic maps of 1882 and 1890 do not show it nor does the official map of 1913. Interviews with older local residents support the evidence that the pond mouth gradually filled in with sand. For some inexplicable reason the stream and springs at the south and rainfall runoff were insufficient to supply the pond with enough water so that it became a salt meadow and only heavy rains or high storm tides restored it temporarily. But, in the early 1920s, an unusually severe northeasterly storm blocked the mouth entirely with sand. By the end of the 1940s natural causes had gradually refilled the pond sufficiently for the local mosquito control commission to open the mouth and drain it. Once the tidal flow, complemented by runoff and the southern stream, returned to recreate the shallow pond, a local resident who claimed ownership of most of it, took it upon himself to construct a dam near the mouth to build up a permanent body of water again (28).

Today, the brickyards have long since disappeared. The nearby saloon, which catered to the workers, is dry; the pond wet. About 3 to 5 feet deep, the pond is bordered by what appears to be mainly Phragmitis communis, with less on the east side than on the west. At least 10 Canadian geese and a swan go about their business in its waters, their course disturbed by only one small, rickety jetty midway on the east side; there are no bulkheads. The mouth narrows considerably to a 2 feet wide, 6 inch deep flow of water to the sound. Map 10 is a freehand approximation of today's pond condition with the location of the former brickyards included as indicated by conversations with present-day residents. Private homes (not shown) with well-treed shady yards are on the west side of Fresh Pond Road and on the low hill that rises from the east bank. It is evident that for the past 25 years private management, if tacit concurrence by adjacent property owners in an unwritten agreement not to molest the pond's shores can be called that, has kept the pond in a relatively natural state.

Brookhaven: Long Island Lighting Company Site

Other areas along the north shore of Long Island have not fared as well as Fresh Pond, environmentally speaking. One such is the site of the Long Island Lighting Company's nuclear power plant just to the west of Wading River in Brookhaven. Low lying bluffs, about 100 feet high, rise from the narrow sand beach to slope gently southward. The eastward extension of bluff and beach is interrupted only by a wide salt marsh through which Wading River and its tributary streams meander aimlessly toward the sound. Until recently a few

MAP 10


ABANDONED STONE JETTIES
N
BRICKWORKERS HOUSES
PROVOST
BRIDGE
DAM
GOLF COURSE
FORMER SALOON
FRESH POND
FRESH POND ROAD
MARION'S LANE
BROOKFIELD ROAD
LISTER CIRCLE
SENNE ROAD
TIMBERBROOK ROAD
LONG ISLAND BRICK COMPANY
BROOKFIELD ROAD
BRITISH COLONY ROAD
HUNTINGTON
SMITHTOWN
FORT SALONGA ROAD
BREAD AND CHEESE HOLLOW ROAD
FRESH POND, 1974
WETLANDS

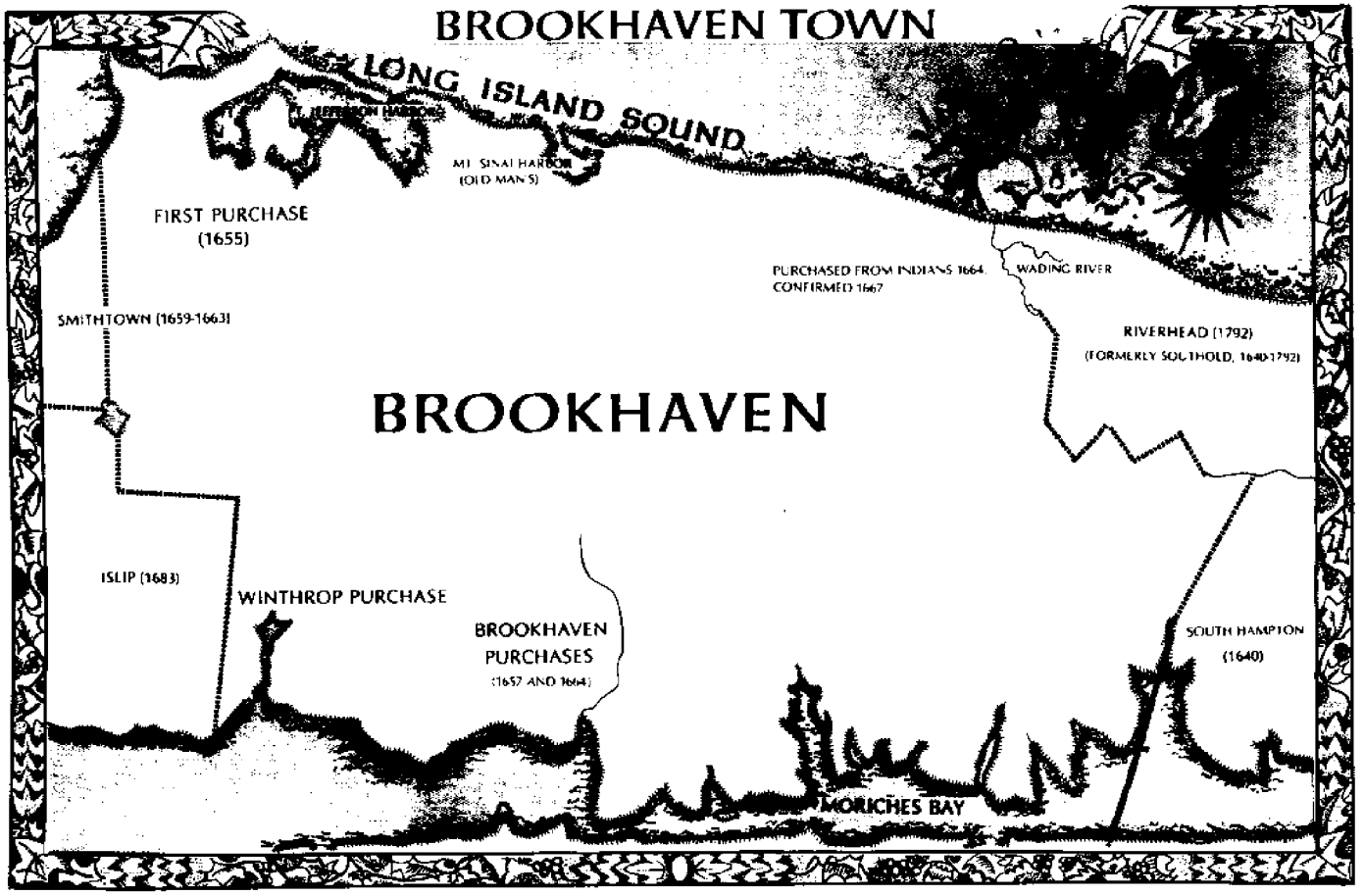
private paths and an occasionally narrow road leading to the beach were all that broke the face of the bluff. Now, immediately west of the river and its sprawling marsh, the electric company has gouged out and leveled a sizable portion of the sandy bluff and built the massive framework necessary for a nuclear power plant.

Wading River has served as the boundary line between the towns of Brookhaven and Riverhead (Southold) since 1655. Two years after the Brookhaven proprietors bought and settled on land at Setauket they turned their attention southward to lands abutting the Great South Bay, but by 1664 they again shifted their interests back to the north shore. In that year they acquired from Mayhew, Sachem of the Setauket Indians, "the feed and timber of all the lands" between Old Man's (Mount Sinai Harbor) on the west and Wading River on the east. The rights granted by the Sachem extended from the sound on the north to the middle of the island (29). Seven years later the proprietors prepared to make active use of the area by ordering that a village be settled at Wading River "or thereabouts" by eight families or eight men to have accommodations as the place will afford" (30). The initial method of land division among the eight assumed the characteristics of a "grab bag" situation. Daniel Lane received an allotment "convenient to the water for his calling" (most likely a miller by trade), and three others could take up their allotments "at or near the Wading River where it is most convenient." It is likely that these men could have no more than their proprietary shares called for, but the actual location of each one's choice seems to have been left to their own devices.

Such a haphazard beginning did not establish a pattern for the future. By 1675 the town proprietors regularized the granting of allotments in the new village (31). Realizing, however, that they had erred somewhat in seeking and receiving what was specifically designated as a "free gift" from Mayhew of all the feed and timber, which carried with it no fee title to the land, the proprietors dispatched Richard Woodhull to negotiate with Gie (Gy), then Setauket Sachem, for a confirmation of their original purchase, included in which would be the land between Old Man's and Wading River. Gie obliged them on 19 November 1675, specifying that his ratification and confirmation of all former purchases was to be amplified to encompass all lands within the area still unpurchased from the Indians and include "all the uplands, meadows, timbers, trees, with all harbors, creeks, ponds, and fishing, fowling, and hunting" (32).

An indication of the degree of finality with which the Indians viewed these land transactions is found in the 3 June 1684 minutes of a town meeting. Prior to that time the Indians persisted in giving away land in the Old Man's--Wading River territory, or renting it to other Indians from adjoining towns in spite of Gie's 1675 conveyance. The town fathers thought this quite improper and dispatched a committee to explain to the Indians the error of their ways. To insure that the trouble would not recur, it was voted at the same meeting that all Indians who planted or proposed to plant crops in that territory must identify themselves to town officials as bone fide local residents. Arrangements were also made to survey and lay out the land so that it could be transferred to private ownership quickly. Regardless of the good intentions of the resolution of 1675, the surveying and allotting of lands did not take place immediately. Twenty years later, not to be hurried into such matters, the trustees of Brookhaven ordered that four men journey to Wading River to discuss the boundary line between their town and Southold, and to

MAP 11


BROOKHAVEN TOWN
LONG ISLAND SOUND
MT. SINAI HARBOR
(OLD MAN'S)
FIRST PURCHASE
(1655)
SMITHTOWN (1659-1663)
PURCHASED FROM INDIANS 1664.
CONFIRMED 1667
WADING RIVER
RIVERHEAD (1792)
(FORMERLY SOUTHOLD, 1640-1792)
BROOKHAVEN
ISLIP (1683)
WINTHROP PURCHASE
BROOKHAVEN
PURCHASES
(1657 AND 1664)
SOUTH HAMPTON
(1640)
MORICHES BAY

"survey and lay out the town's meadows according to the proportions as may appear by the rights of commonage" (33).

The boundary line between the two towns was decided upon as the middle of Wading River, but there still remained the question of fee title to land to the east of it. There being no urgency in the minds of the proprietors of either town to settle the matter, they left it dormant until 1709 when an occasion arose that offered a simple means of solution. In 1707 one John Rogers, "an indigent and decrepit person," had been brought from Southold to Brookhaven, there to remain a burden on the town and a charge to the taxpayers. Southold refused to accept him back; Brookhaven insisted, but had no recourse unless they could come up with a quid pro quo. In 1709 this took the form of Brookhaven offering to cede to Southold all its claims to land east of Wading River if that town would agree to take back Rogers; Southold agreed (34). Such are the ways of land disputes and decrepit men.

Long before the boundary settlement and land conveyance to Southold, individuals had taken over, by allotment, much of the land on the west side of the river. In 1701 Brookhaven town trustees awarded Isaac Dayton his share of land, which comprised "all the meadow or creek thatch lying to the westward of the said great river and little creek bounded westward by the common land of Brookhaven," and John Roe received a 30-acre plot near the head of the river (35). Five years later the trustees discovered that Roe had fenced off some of the common meadow in addition to his allotment, but rather than take any legal action they decided to grant him a lease for the fenced area for seven years. Shortly thereafter, in spring 1708, Roe and others from the little village at Wading River petitioned to have the liberty to build a grist mill "at the Red Brook." The trustees granted the request with the proviso that it be done within two years and that the villagers maintain the mill continually thereafter (36).

Wading River village and its environs never became a large town, but it did manage to survive in rustic simplicity for well over two centuries. After successive laying out and divisions of the common land in the area west of the river, which finally seems to have come to an end in 1728, generations of villagers followed the practices of their forefathers, farming and grazing (37). Authorized bumpy routes to the outside world came slowly. Not until 1728 was the first highway of 4 poles wide laid out to Wading River and then another 10 years later, as an extension of the first, to pass the mill there and turn south (38). But, in 1746 and again in 1748, the commissioners of highways, upon viewing local traffic and use, determined that a road running from the 1728 road (probably today's North Country Road) north to the beach along the west side of the river was "unnecessary to be and remain an open road" (39). They then decreed that Benjamin Tuthill, through whose land the road went, could maintain swing gates at both ends but could not obstruct passage by the public.

From the records it appears that the local residents on either side of the river did not encroach upon it or the marshes to any noticeable extent. The possible exception would be the mill rights originally granted to John Roe, Jr., and his neighbors in 1708. That grist mill undoubtedly was operated and its structure repaired or rebuilt periodically by successive millers over many years of use. Jonathan Worth, miller, was granted the right in 1783 to connect his mill dam at Wading River to a road running to Pine Neck and in 1810 inspectors viewed the mill on the basis of a report that Worth had gone beyond

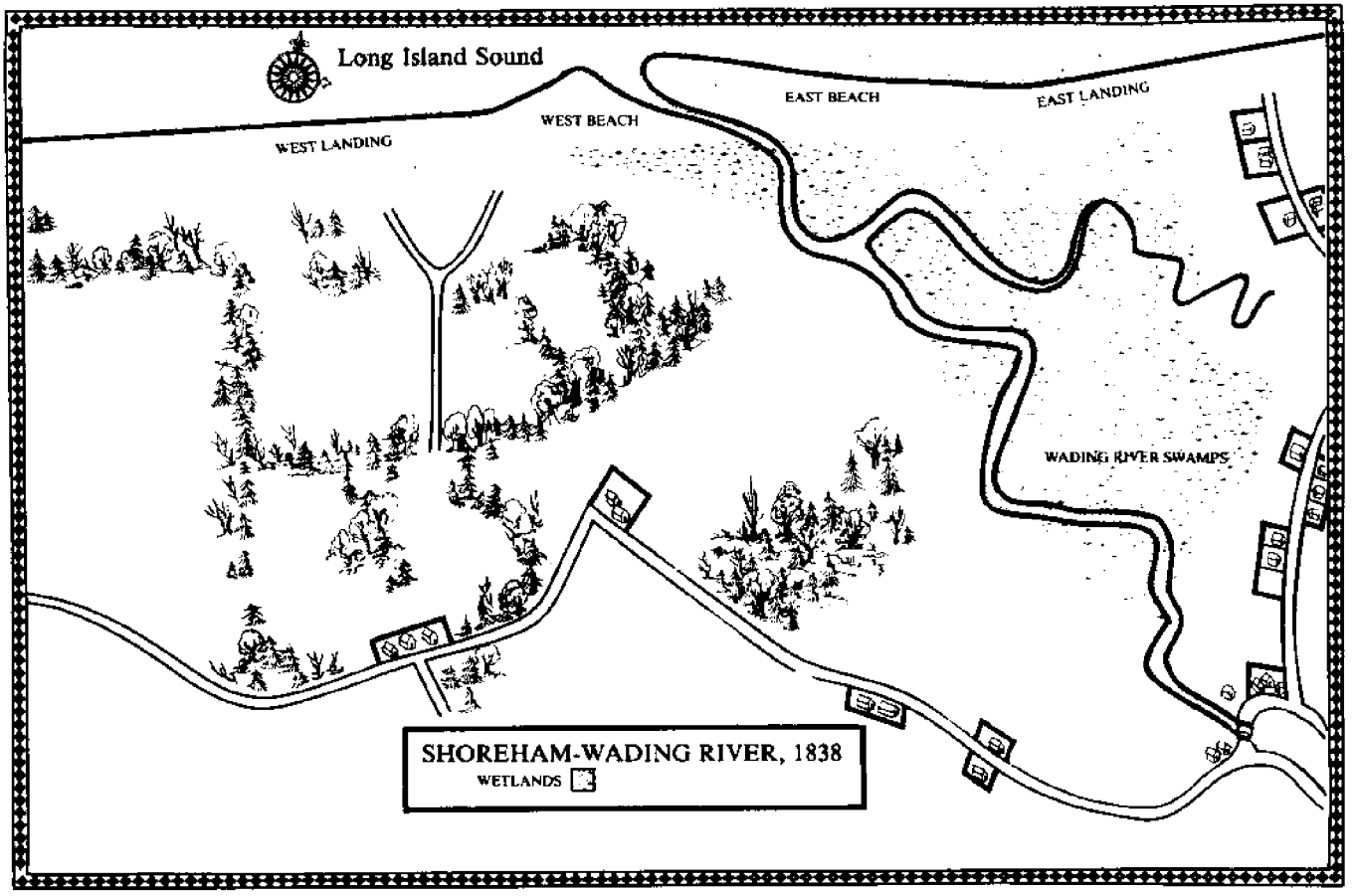
the granted limits of 1708. He had not (40). Many years later a well-known historian of Long Island, Richard M. Bayles, wrote that in 1874 the village population stood at 250, that a small creek still powered a grist mill, and that the creek was sufficiently navigable so that small boats could haul "considerable quantities of cordwood" to the shore landing for shipment to New York. In passing he also observed that the people were engaged mainly in farming and "apparently belong to the well-to-do class" (41). Whether or not the mill itself continued in operation for many years thereafter is not known, but in 1878 the trustees of Brookhaven deeded to George Hawkins the fee title to the original rights and property of 1708 as well as all the town's right, title, and interest in the land covered by Red Brook, the mill pond, and all adjoining land that had been taken for the mill's use (42).

No industry to speak of developed in the village or the surrounding countryside. Deeds and wills written during the eighteenth and nineteenth centuries, particularly those having to do with the present Long Island Lighting Company property, refer to meadows, woodland, salt meadow, and an occasional orchard or house and out buildings (43). The US Coast and Geodetic Survey map of 1838, although admittedly only an approximation of population density and topographical features along the coast, bears out the picture painted by these local instruments of conveyance. In fact, maps and an aerial photograph produced during the early years of the twentieth century suggest that, even with the onslaught of the century's technology and population explosion, little took place in this rural backwater that would disrupt the tempo of existence or materially alter natural, physical features. Along North Country Road, west of Wading River, land ownership patterns stabilized generations ago with holdings ranging from 113 to 350 acres, as illustrated in Map 13 for 1909 (44). That seems to be the one pattern the electric power company did not break.

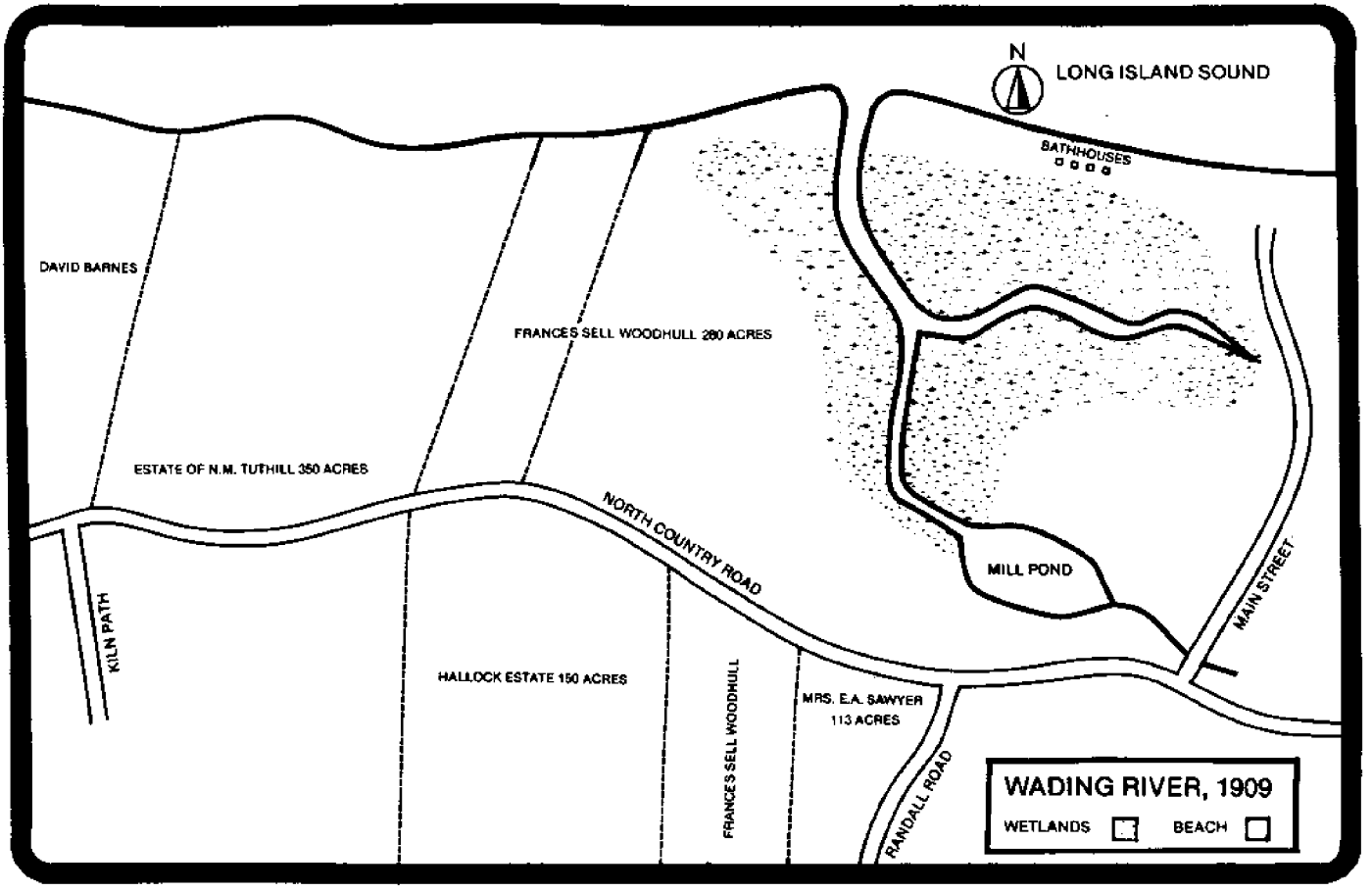
To say that the advent of the Long Island Lighting Company on the bluff and marsh to the west of Wading River a few years ago adversely affected the natural landscape and caused some degree of nuclear-oriented consternation among the local inhabitants would be somewhat of an understatement. A comparision of Map 13 for 1909 and Map 14 for 1974 with Map 15 for 1938 and 1972 shows that the power plant, built on what had traditionally been a large plot of woodland, meadow, and marsh under single ownership, is precariously juxtapositioned next to what still remains of a natural beach-salt water marsh complex with its associated river which has had the habit over the centuries of meandering where and when it pleased. In this particular instance, environmental preservation has been forced to give way before nuclear power progress.

And to say that a land management policy, consistent or otherwise, existed at any time after settlers first moved into the area in the seventeenth century would be an outlandish overstatement. If such policies can be described as an agreed upon, preconceived notion as to how the land will be allotted and used, then, yes, a land management policy did exist--briefly. The early settlers on both sides of the river presumed, as dictated by their lifestyle as pioneer tillers of the soil, that each grantee of a share would use the woodland for cordwood and building supplies, the arable land for crops, the waste for grazing, and the salt marsh for thatch grass (45). That was the extent of land management. Even that rather inchoate policy vanished once the land passed from the undivided common land bank into private hands. Thereafter, any restrictions on land use depended almost solely upon the

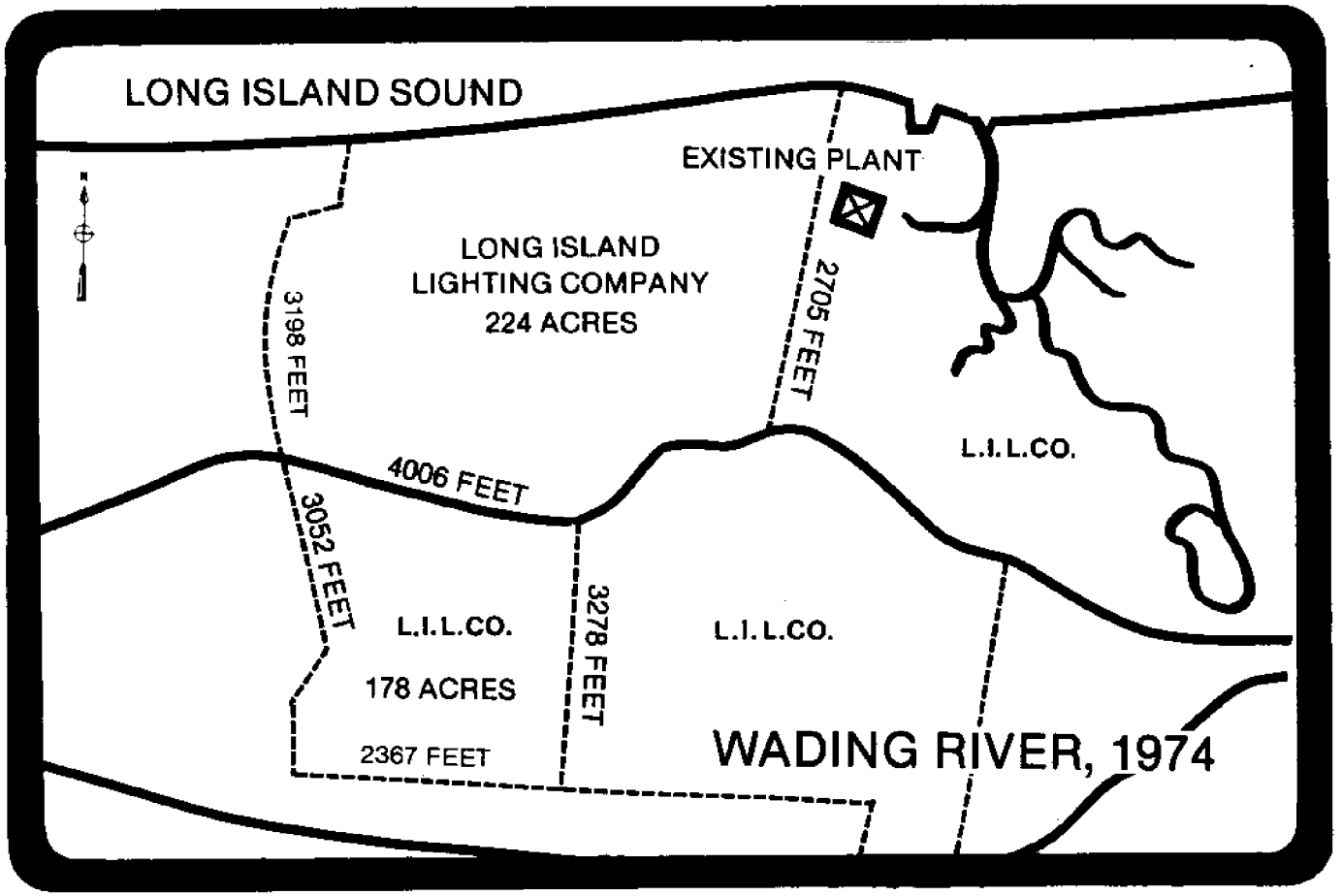
MAP 12


Long Island Sound
WEST LANDING
WEST BEACH
EAST BEACH
EAST LANDING
WADING RIVER SWAMPS
SHOREHAM-WADING RIVER, 1838
WETLANDS

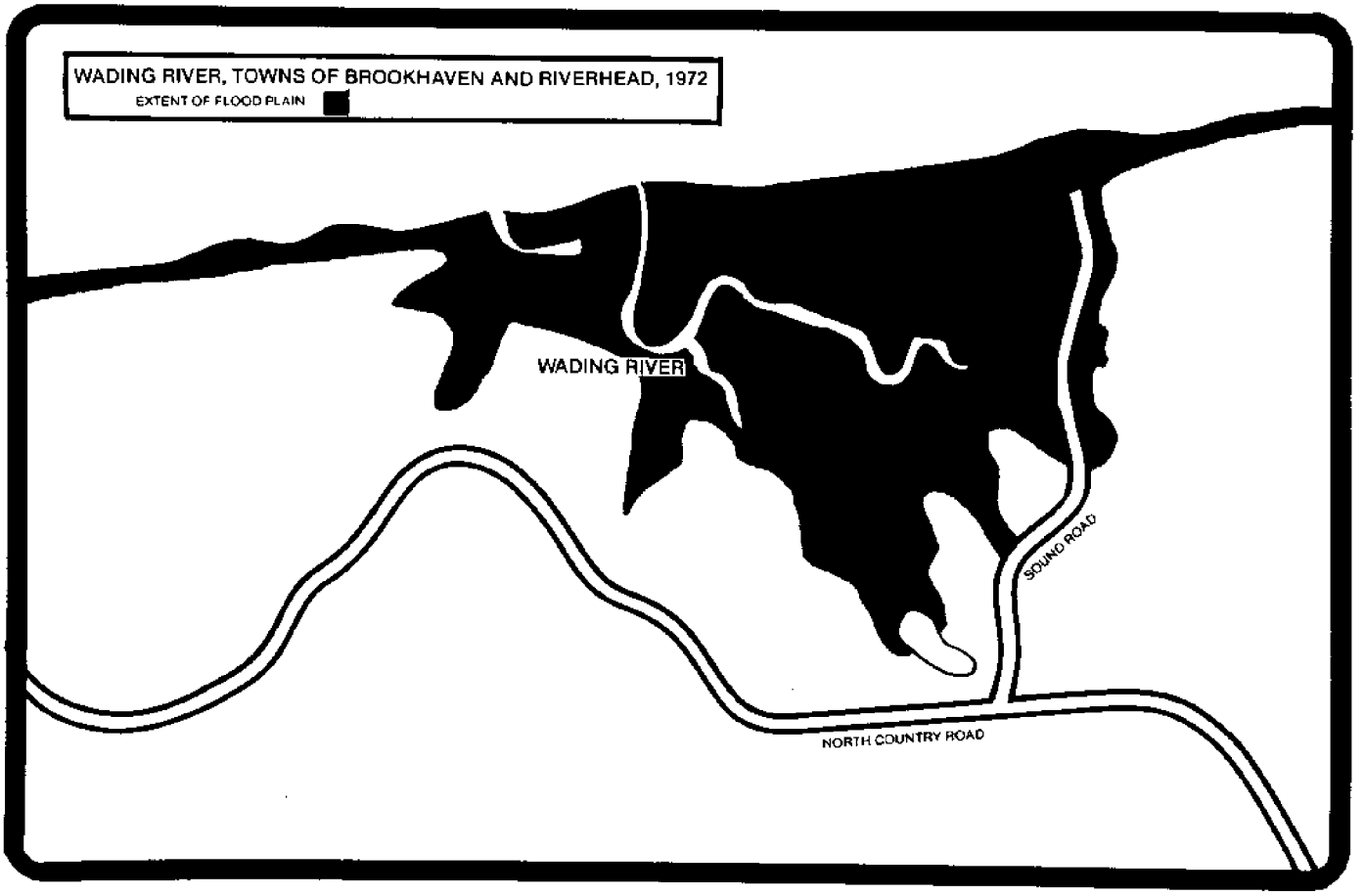
MAP 13


N
LONG ISLAND SOUND
BATHHOUSES
DAVID BARNES
FRANCES SELL WOODHULL 280 ACRES
ESTATE OF N.M. TUTHILL 350 ACRES
NORTH COUNTRY ROAD
MILL POND
MAIN STREET
KILN PATH
HALLOCK ESTATE 150 ACRES
FRANCES SELL WOODHULL
MRS. E.A. SAWYER
113 ACRES
RANDALL ROAD
WADING RIVER, 1909
WETLANDS
BEACH

MAP 14


LONG ISLAND SOUND
EXISTING PLANT
LONG ISLAND
LIGHTING COMPANY
224 ACRES
3198 FEET
2705 FEET
4006 FEET
3052 FEET
3278 FEET
L.I.L.CO.
L.I.L.CO.
178 ACRES
L.I.L.CO.
2367 FEET
WADING RIVER, 1974

MAP 15


WADING RIVER, TOWNS OF BROOKHAVEN AND RIVERHEAD, 1972
EXTENT OF FLOOD PLAIN
WADING RIVER
SOUND ROAD
NORTH COUNTRY ROAD

predilections of individual landowners to follow the bucolic call of Ceres. Because the areas lacked any harbor to speak of and the level of technology precluded alternate possibilities of exploitation, ambitious persons either did just that or had the choice of leading frustrated lives or leaving.

The only instance when the pursuit of a plan for land use might be read into the records is the irregular and intermittent opening and closing of roads, the insistence by Brookhaven's trustees that John Roe, Jr., lease the common land he fenced in 1706 and that the successor to Roe's mill over 100 years later confine himself to the granted property. To that meager list can be added the controversy precipitated by the announcement of the Long Island Lighting Company that it proposed to construct a nuclear power plant west of the river on the old Woodhull-Tuthill properties (46). These, however, cannot be construed as land use management *per se*, but rather must be looked upon as *ad hoc* decisions based on expediency.

Southold: West Creek

To the east of Wading River lie Riverhead and Southold. Now two towns, they were once a single plantation called Southold, an offshoot of the unchartered, self-governing colony of New Haven that Connecticut absorbed by royal charter in 1662. Founded in 1639/1640 by migrants from Massachusetts by way of New Haven, Southold's origins did not differ markedly from the other towns in Suffolk County settled by New Englanders, nor did allotments and use of land, including today's Indian Island County Park in Riverhead and West Creek in Southold, which deviated little from the now familiar pattern. However, unlike some of its sister towns, Southold became a divided community early in the eighteenth century over the question of who actually owned and, thus, could control the undivided common lands: the descendants of the proprietors exclusively or the town freeholders and inhabitants as a whole. The resolution of the dilemma took the better part of the century and relied ultimately on state legislative action to ratify a pragmatic and occasionally contested decision in the community in 1707 that had placed the ownership of all of the undivided lands in the hands of a small group of "commoners" who could trace their lineage and/or commonage rights to the original proprietors. That decision and later legislative acts had far-reaching implications for local land use management, including wetlands, both then and now.

When the Southold colonists first arrived on the North Fork and built their humble cottages, they did so on land they did not own. The colony of New Haven purchased the territory from James Farrett, agent of the Earl of Stirling, in 1639 and dispatched some of its own inhabitants, led by John Youngs (Yonges), there early in 1640. Not until 1649 did the settlers accumulate sufficient wherewithal to buy out the parent colony. Whether or not the first settlers drafted a plan of land distribution prior to departing from New Haven cannot be ascertained from the records (the earliest written records of the new puritan enclave were lost years ago), nevertheless, from later official records it is certain that they followed the established New England procedure of allotting land for a home lot and crops to each individual based on his proportionate contribution to the cost of the venture.

Slowly, the infant settlement extended its limits by purchase from the Indians so that when the time came in 1665 to prove their claims to the new proprietary government of the Duke of York they could produce a confirmation

deed describing their bounds, dated December 7 of that year and signed by 43 Indians (Map 16) (47).

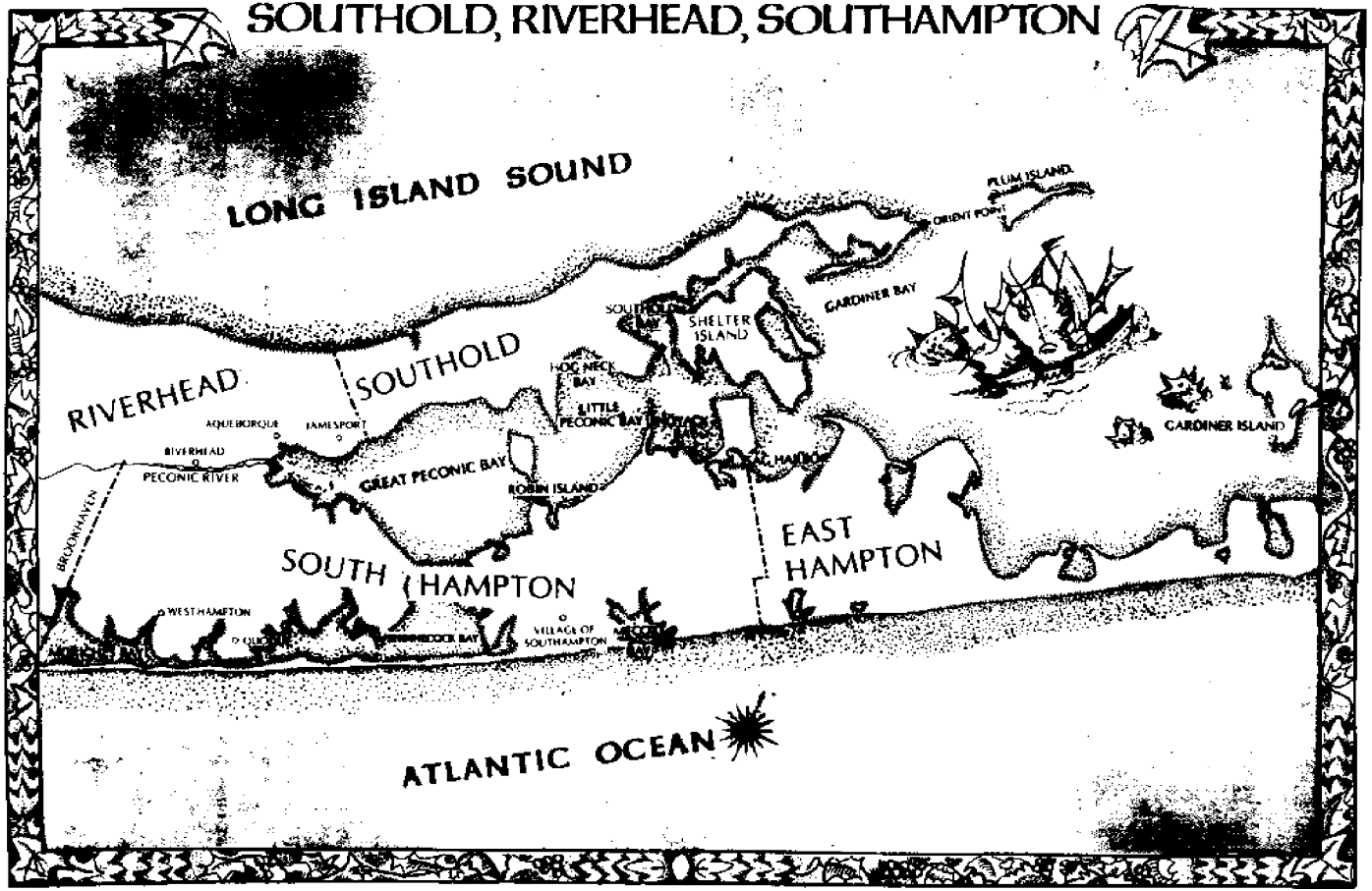
The original home lots the proprietors granted to themselves consisted of about 4 acres. With them went commonage rights that varied from 1 to 7 acres depending on location (for example, in the Cutchoque Indian field it comprised 20 acres; in the North Sea lots along the sound shore, 7 acres; and in good meadow land 1.5 to 2 acres). As new settlers arrived they, too, received home lots and farm land allotments, as did those sons who attained maturity, but commonage rights soon came to be disposed of separately by the proprietors by sale or grant to only a few. As in most strict puritan communities, Southold's proprietors kept close control over who could or could not live among them by withholding land and denying entry. This they formalized in an ordinance of 1654 that stated no one could sell or "set" any property to anyone not a legal townsmen without the approval of the freemen in public meeting, "as also that the town have the tender of the sale of house or land and a full month space provided to return an answer" (48).

When the unwanted authority of the Duke of York was imposed on Long Island in 1665, the freeholders of Southold successfully resisted Governor Nicolls' demands, as they later did under Governor Dongan, to submit their Indian deeds for ratification and confirmation. Nevertheless, despite their persistence in holding to the view that the town came within the jurisdiction of Connecticut, the freeholders eventually found Governor Edmund Andros too powerful for them. In 1676 they succumbed to his pressure and, probably ungraciously and with some hostility, sent delegates to New York to obtain a charter. They received one on October 28 of that year, granting to seven Southold proprietors "for and on the behalf of themselves and their associates...their heirs, successors, and assigns," all the land described and bounded in the Indian deed of 1665, "together with all rivers, lakes, waters, quarries, timber, woods, woodland, plains, meadows, broken pieces of meadows, pastures, marshes, fishing, hawking, hunting, and fowling, and all other profits, commodities, emoluments, and hereditaments" belonging to all the land within the town limits, to the use and behoof of the patentees and their associates. The charter stipulated that title to the land thus conveyed, to be held as of the manor of East Greenwich in Kent, should in no way prejudice or infringe upon the property of anyone who already had rights by patent or other lawful claim to any parcel in the town, and declared that the lands "shall have relation to the town in general for the well-government thereof." Any land as yet unpurchased from the Indians could be bought "according to law" (49).

Soon after the seven named patentees returned to Southold, patent in hand, a question arose as to just who, other than the seven, could enjoy the patent rights. To quiet the fears of their fellow townsmen, the seven issued a declaration that they had received the land grant "in the behalf of ourselves and of all the freeholders, inhabitants of their town, who are therein [in the Andros patent] called associates." They admitted and declared that "all which freeholders" were their only associates in the patent and no others, thereby conferring on them full power to hold, possess, and enjoy themselves, their heirs and assigns, all the common rights, particular shares, and allotments contained in the patent and now in their possession, "as fully, amply, and freely as if they and every of them had been therein named" (50).

That settled the matter, at least for the time being. Heretofore the town's freeholders, or associates, exclusive of all propertyless inhabitants,

MAP 16


SOUTHOLD, RIVERHEAD, SOUTHAMPTON
LONG ISLAND SOUND
PLUM ISLAND
ORIENT POINT
GARDINER BAY
SHELTER ISLAND
SOUTHOLD BAY
HOG NECK BAY
LITTLE PECONIC BAY
GREAT PECONIC BAY
ROBIN ISLAND
RIVERHEAD
SOUTHOLD
AQUEBOGUE
JAMESPORT
RIVERHEAD
PECONIC RIVER
BROOKHAVEN
GARDINER ISLAND
SOUTH HAMPTON
EAST HAMPTON
WEST HAMPTON
VILLAGE OF SOUTHAMPTON
ATLANTIC OCEAN

convened frequently in town meetings to order the affairs of the town and distribute land. In 1665 they covered themselves in the event a clerk lost or neglected to record a land grant by legislating that four years peaceable possession would be considered good title. As a group, the freeholders granted lands, approved construction of wharves, gave their consent to exchanges of land between individuals and between individuals and the town, and saw to it that land abutting watering places and some marshes was left open for all to use (51). After the charter year and accompanying declaration, they did nothing to alter these practices and procedures, continuing to grant lands, sometimes with commonage rights and sometimes not, reserve easements across allotted property if deemed to be in the public interest, and bestow land and mill operation privileges upon those who wished to serve the town in that capacity. In the latter instance, they did not deviate from the custom of the other Long Island towns of reserving the right to set the tolls charged and to repossess the property if the mill were not maintained in good working order (52).

After a number of years of the proprietors dividing their lands among themselves or granting home lots, acreage, and commonage rights to newcomers, an odd situation developed with respect to the remaining undivided lands. Traditionally, all landowners, the freeholders or associates of the charter, met frequently in town meetings to pass upon ordinances dealing with the laying out of roads, height of fences, pounds for stray livestock, cutting of creek thatch, and similar weighty matters. At such meetings they also voted on land division allotments to shareholders, and grants of land and commonage rights to newcomers. Sometime after 1661 the freeholders, who still held shares in the undivided land, stopped the practice of bestowing commonage rights on those they approved of to take up residence in the community. Thereafter, new settlers could acquire home lots and farmland, but received only limited rights of use or no rights at all in the commons. If they could not purchase a share of the commonage outright, then they could only use such lands to the extent permitted by the rules laid down by the associates. Furthermore, many of the associates, or commoners as they came to be called, were in a sense bought out by the remainder through the process of being given a sufficiently large allotment in a specific division to preclude their participation in later divisions (53). As a result, the number of commoners who still controlled the undivided lands, including many creeks and wetlands, dwindled over the years.

Because land divisions, the annual rental of creek thatch, and the varied uses of the commons were voted upon at town meetings during the seventeenth century, those who came into possession of land by way of grants from the commoners began to insist that they too should have, in fact did have, a voice equal to the commoners in such decisions. They relied upon the wording of the Indian deed of 1665 that granted the land "for and on the behalf of the inhabitants according to their and every of their several and particular dividends." Believing that once they had bought land they had, by inference, also paid their share of the purchase price, which would then entitle them to a dividend, they contended that the Andros patent of 1676 confirmed to them the land and a voice in its disposition. Of course, they were referring to that section of the patent that granted the territory to the patentees and "their associates, the freeholders and inhabitants of the said town, their heirs, successors, and assigns...to the proper use and behoof of the said patentees, their associates, their heirs, successors, and assigns forever,"

and the sentence that declared that the land and premises "shall have relation to the town in general for the well-government thereof."

To refute these contentions, the commoners very probably argued that the phrase in the Indian deed "inhabitants and township" simply referred to all of the landowners who had paid the original price to the Indians and that there were no others in the town at that time. By the same token, the words, "freeholders and inhabitants" in the Andros patent did not mean two distinct categories of individuals, "freeholders" and "inhabitants," but rather related to a single group of freeholders who were also inhabitants; that is to say, "and" was not to be interpreted as joining two discrete groups but to connect, almost repetitiously, two words, each descriptive of the other with the latter being simply an additional qualifier that the freeholders were and had to be inhabitants. They also must have averred that "heirs" and "assigns" restricted any land rights to their descendants and to those to whom they specifically assigned commonage rights equal with their own. "Successors" would then be irrelevant because the commoners were still very much alive and thus a process of succession could not have taken place. Ergo, the commoners must have triumphantly proclaimed the right to manage and dispose of the undivided common lands devolved upon them alone and they were to do with it as they thought best. To preserve and protect their interests, the commoners, as a group, met in separate session beginning in 1707 (54). By 1726 the commoners had firmly established in the minds of Southold inhabitants, by the simple pragmatic method of meeting as a distinct group and selling portions of the undivided common lands, that they had every right to continue doing so (55).

This did not quiet the affair. As various small parcels were discovered for which no owner could be found, or for which there was a cloud on the title, the commoners and freeholders rose to the occasion and the matter usually had to be determined by court action. None of these disputes settled matters to anyone's satisfaction. Finally, in 1796, the commoners petitioned the state legislature for recognition as a distinct and unique group of landowners in Southold vis-a-vis the undivided lands. The legislature obligingly passed an act on April 8 authorizing the commoners to hold separate meetings as the proprietors of the undivided lands and meadows in the town, empowering them to elect three trustees to manage their land, with voting to be based on the number of rights each commoner held (56).

The patentees and their associates having obtained a charter by ducal fiat, and their legal heirs, successors, and assigns, the commoners, protection by legislative fiat, at the end of the nineteenth century the remaining town freeholders decided that they too must have such legal recognition to concentrate control of their common lands in an elected committee. Ever since the original proprietors began allotting lands, some had fallen into private hands, some remained as undivided commons, and a number of small parcels came into the possession of the town for the use of all the freeholders. Each of these categories contained upland, ponds, creeks, and wetlands. A clear distinction had been made between private and commoner land in 1796 respecting ownership and management; the town lands continued to be managed and disposed of at annual town meetings. Apparently, toward the end of the nineteenth century the total acreage of town lands had diminished to such an extent and the interest in annually renting the right to cut thatch grass had so waned among the local farmers that it became bothersome to place these trivial matters on the agenda of town meetings. Accordingly, town officials requested the state legislature to create a board of trustees to take over the use and

disposal of the common lands of the town for the benefit of the residents and taxpayers.

In 1893 the legislature passed such a law. Each year at an annual town meeting the town electors were to elect five freeholders who would constitute a board of trustees which, by the law, could "manage, lease, convey, or otherwise dispose of all and any part of all such common lands, waters, and lands under water, or rights or other interests therein; subject as to land under water to the public right of navigation and to the riparian rights of adjoining uplandowners" (57). By this act Southold belatedly acquired what the other towns in the county had had for generations: trustees invested with a public trust obligation to manage certain lands and lands under water for the benefit of the cestui que trust, the taxpayers and residents (that is, freeholders and inhabitants) of the town. But, unlike the other towns, this was not an autonomous body, because the law expressly made the trustees subject to the rules and regulations already passed or thereafter to be adopted by the electors of the town. Furthermore, rather than maintain in a separate account money collected from leases and sales, the trustees must turn it over to the town supervisor each year for him to disburse in the interests of the town as the electors direct at their annual meetings. As a consequence of this law, the power to manage and dispose of the town's waters, waterways, and wetlands now emanated from three different sources: the commoners, the private owners, and the johnny-come-lately town board of trustees, each with its own notions about what to do with such areas under its control.

How, then, did each of them function as managers of land? Long before either group of trustees came into existence, the town freeholders, including what would later become the commoners, exercised jurisdiction over ponds, creeks, and wetlands by insuring that everyone had access to the former and that any individual who had need of thatch grass could competitively bid for cutting rights at an annual public auction (vendue sale) (58). After 1707, they continued this tradition, but excluded from their purview those lands and wetlands owned by individuals or to which the commoners could prove title, particularly after 1796. In 1819 the freeholders, or electors as they were now being called, voted that the privilege of fishing, hunting, and fowling was to be free within the town and instructed the commissioners of highways to lay out roads to and from "any and every place where the free privileges of the town are forbidden or obstructed" (59). In so many words, they thus notified private owners who claimed exclusive control that the waters of the town had been and would continue to be vested with public rights paramount to their private rights.

More than once the town had to defend this position against those who attempted to gain private control over local waters and the lands under them. When Samuel B. Nicoll of Shelter Island petitioned the state legislature in 1835 for a grant of land under water in an area many believed to be traditionally their public land, the Southold electors resolved that water privileges were of paramount importance to them and that it was "an important duty of every voter to watch, to detect, and expose every and any attempt by persons, towns, county, or legislative proceedings" that might deprive them of the use thereof (60). Fearful that Nicoll's application, if approved, would establish a precedent detrimental to the interests of the town, they filed a remonstrance with the state legislature that stated that for years town inhabitants had procured fish and seaweed from the sound and bays that allowed them to produce for home consumption and export "many thousands of bushels of

wheat yearly." If cut off from these resources and forced to pay for them or for manure, their livelihood would be endangered and wheat production made unprofitable. Pointing out that water privileges had traditionally been enjoyed by all inhabitants, they reminded the state legislature that "whenever any small number of individuals has attempted to appropriate any portion of these privileges to their exclusive benefit, this town from its first settlement declared them...free for the use of each and all the inhabitants." They then directed the commissioners of highways once again to lay out roads to beaches and oft-used waters, offering "ample indemnity" to those whose lands they crossed for "damage done above common high water mark" (61).

One would assume that after the creation of town trustees in 1893, the voters would turn over direct control of wetlands and lands under water to the body. In general, it seems that that is what happened. However, if one also assumed that the trustees would be passive and await direction from the town board and voters on rules and regulations to follow, that would not be altogether correct. Apparently, the town board felt that the trustees should have the responsibility for drawing up such regulations as they deemed necessary to govern the trust res. Today, in Southold it seems to be an accepted truism that the board of trustees has sole jurisdiction over lands under water, although they admit to having no control over private lands under water or the bays. Because there is scarcely any upland left to which they can show clear title, the trustees confine their attention to town creeks and the harbors. It is assumed that zoning will adequately restrict private owners' use of whatever submerged lands they might claim as theirs. According to the current president of the board of trustees, the board passes ordinances it deems necessary for the proper management of the trust property and then asks the town board to do likewise, thus making it a part of local law (62).

Since 1915 mutual action by both boards has produced a number of ordinances designed to regulate the times, places, and methods of harvesting eels, shrimp, scallops, and shellfish in local waters (63). Looking to other water related activities, they enacted an ordinance in 1935 prohibiting anyone from monopolizing any public docks, bulkheads, or landing places. Many years later, in 1966, they added another ordinance requiring a permit from the trustees before placing "piles, stakes, buoys, piers, docks, bulkheads or other objects in or on any Town waters or public lands under or adjacent to Town Waters," restricted mooring from the end of any town highway, and prohibited dredging for sand and gravel without permission from the trustees (64).

In 1971 the town board followed in the footsteps of other towns in the county and across the nation by adopting a wetlands ordinance to "protect the quality of wetlands, tidal waters, marshes, shore lines, beaches and natural drainage systems for their conservation, economic, aesthetic, recreational and other public uses and values" (65). The ordinance is designed to regulate new construction, such as docks, bulkheads, and similar structures on private lands, but contains a long list of exceptions to it, such as the "ordinary and usual" activities associated with mosquito control, shellfishing, soil conservation, agriculture and aquaculture, the maintenance or repair of existing buildings, docks, piers, bulkheads, jetties, groins, and similar structures, and expressly exempts all areas under the jurisdiction of the town trustees (66).

As for the commoners, they are now no more than a historical oddity, an anachronism that has survived for over 300 years. At one time masters of all

they surveyed, they now command 20 acres of salt meadow on Indian Neck. Their numbers have shrunken to under 26 who control the 108 shares still extant. Over the years their predecessors leased and then sold the undivided lands evidently without giving much thought to use restrictions, beyond what one would expect as it conformed to the customs of their day, or preservation. Fortunately for their remaining small domain, today's commoners are more foresighted. About 5 years ago they made arrangements to lease their 20 acres to the town for 10 years, with an automatic renewal clause if both parties continue to agree, in return for which the town would remove the property from the tax rolls. The lease stipulates that the marsh is to be left in its natural state (67).

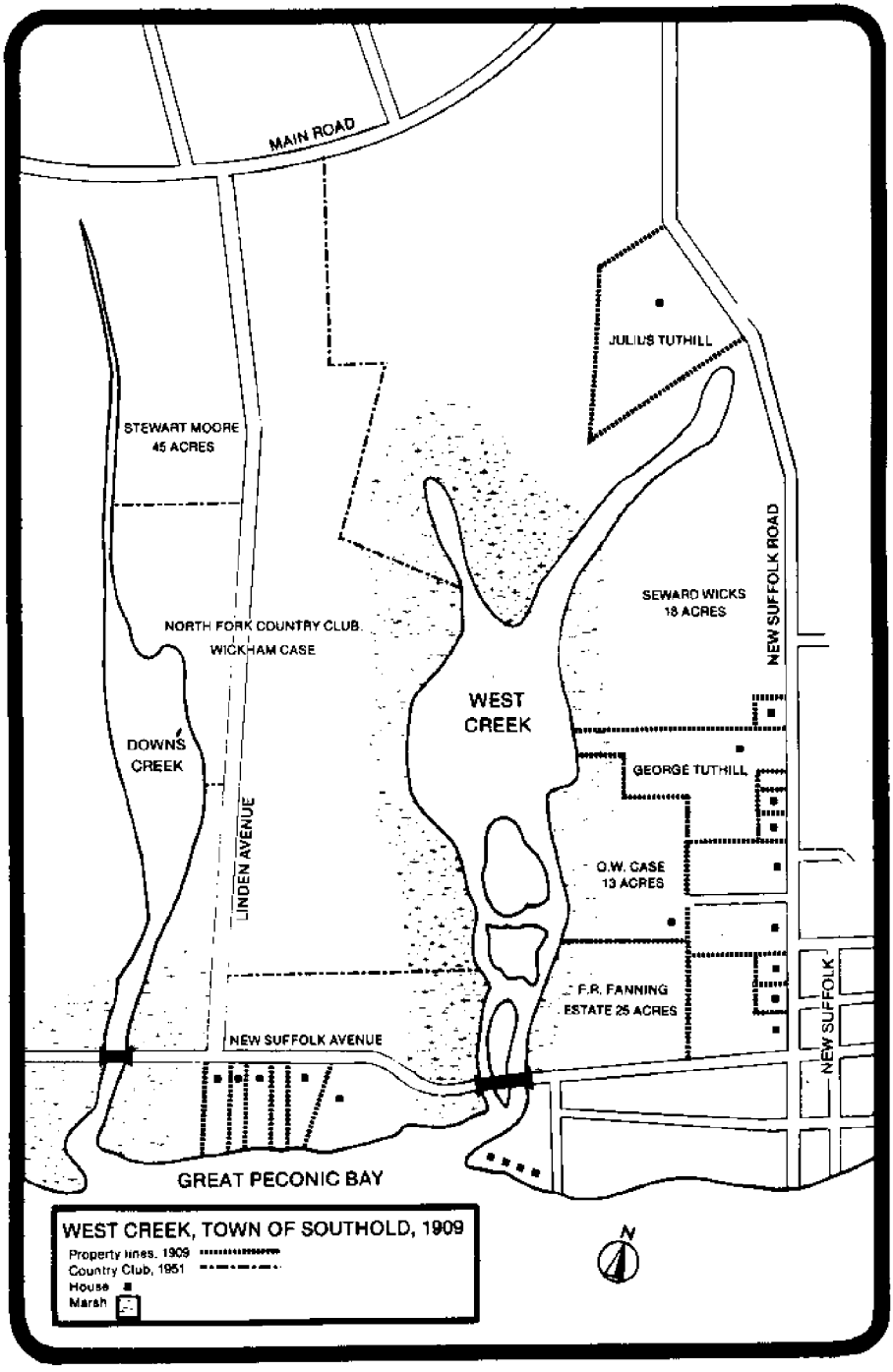
This leaves the private sector to be considered, the wetlands and lands under water that came into the possession of individuals. Some have gone the way of the bulldozer, the bulkhead, and filled foreshores for private facilities or commercial activities; others have survived or reverted essentially to their natural state. West Creek, for example, is one wetlands area that has been able to withstand extensive human encroachment. The first mention of Robins Island Neck, today's village of New Suffolk, where West Creek is located, appears in the official records for 1662. In that year William Wells is credited with owning 60 acres at the north end of the neck with Mr. Booth adjoining him to the south. In the middle of the following decade another property owner, Jeremiah Vail, is added (68). By the end of the century the land surrounding the creek, as well as the entire neck and Corchaug Neck to the north and east, had passed out of the common and undivided lands into private hands, with the names of Booth, Wickham, and Goldsmith dominating the list of owners (69).

Only once did the ownership of any of the West Creek area become a point of controversy. In 1767 the commoners moved to assert title to an island of thatch grass near the mouth of the creek. Although they relied upon depositions such as the one recorded by a 90 year old resident who described himself as "much of a gunner and hunter" some 70 years ago, they evidently could not produce sufficient evidence to support their claims. Despite their loss, we now have a fairly good description of the characteristics of the creek near its mouth.

> [He] waded over the creek which at low water was higher than his knees, and that there was a large flat in said creek at the then wading place and channel running on each side of the flat. Which of the channels of water on each side of the flat was deepest, he forgets. But, he thinks that on the north side the flat was, and that in that day there was no thatch on said flat saving two spots or bunches so small that a man might clasp them with his two hands; but that in a few years them two bunches spread considerably so that two or more cocks of thatch might have been got on them; and that he believes the channels of water on each side of the flat at low water was a full rod or more wide and at high water they was so deep it was not safe to go over...(note: a cock is a small pile of hay of indeterminate size; arch. use) (70).

As in the case of Fresh Pond in Smithtown and the Wading River area in Brookhaven, the many conveyances through deeds and wills written during the nineteenth and twentieth centuries strongly suggest that human activity in West Creek and its marshes restricted itself to agricultural pursuits and

MAP 17


MAIN ROAD
JULIUS TUTHILL
STEWART MOORE
45 ACRES
NEW SUFFOLK ROAD
SEWARD WICKS
18 ACRES
NORTH FORK COUNTRY CLUB.
WICKHAM CASE
WEST
CREEK
DOWNS
CREEK
GEORGE TUTHILL
LINDEN AVENUE
O.W. CASE
13 ACRES
F.R. FANNING
ESTATE 25 ACRES
NEW SUFFOLK
NEW SUFFOLK AVENUE
GREAT PECONIC BAY
WEST CREEK, TOWN OF SOUTHOLD, 1909
Property lines, 1909
Country Club, 1951
House
Marsh
N

possibly some shellfishing in the creek itself (71). Sometime prior to 1914 the North Fork County Club leased land between Down's Creek and West Creek for a golf course, continuing this arrangement until 1951 when the club bought the land from Clifford Case (72). Map 17 and a later aerial photograph taken in 1938 (as well as present-day personal observation by the author) clearly indicate that human activity approached the outer fringes of the creek and wetlands but did not meddle in the marsh to such a degree as to materially alter its natural characteristics.

Riverhead: Indian Island County Park

Ten miles to the west of West Creek is Indian Island County Park forming part of the northwest rim of Flanders Bay at the mouth of the Peconic River. Once a part of Southold and treated like any other land during the period of colonial land divisions, it is now within the town of Riverhead which seceded from Southold in 1792. Bounded on the south, east, and northeast by Sawmill Creek, Flanders Bay, and Terry Creek, and hemmed in by Hubbard Avenue and the tracks of the Long Island Railroad on the north, it consists of a narrow sandy foreshore giving way quickly to cleared meadowland intermixed with extensive stands of cedar trees and low, marshy areas. Today's park sprawls over almost 300 acres of upland and marsh which at one time or another within and near its boundaries was host to a saw mill, cranberry bogs, and a duck farm in addition to various dirt roads that came and went as the need arose to cross the interior or to gain access to the few private homes built mainly along its southern and western edges.

The land that would eventually become Indian Island County Park was part of the Aquebogue Purchase bought from the Indians by the Southold proprietors in 1648 (73). Within three years the proprietors laid out lots and granted them to individuals, one of whom was probably John Youngs, then minister of the Congregational Church, who received parcel number 12, described as a meadow at Aquebogue "on both sides of the river" (74). It did not take long for the new landowners to realize the value of the natural resources they had come into possession of by their allotments. The extensive woodlands and two large creeks (Sawmill and Terry's creeks) invited exploitation. In 1659 John Tooker and Joshua Horton asked for and received a grant of the privilege of building a sawmill on Sawmill Creek, with "liberty to cut all sorts of timber," but with the reservation that they should not cut any oak trees other than those necessary to get to the pines and cedars. The Southold proprietors bestowed upon them a 21-year monopoly and 10 additional acres of land surrounding the mill site, which they located about a mile west of the park site (75). A second sawmill did not appear in the park vicinity until sometime shortly before 1743. This one was located near the head of Terry's Creek, which serves as the park's east boundary (76).

One might expect that the region, which offered woodlands, two creeks, and a large river, would attract settlers quickly, but that was not to be the case. It remained as large holdings in few hands for many years. In fact, the hamlet of Riverhead was virtually a nonentity until thrust into prominence by a dispute between the towns of Southold and Southampton over where the annual court sessions should be held. When the East Riding of Governor Nicolls' creation became Suffolk County in 1683, the colonial assembly designated Southold as the town where the paraphernalia of justice, a court house and jail, would be built. The long trip across to the north fork, however, evidently irked the people of Southampton, so much so that they openly

complained and had court held in their town for a while. Southold objected. To placate the two factions, the assembly passed an act in 1727 "for the erection of a court house and jail to be located at or near Riverhead" (77), thus making the village of Riverhead the county seat. The village, actually a small hamlet of a few houses, did not benefit overly much from its new status. Almost 100 years later, Timothy Dwight, later to become president of Yale College, described the village as a "miserable hamlet containing about ten or twelve houses and a Court House, a poor decayed building, and jail" (78).

By the time Riverhead became a town in its own right in 1792, when the state legislature separated it from Southold, economic activity in and near the park site had changed little over the years. Entrepreneurs bypassed the area to set up mills and small shipbuilding establishments on the larger, more accessible Peconic River. During the nineteenth century the future park site was divided and divided again among the heirs of deceased owners, one or more of whom began the process of draining the swamp land along the southeastern edges (79). The Long Island Railroad tracks were laid in 1844 and in 1868 the town authorized the construction of Hubbard Avenue paralleling the railroad tracks, thus fixing the northern perimeter of the park site (80). For many years as train passengers gazed out the window they saw nothing but trees and an occasional open meadow (81). Woodland, meadow, and marsh it was; woodland, meadow, and marsh it remained, the landscape broken only occasionally by the buildings of a homestead farm.

Forebodings of a future use for the park site arrived inauspiciously in Riverhead in 1873 on a clipper ship from China. The captain's gourmet tastes had been tantalized by White Pekin ducks in the Orient and he brought a small flock back with him, of which 14 survived the ocean voyage (82). Whether or not this genesis of the duck farm industry in eastern Long Island motivated the sudden increase in the number of conveyances of park site land at the turn of the century is not known, but in 1905 Henry S. Knabenschuh began buying up small parcels along the eastern edge (83). At least one small duck farm existed on the land as early as the 1890s, but did not develop into one of the island's largest duck farms until the Warner family acquired it just prior to the first world war (84).

By that time other economic activities had begun to compete with the ducks for space. Suffolk County had come into possession of some of the land on the south side of Sawmill Creek, and some conveyances written in 1908 and 1909 carried the reservation that they were "subject to the right of Suffolk County to flood the marsh for cranberry purposes" (85). Nevertheless, the duck business prospered so that by the 1920s Hollis V. Warner, whose father, John, had begun in a small way in 1914, could begin to expand his holdings and become, reputedly, the second largest duck farm in the world" (86). Beginning in 1922 and intermittently thereafter until 1944 Warner bought an additional 180 acres of meadow and marsh, 117 of which lay on the south side of Sawmill Creek and 62.7 on the north side (87). In 1949 his duck output was estimated at 500,000 annually, with a spring peak population of a quarter of a million ducks fertilizing the land and polluting nearby waters, which dropped to 60,000 in the winter months (88). The farm contained as many as 70 buildings, employed 140 people, and had a 3 mile long narrow gauge railroad track running through the buildings to carry a feed train. A migrant worker's camp also existed near the park site. Map 18 shows a number of individual owners of portions of the future park site, but it is unlikely that any of them materially altered or modified the basic natural features. An aerial

photograph taken in 1938 shows some cleared areas in the southeastern section, and what could be a marsh on the north side of the mouth of Saw Mill Creek. Yet, few buildings are discernible and the entire area seems to have remained forested, with a narrow beach along the southern and eastern parameters. South of the Saw Mill Creek extensive building took place.

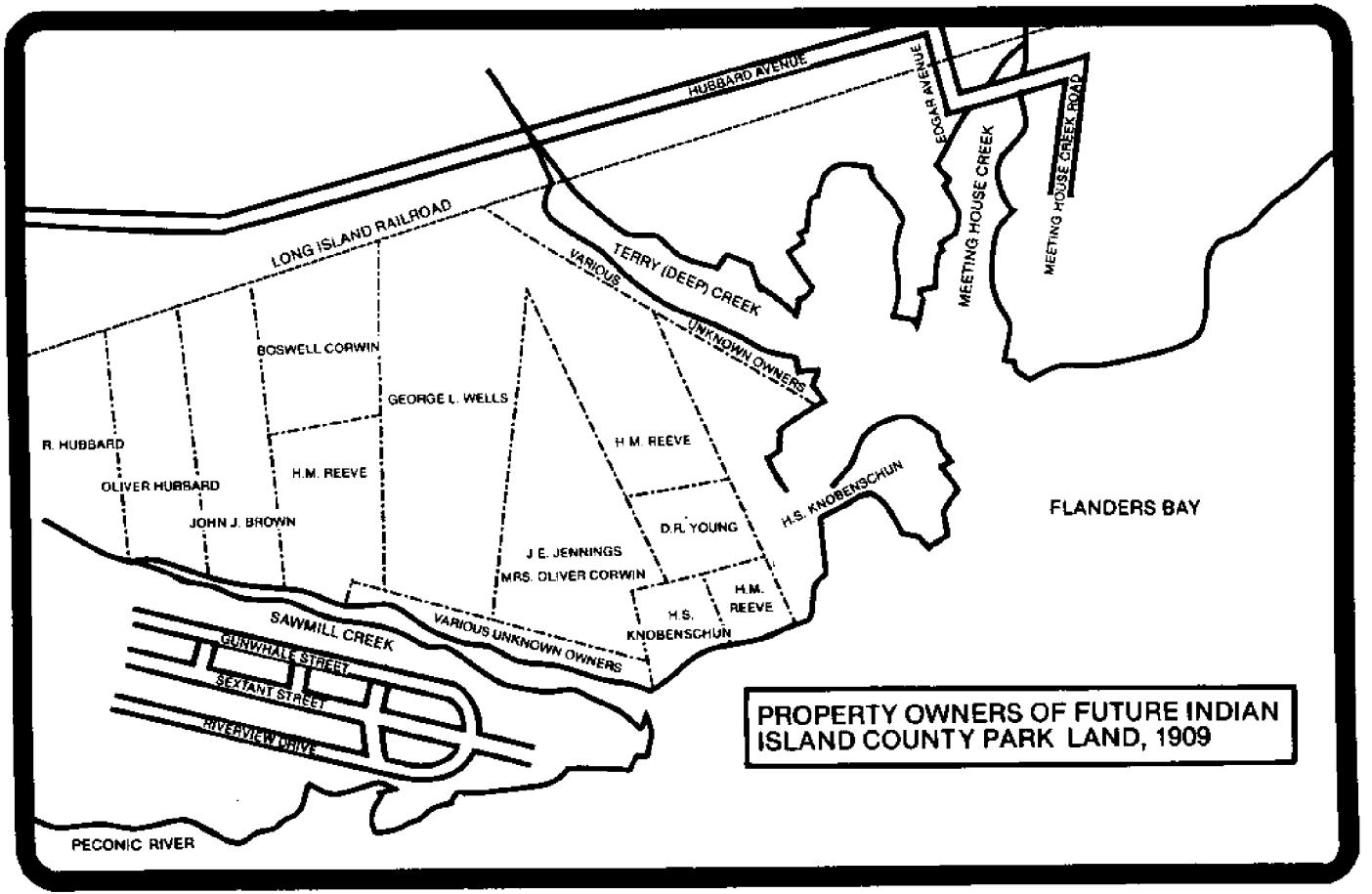
Today, the duck farm has vanished, to be replaced by a county park. In the late 1940s, financial difficulties forced Warner to mortgage much of his farm. In 1963 he sold the incumbered acreage for $455,000, which at that time carried mortgages of over $86,000 (89). At that time rising public awareness of the ever-increasing problems of pollution drew the attention of the press and health officials to the duck farm, which they blamed for polluting the surrounding waters. With that in mind, and armed also with a strong outcry against the socioeconomically deplorable conditions in the migrant workers' camp, the county moved to condemn the farm. Immediately prior to condemnation, the duck farm had about 150 housing and 50 storage units. On 24 May 1963, the county took control of over 250 acres north of Sawmill Creek and quickly destroyed 60 of the housing units. A subsequent map of 1964 (a second taking map) described the park site as having thickly scattered duck farm buildings on most parcels bought, with many other houses, with wooded upland in the extreme west end and salt marsh in the extreme east end (Map 19). To insure that there would be no esoteric claims to that land, or any other in the Town of Riverhead for that matter, in 1964 Riverhead officials obtained from the trustees of Southold and the proprietors of the commonage quit-claims for all their rights, titles, and interests in Riverhead (90). Town and county now had clear title and Indian Island County Park came into existence; pollution had been halted, or so some would claim; a sociological blight had been eradicated; and further detrimental exploitation of the land halted.

Southampton: Hayground Creek

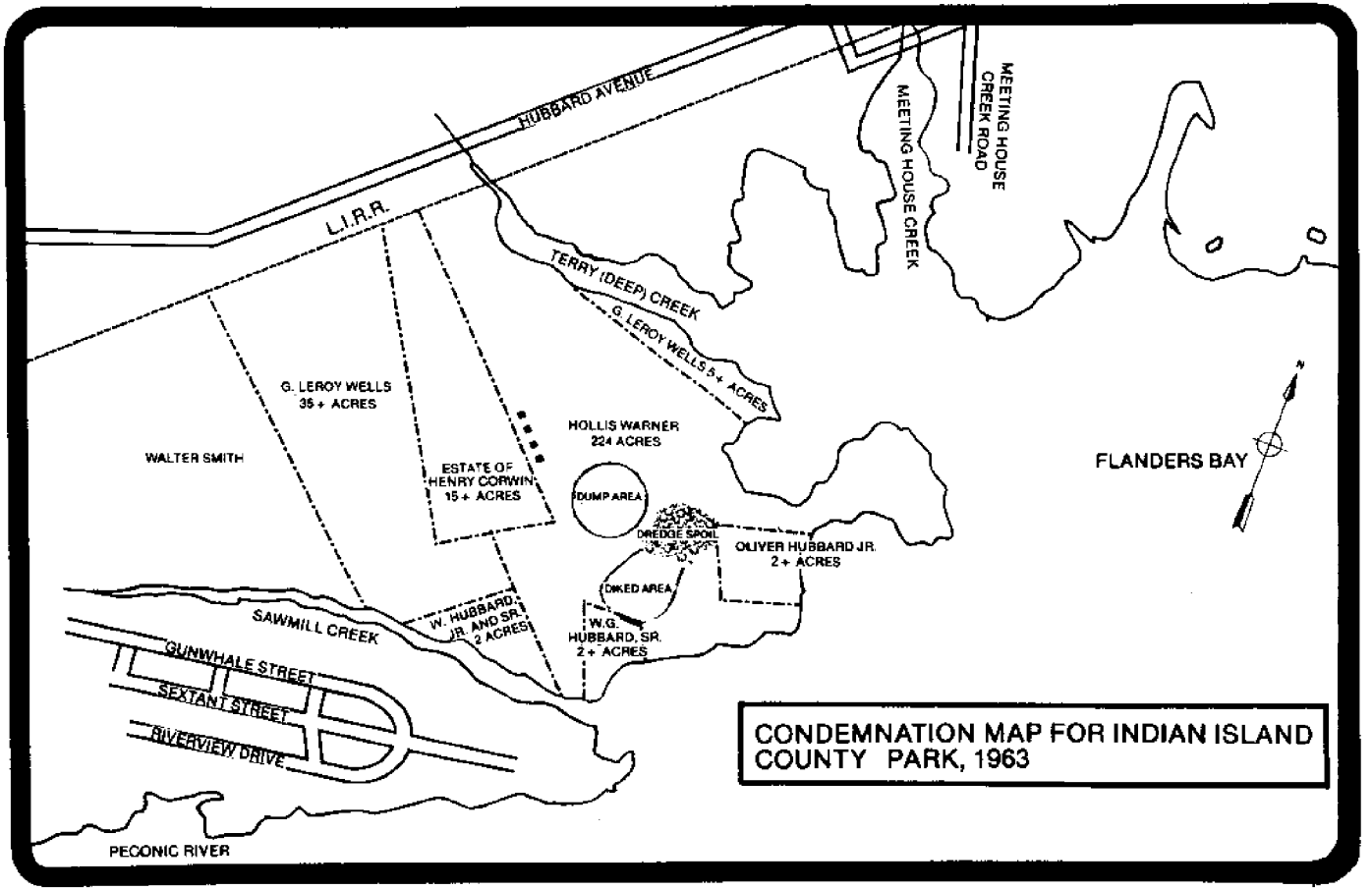
Like Southold and the other seventeenth century towns in the county, Southampton was peopled by Englishmen who had first spent some time in New England before moving on. But, unlike the other towns, the first proprietors actually conceived of a land use plan even before they knew exactly where their new settlement would be. Such foresight was really based on hindsight and unhappiness with their situation in Massachusetts where they had lived. Many arrived in that colony in the 1630s and built their homes in Lynn. But as the decade wore on the town limits proved to be too confining for the population after a sudden influx of newcomers in 1638 and 1639. Unable to expand the town's boundaries farther because of surrounding townships, a number of the inhabitants approached John Farrett for a grant of land on Long Island. Farrett, acting as attorney for the Earl of Stirling, granted them 8 square miles, allowing them "choice to sit down upon as best suits them" (91).

In anticipation of the grant, the three organizers, later increased to six, wrote a document they entitled "The Disposal of the Vessell." In it they contracted with a shipowner to take them and other settlers to Long Island, arranged for the continued use of the ship, and guaranteed each of the signers a home lot and planting land based on each having already expended 5 pounds in the venture. They then set down how they proposed to manage the new community. First, since the organizers had disbursed over 80 pounds, they exempted themselves from all taxes and other charges for any time that they did not actually live in the new settlement. Next, "because of the delaying to lay out

MAP 18


HUBBARD AVENUE
EDGAR AVENUE
MEETING HOUSE CREEK
MEETING HOUSE CREEK ROAD
LONG ISLAND RAILROAD
VARIOUS
TERRY (DEEP) CREEK
UNKNOWN OWNERS
BOSWELL CORWIN
GEORGE L. WELLS
R. HUBBARD
OLIVER HUBBARD
H.M. REEVE
JOHN J. BROWN
H.M. REEVE
H.S. KNOBENSCHUN
FLANDERS BAY
D.R. YOUNG
J.E. JENNINGS
MRS. OLIVER CORWIN
H.M. REEVE
H.S. KNOBENSCHUN
VARIOUS UNKNOWN OWNERS
SAWMILL CREEK
GUNWHALE STREET
SEXTANT STREET
RIVERVIEW DRIVE
PECONIC RIVER
PROPERTY OWNERS OF FUTURE INDIAN ISLAND COUNTY PARK LAND, 1909

MAP 19


HUBBARD AVENUE
L.I.R.R.
MEETING HOUSE CREEK ROAD
MEETING HOUSE CREEK
TERRY (DEEP) CREEK
G. LEROY WELLS 5+ ACRES
G. LEROY WELLS 35+ ACRES
WALTER SMITH
ESTATE OF HENRY CORWIN 15+ ACRES
HOLLIS WARNER 224 ACRES
DUMP AREA
DREDGE SPOIL
OLIVER HUBBARD JR. 2+ ACRES
DIKED AREA
W.G. HUBBARD, SR. 2+ ACRES
W. HUBBARD, JR. AND SR. 2 ACRES
SAWMILL CREEK
GUNWHALE STREET
SEXTANT STREET
RIVERVIEW DRIVE
PECONIC RIVER
FLANDERS BAY
CONDEMNATION MAP FOR INDIAN ISLAND COUNTY PARK, 1963

the bounds of towns and all such land within the said bounds has been generally the ruin of towns," they reserved to themselves the power to dispose of land. In doing so, they stated that a home lot would always be a home lot, with only one dwelling house permitted on it, and planting lots should be used for that purpose only and not subdivided into home lots, to avoid "the over charging of commons and the impoverishment of the town." Commons were to remain commons with no one permitted to encroach upon it "so much as one's hands breadth" to claim it for himself. If a person wished to sell his home lot and farm, he must do so as a unit. Those moving into the settlement would have to be satisfied with 4 acres for a home lot and 12 acres for planting, "and so much meadow and upland as may make his accommodation fifty acres." However, the proprietors reserved the right to add to a man's holdings if they so desired. Finally, to insure that all inhabitants would have the full benefit of the waters within the town, they dictated that "no person nor persons whatsoever shall challenge or claim any proper interest in seas, rivers, creeks, or brooks howsoever bounding or passing through his grounds, but freedom of fishing, fowling, and navigation shall be common to all within the banks of the said waters whatsoever" (92).

It is apparent that the other potential settlers objected to being thus dictated to by an oligarchy, however well-intentioned the six men might have been. In response, the proprietors, in a declaration in June, modified their control over the land to the extent that they agreed to relinquish it once the first divisions had been made and a church organized. Thereafter, they would "lay down [their] power both of ordering and disposing of the plantation and receiving of inhabitants, or any other thing that may tend to the good and welfare of the place, at the feet of Christ and his church, provided that they [the church members] shall not do anything contrary to the true meaning of the former articles" (93).

Once established in their new location, the proprietors set about allotting land in the usual manner. Their peaceful progress in such matters, however, was interrupted by the arrival of Governor Nicolls in 1665 and the advent of the proprietary government of the Duke of York (94). Following the example of Southold, the men of Southampton successfully resisted Nicolls' repeated demands that they produce their Indians deeds and receive a confirmatory patent from him. They relied upon the simple fact that they had arrived on Long Island many years before the duke's government, had paid a substantial price for their land, and, by the common law, would be sustained in any court of law as to their title. But, as with their sister town on the North Fork, the proprietors could not withstand the pressures applied by Governor Andros in 1675. Andros pointed out to them that in 1670 the Court of Assizes had in fact rejected their argument and they were in danger of having all their lands confiscated (95). Southampton submitted and on 1 November 1676 Andros duly issued the town a patent, confirming to them their tract of land (96).

Thus secured in their lands, the proprietors returned to dividing it and living upon it in the manner to which they had become accustomed, that is, until Governor Dongan inaugurated his plan in 1686 to tighten control and increase quit-rent collections by renewing all patents. Of course, the town resisted this authoritarian intrusion into their local affairs, but, as could have been predicted even then, they capitulated and received their final patent on 6 December 1686. By its terms, the proprietors reconfirmed to them all the tract of land described in the Andros patent. Dongan also awarded them the ownership of certain lands within those boundaries, title to which had

been in dispute with the Indians. As with Huntington, Brookhaven, and Easthampton, Dongan incorporated them as a "body corporate and politic" and created 12 of the patentees "trustees of the freeholders and commonalty" of the town, vesting in them:

> all and singular the houses, messuages, tenements, buildings, mills, mill dams, fencings, enclosures, gardens, orchards, fields, pastures, woods, underwoods, trees, timber, common of pasture, feedings, meadows, marshes, swamps, plains, rivers, rivulets, waters, lakes, ponds, brooks, streams, beaches, quarries, mines, minerals, creeks, harbors, highways and easements, fishing, hawking, hunting and fowling...and all other franchises, profits, commodities, and hereditaments whatsoever to the said tracts and necks of land and premises belonging... (97).

Respecting the land already appropriated, the patent guaranteed title to each individual owner thereof, but as for the remainder not yet taken up or allotted to individuals, the trustees were to manage it "to the use, benefit, and behoof of such as have been purchasers thereof and their heirs and assigns, forever, in proportion to their several and respective purchases thereof made as tenants in common without any let, hindrance, or molestation to be had or reserved upon pretence of joint tenancy or survivorship" (98).

Unfortunately, the apparent clarity of these charter distinctions did not withstand the test of time. Southampton walked down the same primrose path as did Southold. The proprietors allotted lands to themselves and to those who were accepted into the community in later years. In the case of the former, persons receiving allotments still retained a share of the undivided lands; in the latter instances, individuals acquired only the land granted with no rights in the commonage other than what the proprietors allowed them for use only. They could, of course, purchase shares or fractions from any proprietor who agreed to sell them (99). It will be remembered that, as James T. Adams described them, a share was the proportionate interest each proprietor owned in the total undivided land at any time expressed as a ratio of the amount he paid in to the joint stock of the company bore to the total amount of that stock (100).

By various conveyances over the years the number of proprietors increased greatly. Not only did individual rights shrink, but the remaining amount of undivided land became smaller with successive divisions, so that eventually a large number of people had claims on increasingly smaller bits of land. Nevertheless, the inevitable argument developed between them and the other freeholders over who had the right to manage and dispose of the commons. Following the precedent set by Southold in 1796, committees representing the town and the proprietors met in 1816 to prepare a jointly supported bill that would clarify the situation.

The bill, as enacted by the state legislature in 1818, gave the proprietors the power to elect a board of trustees, consisting of no more than 12 of their group "to manage all the undivided lands, meadows, and mill streams," in the town. This act conferred on the trustees "the same power to superintend and manage [the trust res] as the trustees of the freeholders and commonalty of the town of Southampton now have, and shall have full power to sell, lease, or partition" their property. They could also make rules and regulations to manage all property rightfully theirs. The act drew a clear distinction

between the proprietors and the town's trustees respecting the areas under the control of each body:

> Nothing in the afore recited act shall be construed to give the proprietors or their trustees any power to make any laws, rules, or regulations, concerning the waters (other than mill streams), the fisheries, the sea-weed, or any other productions of the waters of said town, or in any manner or way to debar the inhabitants of the said town from the privilege of taking sea-weed from the shore of any of the common lands of said town, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced; which waters, fisheries, sea-weed, and the productions of the waters, shall be managed by the trustees of the freeholders and commonalty of the Town of Southampton, for the benefit of said town, as they had the power to do before the passing of this act (101).

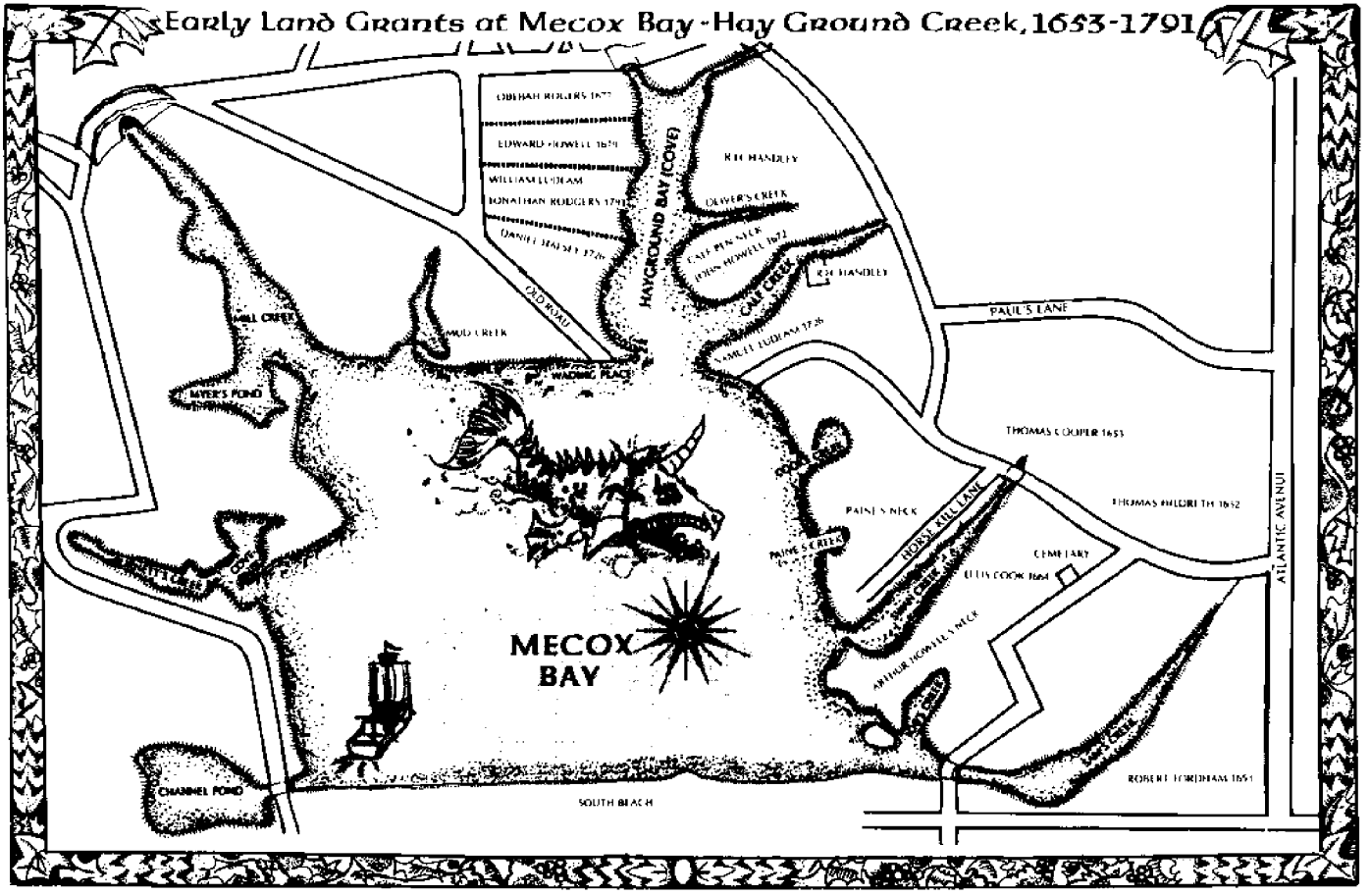
Thus did the state legislature ratify what had come to be the accepted interpretation by the town of its Dongan patent. A clarification of the powers and duties of the town trustees was written into an act in 1831, which, in addition to establishing rules of procedure for trustees' meetings, declared that they had the "sole control over all the fisheries, fowling, sea-weed, waters, and the productions of the waters within the said town not the property of individuals, and all the property, commodities, privileges and franchises granted...[by] Governor Dongan" (102).

Unlike the trustees of the proprietors of Southold who have remained alive but not really viable anymore, those in Southampton finally liquidated themselves by selling all their remaining uplands in 1882. Ever since 1640 they or their predecessors had overseen the distribution of lands in the town, now they had no more. For them, time and land had run out. In 1890, having nothing better to do, the trustees resigned in a body (103). Their passing in no way affected management of the town's wetlands and lands under water, the town trustees having had that power ever since the patent of 1686. Today, they still exercise jurisdiction over approximately 25,000 acres of such lands.

During the 300 years of proprietors' and town trustees' jurisdiction over the Mecox Bay-Hayground Cove area the history of land use there, although somewhat similar to that of Fresh Pond and West Creek, is more akin to Huntington Harbor because of the continued presence of both private and public lands. Even after the land divisions of the seventeenth century in the area, some land remained commonage for almost 200 years. Today, the land surrounding the two bodies of water is completely in private ownership, yet their waters and the lands under them are public, owned and managed by the town trustees.

The first division of land there took place within 10 years after the founding of the town. As soon as the proprietors had allotted the lands in the immediate vicinity of the town spot, they turned their attention eastward. Having already granted much of the meadow on the west side of Mecox Bay before 1648, they proceeded to parcel out the eastern bank between Sam's Creek and Calf Creek in 1653 and again in 1677 (104). After the latter division, the area east and northward of the bay took on vague characteristics of a separate settlement, but, unlike other early villages, it was not a cluster of houses but rather a number of scattered farms in proximity to each other.

MAP 20


Early Land Grants at Mecox Bay - Hay Ground Creek, 1653-1791
HAYGROUND BAY (COVE)
OLD ROAD
PAUL'S LANE
ATLANTIC AVENUE
MECOX BAY
SOUTH BEACH
PAINE'S NECK
HORSE KILL LANE
CEMETARY
MYER'S POND
CHANNEL POND
THOMAS COOPER 1653
THOMAS HEDRETH 1652
ROBERT TORDHAM 1651
ARTHUR HOWELL'S NECK

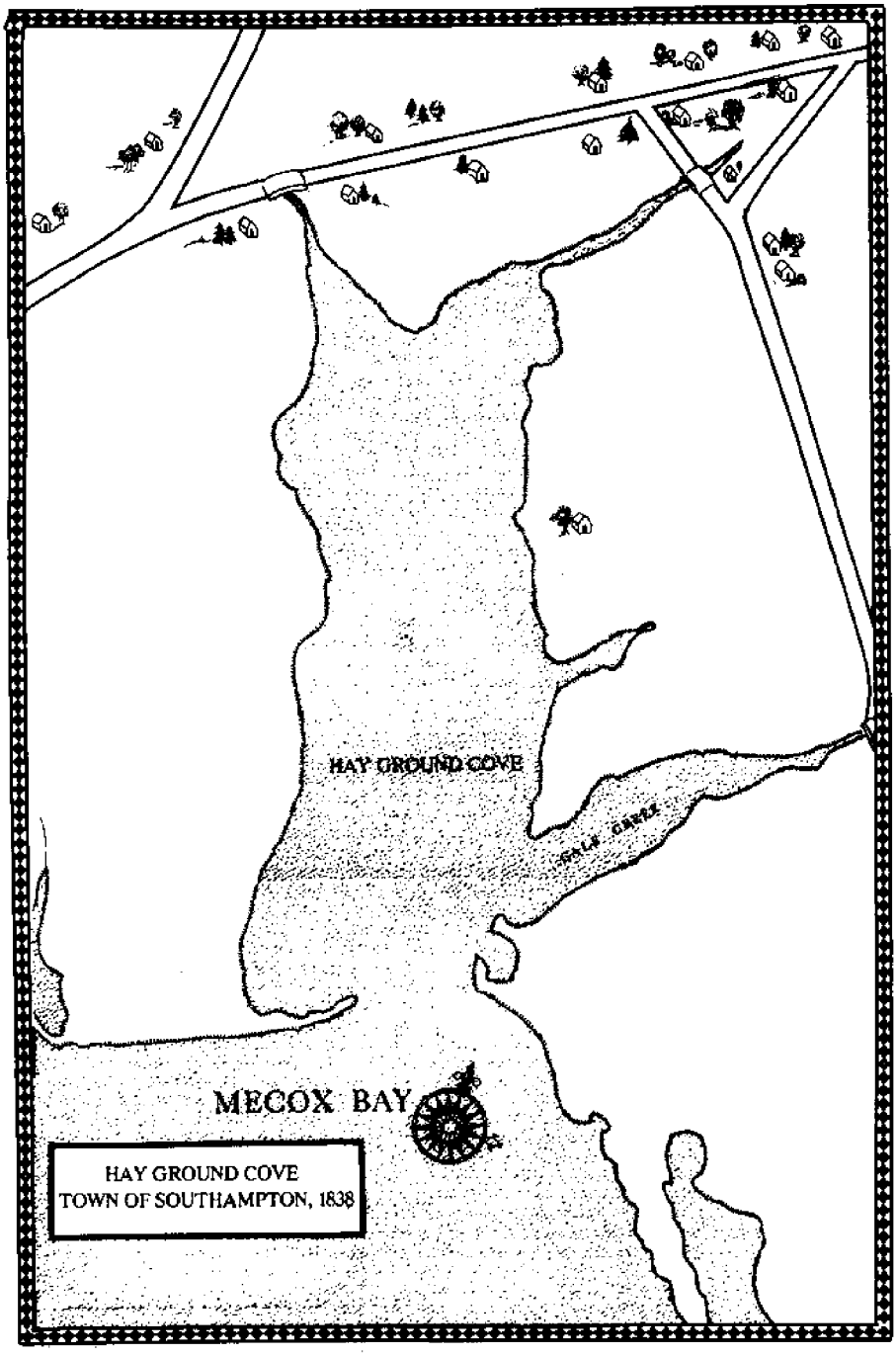
Gradually, the proprietors disposed of the land around the bay, with much of it along the northern periphery allotted in the 40 acre division of 1679 and the 30-acre division of 1712. By the end of the seventeenth century much of the upland around the bay and cove had been taken up by various individuals, as suggested by the many grants and conveyances reprinted in Volume V of the town records (105).

The fact that major divisions took place did not mean that all the land passed into private lands. Some individuals simply did not take up their dividends at the first offering, thus leaving large sections as commonage. Throughout much of the eighteenth and well into the nineteenth centuries, the proprietors continued to allot or sell the remainder in and near the bay and cove (106). What remained as common land they rented each year at a vendue sale for the valuable hay or thatch grass it produced. In 1698 the proprietors made a general list of the locations of common grass acreage, in which they included the north and south sides of the bay and the land around the cove. Thereafter, these sites figured prominently in the vendue sales until at least the mid-nineteenth century (107).

Toward the end of the eighteenth century the proprietors or the trustees of the town began to allow individuals to use selected portions of the commonage for other than hay cutting. In 1793 the trustees granted Jonah Tarbel the privilege of building a fulling mill on Hayground "creek," with permission to raise a dam on the common land and to run it across the creek. It is possible that Tarbel eventually located his mill at the Scuttle Hole, north of the cove, although Adams, in his history of the town, claims a mill existed on the creek between the cove and Kellis Pond (108). The trustees also permitted farmers to run fences into the waters of the cove and bay a sufficient distance to prevent cattle grazing in fields from wandering into the water and ambling off or drowning (109). Such recorded accounts offer a graphic illustration of the types of activity that had gone on around the bay and cove for generations, activities that persist even today: farming and husbandry, neither of which can be considered as serious threats to the ecological balance of the area. There was, of course, a brief flurry of activity at the south end of Mecox Bay during the height of the local offshore and drift whale industry at the end of the seventeenth and into the early part of the eighteenth century. John Cook had his try works (place to extract fat) there, but it and any others like it left no permanent scars on the land (110). Maps of the nineteenth century (Map 21, for example), even though only approximations, indicate that open fields and few dwellings were the rule. A later map of 1889 of the US Coast and Geodetic Survey shows little or no change during the intervening 50 years.

The waters of the bay and cove also served the needs of the community at large. Having been removed from under the control of the proprietors to dispose of by virtue of the agreements of 1640, they fell under the purview of the trustees after 1686. In the eighteenth century the trustees passed a number of ordinances regulating shellfishing and methods of fishing in town waters, specifically prohibiting the sale out of the town of oysters taken in Mecox Bay (111). They continued the practice in the nineteenth century, not only regulating shellfishing but also prohibiting the use of seine nets in the bay and other waters of the town. Beginning in 1767 the trustees initiated the practice of leasing plots of land under water in the bay to individual shellfishers (112).

MAP 21


HAY GROUND COVE
MECOX BAY
HAY GROUND COVE
TOWN OF SOUTHAMPTON, 1838

One other human activity with respect to the bay and cove deserves some mention, that is, the periodic digging of a "seapoose" between Mecox Bay and the ocean. The first record of such an undertaking appears in 1647 when the proprietors found it necessary to open a channel to the ocean to insure the continued running of a water mill. They did so again in 1652 and 1653 (113). Seapoose digging in the autumn or winter became a standard practice of those living in the bay area. Apparently, some of them took it upon themselves to dig where and when they chose, because the trustees found it necessary in 1772 to restrict digging to "the middle place" (the center of the beach at the south perimeter) and in 1784 they had to prohibit the opening of the bay without formal approval from a committee appointed for that purpose (114). Since that time the orderly, periodic cutting of a seapoose under the authority of the town trustees has taken place up to and including recent years, the purpose now being to stabilize the water level to prevent flooding of land and the cellars of homes near the shores.

In the first decade of the twentieth century yet one more economic venture intruded into the area in the northernmost reaches of Hayground Cove. In 1910, George E. Jones, owner of the land on the east side of the west creek at the head of the cove, bought some ducks and began wholesale breeding of them for the market that had been created by the efforts of the clipper ship captain in Riverhead. The duck farm, situated on approximately 10 acres of land, passed through a number of hands until it came into the possession of John Bellini in 1952 (115). He named it the Long Island Duck Farm and prospered.

Ducks and duck farmers, at least according to many environmentalists and nearby residents, have strange and unwelcome habits. The ducks, as they waddle over the land, fertilize liberally. Some is washed into the creek and cove by rain, causing increased nitrogen content in the water and other ill effects; the remainder piles up ever so slowly so that the duck farmer, to prevent the ducks from becoming mired in their own, cover the afflicted area with dirt. The result is a slow, imperceptible land-fill operation that takes place over many years. In the case of the Bellini farm, such predictable activities gradually filled in portions of the creek and obliterated whatever wetlands might have been there in the past.

Within the past three or four years some residents who own property bordering the bay and cove area took up the cry of environmentalists who alleged that such operations severely polluted nearby waters. The antipollution fad of blaming it on the ducks gained popularity. Heeding the cry of the local voters, the town rezoned the property from residential to multiple-dwelling use in 1970. Bellini, under such pressure and for whatever reasons of his own, closed the duck farm, and entered into negotiations with a group from Great Neck in western Long Island that had developed plans to construct condominiums on the site. That was a duck of a different odor. After re-evaluating relevant scientific data, residents concluded that duck rather than population pollution is acceptable, scientifically speaking. Suddenly, ducks with their byproduct of feathers and manure became de rigueur. Residents, who had already formed into a private organization to promote the cause of environmental preservation, reacted quickly. They brought suit to have the 1970 rezoning overturned. The suit is still pending--and Bellini reintroduced ducks (116).

It is difficult to pass judgment on the actions of those long dead if, for no other reason than that it is frequently too simple a matter to point the

finger of blame at the adverse consequences of their decisions. Often, when measured by their own standards, beliefs, and knowledge they cannot be faulted. Yet, when viewed from the perspective of today and the legacy they left, what is "wrong" with the present condition and use of our natural resources, and the continued wasteful destruction of them, can, in fact, be traced to them. In the final analysis, neither the public nor the private sector, when viewed in the roles of managers of land, can accept accolades for their past performances.

On the day that any given group of Englishmen arrived on the island to found a new settlement, with the possible exception of Smithtown and Islip, management of the land became a community problem, even a duty. Basic needs of survival combined with limited natural resources to dictate what they could and would do (there were no minerals and the soil proved to be of but middling agricultural quality). Another restriction of possible diverse uses of the land took the form of the intellectual baggage and agricultural predilections they brought with them. The temper and aspirations of most members of a community were such that opportunities to be other than a farmer were few. For those who left the fields to take up other pursuits, because of training and expertise or just simply inclination, villagers would welcome them as builders and operators of grist, saw, and fulling mills; as tanners, tailors, or cobblers; as coopers, brickmakers, or blacksmiths--but only as many as would satisfy their needs. Thus, the early colonial "planners" geared their land distribution and use programs to what they knew, and what their forefathers in another land knew, to be the accepted use of land: agricultural pursuits and husbandry complemented by closely related supportive activities.

To the extent that the clearing of forests to make way for crops and to supply the saw mills depleted the timber supply and removed a desirable ground cover, their activities might be judged as having had an adverse effect on the land. Such a judgment, however, would be unreasonable in light of the small size of the population and the amount of natural resources then available to them relative to their needs. The same holds true when one reflects on how they managed their waterways and wetlands. Streams adaptable for mill power they used sparingly; not because they feared pollution, but because they recognized that two mills might be one mill too many. To insure the success of such ventures, they granted monopolies, and made them, to all intents and purposes, public utilities by regulating where they would be built, the size of the dams if water mills, and even the fees millers could charge. As for saw mills, they restricted the lumbering area, although such allotments often proved to be generous. Of all the practices associated with colonial life on Long Island, mills and their accompanying dams are the ones that most directly affected wetlands. Dams trapped water that would back up over shallow depressions and marshland to create mill ponds. Generally, however, wetlands, whether granted to individuals or retained in the commonage, they assumed would be used for the thatch grass they produced. Yet, more than once they found it necessary to drain pestiferous wetlands and the records show that on rare occasions they gradually filled them in by design, the original mill pond site in Huntington a case in point (117).

Few, if any, of these activities in and of themselves can be construed as mismanagement or wasteful use of land and wetlands. Acreage thus affected did not materially lower the environmental quality nor subtract enough from the remainder to have a major adverse impact. It must be said that the managers of the common lands and wetlands, whether proprietors or town trustees, carried

out their functions well, attuning their policies and decisions to the needs and desires of the community at large. In general, it seems that they parcelled out land as people needed it, not simply because grantees wanted more just for the sake of having it. However, Richard Smith, William Smith, and William Nicolls can be excluded from this observation, for they and a few others appear to have been afflicted with a manic urge to speculate in land (this is not necessarily to imply that many others would not have done so, given the political and financial resources). Both trustees and proprietors took care to see that the lands and wetlands under their control were only used for the purposes intended. They created committees to oversee their domains (Southampton had a committee on encroachment); passed ordinances regulating the times, places, and methods of fishing, shellfishing, and even grazing. A few of these were undoubtedly in the interests of preservation; but most were born out of a deep-seated conviction that only those who actually held some form of legal rights in the land could take advantage of the resources therein.

This state of affairs persisted throughout the colonial period and well into the nineteenth century. But as populations swelled, accompanied by advances in technology that placed greater demands on the land and opened up possibilities of more diversified uses, the trustees disposed of more and more of the trust res, including wetlands and lands under water. During the nineteenth century the belief that land should not lie fallow but be employed whenever possible to economic advantage, preferably by private individuals, became the underlying motive. This was particularly true in the latter decades of the century and thereafter; Huntington Harbor and the Great South Bay are prime examples of this trend. Secure in the belief that the individual owner knew best how to use and enjoy his land, town trustees gave their blessings, almost indiscriminately, to dock construction, bulkheading, and wetlands-filling operations. Admittedly, they continued to control use of land under water by leases; they did complain, usually after the fact, when they awoke to find that someone had bulkheaded out too far. But, in the latter instances, rather than force the party to remove the offending structure, they moved the bulkhead line out to accommodate it.

Over the centuries proprietors and trustees have given, granted, and sold virtually all the upland they once owned. In that process they drastically reduced the area of their jurisdiction to the point where all that remains is certain wetlands, the foreshore, and lands under water. The proprietors actually have long since gone out of existence, leaving the trustees to manage what little is left. The irony of it is that, to preserve some of it from further exploitation, authorities at all levels of government are now in the unenviable position of having to pay greatly inflated prices for acreage that generations of trustees and proprietors gave away or sold, sometimes for a mere pittance.

The legacy the trustees and proprietors left is one of fractionalized local control of natural resources, subject to whatever habits evolved in any given community. In the early years this did not create dissimilar situations in the villages and hamlets scattered across the county. Rather, it produced a certain uniformity that had its origins not only in the need for community effort to survive and prosper but also in the puritan church-oriented belief that the parts served the whole and no man should possess more than he could actually make use of. These habits, attitudes, and beliefs began to wane by the end of the eighteenth century, to be supplanted by the notion that the

whole served the parts; that profitable exploitation by an individual to maximize his own use and enjoyment was in his best interest and, thus, in the best interests of the community at large, regardless of the long-range detrimental effects on the environment (a possibility that evidently did not occur to many). Superimposed upon this was the assumption that nature's American cornucopia provided enough for all, if not in one place, then in another. When combined with the older puritan concept that God favored the successful and those who were not had to be satisfied with what they had (118), it produced a climate of opinion and a rationale that precluded the need to preserve wetlands for their own sake as a natural resource.

Cumulatively, then, the practices and beliefs of earlier generations of land managers have produced today's situation: a greatly reduced supply of wetlands and highly localized control, or lack thereof, of land under water resources that border on the chaotic if one takes a county-wide view. They may have worked well and served their purpose while the population remained small. Today, it is a different kettle of fish--or bushel of oysters, if trite liberties can be taken with a hackneyed phrase. With one or two exceptions, the practices of town trustees in the county, geared to an earlier generation, seem unable to withstand, in fact are being submerged by, a population flood. Oddly enough, to preserve their control over lands under water and wetlands they must come full circle back to a seventeenth and early eighteenth century land management policy which, for the good of the community (not the individual), prevented such areas from falling under private control to the exclusion of the public.

So far, little attention has been paid in this summary to the role of the private individual. It is not enough to say that the observations on the evolving practices and beliefs of proprietors and trustees applies with equal force to them as well, even though they do. It must be added that in many instances private individuals have contributed much more time and effort to wetlands destruction than the managers of the undivided commons ever did. As soon as title to wetlands and even some lands under water passed to an individual, that parcel was removed from the direct control of local authorities. The new owner could work his will on it, short of setting fire to the trees or undergrowth on it to the endangerment of surrounding areas. His land became subject only to whatever laws of real property applied generally to privately owned land, with the possible exception of occasional easements authorities reserved to the public such as access across the foreshore. But even the latter, abetted by court decisions and state legislation, have been extinguished by many owners by means of extending bulkheads, jetties, and docks out beyond the low water mark.

Private land management, the greatest obliterator of wetlands, has been highly individualistic. A review of any of the sites analyzed herein will attest to that. In this century, that form of management has far outstripped the older uses geared to an agricultural society that had minimal need for docks and bulkheads, and none for marinas, restaurants, condominiums, and hotdog stands strewn along the water's edge. Buttressed by the latter nineteenth century philosophy already alluded to above, deep-seated in both public officials and private citizens in the county, riparian owners (those with waterfront property) have pretty much done as they pleased, often with predictably disastrous results for wetlands. Most have abided, albeit grudgingly, by the laws and local ordinances that, increasingly in the past few years, have attempted to control waterfront use. A few have either ignored

them or flouted their alleged rights in the face of those, be they public officials or private citizens, who might try to stop them. The histories of Huntington Harbor and the Great South Bay seem to be the rule in this case; those of Fresh Pond, West Creek, and at least some of Mecox Bay, the exceptions. And, it can be said for the latter that they depended on the whims of surrounding landowners and not on any systematic land management policy. Other owners might have done otherwise; future owners still might.

To say that private owners have functioned in a twilight zone of extra- or illegal activities, or that trustees and town boards have had the unilateral power to control wetlands and lands under water in the public interest possibly in violation of the alleged riparian rights of upland owners, would be far from the truth of the matter. Each group acted under color of law or what they thought the law to be. Englishmen brought with them their common law, which generally protected public rights in the foreshore and lands under water. However, later court decisions and acts of the state legislature sometimes supported, but more often modified and in some cases even nullified, this part of the common law. This, too, has been and will continue to be an integral feature of the history of wetlands management in the county and must be taken into account to complete the picture. To that task we now turn.

CHAPTER V FOOTNOTES

(1) This category would include, along the north shore, Cold Spring, Huntington, Centerport, and Northport harbors in Huntington; Stony Brook Harbor in Smithtown; Port Jefferson Harbor in Brookhaven; Orient, Greenport, Southold, and Cutchogue harbors in Southold; and near the mouth of the Peconic River in Riverhead; on the south shore it would include part of Lake Montauk, Three Mile Harbor, and Sag Harbor in East Hampton; parts of Shinnecock Bay and Moriches Bay in Southampton; and the mouth of the Patchogue River in Brookhaven. Sites along the north shore of the Great South Bay are simply too numerous to list, although the water frontage of most large villages are likely candidates for inclusion.

(2) Sleight, Harry D., ed. Town Records of the Town of Smithtown, Long Island, NY with other documents of historic value, (Smithtown, NY: Town of Smithtown, 1929-1930, 2 vols.), II, p. 382.

(3) Ibid., II, p. 383.

(4) Street, Charles R., ed. Huntington Town Records Including Babylon, Long Island, New York (Huntington, NY, 1887, 3 vols.), I, p. 93, 179, 197-200, 209-214; Sleight, Records of Smithtown, II, 388-389.

(5) Street, Huntington Town Records, I, p. 187-188, 193-197. Epenetus Platt, Jonas Wood, Jr., John Weekes (Wickes), and Thomas Whitson acquired the rights to farm number four; Thomas Skidmore, Mr. Wood, James Chichester, and Thomas Powell owned number five; and Samuel Wood, Joseph Bayly (Bailey), Nathaniel Foster, John Ted (Teed), and Jonathan Harnet, number six. In an agreement signed by all of them September 23, Harnet's name is replaced with that of Ben Jones, and Mr. Wood becomes Jonas Wood, Sr. (Ibid., p. 187-188, 193-197). Huntington's decision to settle the area rests on a Court of Assizes judgment favorable to their claim, but enjoining the town to settle there within three years.

(6) The dispossessed Huntington farmers received, as compensation for their loss, an equivalent amount of lands within Huntington in lands bought from the Indians later (Ibid., p. 212-216).

(7) Pelletreau, William S., ed. Records of the Town of Smithtown (Smithtown, NY, 1898), p. 20-22; Street, Huntington Town Records, II, p. 140-151.

(8) Street, Huntington Town Records, II, p. 160-161.

(9) Frequent mentions of the established line appear in various deeds in the Smithtown records, suggesting that at least as far as that town was concerned the matter had been decided (Pelletreau, Smithtown Records, p. 252-253, 281, 285-286, 290-291, 300-301, all in 1736). Papers relating to Winnecommack, Ibid., p. 367-372, 384-388, for 1701, 1703, and 1768.

(10) Ibid., p. 443-444.

(11) Laws of New York, 1885, p. 938-939, Chapter 560. See also, Sleight, Records of Smithtown, II, p. 354-357, for complete survey.

(12) Street, Huntington Town Records, I, p. 279, lease, Scidmore to Whitman, 1681; Ibid., p. 329-330, Record of lands of Philip Udale, 1681; see also, Ibid., p. 345-347, 354-356.

(13) Tooker, William W. Indian Place Names on Long Island (New York: Putnam, 1911), p. 266-268; Sammis, Romanah L. Huntington Town History (Huntington, NY: Huntington Historical Society, 1937), p. 188-189. The pond's waters were more brakish than salty because of the very narrow, shallow stream opening into the sound that permitted only the high storm tides to enter.

(14) Street, Huntington Town Records, I, p. 155-156, 279-280, 440, 511-513.

(15) Sleight, Records of Smithtown, I, p. 751-754. The patent also required that Smith settle 10 families on his land within three years. As for those who settled there, "the plantations...shall have no dependence upon any other place, but in all respects have like and equal privileges with any town within this government."

(16) Sleight, Records of Smithtown, I, p. 733-787. Portions of the briefs and the complete written decision of the Supreme Court, Suffolk County, Special Term, are reproduced.

(17) Street, Huntington Town Records, I, p. 516-517. The word "cleft" could mean the low bluffs on the sound. The phrase, "main run of water that runs out of the pond and into the pond," could be the stream to the north emptying into the sound and the one to south feeding the pond, or, it could simply refer to the former since it suggests alternate water flows tidally. A woodland pole was about 16 feet long, so that the pondside length covered 1,280 feet. The pond is about one-third of a mile long, about 1,760 feet, so that Arthur lacked only 500 feet of its entire length.

(18) Sleight, Records of Smithtown, I, p. 405, II, 427-429. See, Pelletreau, Smithtown Records, p. xiv-xvi, 359, for division by Smith's grandchildren in 1736 of land on west boundary into long lots, and deed from his wife, Sarah, to son Daniel for part of Fresh Pond.

(19) "Certificates of Laying Out" (Huntington, NY: Town Historian's Office).

(20) Sammis, Huntington Town History, p. 191.

(21) Pelletreau, Smithtown Records, p. 212-213.

(22) Street, Huntington Town Records, III, p. 608-609. The leasing of lands under the waters of the sound was illegal and therefore voided that portion of the lease because the trustees did not own those lands.

(23) In 1902 Mary A. Brown sold to H.C. Brown 315 acres from part of a trust, the trustees retaining the right to mine, dig, and excavate gravel and sand and to manufacture brick (Suffolk Co., NY. County Clerk's Office. "Deed Liber" (Riverhead, NY), 546, cp. 355. Mary Brown had acquired part of the brickyard area in 1882 from C.R. Buffett (Ibid., Liber 266, cp. 223).

(24) Rogers to Buffett, Ibid., Liber 132, cp. 525 (1865); Ketcham to Soper, Ibid., Liber 146, cp. 105 (1867); Will File 10808, Letters of Administration, N-170.

(25) Sleight, Records of Smithtown, II, p. 431.

(26) Sammis, Huntington Town History, p. 189. She attributes this to a dam at the head (mouth?) of the pond, which has left only a shallow round pond.

(27) Smith, L. Lawrence. History of Smithtown (n.p., 1882).

(28) This history of events was obtained from interviews with George Stringer and William M.A. Brown on 16 July 1974. Mr. Brown is the grandson, born in 1908, of H.C. Brown who ran the brickyard. Edward Senne built the dam in 1950, providing an opening in the center for tidal flow.

(29) Shaw, Osborn, ed. Records of the Town of Brookhaven (New York: The Derrydal Press, 1930-1947, 7 vols.), Book A, p. 11.

(30) Ibid., p. 5. The Indian name for Wading River was Pawquacumsuck.

(31) Ibid., p. 36-37, grant of 10 acres to Richard Woodhull, 1675; Ibid., p. 13, conveyance of land between "the going down of the beach" 3 miles east of Old Man's to Wading River by John Budd, 1676; Ibid., Book B, p. 7, 35, additional grants to Woodhull in 1680 and 1685.

(32) Ibid., Book A, p. 42-43.

(33) Ibid., Book B, p. 194-195; Ibid., Book C, p. 20. The rights of commonage, methods of allotments, and the existence of trustees in the town, were similar to those employed in Huntington.

(34) Ibid., p. 55, 57. In 1710, still indigent and decrepid, Rogers returned to Southold from whence he came.

(35) Ibid., p. 31, 35.

(36) Ibid., p. 49, 53.

(37) Ibid., p. 87, 112, 125, 126, 129 for divisions of the common lands in 1717, 1721, 1724, 1726, and 1728. A clue as to the tempo of local ways is found in the minutes of a town meeting on 15 May 1749. The voters there approved an ordinance to restrict the grazing of sheep on common or unenclosed lands of the town, with a penalty of one pence for every sheep found unattended, that is, except at Wading River where the sheep "shall go at large." 262.

(38) Ibid., p. 131, 210.

(39) Ibid., Book B, p. 469, 472. Since this road was on the west side of the river, it suggests that the marsh land there was not stable, but receded and advanced intermittently over the years. Years later two more roads were laid out in the region immediately around the river, (Ibid., Book A, p. 85, for 1790, and Ibid., Book C, p. 414, for 1789). Other roads gradually appeared in the vicinity. In 1799 the Town of Riverhead, recently separated from Southold,

ran one to the sound on the east side of the river (Downs, Arthur C., Jr., ed. Riverhead Town Records 1792-1886 [Riverhead, NY: Town of Riverhead], p.33, 427).

(40) Ibid., p. 395; Records of the Town of Brookhaven, Suffolk County, NY... (Port Jefferson, NY: Times Steam Job Print, 1888), II, p. 137 (1798-1856).

(41) Bayles, Richard M. Historical and descriptive sketches of Suffolk County... with a historical outline of Long Island, from its first settlement by Europeans (Port Jefferson, NY: The Author, 1874), p. 283-284.

(42) Shaw, Osborn, ed. Documents of the Town of Brookhaven, 1693-1947 (Patchogue, NY: The Patchogue Advance, 1947), p. 173.

(43) Early Long Island Wills, 1690-1703 (n.p., 1897): John Corwin (1700), p. 254-255; Peter Whitier (1697), p. 172; John Tooker (1688), p. 38; Zachary Hawkins (1798), p. 168; Isaac Dayton to Isaac, Jr., (1707-1716), in Shaw, Brookhaven Town Records, Book B, p. 331, 355; Dayton family to Adam Terrill (1717), Ibid., p. 364-365; Jonathan Horned to John Robinson (1714), Ibid., p. 486; John Robinson to Josiah Ranier (1726), Ibid., p. 416; James Woodhull (1861), in Suffolk Co., NY. County Clerk's Office. "Will File," Riverhead, NY: Surrogate Court. 5347, WL7/439; Nathaniel M. Tuthill (1906), Ibid., Intestate 17005; Frances Woodhull (1918), Ibid., 24159, 70/570.

(44) Even the cemetery that appears on an 1873 map remained untouched, that is, at least until 1930 when a Roman Catholic orphanage bought the property. At that time Helen Tuthill, descendant of the colonial owner, had the headstones removed to the public cemetery at Mount Sinai, leaving behind the ancestral bones that had long since integrated with the subsoil. Tuthill, Fanny T. Tuthill Geneology, p. 7-10.

(45) The term "waste" is used here to indicate open meadowland not cultivated, scrub forest land, and fallow fields, the commonly accepted understanding of the term during the colonial period.

(46) The company first publicized its plan to construct a nuclear power plant in 1966, at which time it applied for the appropriate permits from federal, state, and local authorities. Resistance developed quickly and it was not until 1973 that the Atomic Energy Commission, after innumerble and exhausting public hearings, issued a permit. The decision of the AEC is now being appealed through the courts by environmental conservation groups, but the company is proceeding with construction with a target date of 1978 and has alternate plans for the use of coal or oil if the environmentalists are upheld in their objections to the nuclear plant.

(47) Case, J. Wickham, ed. Southold Town Records (New York: S.W. Green's Sons, 1882-1884, 2 vols.), II p. 6-8.

(48) Craven, Charles E., ed. Whitaker's Southold; being a substantial reproducton of the history of Southold, LI, its first century by the Rev. Epner Whitaker (Princeton, NJ: Princeton University Press, 1931), p. 6, 81-83, 130-132. Those who left the town often "laid down" their home lots and common rights to the town, that is, returned them to the town's land bank. Liber A of the town records gives fragmentary evidence of land divisions and in 1651

there appears a description of individual holdings then extant. Lands were divided by lot and rules laid down how certain plots were to be enclosed.

(49) Case, Southold Town Records, II, p. 8-11. The patent was not officially recorded until 18 January 1685/1686.

(50) Ibid., p. 11-12.

(51) Ibid., I, p. 228-230, 246-247, 366-367.

(52) Ibid., II, p. 194-195, 338-339.

(53) Ibid., I, p. 135-138f. For example, Case, the editor of the town records, points out that John Youngs and all the Youngs had all of their shares laid to them in the Oysterpond division. Thereafter they were not named in any other divisions. Similarly, William Wells, Barnabas Horton, Thomas Mapes, and seven others received allotments in the Corchaug and Accabauck divisions, but not in subsequent divisions elsewhere. The material on the origins of the commoners as a distinct group are taken from this source. Cf. Southold, NY. Town Clerk's Office. Southold Town Records (Southold, NY: at Town Historian's Office, 1651-1885, 5 vols.), Libers A and C for detailed records of land divisions by the freeholders or the commoners. The first indication that individual commoners had become dissatisfied with the situation as it had existed in the seventeenth century is recorded at town meetings in 1702 and 1705 when two of them protested against the leasing of creek thatch by town vote (Ibid., p. 137).

(54) Southold, NY. Public Library. "Whitaker Collection" (Southold, NY [doc. no. 96F]) cites a report to the town by a three-member committee in 1849-1850 that referred to the origins of the commoners and the 1707 meeting as recorded in the minutes of June 3 of that year; cf. typescript of the report by L.T. Waitz, Town Historian, 1972. The 1850 committee sharply criticized the commoners selling creek thatch and small bodies of water in the town, thus taking up the argument of their predecessors, the noncommoner freeholders of 100 years earlier.

(55) Case, Southold Town Records, II, p. 496-497. In 1719 they auctioned off land without objection from the other freeholders; in 1731 they appointed a committee of three to settle the boundaries between their own lands and those of other private owners; in 1762, a commoner asked the voters at a town meeting to order the commoners as a whole to pay the expenses of having their bounds surveyed (Ibid., I, p. 137).

(56) Laws of New York, 1796, Chapter 52; amended in 1847 by Chapter 399 and again in 1906 by Chapter 511 to strengthen the legal rights of the trustees to initiate actions to recover land by ejectment or trespass suits and to sell and convey by deed their right, title, and interest in any or all of their lands and meadows. A 1950 list of commoners shows 108 shares or rights divided among 28 holders, only three or four of whom bear the names of seventeenth century associates (Southold Public Library, Whitaker Collection, 96F).

(57) Laws of New York, 1893, Chapter 615, as amended by Chapter 404 of the laws of 1952. The trustees, as duly elected town officials, were subject to all state laws governing such officials.

(58) Case, Southold Town Records, I, p. 34 et passim. During the 1720s and later frequent entries were made respecting the annual leasing of common creek thatch. Although Robins Island Neck, where New Suffolk and West Creek are located, is not mentioned, South Harbor, Hogs Neck, Indian Neck, Cutchogue, and the Mattituck River area appear often, indicating where the remaining common creek thatch areas were located for years in sizable enough plots to warrant cutting (Ibid., II, p. 194, 530-531). Apparently, in the various divisions, they made most ponds and some lands adjacent exempt from allotment. According to the editor of the records, every pond from Oysterponds (now Orient) to Riverhead along the King's Road was exempted and marked as town property, although certain people were granted restricted privileges of use.

(59) Craven, Whitaker's Southold, p. 179.

(60) Southold, NY. Town Clerk's Office. Southold Town Records, Liber D, p. 172; typescript in town historian's office.

(61) Ibid., Remonstrance of 16 December 1835 and resolution of 5 April 1836.

(62) Telephone conversation with Mr. Alvah Goldsmith, President, Board of Trustees of the Town of Southold, 6 August 1974.

(63) Southold, NY. Town Clerk's Office. Southold Ordinance Book, 1915-1973 (Southold, NY), Title: Water Ordinances; protection of clams, bay constable to enforce county law on clam size and highway superintendent to post signs forbidding clamming by nonresidents, 1930; on shrimp, nonresidents forbidden to harvest, Liber M, 769, 1933; nonresidents strictly forbidden from shrimping in designated areas, including West Creek, Liber J, 147, 1933; on scallops, dredging not permitted in Mill Creek and Pete's Neck Bay, amended 1944; on clams, the manner of taking circumscribed, 1949; on shellfish in general, regulations on the manner of harvesting, size, and residence requirements, 1966, amended and updated by Chapter 77 of the town's laws, 1973.

(64) Ibid., 18 May 1959. Other similar ordinances required permits for duck farms (1949); prohibitions against dumping waste matter in town waters (Chapter 41, 1949).

(65) "Wetlands, Chapter 97," in Code of the Town of Southold (Spencerport, NY: General Code Publishers Corp., 1973), Art. I, para. 11B.

(66) Two obvious potential weaknesses seem inherent in this ordinance. First, the exemption of the trustees from its provisions removes from under its jurisdiction all town waters other than those in private hands; second, the exclusion of existing structures and the "ordinary and usual operation" or maintenance of them will pose problems in the future as the history of Huntington Harbor will attest, not to mention future confrontations by riparian owners who will object to either the trustees or this town ordinance, based on arguments that will be cited in a later chapter.

(67) Telephone conversation with Mr. Phillip Horton, commoner and member of the board of trustees of the Town of Southold, 6 August 1974.

(68) Case, Southold Town Records, I, p. 120-156. In 1675, Vail's land is described as meadow.

(69) Ibid., I, p. 294-295; II, 57-58, 356; Werner, Charles J., comp. Genealogies of Long Island Families (New York, 1919), p. 41.

(70) Case, Southold Town Records, II, p. 498-499.

(71) Ibid., I, p. 286-288; Frost, Josephine. Wickham-Billard Genealogy (New York, 1935), p. 3-16; Werner, Long Island Families, p. 41 et passim; Joseph P. Wickham, (1806), in Suffolk Co., NY. County Clerk's Office. "Will File" B/356; John P. Wickham (1806), Ibid., B/380; Elizabeth and Parnel Wickham (circa 1884), Ibid., 19/420, 21/298; Foster R. Fanning (1897), Ibid., M/259, 33/198; Wickham Case (1931), Ibid., 336P1931; Oliver W. Case (1946), Ibid., 550/p1946; Clifford T. Case (1956), Ibid., 31P1956; Ruth B. Case (1971), Ibid., 1134P1971. Many use such words as meadow, marsh, thatch, creek, and occasionally refer to a dwelling house.

(72) Will of Wickham Case, 1931; Deed, Clifford Case to North Fork Country Club, 26 November 1931, Suffolk Co., NY. County Clerk's Office. "Deed Liber," 3293, 501.

(73) Case, Southold Town Records, II, p. 12. The name Aquebogue, originally "Ucque-baug" in the local Indian language, means "the end of the watering place" or "head of the Bay." See Tooker, Indian Place Names, p. 16-17; cf. Meier, Evelyn R. The Riverhead Story (Riverhead, NY: Town of Riverhead, 1967), p. 9-10.

(74) Ibid., p. 16-17, 21. A list of John Young's lands in 1656 "in the second division" credits him with five lots, bounded east by Jas. Parshall, west by John Swazey, north by the North Sea (Long Island Sound), and south by the south harbor or bay south. See also, Ibid., I, p. 379, for other conveyances in the area in 1679-1680.

(75) Yeager, Edna H., comp. Peconic River Mills and Industries (Riverhead, NY, 1965), p. 1-3.

(76) Downs, Riverhead Town Records, p. 264. This location can be fixed by the authorization for a road in that year that called for a "two pole" running out of the King's Road "between William Penny's and Daniel Pike's...down to the mill at the head of Peter Halliock's [Hallock] meadow." This has been identified by the editor of Riverhead's records as Poor Lane, now Shade Tree Lane, in Aquebogue. The extent of lumbering for the sawmills in the eighteenth century caused John L. Gardiner to observe in 1798 that "the woods of this part of Long Island is (sic) disappearing. Thousands of cords are annually cut down...for sale. If it were not for the vast forests of pine trees...it would be soon destitute of wood." John L. Gardiner, "Notes on East Hampton, 1798," in New York Historical Society, Collections ...for the year 1869 (New York: Printed for the Society, 1870), p. 255-256. A conservationist at heart, Gardiner felt that the only remedy to the disease of the ax would be legislative action to curb further lumbering.

(77) Meier, The Riverhead Story, p. 7.

(78) Dwight, Timothy. Travels in New-England and New-York (New Haven, CN, 1821-1822 4 vols.), III. Dwight, an astute observer, offers many similar comments in this volume that concentrates on Long Island and is an excellent source of capsule commentaries on the county's towns at the beginning of the

nineteenth century. N.S. Prime, who wrote a well-known history of the island later in the century, thought Riverhead town to be one of the most "sterile spots in the county...its land being incapable of repaying the labor of cultivation," quoted in Meier, The Riverhead Store, p. 15.

(79) Nathan Reeve, 1851, in Suffolk Co., NY. County Clerk's Office. "Will File," 4174, WLf/318; will of N.A. Reeve, 1857, Ibid., 4794, WL6/207; will of Herman W. Wells, 1864, Ibid., 5844 WL8/1618; division of lands of David Downs, 1866, Ibid., DL 290, 305, 307; will of Noan W. Youngs, 1887, Ibid., 10777, WL22/127.

(80) Downs, Riverhead Town Records, p. 466.

(81) Deeds and wills of the latter nineteenth century use such descriptions as woodland, meadow, cedar swamp. E.A., M.E., and A.M. Wells to G.L. Wells, 1875, Suffolk Co., NY. County Clerk's Office. "Deed Liber," 554, 556; H. Corwin to J. Edwards, 1888, Ibid., Liber 332, 463; J.E. Wells and W.M. Cordelia to J.M. Edwards, 1891, Ibid., Liber 414, 229; P.J. Tuthill to M.E. Downs, 1893, Ibid., Liber 418, 474; E.H. and R.L. Reeve to A.S. Reeve, Ibid., Liber 1278, 29; J.H. Perkins to H.M. Reeve, 1897, Ibid., Liber 461, 196; M.E. Wells to G.L. Wells, 1897, Ibid., Liber 554, 557; M.E. Wells to G.L. Wells, 1900, Ibid., Liber 1209, 213; Will of C.F. Wells, 1893, Suffolk Co., NY. County Clerk's Office. "Will File" 13868, WL33/162; will of J.D. Howell, 1905, Ibid., 16691, 45/554; will of O.H. Corwin, 1905, Ibid., 16564, 45/210; and others through 1907.

(82) Meier, The Riverhead Story, p. 41. According to the author, eight of the birds were sacrificed on the dinner tables of the town to prove their worth. The remaining six became the founders of generations of millions of ducks, with over 7 million sent to market in 1966.

(83) W.B. and A.B. Codling to H.S. Knabenschuh, Suffolk Co., NY. County Clerk's Office. "Deed Liber," 565, 296, 12 acres; O.W. and W.M. Hubbard to Knabenschuh 1 May 1905, 1 acre; C.F. Downs et al to Knabenschuh, Ibid., Liber 573, 346, 2 acres; L.E. Young et al to Knabenschuh, Ibid., Liber 521, 122, 2 acres; E.D. Fishel to Knabenschuh, Ibid., Liber 571, 123, 1 acre; G.L. and M. Wells, Ibid., Liber 571, 141, neck leading to Indian Island; J.P., M. and G.B. Terry to Knabenschuh, Ibid., Liber 571, 139, 15 acres; C.F. And I.M. Downs to Knabenschuh, Ibid., Liber 571, 252, 15 acres; L.E. and R.E. Downs to Knabenschuh, Ibid., Liber 572, 464, no acreage given; C.L. Downs to Knabenschuh, Ibid., Liber 573, 347, 15 acres; H. Downs et al, to Knabenschuh, Ibid., Liber 572, 463, no acreage given; W.A. and O.A. Terry, L. Young, E.M. Fanning to Knabenschuh, Ibid., Liber 573, 387, share of undivided interest of D.A. Downs; H.J. Wells to Knabenschuh, Ibid., Liber 578, 580, 7 acres; H.M. Reeve, F.E. and J.L. Hallock to Knabenschuh, Ibid., Liber 587, 388, three meadow lots; E.A. Vail and S.T. Benjamin to Knabenschuh, Ibid., Liber 595, 260, 15 acres; W.B. and A.B. Codling to Knabenschuh, Ibid., Liber 607, 522, 13 acres; for a total of well over 85 acres.

(84) Wilcox, LeRoy. Long Island (n.p., 1949, 4 vols.), II, p. 458.

(85) Agnes King to Herman Hesse, 1908, Suffolk Co., NY. County Clerk's Office. "Deed Liber," 655, 358; Herman and Mary Hesse to H.F. Nampaey, 1909, Ibid., Liber 695, 401.

(86) Wilcox, Long Island, p. 458.

(87) E.G. Warner, to H.V. Warner, 1922, Suffolk Co., NY. County Clerk's Office. "Deed Liber," 1050, 40; D.G. Homan to H.V. Warner, 1926, Ibid., Liber 1190, 303; A.J. and J.W. Hallock, 1926, Ibid., Liber 1219, 384; same to same, 1926, Ibid., Liber 1219, 381; Heelbarp Corp. to H.V. Warner, 1929, Ibid., Liber 1467, 179; D.G. Homan, 1929, Ibid., Liber 1474, 559; C. Tooker, foreclosed mortgage to H.V. Warner, 1940, Ibid., Liber 2084, 229; J.T. and R.H. Downs to H.V. Warner, 1942, Ibid., Liber 2257, 500; F.W. and H.H. Reeve to H.V. Warner, 1942, Ibid., Liber 2257, 503; D.R. Young to H.V. Warner, 1942, Ibid., Liber 2257, 495; D.R. Young et al, to H.V. Warner, 1942, Ibid., Liber 2257, 508; H.E. Reeve et al, to H.V. Warner, 1944, Ibid., Liber 2351, 424; and J.A. O'Keefe, foreclosed mortgage, to H.V. Warner, 1945, Ibid., Liber 2475, 468.

(88) Wilcox, Long Island, III, p. 29.

(89) Suffolk Co., NY. County Clerk's Office. "Mortgage Liber" (Riverhead, NY), Liber 1644, 199-212; 1957, Ibid., Liber 2950, 435-444; H.V. and C.B. Warner to H.V. Rosenblum, 1963, Liber 5294, 435. A few years later, both financial and personal problems culminated in his death.

(90) Suffolk Co., NY. County Clerk's Office. "Map File" (Riverhead, NY), No. 111940; Board of Trustees of Southold to Town of Riverhead, 1964, in Suffolk Co., NY. County Clerk's Office. "Deed Liber," 5662, 169; Proprietors of the Common and Undivided Lands of Southold to Town of Riverhead, 1965, Ibid., Liber 5733, 350. Incidentally, the Town of Riverhead has not printed a municipal code book available to the public, has no shellfish laws, and in 1972 was only giving thought to a wetlands ordinance.

(91) Adams, James T. History of the Town of Southampton (Bridgehampton, NY: Hampton Press, 1918), p. 44-48, 261-263. The grant actually included "eight miles square of land or so much as shall contain the said quantity not only upland but also whatsoever meadow, marsh ground, harbors, rivers, and creeks lie within the bounds..." and is dated 17 April 1640.

(92) Ibid., p. 256-260; cf. Pelletreau, William S., ed. Records of the Town of Southampton (Southampton, NY: Town of Southampton, 1878-1928, 8 vols.), I, p. 2-7. In a later declaration, dated in June of the same year, they limited the time of this article to two years from the date of settlement. The remaining provisions governed the felling and removal of trees, restricted all travel to public roads so that none would cross over private property of others, and left the inhabitants to decide any controversies among themselves in whatever manner suited them.

(93) Adams, History of Southampton, p. 260.

(94) Heretofore Southampton had been an integral part of the colony of Connecticut. In 1644 the town signed the Articles of Combination with Connecticut, partly out of fear of renewed Indian hostilities in the general area. The Pequot War of 1637 was fresh in their memories and joining the other colony would give them the benefit, so they thought, of the strength of the newly formed Confederation of New England, which had been aired by Massachusetts in an effort to find safety in numbers against the Dutch, French, and Indians--and to dominate the other colonies as she felt it her

right to do. Andrews, Charles M. Colonial Period of American History (New Haven, CN: Yale University Press, 1937, 4 vols.), II, 98, 100, 164, et passim.

(95) Adams, History of Southampton, p. 92; for the reprint of the remonetrances sent to Andros, and his reply, see p. 276-278.

(96) Ibid., p. 279-280.

(97) Ibid., p. 281-287; cf. copy in Southampton, NY. Board of Trustees. The Board of Trustees of the Freeholders and Commonalty of the Town of Southampton (Southampton, NY, 1968), p. 8-17.

(98) Ibid. In all other respects the Southampton patent is almost indentical in its wording with those issued to the other trustee-patent towns on Long Island.

(99) Pelletreau, Southampton Town Records, III, p. 83-91, for the Great South Division; elsewhere in this volume for other major land divisions among the proprietors. For evidence of disputes between proprietors and other townsmen it is necessary to read through each volume page by page. The editors, Pelletreau and others, have done such a sloppy job of indexing and arrangement of the documents, to say nothing of the ones they abstracted or simply commented on, that the index is little more than a genealogical reference table and is not to be trusted to find other sought-after data.

(100) Adams, History of Southampton, p. 63.

(101) Southampton, NY. The Board of Trustees of...Southampton, p. 19-21, for a reprint of "An Act relative to the common and undivided lands and marshes in Southampton, in the County of Suffolk," passed 15 April 1818.

(102) Laws of New York, 1831, Chapter 283. One reservation in the act modified the power of the trustees to the extent that they might have been abrogated, changed, and altered by state laws, and, of course, excluded the property of the proprietors.

(103) Adams, History of Southampton, p. 249-250. Pelletreau, editor of the town records, scarcely takes note of this, relegating the event to a footnote (VII, p. 129); yet he does pay some attention to titles to lands under water in his discussion of Mecox Bay, beaches, and similar areas, but his comments are scattered throughout the volume in a rather random order.

(104) Ibid., p. 83f. There is evidence that Edward Howell received 4 acres of meadow at Mecox as early as 1644, but this is probably on the west side; cf. Pelletreau, Southampton Town Records, I, p. 40. According to Tooker, Indian Place Names, Mecox meant "plains" in the Indian tongue.

(105) Pelletreau, Southampton Town Records, V; known also as the "Red Book of Deeds."

(106) Sleight, Harry D. Trustees' Records of the Town of Southampton (Sag Harbor, NY, 1931, 3 vols.), I, p. 63, to Abram Halsey, 1743; Ibid., p. 132, to Zebulan Peirson, 1757; Ibid., p. 506, survey for land for Silas Halsey, 1791; Ibid., II, general survey of land on both sides of the cove to see if disposal

would "discomode" the public and to asseas its value, 1797; Ibid., p. 297, 299, to widow of Silas Halsey and to Jane and Ruth Halsey as confirmation, 1825.

(107) Trustees of Southampton v. Mecox Bay Oyster Co., Ltd., p. 281, 382, 335-336; Sleight, Southampton Trustees Records, I, p. 81, 149, 156, 167, et seq.; II, p. 312, 318, 319, 332, et seq.

(108) Ibid., I, p. 539. He also had to maintain a road below the mill at the place where it crossed the brook and insure that it would not be gullied or damaged by the mill operation; p. 550, for Scuttle Hole reference; Adams, History of Southampton, p. 14.

(109) Sleight, Southampton Trustees Records, II, 34, 227; Trustees v. Mecox Bay Oyster Co., 314.

(110) Adams, History of Southampton, p. 231f.

(111) Trustees v. Mecox Bay Oyster Co., p. 295, 322, 325 et seq.

(112) Trustees v. Mecox Bay Oyster Co., p. 345-346, 349, 352-353, Sleight, Southampton Trustees Records, II, p. 232, 234-235, III, p. 10.

(113) According to Adams, History of Southampton, the term "seapoose" is from the Indian and means "little river," the first syllable actually having nothing to do with the English word "sea"; Pelletreau, Southampton Town Records, I, p. 43, 94; II, p. 85. Another reason given for this practice is that it was necessary to prevent the flooding of surrounding land.

(114) Trustees v. Mecox Bay Oyster Co., p. 341-342, 351.

(115) G.E. Jones to R. Rogers, 1920, Suffolk Co., NY. County Clerk's Office. "Deed Liber," 1006, 360; 1922, R.J. Rogers to F.J. Martin, Ibid., Liber 1057, 411; First National Bank of Southampton, mortgage deed to J.J. Kronshage, 1931; 1948, J.J. Kronshage to W.F. Kronshage, Ibid., Liber 2788, 595; 1952, W.J. Kronshage to J. Bellini, Ibid., Liber 3343, 154.

(116) This brief summary of recent events in the area has been taken from the author's sometimes personal involvement in them and a brief article: Kavenagh, W. Keith, "Duck Suit Back in Court," Newsday, 17 July 1974.

(117) It is assumed here that the mill ponds created and the marshland drained consisted primarily of high marshes. Total acreage affected when added together, 3 acres here--10 acres there, was probably substantial, but when compared with the loss of wetlands acreage within the past half century it pales into insignificance.

(118) This was re-enforced in the latter nineteenth century by the rags-to-riches Horatio Alger philosophy that swept the country then, epitomized by the belief that economic success was the measure of all things and free private enterprise the best method of solving all ills. Later historians have labelled this Social Darwinism, the economic survival of the fittest.

CHAPTER VI

THE PUBLIC TRUST DOCTRINE IN ENGLAND AND AMERICA

In the histories of the customs and laws of the two great civilizations that strongly influenced the American legal system one can find innumerable examples of the existence of the concepts of the trust obligation and public lands held for public uses. The Romans did not really have trusts or uses, per se, but their laws recognized that it was possible for a thing to have two owners with different degrees of rights, interests, and uses, a fundamental requirement of trusts as well as leases, mortgages, and the like. It was for the English to develop and perfect the trust concept to a high degree of sophistication as we know it. Both civilizations, however, recognized that some lands were of such fundamental importance to the community at large that they should be owned and regulated for the public benefit.

Under Roman law the legal owner, the dominus ex jure civile (or ex jure Quiritum), who was the holder of the fee title and the only one who could dispose of it, could pass the beneficial use of a thing to another, who held baritarium ownership, without affecting the legal ownership (1). The Romans also recognized the existence of public land, in a sense common land, held by the government for the people. As early as the fourth and third centuries BC, one finds that conquered territories were considered public lands to be held or distributed to the victorious Romans as the government deemed it in the best interest of the people (read here also Republic and later Empire) to do so and to reward military and political leaders. One can interpret this practice in one of two ways: either the Romans acquired all conquered lands as public, to be distributed and conveyed to individuals for services rendered; or the Romans recognized privately held lands of barbarians, transferred title to a loyal Roman, and retained what was left for the state until such time as any or all of it was conveyed into private hands. It would be difficult to read into this a trust obligation, but one can see a well-defined public land policy of using lands within Roman jurisdiction either to reward citizens or to be held for the use of the state for whatever beneficial purposes it deemed necessary.

With the advent of what is called the Dark Ages in Europe and its accompanying intellectual paralysis, the influence of Rome and its laws almost disappeared from large sectors of western Europe. Even at its height, Roman law had had the least impact on England; it vanished entirely when Rome abandoned the island early in the fifth century AD, leaving it to successive waves of barbarian invasions. Nevertheless, some of it would eventually return, however indirectly, as the result of the efforts of the Roman emperor Justinian who, 100 years later, attempted to codify the legal systems and laws of his widely scattered and culturally diverse empire.

The Corpus Juris Civile, or the Justinian Code, begun under the direction of Justinian a year after he ascended the throne of the eastern empire in 527, is

the principal source of knowledge of Roman law and the instrument that conveyed the Roman legal system to the modern world via the medieval scholars of the thirteenth and fourteenth centuries. Although not a legal code of laws as such but rather more of a commentary on the laws, the Corpus Juris consisted of the imperial constitutions of past centuries, the writings of jurists, and the old laws and known customs (consuetudo). The entire collection was published over a period of years in parts called the Code, Institutes, Digest, and Novels. Of these the Institutes served for centuries as an elementary textbook for the study of law.

Of interest to us here is the Institutes' observations on public property. The second book of the Institutes begins by pointing out that "some things are by natural law common to all men, some are public, some belong to a corporate body, some belong to no one, most things belong to individuals and are acquired by various means..." In other words, certain things (res) are not susceptible to private ownership, such as: (1) things common to all men (res communes)--the air, running water, the sea, and seashore; (2) things public (res publicae)--rivers and harbors; (3) things belonging to a corporate body (res universitatis)--theaters, race courses, and the like, found generally in cities; (4) things belonging to no one (res nullius)--sacred things (res sacrae) such as churches, religious things (res religiusae), as with graveyards, and sanctioned things (res sanctae) such as city walls and gates. As for shores and waterways, specifically, the Institutes interpreted former laws and customs to hold that:

> 1. By natural law the air, flowing water, the sea, and therefore the shores of the sea are common to all. Consequently, no one is forbidden to approach the shore, provided that he does not interfere with dwelling-houses, monuments, and buildings, for these are not subject to the jus gentium, as the sea is. 2. All rivers and harbors are public; consequently the right of fishing in a harbor and rivers is common to everyone. 3. The sea-shore extends to the limit reached by the highest winter flood. 4. The use of riverbanks is public and juris gentium, like the use of the river itself; and so every one is free to put in at the bank, to fasten ropes to trees growing on the bank, or to land a cargo, just as every one is free to navigate the stream. But the ownership of the banks and of trees of sea shores too is public and juris gentium, like the use of the sea itself, and so any one may set up a hut to retire into, may dry his nets, and draw them up from the sea. But the ownership of the shores may be supposed to be vested in no one, and to be governed by the same law as the sea and the sea-bottom (2).

To say that Roman law directly influenced English law to any extent, at least prior to the thirteenth century, would be misleading, but to say that the early Anglo-Saxons and later the conquering Normans independently evolved systems of public lands invested with a vague forerunner of a public trust obligation might not be wrong or even too outlandish to take into account. There was, of course, no direct carry-over of Roman law after the end of Roman occupation in 440 AD. The Teutonic tribes that overran the British Isles and virtually wiped out the Britons brought their own land systems with them. The district in which each tribal group lived was not considered to be private property but rather for the use of all in the community, although each head of a household actually owned the land on which his house stood. Under the dictates of the three-field system of agriculture then current, fallow

meadowland and the waste or common land, usually woods, was used by all for rights of pasturage, wood-cutting, and similar basic needs of these primitive agricultural communities (3).

Eventually, the vast amount of wasteland in England came to be looked upon as a common stock from which the king and the Witan, the supreme council of the realm, had the right to make grants of land by charter. Gradually, this translated itself into a belief that unoccupied land belonged to the Crown and that the king was prima facie the owner, even of the sea shore below high water mark (4). As small weak kingdoms merged with or became absorbed by larger kingdoms and, eventually, the largest kingdom and its king encompassed the whole nation, the idea that all unoccupied land was the royal domain, terra regis, became more strongly developed. Concurrently, the claims of the kings to certain dues, services, and proprietary rights began to be recognized.

Even though a clear-cut theory of tenure may not have existed in Anglo-Saxon England, the Norman conquest of 1066 imposed one upon the country. Thereafter, all land was held of some lord and ultimately of the Crown throughout the entire nation. No allodial land remained (5).

With the conquest, William I assumed all the rights of the Anglo-Saxon kings and their possessions held in a private capacity. No longer did a distinction exist between the king's ownership of land privately and his suzerainty over unoccupied lands as head of the nation. All became terra regis. Despite this change, certain customary common rights prevailed. Even though all rights over the land within a district not expressly claimed by an individual came to be regarded as vested in the lord and he in turn was regarded as a tenant of the king, the common rights of pasturage, fishing, and wood gathering persisted (6). The Normans and their successors wove into the socioeconomic fabric of England a theory and practice of feudalism that decreed that every occupant of a piece of land, legally possessed of it, held of some superior lord and ultimately of the king into whose hands the protection and well-being of his subjects was placed. In this system, certain common rights became an integral feature and incident of lands traditionally held to be beyond exclusive private ownership and vital to the existence of the community. That is to say, such lands could be held privately, but they were subject to the rights of the public to use them for essential activities such as wood gathering, fishing, livestock grazing.

Into this system came the Roman law, although it did not appear conspicuously until the middle of the thirteenth century. The growth of the study of Roman law in England began with the lectures of Vacarius at Oxford in 1149 and became quite popular thereafter until early in the next century when resistance to it developed. A general opposition to its "cosmopolitan doctrines" arose among common law lawyers and the church resulting in laws that forebade the teaching of civil law at least in London. Nevertheless, through the writings of Bracton some of the concepts of the Roman law found their way into the English system (7). Quoting Justinian's Institutes extensively, he used that work in support of his analysis of the prevailing English law with respect to common rights and their inalienability in certain lands, although he did not specify more than the known and accepted common rights of turbary, piscary, and the like. His influence, and correspondingly that of the Roman law, can be found most directly in the doctrine of seisin and possession of real and personal property.

Under the technical rules of law that feudalism created after the Norman conquest, real property could not be disposed of (devised) by will. Also, under the feudal system an heir to an estate in land has to pay the lord a relief in order to succeed to it; a tenant could lose his real property to his lord by forfeiture if convicted of treason or by escheat if guilty of a felony. Creditors could attach the property for payment of debt. Trusts, or uses as they were called, arose to circumvent these restrictions.

To overcome such feudal restrictions yet remain within the legal system without being hampered by the prevailing rules of law, a tenant would enfeoff the land to a trusted friend who then became seised of the land but who was bound only by friendship to manage the land for the benefit of the feoffer, members of the feoffor's family, or a designated third party. The law recognized the feoffee as the legal owner of the land; yet the feoffer retained the benefits of ownership within the legal fuedal burdens (8). Simply stated, A grants his land to B for the use of A or his family. A can then write a will instructing B to make use of the land for the benefit of his heir C, or to grant it to C upon A's death. By passing title to B to be vested in C at some future time the land is never without a living tenant, for feudalism could not conceive of land being tenantless. This insured that A's heirs would come into possession of the property which normally would revert to the superior lord upon A's death. If C were underage, to insure that he would not become the ward of the mesne lord, A would enfeoff four, five, or even ten so that at least one or more would always be in his majority and be able to assume the governance of C the minor. This cut off the lord from all hopes of exercising his traditional rights of wardship. Similarly, if A owed a large debt, he would enfeoff to B for A's use; a creditor then could not attach A's property since B held the legal title even though A continued to enjoy all the benefits of that property. In this way landowners were able to circumvent feudal restrictions. However, it all depended upon the honesty and conscience of B, the feoffee, or, as he was later labelled, the trustee.

Most applications of the trust were entirely legitimate and reflected an effort on the part of society to get around the rigid fuedal structure it had placed on itself. Trusts originated as personal trusts or confidence placed by one person in another. Once the land had been granted away the grantor lost his legal hold over it and only the trusted friend was recognized in law as being the owner. The grantor had but an inchoate equitable interest with no real remedies in the law to force the grantee to do or not to do something once the transfer had taken place. Unable to find relief in the common law courts, the beneficiary of the use had recourse only to petition to the king to redress his grievances. Under the early English system the king was the source of all justice and even the common law courts derived their authority from him. If one could find no remedy in the courts he appealed to the king who could do what the courts could not, that is, he could mete out justice based on equity where the law courts were otherwise restricted by their rules to either no remedy or an inadequate one. In this way equity jurisdiction came into being and slowly built up precedents and rules of its own, supplementing the workings of the common law courts (9).

During the reign of Edward I (1272-1307) the king usually referred all petitions to the chancellor. Edward III (1326-1377) formalized this procedure by decreeing that all such petitions for relief be sent directly to the chancellor or to the keeper of the Privy Seal. It was not until the fifteen

century, however, that such procedures became systematized. By that time the practice of creating trustees to uses had become common, particularly so since this century witnessed a major civil war in England and many persons resorted to the device to save their lands in the event they happened to find themselves on the currently losing side and accused of treason. Even then the trustee to use had only a moral obligation to fulfill the terms of the trust imposed upon him. Nevertheless, the chancellor's court, the court of chancery, could instruct a trustee to carry out his duties and threaten him with contempt of court if he did not.

Until the reign of Henry VIII, Parliament paid little attention to trusts. By then large quantities of land had been transferred to trustees, thus subjecting it to two owners, one in law, the other in equity. Creditors found it difficult if not impossible to enforce claims against debtors; lords with tenants were deprived of their rights of wardship and escheats; the king lost his rights of forfeitures. At the insistence of Henry VIII, Parliament passed the Statute of Uses in 1535 in an attempt to wipe out all those uses not active and proved to be a device to create a passive repository of the legal title (10). Unfortunately, the statute did not accomplish its purpose. The courts soon interpreted it as not applying to active uses, or trusts, where the trustees had certain specified duties to perform. Nor did they permit it to be applied to uses for a term of years, claiming the statute only covered freehold estates to uses.

This does not mean that the statute became a useless piece of paper. What it did, at least in terms of passive uses where the trustee had no duties to perform, was to transfer the legal estate to the cestui que use. No longer could the beneficiary dispose of his lands by will; he again became subject to the feudal dues of relief, wardship, and the like. To distinguish between an active and a passive use the former came to be called a trust and a whole body of modern law developed around it to insure that the trustee would carry out his duties on behalf of and for the benefit of the cestui que trust. It also caused the passage of the Statute of Wills which permitted a freeholder certain powers to devise his land where otherwise under feudal custom he could not (11). Because it abolished the practice of livery of seisin, the tangible, open, and easily recognized act of transferring property (but a cumbersome one that made the grantee actually take physical possession of the land), it gave legal validity to bargain and sale deeds that required no open and notorious act. This opened up the possibility of covert transfers of property. Consequently, in the same year, Parliament passed the Statute of Enrollments, the object of which was to require that bargain and sale deeds be publicly enrolled in the locality in which the sale took place (12).

As a result of the Statute of Uses, the courts began to define and describe various types of trusts (13). For purposes of this study the active express trust is probably the most pertinent (14). An active express trust requires the performance of some active duty on the part of the trustee and comes into existence when the individual creating it did so with that express intent in mind (15). In contrast, a passive trust would be one where no active duty is required of the trustee, permitting the cestui que trust actually to possess, enjoy, and exercise all the benefits incident to ownership of the land.

Generally speaking, neither statutes of limitations nor adverse possession are a bar to express trusts. A rule of equity, in distinguishing between express and other forms of trust, states that "to an action based upon the

breach of an express trust the Statutes of Limitations are not bar." Once property has been vested with a trust none can claim adverse possession unless they can prove a good and legal title, or possession, over a period of years prior to the creation of the trust (16).

To return momentarily to Roman law, it is not beyond reason to claim that Roman law had an influence on seisin and possession of real and personal property in England. In fact, where there had been no clear distinction between these two types of property, those who studied the Roman law engrafted the two onto the laws of property. By the end of the fourteenth century the Court of Admiralty used Roman forms of written procedure along with Roman substantive law. Roman forms of interrogating witnesses in the Court of Chancery also became common practice. One must not neglect the work of Bracton and his efforts to systematize English law through his writing which relied heavily on Justinian's Institutes. The sixteenth century conception of the commonweal finds its origins in the Roman principle of public policy (17). The medieval idea of a natural law and a law of mankind, born of feudalism and christianity, has a direct parallel in the Roman jus naturale and jus gentium. Above all, the fact that the two legal systems found it necessary to acknowledge that certain lands were vested with a public right which in general should not be sequestered by private individuals speaks to the point that neither was an isolated or parochial ideal but rather a somewhat more universal one.

The relevance of the Roman law, in the sense that it recognized the superior rights of the public over those of exclusive private rights in specific areas, should not be underestimated. At the very least, it underscores the ancient origins of such a concept in law and custom. At most, it adds centuries of continuity to the theory, and later the belief in England that the kings held the terra regis not as their personal property to be parcelled out at their whims, other than what was needed for immediate income to sustain themselves and families in a manner befitting royalty, but rather for the benefit of their subjects, the people of England (18). The importance of this to Stuart-Hanoverian England and, by extension, the American colonies, specifically New York and its colonial charter towns on Long Island, must now be taken into account.

In the centuries after the Roman conquerers left England, taking with them their laws and customs, the island population soon reverted to primitive tribal ways. Society slipped quickly into the intellectual, economic, and social morass that gripped all of Europe as successive waves of barbarians swept through and brought with them the Dark Ages. Gone was the unifying character of the Roman law; gone was its principle that the sea, seabed, and foreshore were a matter of jus gentium and not susceptible to private ownership. Petty kings now dispensed justice based on local, tribal law and custom; trade and commerce virtually came to a standstill, followed by an almost complete lack of interest in the sea and things appurtenant to it (19). Local lords dominated the waterways, the foreshore, and the sea only insofar as they had the effective power to do so. Use of the waters and wetlands reduced itself to occasional fishing and fowling, although Saxon lords might build a fish weir in a river and extract tolls from the few adventurous souls who passed their way. The general public, if it can be called that, vanished to be replaced by little clusters of people huddled together in hamlets or small towns for security. There was no one to assert the jus publicum in

wetlands and the foreshore; that concept had been translated into common use of the forests and fields for wood gathering and grazing on the waste.

The battle of Hastings in 1066 changed all that. When William of Normandy crossed the Channel and defeated Harold's troops, exhausted from a forced march after fighting the Danes in the north country, he brought with him the paraphernalia of feudalism. He took unto himself all the land in the realm, including the foreshore, waters, and the lands under them. Thereafter, all held immediately or mediately of the king in some feudal arrangement, he being the only one to hold land in allodium, that is, complete independence of ownership devoid of any feudal dues or services to any superior lord (20). William and his successors could and did grant portions of the sea and other waters to vassals, bestowing upon them the right of a "several fishery" (the right of the grantee to fish and build weirs to the exclusion of all others) (21). William also laid the foundations for the centralization of power and authority in the Crown and thus paved the way for the revival of commerce, industry, and renewed interest in the use of waterways.

By 1215, the year of Magna Carta, most, if not all, of England's tidal waters passed into the hands of private proprietors. They and the kings weired out or exacted tolls as the spirit moved them and the need arose (22). But, like the battle of Hastings, the confrontation between King John and the barons at Runnymede altered the status quo. John, who was obsessed with a need to recover lost lands in France, displayed a marked propensity to lose every campaign he fought there. At home the barons, who bore the brunt of raising men and money for these military dalliances, revolted under the burden of excessively high taxes, John sequestering of some of their castles and holding families hostage to insure good behavior, and general mismanagement of the powers of government (23). The result, of course, was the capitulation of John and his reluctant signing of Magna Carta.

Many things have been attributed to that document as if they had flowered full-blown on the field of Runnymede. In point of fact, it only served the purposes of the revolting barons who forced it on John; it was for later generations of Englishmen and Americans to read into it that which was not intended in 1215 (24). Of particular concern to us here are the sections purportedly dealing with use of the foreshore and lands under tidal waters, namely, chapters 13, 33, 41, and 47. In them can be found the vague beginning of the gradual opening up of the foreshore, waters, and lands under them to freer use by the general public.

Chapter 13 granted to London and all other cities, towns, boroughs, and ports "all their liberties and free customs," both by land and water. This enabled trade and commerce to expand so that by the middle of the thirteenth century the general public acquired the right to use the foreshore for docking, towing, and cargo discharge. Chapter 41 gave encouragement to international trade by promising safety to foreign merchants and protection from "evil tolls." Superficially, these two chapters appear to be supportive of each other, but in reality they were not. Chapter 13 guaranteed to all towns their right to exact heavy taxes, to force foreign merchants to leave after 40 days, and to restrict them to wholesale trading only. Such were their "ancient liberties." The latter chapter was a bar only against the king. Because it was in the best interests of the barons to promote more open trade, for they were the greatest consumers of continental wines and luxuries, these two chapters eventually established a framework within which freer trade developed (25).

Chapters 33 and 47 relate more directly to the use of wetlands, waters, and the lands under them. The former decreed that all weirs throughout England "shall be put down, except on the sea coast." This had the effect of removing impediments to navigation and has been interpreted as prohibiting fishing monopolies in the realm, although the latter was not the intention of the barons at the time. Chapter 47 commanded that all forests set aside by the king for his exclusive use be disaforested, thus opening them to use by others, and that "a similar course shall be followed with regard to river banks that have been placed in defense," by the king during his reign. The narrow intent of these two chapters in the thirteenth century was to remove obstructions to navigation in the form of fish weirs and low bridges, the latter type of obstruction being what some writers interpret the phrase "in defenso" to mean (26). The broader intent, as read into them by later generations, was to allow greater public access to navigable rivers and their banks for trading, fishing, and net drying.

Actually, trade did not flourish nor did the general public rush to the foreshore to exercise their rights there. In fact, they still really had no rights per se, because the feudal hierarchy of land ownership maintained its stultifying grip and the king retained his proprietary rights in the great wastes of the realm, of which land under water and wetlands were undifferentiated parts. He could, therefore, alienate from that land bank whatever he chose to whomever he wished (27). Over four centuries would have to pass before England would have a government sufficiently centralized and water borne trade expanded enough to fully reawaken public interest in asserting control over the foreshore and navigable waters. Nevertheless, Magna Carta did set the stage for later judicial decisions which, although not always historically accurate or a strictly logical interpretation of its terms, destroyed exclusive private proprietary claims to the foreshore and lands under water in the interests of more sophisticated economic conditions (28).

During the sixteenth century England overcame political strife internally to emerge as a contending power for supremacy in ocean-borne commerce and colonization of the western hemisphere. At that time, as in the past, the Crown held title to most of the lands under water in and around the realm, but much of the foreshore had been granted out piecemeal long since or had fallen under private control simply by long use. To further its own policies of promoting trade, encouraging the fishing industry, and lending support to overseas ventures, all of which required use of large expanses of the foreshore, the Crown took steps to reassert its alleged ancient title in the foreshore and all lands under water.

In the last decade of the sixteenth century Queen Elizabeth commissioned Thomas Digges, a lawyer, to delve into the matter in the hopes that he would uncover sufficient historical evidence to justify taking the matter into the courts. He soon produced the desired material and wrote a treatise that argued that the Crown did indeed have, in fact always had, title in the foreshore as part of the great waste of the realm. Unless a specific grant could be produced, the claim of long user would not do (29). Initially, the Crown lost in the courts, but the Stuart dynasty, successor to the Tudors in the next century, pursued the matter aggressively. By imposing extraordinarily heavy taxes on the foreshore and granting monopolies therein to favored companies, Charles I forced the issue back into the courts. He, too, lost, but by the simple expedient of replacing the judges and resubmitting his argument,

Charles won a favorable decision in 1634 in the notorious Attorney General v. Philpot case. In its decision the court accepted the Digges doctrine and laid down what is labelled the prima facie rule, that is, the Crown has the paramount title to the foreshore by royal prerogatives (30). Even though this decision and others like it, which Charles insisted on applying strictly to regain full control of the lucrative foreshore, eventually led him to a very brief acquaintance with the headsman in 1649, later courts and other judges have confirmed it as a fundamental principle of common law (31).

Arguments over who owned and thus had jurisdiction over the sea, seabed, and, therefore, the foreshore in the realm dragged on for decades both before and after Philpot. That case was simply a highwater mark because of its clear statement that title was vested in the Crown and probably because of its notoriety. As early as 1591 in the admiralty case of Officium Domini c. Dulinge the court accepted the argument that the Crown, by right of royal prerogative, owned as proprietor the sea and hence the foreshore (32). Eventually, the contending parties came to accept, with a few exceptions, the theory of Sir Mathew Hale as set forth in De Jure Maris published some seven years after the restoration of Charles II to the throne of England in 1660. In his treatise Lord Chief Justice Hale averred that the king held the proprietary title, the jus privatum, to the sea as far as it ebbed and flowed, which included the foreshore. Yet he carried his argument one step farther than others and reasoned that the king as sovereign held it not for this personal use and enjoyment but for the benefit and use of his subjects, thereby engrafting upon the proprietary title the jus publicum. In other words, the king had title to the foreshore in his own right as a proprietor, but it was subject to the rights of the public for navigation and fishing. Hale believed the king could alienate portions of the foreshore, but could not thereby extinguish the public rights of use. An easement existed across the foreshore that a grantee could not obstruct except by express permission of Parliament (33). It could be said that Lord Hale gave final form to the public trust doctrine as it relates to the foreshore (and possibly tidal marshes) and vindicated Bracton's thirteenth century efforts to infuse the Roman legal concept, if not in whole then in part, into the common law. Since the seventeenth century many court decisions and legal writers have cited Hale with approval as being the primary authority on the English law as it pertains to the foreshore (34).

At first glance one might conclude that De Jure Maris and its later general acceptance provided the general public with unrestricted access to and use of England's tidal waters and the foreshore (35). This is not true for two reasons: the Crown granted away large segments of the foreshore and thus private proprietors allegedly had some rights that might bar certain public uses; and in the eighteenth and early nineteenth centuries English courts had a number of opportunities to apply Hale's doctrine, but did so in terms of specific public rights more in the nature of easements to be defined and categorized than as a blanket all-purpose use in complete derogation of private rights (36).

In 1667 Lord Hale reached the conclusion that "the jus privatum that is acquired to the subject by grant, patent, or prescription must not prejudice the jus publicum, wherewith public rivers and arms of the sea are affected for public use" (37). In 1703 an English court concurred in Warren v. Matthews, by declaring that in its considered opinion "Every subject, of common right, may fish with lawful nets in a navigable river, as well as in the sea; and the

King's grant cannot bar them thereof" (38). But in 1741 a court, although agreeing that the king's subjects had a common of piscary and freedom of navigation in public waters, was not prepared to include unrestricted use of privately held foreshore and upland. Ward, the plaintiff, had been fishing in a river in Geswell Haven in the parish of Woodham and beached his boat on the shore; Creswell, the proprietor, confiscated six oars from Ward's boat. The plaintiff initiated a replevin action to regain possession of his oars, claiming he was exercising the common right of fishery at the time. Creswell swore that the oars damaged his property. In Ward v. Creswell the court held that "the right of fishing in the sea is common to all the King's subjects," and every man may fish there of common right as well as in navigable rivers, but decided that the plaintiff had not proven it was necessary, in the exercise of that right, to land his boat on the defendant's land (39). Creswell kept the oars.

Toward the end of the eighteenth century two cases came before the courts that dealt directly with use of the foreshore. During the 1770s the City of London undertook to build a horse towpath along the banks of the Thames River under the powers vested in the city by the statutes of 14 Geo. 3, c. 91 and 17 Geo. 3, c. 18. A property owner along the path right of way followed behind the workers and cut down the pilings driven into his land, claiming the mayor of the city had no right to place them there. In the resulting case of King v. Smith in 1780, the court held that the property owner had no right to destroy that which had been permitted by statute. Not content with that, Justice Buller added that the subjects of the Crown had a right to take fish found between high and low water mark on the seashore and, therefore, the actions of the defendant were contrary to long established common rights in that he, by removing the pilings, had indicated his intention to bar the public from the use of the foreshore (40).

Yet, nine years later another court took a different view in the belief that private owners had some rights maintainable against the general public. The court felt that if it were otherwise, those owning property along the seashore or banks of navigable rivers and streams could do nothing to stop the public from indiscriminately tromping across their land at any point. In 1789 in Ball v. Herbert a court was presented with a situation wherein the defendant had exercised an alleged common right by dragging barges down a river at Wiggenhall in Norfolk by means of attaching ropes from them to horses walking along the shore. This, of course, required that the entire assemblage of horses, men, and ropes pass over the plaintiff's foreshore, much to his annoyance and chagrin. The court held that the common law right of use of the foreshore did not extend to towing along the banks of ancient navigable rivers (41).

Other cases during this period dealt with not only specific rights of the public in the foreshore, but also the question of the extent to which a proprietor, who alleged title by either grant or prescription, could interfere with public use. Richards, who claimed he had the right by royal grant and by possession longer than 60 years, proceeded to build wharves, and other buildings on a section of the shoreline in Portsmouth. The Crown disputed his right to do so and sued in court to have the structures removed. In 1795 in Attorney General v. Richards, the court ruled in favor of the Crown based on the prima facie rule that the Crown had paramount rights in the area between high and low water marks under the common law. Thus, the defendant could not do what the Crown sought to enjoin. Not only did the court decide that the

royal patent did not confer such a right upon the defendant, but it also ruled that his structures interfered with navigation and prevented mooring in the area. Because of this and the fact that the structures impeded free flow of the tide and restricted the carrying off of excess mud, the court declared them a purpresture, a nuisance, that must be removed (42).

A similar question came before the courts again 15 years later in Attorney General v. Parmeter. The court firmly declared that "It is perfectly clear that all the soil under the salt water between high-water mark and low-water mark is the property of the Crown," and even though a king could dispose of his private rights therein, public rights remained intact "even if [they] be within the grant." The king could not "in any degree affect the public right of the subject passing and re-passing upon the salt water: he cannot affect that by anything which can be done by him" (43).

Others who asserted that they had exclusive rights in the foreshore and adjacent waters frequently met with the same fate when they presented their claims in court. In 1822 the lords of the Manor of Brighton discovered someone taking sand from the seashore and accused him of trespass, since they claimed title to the land between high and low-water marks. At Hilary Term on 13 February 1823, on appeal, the Court of King's Bench found for the defendant, holding that the right of "wreck" (the right of the adjacent landowner to collect for his own profit wrecks of the sea washed up on shore), on which the lords based their claim, among other assertions such as ancient rights and long user was not alone enough to confer title, by presumption or construction of law, to the ownership of the foreshore against the Crown. The court stated that the rights of the Crown to the sea and seashore were not "any beneficial interest to the Crown itself [and, then, by inference, not to the lords either by grant or otherwise], but for securing to the public certain privileges in the [foreshore]." A person could remove sand and stones and the Crown could not interfere if the act did not prejudice the interest of the public and become a nuisance (44).

The case cited above generally adhered to the accepted belief that the Crown had the dominium and imperium (proprietary rights in and jurisdiction over) the waters of the sea adjacent to the realm and as far as the tide ebbed and flowed. The king's subjects had the right to use the resources thereof, indeed a right deemed to be an inherent privilege emanating from the Crown. In other words, "the king has the property, but the people have the use necessary" (45). However, much prior decisions tended to interpret rights in the foreshore favorably in the public interest, one judicial decision attempted to reverse the trend. In 1821 certain local activities of others disturbed the lord of Great Crosby manor, riparian owner of land along the tidal Mersey River. An employee of a hotel on manor land fell into the habit of driving hotel customers to the beach in bathing machines, for a fee, from which they could descend and disport themselves in the water. To do so he passed over m'lord's foreshore where stakes had been driven in to hold fishing nets strung out into the water. The lord of the manor sued for damages, accusing the hotel employee of breaking and entering between high and low water marks and, "with feet in walking, and with the feet of horses, and with the wheels of bathing machines, carts, and other carriages, passing over, tearing up, damaging the sand, gravel, and the soil of the said close" (46).

Upon reviewing the merits of the case (Blundell v. Catterall), searching the record for precedents, and ruminating on their findings, three of the four

judges held for the plaintiff; one dissented. The majority on the bench found that the jus publicum in the sea and foreshore was restricted to activities associated with navigation and fishing and that "a claim of public piscary is a claim for something serving to the sustenance of man, not a matter of recreation only..." (47). Thus, they indicated quite clearly that recreation (for example, bathing in the seas and rivers) held a low place on their scale of values, a scale that apparently reflected their moral and social rather than their judicial values. The three agreed that Blundell did have exclusive stake-net fishery rights and Justice Bayley went so far as to write:

> The practice of bathing may contribute to health, but it ought to be confined within reasonable limits, and it is by no means necessary that the right should be coexistent with the whole shore of the sea, or that it should extend to places where the right of fishing with stake nets exists... It would be attended with great inconvenience to the public if a general right, free from all regulations by the owners of the soil, was to be exercised throughout the whole of the kingdom... (48).

In his dissenting opinion, Justice Best replied:

> Free access to the sea is a privilege too important to Englishmen to be left dependent on the interest or caprice of any description of persons... The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbors... Magistrates are armed with authority to bring to punishment such as bathe indecently. I would rather reply on disinterested and responsible magistrates than on an interested and irresponsible lord of a manor (49).

The majority opinions in Blundell v. Catterall have not withstood the test of time. Written at a time when the Industrial Revolution was well underway in England and people were flocking to cities like Manchester and Birmingham in search of economic success through hard work, they took into account the gospel of work and profit espoused by a class of landed gentry that was profiting as never before from privately held real estate.

The public right to the use of the foreshore, the area between the high and low-water marks, found acceptance in the learned treatises of some of the leading authorities on the subject in the nineteenth century. Hall observed in 1875 that "there can be no doubt whatever but that the public have a right to fish on the shore, although the soil thereof may happen to be private property... The public fishery extends over sea and shore..." and described the shore as "a highway for fishing... as public as the sea itself" (50). Twenty years earlier Wollrych claimed that "navigation and public fisheries are the inheritance of the subject, by virtue of the general title, or jus publicum, which everyone possesses" (51). Even if the Crown had granted upland and seashore to a subject the public right to fish could not be restrained by virtue of the grant (52).

Traditionally, the two paramount public rights in the sea, seashore, arms of the sea, and navigable rivers were the rights of navigation and fishing.

According to one authority on the subject (53), the public has a right of access across the foreshore to fully exercise its right to fish in the sea and navigable rivers. Obstructions that negate these rights are unlawful. Grants that included these areas came to be recognized as vested with the jus publicum. This principle was stated by Lord Hale in the seventeenth century and 200 years later Angell flatly stated it as a point of law asserting:

> The King may doubtless grant the soil covered by tidewater to an individual, but the right of the grantee is always subservient to the public rights... The law... is, that where a part of the sea coast or shore, being the property of the Crown, giving jus privatum to the King, is granted to a subject for public uses, and to be enjoyed so as to be detrimental to the jus publicum, therein such grant is void as to such parts as are open to such objection;... or it is a grant which does not divest the Crown or invest the grantee. The Crown may, by letters patent, grant to a municipal corporation, or the corporation of a town or borough which is caput portus, all the land which is between high and low water marks; but the subject matter of grant, as being a jus privatum in the King, must be subject to the jus publicum, or public rights of the people to the passing and repassing over both land and water (54).

That is to say, where there was a conflict between the jus publicum and the jus privatum of the owner of the foreshore, the jus publicum was paramount and the owner could be restrained from encroaching on the rights of the public. He would be confronted with the principle that "it is not true that the ownership of the shore by the subject tends to limit either the rights or enjoyment of the public... The subject is as limited in his ownership as the Crown was before it granted him the shore" (55). He could not take away public rights by his actions. Nevertheless, it is likely that if a subject received a specific grant of the foreshore from the Crown in which was included permission to bulkhead and fill, thus obliterating the foreshore, his taking advantage of such a grant would extinguish the jus publicum in that part of the foreshore.

Woolrych observed that a grant to exclude the public from taking fish in a navigable river or in the sea was considered, by this time (1853), to be invalid and that anyone misusing a grant of the foreshore voided such portions of that grant as invaded the public rights (56). Yet, Hall modified unrestricted public access to the foreshore to the extent that the public could be required to follow a certain right of way to reach the shore. Once there, however, there existed a common law right of way along the dry sand above the high-water mark to the nearest road, subject only to what might be sufficient to protect private property rights (57).

How much of the letter of the English common law and the public trust doctrine journeyed across the ocean with the early colonists has not been fully determined by historians. Yet, the spirit of them, if not their exactitude, arrived with the settlers as surely as did the Susan Constant, Goodspeed, and Discovery at the site of Jamestown in 1607; of that few historians have any doubts (58). On the eve of colonization, Calvin's Case laid down the rule that the law in the new colonies would be what the king said it would be. In commenting on this, Julius Goebel, Jr., a noted legal historian, observed that the rights of the Crown in the new settlements were attributed by a legal fiction to conquest, thus reasserting the old medieval dogma respecting the king's prerogative of legislation in his dominions by

conquest (59). To insure the continuity of law between the realm and the dominions, almost all colonial charters contained a provision that laws were to be passed by a governor and council with the advice of an assembly of freemen, "so always as the said statutes, ordinances, and proceedings, as near as conveniently may be, be agreeable to the laws, statutes, government, and policy of this our realm of England" (60). From this it follows that, as one nineteenth century legal authority stated categorically, the American colonies were considered parts of the dominion belonging to the Crown, and "not only the jurisdiction of the British sovereign extended over the territory acquired by the colonists from the native occupants, but also the same jus proprietatis, or right of property in all the tidewaters included by such territory, existed in the Crown, to the same extent as in the tidewaters of the realm, and were held like the latter" (61).

The US Supreme Court and lower federal courts have generally followed this principle in interpreting colonial charters that involve the seashore and lands overflowed by tidal waters. The Supreme Court dealt with it in Martin et al v. the Lessee of Waddell in 1842, an ejectment action concerning ownership of land below the high-water mark in the Raritan River and Bay in New Jersey (62). The plaintiff alleged title to land under water there as successor under grants from Charles II through the Duke of York to the proprietors of the Jerseys; while the defendant, who leased oyster lots from the state, claimed rights under a New Jersey statute that reserved some of the lands in controversy for purposes of oyster cultivation. The royal charters of 1664 and 1676 to the Duke gave him, his heirs, and assigns a large stretch of territory along the Atlantic coast, together with all lands, islands, soils, rivers, harbors, marshes, waters, lakes, hunting, hawking, fishing, and fowling therein. The Duke conveyed part of this territory to the proprietors of East New Jersey, including the lands in question, for a valuable consideration, along with all the rights of property and government that had been conferred on the Duke by his charters.

The court found that in 1702 the proprietors surrendered all of the customary powers and privileges under these charters to Queen Anne and held that the people of New Jersey then succeeded to the prerogatives and regalities that had been re-invested in the Crown or Parliament in 1702. It thus upheld the power of the state to allow the use of submerged tidelands for growing oysters and rejected the claim of the plaintiff. In considering the plaintiff's argument that his chain of title extended back to the fee simple grants from the proprietors to land below the high-water mark, the court based its final decision upon a construction of the letters patent and the effect of the surrender by the proprietors to the Queen in 1702, ruling that the territory had been owned originally by Charles II "in his public and regal character as the representative of the nation, and in trust for them" (63). Citing Blundell v. Catterall and Duke of Somerset v. Fogwell, the court held that the king, since Magna Carta, had no power "to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shellfish or floating fish within the limits of his grant" (64).

The court interpreted the charter as not granting the dominium in the navigable waters and the lands under them as private property to be parcelled out and sold to individuals for their own benefit, but rather construed it as in the nature of a trust for the common use of the community to be established in the new colony. The justices reached this conclusion by considering the

patent to be an instrument "upon which was to be founded the institution of a great political community," and not a deed conveying private property per se. That is to say, the Duke, his heirs and assigns, were to "stand in the place of the King, and administer the government according to the principles of the British Constitution," according to the laws of the realm as nearly as circumstances would permit (65). In its decision, the court also accepted Lord Hale's statements on tidal waters and the public trust.

> What if... the shores, and rivers, and bays, and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well as for shell-fish as floating fish, had been converted by the charter itself into private property, to be parcelled out and sold by the Duke for his own individual emolument? There is nothing... in the terms of the letters patent, or in the purposes for which it was granted, that would justify this construction... The land under the navigable waters passed to the grantee as one of the royalties incident to the powers of the government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soil under them, are held by the Crown (66).

Extending this beyond 1775, the court pointed out that when the Revolution occurred the people of each state became sovereign and thereafter held the absolute right within the territorial limits of each to all the navigable waters and soils under them for their own common use, subject only to whatever rights they later surrendered to the federal government in the Constitution. Extrapolating from the Duke's charters to others issued in the seventeenth century, the court declared that they were subject to the same interpretation because none of them "differed materially from it in the terms in which the bays, rivers, and arms of the sea, and the soils under them, were conveyed to the grantee..." (67).

The doctrines of jus publicum and public trust came before the Supreme Court sufficiently often and at widely spaced intervals so that it had a number of opportunities over the years to clarify and refine its stand. In the famous case of the Illinois Central Railway Company v. State of Illinois in 1892 the court dealt with the power of state to alienate property held in trust (68). Back in 1869 the state granted title to more than 1,000 acres of submerged land in Lake Michigan, comprising most of the commercial waterfront of the City of Chicago, to the railroad company without receiving a valuable consideration. The grant included all submerged land for 1 mile out from the waterfront extending 1 mile in length along the city's main business district. Four years later the state legislature revoked the grant by repealing legislation and brought suit to quiet title and confirm the state's ownership of the land granted. The court upheld the state's revocation of the grant, rejecting the claim of the railroad that the grant was an absolute conveyance of title to the submerged lands giving it as full power to use and dispose of the land in any manner it chose as if it were uplands. The court observed that the grant gave the railroad the complete power to manage and control the harbor of Chicago for its own profit and posed the questions, "whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters," and "whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the state" (69).

That each state had ownership and dominion of and sovereignty over its tidewaters and navigable waters, with the right to use or dispose of any portion thereof, was not questioned by the court. However, it noted that whether or not navigable waters and the lands under them are privately owned, they are subject to the right of the public to use the waters and to the power of Congress to regulate navigation under the commerce clause. Also, the power of the state to alienate such property, which was held in trust, was limited. Pointing out that public trust property could not, by grant, be placed entirely beyond the direction and control of the state, the court attempted to clarify grants of land which would materially benefit the public. While condoning grants that would permit the construction of commercial docking facilities and thus any commerce, the court flatly stated that the state, by such grants, could not abdicate its control or trust responsibility over navigable waters or the lands under them to the extent of an entire bay or harbor. "The control of the state for purposes of the Trust can never be lost except as to such parcels as are used in promoting the interests of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining" (70).

Simply stated, the court declared that there could be no irrepealable contract to convey property in disregard of a public trust if the trustee is bound to hold and manage it for the benefit of the cestui que trust, in this particular case the people of the State of Illinois. "The state can no more abdicate its trust over property in which the whole people are interested... than it can abdicate its police powers in the administration of government and the preservation of peace" (71).

Shively v. Bowlby ranks with Martin v. Waddell and Illinois Central in importance with respect to public rights in the sea and seashore. This case was a suit to quiet title to lands below the high-water mark in the Columbia River in Oregon. One party claimed title under a patent from the United States, while the other party claimed title under a deed issued by Oregon that authorized the sale of tidelands, with the state reserving the public right of easement to remove oysters and other shellfish and the right to regulate the building of wharves, docks, and similar structures. The court held that rights and interest in the tidelands, which are subject to the sovereignty of the state, are questions of local law (72). Because the suit involved the foreshore, the court reviewed the English common law with respect to public rights therein.

The court noted that under common law where the title, the jus privatum, to the soil below high-water mark in the sea or arms of the sea was in the Crown, or in private individuals, or a corporation by express grant, prescription, or usage, the jus privatum was held subject to the public right, the jus publicum, of navigation and fishing. Pointing out that the king had held possessions in America as representative of and in trust for the nation, the court claimed that the colonial charters under the Stuart dynasty conveyed both territory and the powers of government, including the property and the dominion of lands under tide water, charged with a like trust (73).

In two cases that came before it in the latter part of the nineteenth century, the US Supreme Court found it necessary to extend the principles enunciated in Martin v. Waddell to all navigable waters, thus modifying the English common law in that respect. The question of what waters were navigable was decided on the basis of whether the waters were navigable in fact, rather

than by the English common law that defined them as only those in which the tide ebbed and flowed (74). The court felt such a modification was necessary because the only waters in England navigable in fact were considered to be those in which tidal action occurred, whereas, in America there happened to be a great many bodies of water, such as inland rivers, lakes, and streams not subject to tides but nevertheless navigable. Navigability, not tidal flow, became the rule (75).

Beginning in 1855 the Supreme Court considered a number of cases that dealt with the regulation of fishing and shellfishing. In that year a ship owned by a citizen of Pennsylvania, engaged in dredging for oysters in the Chesapeake Bay, was seized by a Maryland law officer. The ship became forfeit under a Maryland statute that regulated the means of harvesting oysters in state waters. In Smith v. Maryland the court upheld the statute which was within the power of the state to enact as trustee of its navigable waters and lands under them, because the state had title to all such areas within its boundaries, "not only subject to, but in some sense in trust for, the enjoyment of common liberty of taking fish, as well as shell-fish as floating fish" (76).

In its sovereign capacity, the state enacted the ordinance to conserve the public right of fishery so as to prevent destruction of that resource; therefore, it was in furtherance of and not in conflict with that public right. The question of whether a state could regulate fisheries and shellfishing within its own waters had been answered in favor of the states.

State regulations, of course, could extend beyond preservation of local water resources to prohibiting private citizens from obstructing the rights of the general public to fish and to use the waters for legitimate purposes. In 1934 some property owners along the Pine River in Michigan sought to enjoin the state's attorney general from making them remove obstacles from a stream, claiming it was their property and the public had no right of passage or fishing. The federal district court disagreed, stating that there could be no narrowing of rights of the public to fish in public waters in light of the increasing private ownership of lands bordering lakes and streams. In Ne-Bo-Shone Association v. Hogarth, the court thus held firmly to the principle that "the citizen ought not (for other than the most compelling reasons) to be deprived of those blessings which nature's bounty has provided" (77). This was yet another way of saying what a South Carolina federal court had declared in 1894 in Chisolm v. Caines, in subordinating the rights of riparian owners on navigable streams to the rights of the public, that the sovereign could not grant exclusive use of public navigable streams, bays, and harbors, or the beds thereof, because they must always be kept open for public use, commerce, trade, and pleasure (78).

CHAPTER VI FOOTNOTES

(1) Digby, Kenelm E. An Introduction to the History of the Law of Real Property (Oxford: Clarendon Press, 1897), p. 316-318. The word Quiritium refers to a citizen of Rome and derives from Quiritius, the name given by the Romans to Romulus the legendary founder. See also Lee, R.W. The Elements of Roman Law with a Translation of the Institutes of Justinian (London: Sweet and Maxwell Ltd., 1956); and Buckland, W.W. A Text Book of Roman Law from Augustus to Justinian (Cambridge, Eng.: University Press, 1921).

(2) Lee, Elements of Roman Law, p. 109, 113-114, By res the Romans meant any economic interest guaranteed by law, any right or rights having a money value, any interest expressible in terms of money that the law will protect. The law relating to things is thus the law relating to property (Ibid., p. 108). Res nullius has various meanings: that which is not susceptible of private ownership, sacred, and sanctioned res, and things, though susceptible of private ownership, not at the moment owned or have been abandoned (for example, uncaptured wild animals, and res derelictae) (Ibid., p. 110).

(3) Digby, Real Property, p. 5-6.

(4) Ibid., p. 17-18.

(5) Simpson, A.W.B. An Introduction to the History of the Land Law, (Oxford: Oxford University Press, 1961), p. 2. Allodial land is held absolutely with no superiors in tenure involved. Only the king held thus. Full recognition of the introduction of the feudal system is found in Domesday Book of 1086.

(6) Digby, Real Property, p. 34.

(7) Vinogradoff, Paul. Roman Law in Medieval Europe (Oxford: Clarendon Press, 1929), and Lee, R.W. Historical Conspectus of the Roman Law (London: Sweet & Maxwell, Ltd., 1956), are excellent concise accounts of this period and the renaissance in the use of the Roman law. The last of the glossators, or commentators, on the Roman law was Accurius (d.1260), followed by the post glossators, of whom the best known is Bartolus (1314-1357). An ecclesiastic from Devon, Henricus de Bracton, itinerant justice of the eyre, or circuit court, and later judge of King's Bench, attempted to inject Roman legal thought into the English law during the thirteenth century. His treatise, On Laws and Customs of England, is recognized as the preeminent work on English law of the time.

(8) Seisin, an important principal in property law, means a person is in actual possession of land as a freehold estate (an estate in fee or a life estate, but never one for term of years). A person "seised" of the land is in possession as owner of an estate in fee simple, a fee tails, or for life. See, Walsh, William F. A Treatise on the Law of Property (New York: Baker, Voorhis & Co., 1927), p. 95, 134-135. Anciently, a new owner actually had to walk onto

the land and sit himself upon it to become seised of it; later, this converted into the custom of delivering a piece of earth or branch ("turf and twig") to a new owner, known as livery of seisin, to signify the final act of possession.

(9) Ibid. Both Maitland and Walsh cover the evolution of equity and trusts quite well throughout their books; see also Simpson, Land Law, and Holdsworth, Sir William. History of the English Common Law (Oxford: University Press, 1903-1927, 16 vols.), I. Maitland, quoting an old rhyme, defined equity, which is not of the common law, as, "these three give place in court of conscience: Fraud, accident, and breach of confidence." And again "...common law is derived from feudal customs, while equity is derived from Roman and canon law (Blackstone... overrates the influence of Roman and canon law in the history of equity)..." Maitland, Frederick W. Equity, also the forms of action at Common Law (Cambridge, England: Cambridge University Press, 1909), p. 7, 14.

(10) 27 Henry VIII c. 10, reprinted in Digby, Real Property, p. 344-347.

(11) 32 Henry VIII, c. 1 (1540), and explanatory act of 34-5 Henry VIII c. 5; Maitland, Equity, p. 35-36.

(12) 27 Henry VIII, c. 16 (1537), Simpson, Land Law, p. 177. The Colonial Laws of New York from the year 1644 to the revolution. (Albany, NY: J.B. Lyon, 1894, 5 vols.), I, p. 30-31, 44. More than a century later the colony of New York included in the Duke's laws in 1665 a provision for the enrollment or recording of all conveyances of land. In 1683 the colonial assembly passed "An Act to Prevent Frauds in Conveyancing of Lands," reiterating that conveyances must be recorded. Parliament did not pass such a statute until 1677 when it enacted the Statute of Frauds requiring conveyances to be in writing and signed by the parties. Otherwise they would be construed as estates at will. Wills must be in writing witnessed by three persons and declarations of trusts also had to be "manifested and proved" by a written document signed by the party creating the trust (Ibid., p. 224-225). As late as 1771 a more sophisticated act of a similar nature was also passed (Ibid., V, p. 202-204). See also Holdsworth, A History of the English Common Law, III, p. 380-384; 29 Car. II, c. 3.

(13) For a discussion of the status of those involved in trust creation and administration both before and after 1537, see Simpson, Land Law, p. 170, and Maitland, Equity, p. 84.

(14) Descriptions of other forms of a trust obligation (that is, implied trusts, resulting trusts, constructive trusts), see Simpson, Land Law, p. 449-459, and Maitland, Equity, p. 77, 82-84. Simpson, Land Law, p. 438; Maitland, Equity, p. 53, 76-77.

(15) Although certain forms of trusts were voided by law in New York in 1827 and fee title vested in the cestui que trust, express trusts remained as valid as before the law. Washburn, Emory. A Treatise on the American Law of Real Property (Boston: Little, Brown, and Co., 1887, 3 vols.), II, p. 575-580, quoting from Revised Statutes of New York of 1827, art. 2, tit. 2, c. 1, part 2; see also Thompson's Laws of New York... 1939 (Brooklyn, NY: Edward Thompson Co., 1939), Real Property Law, Chapter 52, p. 136-137.

(16) Maitland, Equity, p. 76, 121.

(17) Harding, Alan. A Social History of the English Law (Baltimore, MD: Penguin Books, 1966) p. 140-141, 236-237.

(18) For detailed discussions of Crown lands, or terra regis, and the evolution of the above stated belief that the Crown was restricted in its use thereof, see Wolfe, B.P. The Royal Desmesne in English History; the Crown estate in the governance of the realm from the Conquest to 1509 (Athens, Ohio: Ohio University Press, 1971); and, Wolfe, B.P. The Crown Lands, 1461-1536; an aspect of Yorkist and Early Tudor Government (New York: Barnes and Noble, Inc., 1970).

(19) Plucknett, Theodore F.T., ed. Taswell-Langmead's English Constitutional History. 11th ed. (Boston: Houghton Mifflin Co., 1960), p. 6-8; Jolliffe, J.E.A. The Constitutional History of Medieval England from the English Settlement to 1485 (New York: W.W. Norton & Co., 1961), Chapters I and II.

(20) Maitland, Frederick W. Domesday Book and Beyond (New York: W.W. Norton and Co., 1966), p. 153-154. As noted therein, isolated patches of allodial land existed for a time after the conquest in five counties; see also, Plucknett, English Constitutional History, p. 28-40.

(21) Jaffee, Leonard R., "State Citizen Rights Respecting Greatwater Resources Allocation: from Rome to New Jersey," Rutgers Law Review, vol. 25, no. 4, Sumner, 1971, p. 580, quoting from McKechnie, William S. Magna Carta 2nd ed. (New York: Franklin [first published in 1914; reprinted in 1958]) p. 399-407.

(22) Ibid., citing Waters and Water Rights; a Treatise on the Law of Waters and Allied Problems: Eastern, Western, Federal. Editor-in-chief: Robert Clark (Indianapolis, IN: A. Smith & Co., 1967-72, 6 vols.), I, p. 190; Farnham, Henry L. The Law of Waters and Water Rights (Rochester, NY: Lawyers Co-operative Publ. Co., 1904), p. 112-113, 165-167, 187-190; Moore, Stuart A. History of the Foreshore and the Law Relating Thereto (London: Stevens & Haynes, 1888), p. 639.

(23) Thorne, Samuel E., "What Magna Carta Was," in The Great Charter; four essays on Magna Carta (New York: New American Library, 1965), p. 11-21.

(24) Ibid., John renounced it, with the compliance of the Pope, within a month after signing it, but died shortly thereafter. His nine year old successor's guardians then reissued it. Between then and 1416 there were more than 44 confirmations of it, with their own explicit and inferred additions, see Dunham, William H., "Magna Carta and British Constitutionalism," in Ibid., p. 29-34.

(25) Ibid.; see also Jaffee, "Greatwater Resources, " p. 582-589. According to the latter, "Today neither Crown nor city can restrict or burden tidalwater trade or public navigation easement use."

(26) See Jaffee, "Greatwater Resources" and his accompanying footnotes for a condensation of the scholarly argument over interpretations.

(27) In the seventeenth century Lord Hale in De Jure Maris noted that this was the situation in the thirteenth and later centuries. Hale's well-known treatise is reprinted in Hall, Robert G. Essay on the Rights of the Crown and

Privileges of the Subject in the Sea Shores of the Realm, 2nd ed. (London: Stevens & Haynes, 1875).

(28) "The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine," Yale Law Journal, vol. 79, No. 4, March, 1970, p. 765-768.

(29) Jaffee, "Greatwater Resources," p. 592-593, citing, Thomas Digges, Proofs of the Queen's Interest in Lands Left by the Sea and the Salt Shores Thereof, reprinted in Moore, A History of the Foreshore, p. 185-211. Jaffee asserts that "under royal pressure, the common law courts created a rebuttable presumption that title to any disputed foreshore was in the Crown. The presumptions effect was to deliver into Crown ownership extensive private foreshore properties, the presumption [based on certain feudal ceremonies and imprecise Latin in grants] having been practically irrebutable."

(30) Parsons, George S., "Public and Private Rights in the Foreshore," Columbia Law Review, vol. 22, 1922, p. 706-735. At 708 the author points out that many legal scholars, including himself, find the decision untenable historically and legally.

(31) Actually Philpot seems to be an extension of previous decisions and legal treatises on the subject of ownership of the sea and seabed. See Selden, Mare Clausum (1635); Sir Henry Finch, Law, or a Discourse Thereof (1613), in which he specifically states that "between the high water mark and the low water mark, where by ordinary and natural course the sea ebbs and flows, the common law and the admiralty have divisum imperium; one upon the water, when it is full sea, the other upon the land, when it is an ebb"; Case of the Royal Fishery of the Banne (1610), which also uses the phrase "so high as the sea flows and ebbs in them [branches of the sea and rivers]." The legal treatises of Selden, Welwood, and others during this period concentrated on rebutting Grotius in Mare Liberum, in which he argued for freedom of the seas. The English writers, of course, held the contrary view, that the sea could be possessed by a nation, and in doing so helped to firmly imbed in the legal system the belief that the Crown owned the waters and land under water of the realm (although they did go so far as to claim the entire Atlantic Ocean at one time as subject to the Crown's dominium and imperium, an untenable position in fact and theory both then and now). For the information on these treatises and certain court decisions, I am indebted to Brice M. Clagett, member of the firm of Covington and Burling, Washington, DC, who submitted arguments as common counsel on behalf of the Atlantic coastal states in United States v. Maine et al (US Supreme Court Original Nr. 35, 1970-1974), a case in which this author served as consultant to the US Department of Justice in opposition to the states' claims of ownership of the sea, seabed, and subsoil out to at least 100 miles offshore.

(32) Marsden, Reginald G., ed. Select Pleas in the Court of Admiralty (London, 1897). Philpot accepted this and also reaffirmed the decision in Royal Fishery of the Banne.

(33) De Jure Maris was first published in Hargrave, A Collection of Tracts Relative to the Law of England (1787). A commonly used version today is reprinted in Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shore of the Realm. Hale also believed a subject could acquire title to the foreshore by prescription or use "from a time whereof the memory of man ran not to the contrary." The Statute of Westminster limited

this in 1275 to the coronation of Richard I. In the seventeenth century the Statute of Limitations reduced it to 20 years (21 Jas., chapter 16, 1623).

(34) For example, see Shively v. Bowlby, 152 US 1 (1894); Martin v. Waddell, 41 US (16 Pet.) 367 (1842); Illinois Central RR v. Illinois, 146 US 387 (1892); New York v. New York and SI Ferry Co., 68 NY 71 (1877); Gough v. Bell, 22 NJ L. (2 Zab.) (1850); New York, NH and H. RR v. Horgan, 56 Atl. 179 (RI 1903), to name but a few.

(35) A reiteration of a definition is necessary here with respect to tide waters. I will reply upon that given by Clagett (Ibid., 15), that "as used in English and American legal writings, it normally and properly means all those waters in which a perceptible tide ebbs and flows, including the seas, bays, and other coastal waters, the foreshore, and tidal rivers up to the fall line. The legal distinction invariably made as to underwater land is between the land under tide waters, as thus defined (which belonged to the sovereign out to whatever was regarded as the limit of sovereign dominium at the time) and the land under nontidal lakes, creeks, etc., which belonged to the adjacent proprietor."

(36) For a discussion of the easement approach, see "The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine," Yale Law Review, vol. 79, No. 4, March, 1970, p. 769 et seq.

(37) Hale, De Jure Maris, in Hall, XXIV.

(38) Warren v. Matthews, 6 Mod. 73; 1 Salk, 357; 91 E.R. 312 (1703). See also opinion of Justice Bayley, in Blundell v. Catterall, 106 E.R. 1190 (1821).

(39) Ward v. Creswell, 125 E.R. 1165 (1741).

(40) King v. Smith, 2 Doug., K.B. 441; 99 E.R. 283 (1780). See also Baggott v. Orr, 2 Bos. and P. 472; 126 E.R. 1391 (1801), in which it was stated that, even though the case was one of trespass and decided on other grounds, the right of fishing in the sea, the creeks, and the arms thereof was a common law right and subjects of the king could even take or catch shellfish on the seashore even where it is shown to be private property.

(41) Ball v. Herbert, 100 E.R. 560; 3 TR 253 (1789).

(42) Attorney General v. Richards, 2 Anst. 603; 145 E.R. 980 (1795). In Attorney General v. Burridge, 10 Price 350; 147 E.R. 335, in 1822, the court went so far as to state that a grant of land to the foreshore must be subject to the jus publicum and the king and his subjects must have an easement to pass and repass over it. In other words, structures such as Richards had begun could not impede passage either on the water or along the foreshore.

(43) Attorney General v. Parmeter, 10 Price 378; 147 E.R. 345, 352 (1811); aff'd on appeal to House of Lords, Parmeter v. Gibbs, 10 Price 412; H.L., 147 E.R. 356 (1813). On appeal to the House of Lords counsel for Parmeter conceded that any grant to a subject by the Crown was subject to all such public uses as the Crown itself held it subject to.

(44) Dickens v. Shaw, 1 L.J.O.S.K.B. 122 (1822). According to Hall, Rights and Privileges in the Sea Shore, p. 216-217. General common law rights could not

be lost by local disuse, but could be revived into use for the public good. Yet Hale declared that to a certain extent individuals could obtain title to the seashore by prescription, by custom, or by usage. Prescription is evidenced by constant and usual "fetching of gravel, sea weed, and sea sand between high and low water mark; inclosing and embanking against the sea; enjoyment of wrecks; and the exercise of jurisdiction over the land," in Hall, xx. However, for many years in England prescriptive rights had to be proven to have existed prior to Magna Carta, or "from time beyond memory," since exclusive rights to such things as fishery could not be granted by the Crown after 1215; Duke of Somerset v. Fogwell, 108 E.R. 325 (1826). Obstruction rather than prescription would be assumed if the public exercised its rights over the seashore prior to any alleged prescription. In later years even the time limit of 20 years to claim by prescription did not hold if a river were navigable and such claims when put into practice barred the public right of use; Vought v. Winch, 106 E.R. 506 (1819).

(45) Angell, Joseph K. A Treatise on the Right of Property in Tide Waters and in the Soil and Shores. 2nd ed. (Boston: C.C. Little and J. Brown, 1847), p. 21-22.

(46) Blundell v. Catterall, 5 B.R. Ald. 268; 106 E.R. 1190 (1821). For an incisive and lengthy discussion of this case, see Jaffee, "Greatwater Resources," p. 599-612. The brief summary here of some of the main points of the case are taken from that article as well as from independent reading of the decision. Jaffee's excellent research into the case, attested to by the many accompanying footnotes, should be read, but one has the forlorn hope that he might have written in a more straightforward, clear style.

(47) Ibid., 106 E.R. 1204, as quoted in Jaffee, p. 601. To their credit, the justices did not recognize that bathing in the sea was lawful.

(48) Ibid., 1205.

(49) Blundell v. Catterall, 275, 277-278; 106 E.R. 1193, 1197.

(50) Hall, Rights and Privileges in the Sea Shore, p. 174-175, 193.

(51) Woolrych, Humphrey W. A Treatise of the Law of Waters (Philadelphia, 1853), p. 38.

(52) Schultes, Henry. An Essay on Aquatic Rights (New York: Halsted and Voorhies, 1839), p. 61, 110.

(53) Hall, Rights and Privileges in the Sea Shore, p. 171-172.

(54) Angell, Rights of Property in Tide Waters, p. 25-27. For similar opinions by other authorities see Moore, p. 257; Woolrych, Law of Waters, p. 25, 185.

(55) Moore, p. xlviii, 784.

(56) Woolrych, Law of Waters, p. 442-443. 449.

(57) Hall, Rights and Privileges in the Sea Shore, p. 105, 155, 176-177.

(58) For historians' comments on this, see Chafee, Jechariah, Jr., "Colonial Courts and the Common Law," Massachusetts Historical Society, Proceedings, vol. 68, 1952, p. 132-159; Haskins, George L., "Law and Colonial Society," American Quarterly, vol. 9, 1957, p. 354-364; Goebels, Julius, Jr., "The Courts and the Law in Colonial New York," in Flick, Alexander C., ed. History of the State of New York (New York, 1933, 10 vols.), III, p. 3-43; all reprinted in Flaherty, David H., ed. Essays in the History of Early American Law (Chapel Hill, NC: University of North Carolina Press, 1969); compare with Reinsch, Paul S. English Common Law in the Early American Colonies (New York: reprinted by DaCapo Press, 1970). Even a casual study of local town records on Long Island (that is, those for Huntington, Brookhaven, and Southampton) will provide sufficient evidence to show that such was the case, since they are repleat with examples of attempts to reproduce English legal forms and local government systems.

(59) Goebels, "Courts and Law in Colonial New York," in Flaherty, p. 248. In 1774 the ruling in Calvin's Case came under review in Campbell v. Hall 1 Cowp. 204 (1774), and the court held that the Crown had legislative authority over conquered countries subject to Parliament of Great Britain.

(60) "Second Charter to Virginia, 1609," in Kavenagh, W. Keith, ed. Foundations of Colonial America (New York: Chelsa House R.R. Bowker Inc., 1973, 3 vols.), I, 1714; other charters are reprinted in this volume and in II and III for comparison.

(61) Angell, Rights of Property in Tide Waters, p. 36-37.

(62) Martin et al v. the Lessee of Waddell, 41 US (16 Peters) 367.

(63) Ibid., p. 409.

(64) Ibid., p. 410.

(65) Ibid., p. 411.

(66) Ibid., p. 412-413.

(67) Ibid., p. 410, 413-414. In 1845 the court extended the Martin v. Waddell ruling so as to apply to newly admitted states in Pollard's Lessee v. Hagan, 44 US 212, 229 (1845), and took the opportunity in 1853 to reaffirm Martin v. Waddell in Den, ex dem. Russell v. The Jersey Company, 56 US 426 (1853).

(68) Illinois Central Railway Co. v. State of Illinois, 146 US 387 (1892).

(69) Ibid., p. 453.

(70) Ibid., p. 453-454. Compare this with the decisions in Leverich v. Mayor of Mobile, 110 F. 170, 177, C.C.S.D. AL (1867) in which a federal court stated that the king had no right to grant exclusive privileges in the sea and seashore that would impair the rights of the public to fish. Such grants would be ruled as being ultra vires, since the king acted as trustee for his subjects and could not grant exclusive use of public navigable streams, bays, and harbors, or the beds thereof, so as to prevent use by the public for commerce, travel, and pleasure, Cf. Chisolm v. Caines 67 F. 285, 291 C.D.S.C. (1894). For grants of public trust lands in the public interest, see Morris v.

United States, 174 US 196, 235-236 (1899), in which the Illinois decision was cited with approval and the court again declared that grants must be in the public interest without substantial impairment of that interest; Long Sault Development Company v. Call, 242 US 272, 249 (1916); 212 NY 1 (1914), in which the court again applied the Illinois principle as to use of grants of lands covered by water; United Thacker Coal Company v. Red Jacket, Jr., Coal Company, 232 F. 49, 59, 4 Cir. (1916), in which it was pointed out that such grants would be construed against the grantee if it appeared the grant or his actions were not in the public interest; Western Pacific RR Company v. Southern Pacific Company, 151 F. 376 C.C.A. 9 Cir. (1907), that grants did not normally give exclusive title to public land; St. Anthony Falls Water Power Company v. St. Paul Water Commissioners, 168 US 349 (1897) in which the court held that a corporate charter authorized plaintiff to build power dams in public need; Cf. United States v. Appalachian Power Company, 311 US 377, 427 (1940), wherein it was pointed out that even public power uses had to have a federal license if dams were to be built on navigable rivers open to the public. Cf. Cummings v. Chicago, 188 US 410 (1903); Montgomery v. Portland, 190 US 89 (1903); and Norfolk Dredging Company v. Radcliff Materials, Inc., 264 F. Suppl. 399 (Ed. Va. 1967) for similar rulings on public use and need for licensing.

(71) Ibid., p. 454, 461; Cf. New Jersey v. Delaware, in which the decision, in the spirit of the Illinois case, cited Martin v. Waddell with respect to the states being successors to the Crown of England to title to lands under water and thus subject to the restrictions of the jus publicum. Quoting from the earlier decision, the court reiterated that "never has it doubted that the grant will be upheld where the soil has been conveyed as an incident to the grant or delegation of powers strictly governmental." In such circumstances, "the land under the navigable waters passed to the grantee as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown." 291 US 361, 374 (1934). Insofar as grants by the sovereign of lands under water, federal courts have accepted the dictates of Martin v. Waddell and Illinois Central, as in the case of Maine Railway and Coal Company v. United States, 265 F. 437, C.A.D.C. (1920), in which the court stated that ownership of navigable waters is held in trust by the sovereign "for the nation and subject to public use," yet in Pike Rapids Power Company v. Minneapolis, St. Paul, & S.S.M.R. Company, 99 F. 2d 902, 908; 8 Cir. (1938); cert. den. 305 US 660 (1939); it could be granted if used to public advantage.

(72) Shively v. Bowlby, 152 US 1 (1894).

(73) Ibid., p. 13, 57.

(74) Barney v. Keokuk, 94 US 324 (1876); Packer v. Bird, 137 US 661, 667 (1891).

(75) In Packer v. Bird, at 666, the court ruled that under English common law the title of riparian owners on waters of rivers affected by the tide ran to the ordinary high-water mark, with the title to land below that mark in the Crown; in this country, title was in the state. Having used the term "high water mark" a number of times, the court came to the point where it had to define it in 1935. In Borax, Ltd. v. Los Angeles, an action to decide title to lands under water on Mormon Island in the city, the court accepted the

high-water mark as the mean of all the high tides over a period of 18.6 years and not the neap tide which is the tide when the moon is in its first and third quarters. The court described high-water mark as not being a physical mark on the ground made by the water, but rather a line determined by the course of the tides during daily ebb and flow, the foreshore being the land between the high and low marks as determined by 18.6 years of daily tidal action; Borax, Ltd. v. Los Angeles, 296 US 10 (1935).

(76) Smith v. Maryland, 59 US 71 (1855), 74.

(77) Ne-Bo-Shone Association v. Hogarth, 7 F. Supp. 885, 890, W.D. Mich. (1934).

(78) Chisolm v. Caines, 67 F. 291, C.D.S.C. (1894).

CHAPTER VII

THE TRUST DOCTRINE, THE COLONIAL PATENTS, AND THE NEW YORK STATE COURTS

When the new State of New York supplanted the Crown of England as sovereign power in 1777, the colonial charter towns on Long Island had already accumulated over 100 years of local customs and English legal traditions. All of them, with the possible exception of a few earlier settlements in the west under Dutch rule, were founded after the Philpot decision. Most of them received their first English charters from Governor Nicolls during the same decade that Lord Hale wrote De Jure Maris. From the outset, the townsmen put into practice the legal system they had been familiar with in the mother country, garnered from remembrances of courts leet, quarter sessions, or county courts. Not the full panoply of the English common law, to be sure, for it is unlikely they could recall most of the decisional law that made up a part of it or many of the practices and procedures of the multilayered jurisdictions that administered it. They did not, as some would believe, create a new legal system as a response to frontier conditions in the New World, nor did they eschew the bulk of the common law then or later. They did, in fact, make use of those portions of the common law that suited their needs, thus laying a foundation for its fuller acceptance in years to come (1).

The credit for introducing a more formal version of English law must go to Governor Nicolls, even though it was somewhat of an experimental admixture of that law and the laws of New England and Maryland. The second major stage of the reception of English law came in 1684 with the arrival of Governor Dongan. During his administration the more formal features of the common law were put into practice and the judicial system made more elaborate. By then, based on the Duke's Laws of 1665, the Court of Assizes had original jurisdiction in criminal cases, civil actions, and "matters of equity," and used many forms and procedures more familiar to lawyers in London than to the colonists. This drove many a New York lawyer to seek more knowledge of the law and many a seller of law books in England benefitted thereby (2). It can be assumed, then, that when Dongan purposely included the trust doctrine in his famous patents, he did so in the firm belief that, in the absence of specific colonial legislation and judicial decisions, English common law and the laws of equity would prevail in any questions of application or interpretation of the terms of the patents.

When the writers of the state's first constitution met in 1777, conceivably, they could have jettisoned the entire legal system. But, as creatures of the American Revolution, which had its motivations not in how to alter the existing system but rather in who would control its destiny, they chose to perpetuate the laws that had served them so well in the past. Article 35 accepted those parts of the common law and acts of the colonial legislature that had formed the law of the colony up to 19 April 1775. Mindful that law

should not be static and heeding the underlying premise of English jurisprudence that the law is a dynamic expression of how society wishes to govern its members as time and circumstances might dictate, the framers of the Constitution provided that the law then in force would be "subject to such alterations as the legislature shall make concerning them" (3).

Land ownership, as a principal source of wealth and speculative profits ever since the seventeenth century, received the same favorable treatment. In Article 36 of the Constitution the framers raised a protective shield around land grants, charters to bodies corporate and politic, and rights of property to insure their perpetuation, subject, of course, to future legislative action. English laws served the vested interests in real property faithfully and well for generations; the framers would have been foolish to opt for the vagaries of an untried or alien system. Consequently, the trustees of the freeholders and commonalty of the Long Island towns could continue as they had been authorized to do ever since they received their charters, without fear of loss of rights, title, obligations, or interest expressly granted.

The colonial charters and trust obligation have survived for 200 years since rebellious colonists wrote their first constitution in 1777. Yet, even though the years after 1686 are added to this rather impressive claim to longevity in this country, the charters have not always recovered unscathed from the court battles to which they have been subjected, nor for that matter has the jus publicum in the foreshore and lands under water. Nevertheless, there has never been any serious doubt expressed in any court decision as to the validity of the charters. With but very few exceptions the courts have upheld the principle that the charter towns and their trustees have held the property granted to them as governmental bodies in trust for the public and not simply as private proprietors per se (4).

While concurring that the colonial charters to Long Island towns, which granted them upland and land under water and erected them into bodies corporate and politic, are legal conveyances, the many learned justices who, over the years, have heard cases involving the charters have not reached a consensus as to the scope of proprietary and jurisdictional rights emanating from them. The questions brought before the courts have ranged over the gamut of private rights as against town or state rights in navigable waters, the lands under them, and the foreshore. In their resolutions of the issues, some judges have relied upon Magna Carta to prove that lands under water were inalienable and that a common right of fishery existed in all navigable waters; others have clearly read into that document of varigated interpretations that the Crown could and did grant exclusive privileges in the foreshore and lands under water at its pleasure. Many have relied upon the English common law as it related to public rights in navigable waters and the foreshore, yet their colleagues in other times and other decisions sweep aside the common law, declaring that it has no place in the State of New York.

One of the earliest cases having to do with a town charter and local regulations of lands under water within the boundaries of a charter town began in 1825 when a nonresident took oysters from a harbor in Oyster Bay. When fined for this unauthorized intrusion into local waters, he refused to pay, contending that all citizens of New York could fish in the sea and navigable waters by common law right since the Crown could not have granted those rights to the exclusion of the public. Therefore, Governor Andros had gone beyond his legal powers if he conveyed an exclusive right of fishery to the town of

Oyster Bay in 1677. Naturally, the town rejected this argument, claiming that even though the king could not place rivers in defenso for his personal recreation, he could grant the waters and lands thereunder to subjects who could then have the exclusive use.

In this case, Rogers v. Jones, the court sustained the position of the town, stating that the fishery in navigable rivers was prima facie in the king and therefore public. Nevertheless, the king could grant rights therein and a person claiming exclusive rights must show proof of a specific grant or prove his rights by prescription (5). It held that the 1677 grant from Andros was valid and that the town exercised its lawful proprietary rights in regulating the taking of fish and shellfish within its boundaries. Yet the court, in interpreting the charter as being in the nature of a private proprietary, acknowledged that some general public rights existed, such as the rights of the public to navigation and the rights of the state to regulate the products of the waters in the interests of conservation (6).

Other decisions have cited Rogers v. Jones in support of conclusions reached in respect to colonial charters to towns and their proprietary rights in lands under water. Fifty years after that decision was handed down, circumstances quite similar to those that occurred in Oyster Bay took place in the Great South Bay. In 1875, Charles Strong, at the behest of the town of Islip, challenged the town of Brookhaven's title to the bay in virtually the same manner as had Rogers in Oyster Bay (7). In the opinion of the court in Trustees of Brookhaven et al v. Strong, the defendant's contention that Magna Carta precluded any future grants of exclusive fisheries by the Crown had "practically lost its importance in this country" (8). In effect, the court rejected the majority opinion in Martin v. Waddell as being irrelevant to conditions in this state, although it did not spell out what those conditions were.

Reasoning from a statement by Angell (in Tide Waters at 105) that the owners of land bordering fresh waters have the right of exclusive fisheries in front of their lands, the court declared that, although title might extend only to high-water mark on navigable waters and thus bar such fishery, if the soil under the water is included in the grant then "there is no reason why the same right of fishery would not attach as to fresh waters, subject of course to the superior public right of navigation." Such a principle, the court felt, supported Blackstone's interpretation of Magna Carta that the king was restrained from "granting exclusive rights of fishery, disconnected with any right of soil or in disregard of the rights of the owner of the soil; that this seems to be the view heretofore entertained by the courts of this State" (9). The court thus upheld the title of the town of Brookhaven, granted by colonial charter, to the Great South Bay and confirmed its right to regulate shellfishing. It pointed out, however, that in its decision the right to control fishing or floating fish was not involved in the action and therefore was not considered (10).

During the nineteenth century the courts of this state consistently held to the position taken in Rogers v. Jones and Brookhaven v. Strong that Long Island towns had exclusive proprietary rights in and could thus regulate the use of the soil and its resources under local waters. When, in 1882, the trustees of the proprietors of Southampton undertook to convey the land under the water of Mecox Bay, the town and its trustees challenged their right to do so, averring that they and not the proprietors held the fee title. In Town of

Southampton v. Mecox Bay Oyster Co., the court readily accepted prior rulings as to the proprietary rights of the colonial charter towns, but added that the seventeenth century charters were really intended to create bodies corporate and politic. It was in that capacity, said the court, that the towns took title to all the lands, whether above or below water, within their respective limits. Subject to the public's right of navigation, the towns owned the lands under local waters exclusively (11).

Such exclusivity had its limitations. Even though a town could assert its title to local waters and the lands under them by regulating the use thereof, it would not do so to the impairment of certain paramount general public rights of use. In People v. Staten Island Ferry Co., the court clearly held that even though the king could grant submerged lands as private property, "his grant was subject to the paramount right of the public use of navigable waters which he could neither destroy nor abridge" (12). If such grants conferred a right to impede or obstruct navigation or to appropriate navigable waters for exclusive purposes, then they were void on their face. According to Matter of City of New York, which relied upon the Staten Island Ferry decision, the state, being the public in concrete form, is charged with a trust to hold tideways and tidewaters for public use in navigation and commerce, but it cannot exercise its powers capriciously in that respect, for "if the state may use the waterways for any purpose whatsoever, then it is no longer a trustee, but an irresponsible autocrat." Nevertheless, as trustee and in exercise of its governmental functions, the state "may improve the tideway or the adjacent waters for the benefit of navigation, even to the detriment of abutting upland owners and without compensation to them" (13).

The courts have applied this ruling to private grantees of lands under water as well so that the right of the state to regulate and improve any navigable waters in furtherance of general public use has come to be stated as a truism (14). In Lewis Blue Point Oyster C. Co. v. Briggs, the court was faced with the question of whether the authority of the United States to regulate commerce between the states and improve navigation in navigable waters was paramount to private property rights and exclusive private fishery rights. The oyster company, alleging fee title to lands under the waters of Great South Bay, felt impelled to sue a dredging company which, under federal authority, had dredged a channel through certain oyster lots as an aid to navigation and commerce. First pointing out that the plaintiff had no control over navigation because "the patents from the Crown, which are silent upon the subject, must be taken most strongly against the grantees," the court stated that if the Crown granted navigable waters and the lands under them to private grantees, an implied reservation existed therein to protect the sovereign's right to improve navigation for the benefit of commerce. Since dredging was done for that purpose, the right to dredge land under water "was reserved from the general terms of the grant by necessary implication"; the plaintiff's case failed (15).

When the state, in the name of the people, came into possession of the fee title to all the unappropriated navigable waters and the lands under them it already had at hand two other categories of owners. Towns, as bodies corporate and politic, and municipalities, such as New York City, held title to some waters and submerged lands by virtue of royal patents granted through the agency of the royally appointed governors; private individuals also received grants of land under water in isolated instances. Actually, with the exception of New York City and the towns on Long Island whose boundaries encompassed a

substantial amount of bays, harbors, rivers, and their soils, the state owned in fee most of the remainder. In order to encourage and promote one of the state's major economic activites, that of waterborne commerce, in 1786 the legislature empowered the commissioners of the Land Office "to grant such and so much of the lands under water of navigable rivers, as they shall deem necessary to promote the commerce of this state" (16). The legislators clearly stated the intent of the act by restricting such grants to the proprietors of the lands immediately adjacent to the navigable waters, and then to be used only for commercial purposes. Periodically thereafter the legislature enlarged the granting powers of the commissioners until in 1850 it broadened them to include "land under water, and between high and low-water mark in and adjacent to and surrounding Long Island." The law of 1850 also declared that the grants could be in perpetuity or otherwise to adjacent upland owners, for commerce, beneficial enjoyment, or for agricultural purposes (17). As a consequence of these acts the state granted large tracts of land under water to private businesses and individuals, thus adding their claims to preferential treatment and exclusive rights of use of this valuable resource to those who held by colonial grants (18).

Given the premise that the king, and later the state, could grant waters and lands under them to private individuals, as has been held by a number of courts in this state (19), how much could the state actually divest itself of? In Matter of Long Sault Development Co. v. Kennedy the state Court of Appeals accepted the principle expressed by the US Supreme Court in Illinois Central RR Co. v. State of Illinois in 1892. The Illinois case centered on the question of a grant by the state to the railroad to a mile of Lake Michigan and its submerged lands extending outward 200 feet, comprising a substantial portion of the lake frontage of Chicago. In reiterating the principle that the state holds the title in trust for people so that they may enjoy the waters for navigation and carry on commerce, with liberty of fishing free from obstructions or interference of private parties, the Supreme Court conceded:

> grants of lands under navigable waters that may afford foundations for wharves, piers, docks, and other structures in aid of commerce... which... do not substantially impair the public interest in the lands and waters remaining... a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state (20).

But, the court continued, that is a quite different doctrine from one that sanctions the abdication of general control over lands under navigable waters, an entire bay or harbor, or of a sea or lake. "Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public" (21).

The Long Sault Development Company, handed down in 1914, recognized that in New York the legislative right to grant land under navigable waters to private individuals and corporations for their "beneficial enjoyment" (a ubiquitous term) had been exercised "too long and has been affirmed by this court too often to be open to serious question at this late day" (22). Yet, in keeping with the Illinois Central it distinguished between grants to municipalities of extensive underwater acreage for the general promotion of commerce in the interests of all the citizens, those to railroads for specific rights-of-way, grants to individuals for necessary and reasonable use, and grants that virtually turned over the entire control of a waterway. In this instance,

control of navigation at the Long Sault Rapids, an integral and indispensable part of the St. Lawrence River, passed into the hands of a private corporation. Consequently, the Court of Appeals held as unconstitutional the legislative act that made the grant, quoting the well-recognized principle stated in Illinois Central that "the State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them... than it can abdicate its police powers in the administration of government and the preservation of the peace" (23).

Since the state holds title to the waters and lands under them within its boundaries, excepting that portion specifically granted by itself or its predecessor, the King of England, it has the power to regulate use. Such power, of course, must not be oppressive but for the enhancement of public use and benefit. However, when the power is translated into legislative enactments, it can also affect private ownership. The state "merely regulated the manner in which they are to be used and enjoyed for the purpose of promoting the business, security, and good order of navigable bodies of water," and, therefore, there is no deprivation of ownership but only a prescription of the manner in which it can be used so as not to interfere with paramount public uses (24). This is nothing more than a restatement of the general principle that every owner of land must so use his property as not to injure the public interests.

The intention of the state in granting lands under water has been subject to the interpretations of a number of judges. In their decisions they have ranged widely. The judges have offered a limited, albeit profit oriented opinion in Rumsey et al v. NY & NE RR Co., that "the state not only recognized the right of the land-owner to have access from his own land to the water, but probably adopted the most economical way of promoting intercourse and building up trade and commerce between its different sections." They have also offered the "public benefit" concept in Coxe v. State, which averred:

> When the general doctrines of the English courts on the subject are given full scope, the conclusion is inevitable that the Parliament and the Crown together were not competent to grant to a private corporation, for private purposes, the seacoast around the island below the shore line, without violating established principles of law... While I am not aware of any such restrictions to be found in the Constitution of this state, in terms, yet, from the very nature of the question, it must be deemed to be inherent in the title and power of disposition. The title which the state holds and the power of disposition is an incident and part of its sovereignty that cannot be surrendered, alienated, or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit (25).

Finally, the judges have also gone to the dissenting opinion in Gould v. Hudson River RR Co. that declared, "those grants are regarded as vesting in the grantee the absolute ownership of the soil... The riparian owner... has... something that is valuable to him, and belongs to him, individually, and to the exclusion of any enjoyment by others in common with him" (26). Somewhere in between these statements fall the many decisions of the courts that treated the rights of owners of the foreshore and lands under water, always subordinating them, of course, to the superior regulatory rights of the state.

As a result of colonial and state grants of lands under water and the innumerable allotments of land bordering waterways of towns, there has been created a rather unique category of landowners known as riparian owners. Coupling their advantageous position vis-a-vis access to the water with the belief, held by many in this country, that a person has the right to maximize his own enjoyment and use of his private property to the exclusion of all others, they have claimed certain vested rights in the water and access to it that the general public cannot subserve to its own interests (27). This has given rise to a number of conflicts between riparian owners and those desirous of maximizing the public's right to unrestricted access to and use of the foreshore, waters, and lands under them for pleasure, profit, and the general weal (28).

Frequently, the courts have been called upon for a resolution of this seemingly never-ending controversy. The possibility of unbridled use of riparian rights by a proprietor, whether state or private individual, came under consideration in 1889 in Bedlow v. NY Floating Dock Co. That decision held that even though some might believe that fee ownership of such lands gave the proprietor (in this case New York City by virtue of its colonial charter), as a matter of legal right, authority to place structures on lands under water "as they was fit to make," such a proposition "to its full extent cannot be maintained" (29). But by 1901, the court's position on riparian rights had progressed to the point where a court could observe that "these privileges are absolute property rights as against all but the state" (30). Yet, the same court drew back from the brink of autocracy by warning:

> If it the state may erect upon our tideways or tidewaters any kind of structure that may be suggested by the whim or caprice of those who happen to be in proper, it will be possible to destroy navigation and commerce by the very means designed for their preservation and improvement (31).

From that one could reason that this caveat also holds true for private riparian owners. Unfortunately, even a cursory review of the chapter on Huntington Harbor will suggest that the harbor has been subjected to exactly the type of activity the court cautioned against. Some riparian owners, under the guise of repairing and improving their own self-serving private facilities, have extended docks and bulkheads into the harbor far beyond the original shore line, all in the name of riparian rights. It should be said that many, but not all, riparian owners have sought and received the necessary official approval before proceeding with construction or alteration of facilities. One might indeed blame the town and the state for neglect and disregard of the public interest.

Within a few short years after these decisions were handed down, a case came before the Court of Appeals that offered an opportunity to summarize what had come to be the prevalent judicial view with respect to riparian rights. Wilson R. Smith, a resident of the Town of Brookhaven, owned land on the Great South Bay, bounded by high-water mark, a title he could trace back to a grant in 1697. He built a dock 150 feet long extending out into the bay to facilitate the use of pleasure boats by himself and his friends. The town trustees, relying primarily on their Dongan patent of 1686, claimed that Smith had erected the dock on their land without permission. Furthermore, they had leased the land under water to Post. Even though they conceded that the dock was not a purpresture per se, they contended Smith had no right to construct

it without their consent. Smith, on the other hand, stood firmly on his riparian right, claiming that he had lawfully excercised such rights as appertained to the ownership of the upland in order to gain access to navigable waters (32). Here were all the earmarks of a controversy that could produce a major decision defining riparian rights: a colonial charter town that held the land under water both proprietarily and, as a body corporate and politic, in trust for all its citizens; a lessee who expected to have use of that land; and, an upland owner whose title ran only to high-water mark yet claimed his rights of access, by the means he chose, were superior to his adversaries.

Justice Gray, speaking for the majority of the court, first reviewed the English common law on the subject. If that law were applied, he reasoned, since many held that colonial charters should be interpreted in the light of the times and laws of the seventeenth century, the State of New York after 1777 became contractually obligated to act in respect of the charters as if they were the Crown, that is, as if the Crown continued the owner of the soil. It followed, then, riparian owners had no rights below high-water mark, in the absence of a special license or grant, other than as members of the general public. Therefore, Smith's dock would be an intrusion upon the jus privatum of the Crown and offensive, as a purpresture, to that and the jus publicum (33). Be that as it may, said Justice Gray, it cannot be insisted that the court adhere to this rigid common law doctrine because in the past the court had, quite deliberately, given "practical value, or utility, to the riparian owner's conceded right of access to the navigable part of the body of water in front of the upland." He then proceeded to demolish, or so he thought, the argument favoring the application of the English common law.

> I cannot agree that, in construing these grants of lands under the waters of the bay, we are bound to hold with the doctrine of the common law of England, as to the exclusive nature of the grantee's possession and as to his right to restrict the enjoyment of the riparian owner's right of access. The evidence of the common law, so far as it has not been declared in English statutes, we find in decisions of English courts rendered in existing controversies and those decisions will be given their due effect here, when the law has not been changed by our statutes; unless new conditions, or a different public policy, demand that the rule contended for be modified by our courts in its application. Different political and geographical conditions may justify modifications and whether common-law rules will be followed strictly by our courts will, necessarily, where no vested rights are actually concerned, depend upon the extent to which they are reasonable and in accord with our public policy and sentiment. In not applying, in all its strictness, the common-law doctrine, as declared by the English courts, this court has only interpreted the rule in a juster and more equitable sense and has affected no vested rights... [T]he town of Brookhaven... took and held the thing granted in its corporate political capacity, and as the representative of the Crown... Upon the organization of the state government, it continued to hold the soil of the bay in that capacity... Whatever its rights acquired by the grant, they were and are, nevertheless, subject to the public rights of navigation and to rights of access of riparian owners. These rights have ever existed and, with respect to the latter, their nature and extent, when brought into question in this state,

were not necessarily to be measured by English standards. The proprietary rights of the town were, and they must continue to be, subject to what, under the circumstances, is decided to be a reasonable exercise by the riparian owner of his right of access to the navigable waters of the bay (34).

In rejecting the English common law, Justice Gray declared that it would be unsound to ascertain what riparian rights had been in the seventeenth century and then insist upon their unaltered application to conditions two centuries later. He based this conclusion on the fact that the 1777 state constitution accepted the common law, but inferentially allowed disregard for it by the legislature if future conditions warranted a change or modification (35). In explaining his opinion that the English common law did not apply, based on this legislated loop-hole, he categorically stated that such rules of law had been concocted with reference to "the physical conditions of a country [England] widely differing from our own," and that it would, in effect, be ludicrous to equate England, an island with short rivers, navigable only as far as the tide flows and ebbs, with this country, more particularly the state, whose "position is different, physically and governmentally" (36).

Speaking in the heyday of an economic libertarian philosophy that espoused, at least in theory, the belief that the tenets of laissez-faire should be protected to the utmost by the state, one would almost be expected to take the position that individual rights in property were paramount. But, that is no excuse, then or now, for indulging in geographical distortions and historical inaccuracies as did Justice Gray and those on the bench who concurred in his decision. Putting aside for the moment what can only be described as his anglophobia, for his dictum on the allegedly pronounced dissimilarity between the American and English forms of government cannot be sustained by the political history and reality he should have known, it becomes apparent that when he spoke of this country he had far-flung vistas in mind. The Pennine Mountains of England are but mole hills when compared to the Rockies, or, for that matter, New York State's Adirondack Mountains; England could be submerged in the Great Lakes or washed away by the Mississippi River; that small island would be but an oasis in the vastness of America's southwest. Possibly, he hummed "America the Beautiful" (surely not "God Save the King") as he made his specious comparison. But, geographically, Long Island is not representative of American topography. In fact, one might go so far as to say that the island more closely resembles England topographically than otherwise. It is relatively flat with low hills and coastal bluffs, as are many places in England; it contains many small harbors, bays, and rivers navigable only as far as the tide flows and ebbs, as do many places in England; it is a small island, as is England.

Judge Gray and his associates on the bench had but to examine cursorily the many volumes of printed records of Long Island towns to gain insight into their political heritage. It would, then, have become abundantly clear to them that that heritage, with its many associated customs that became the sociopolitical milieu of eastern Long Island towns during almost 300 years of existence, more closely identified the towns with their counterparts in England than with a town in Idaho or New Mexico or Louisiana, or, for that matter (and closer to home), in Erie or Chautauqua counties in New York.

The judge's refusal to apply principles of the English common law to the situation on Long Island, particularly in the circumstances that produced

Trustees of Brookhaven v. Smith, suggests that they had only a schoolboy's unsophisticated knowledge of the physical geography and history of government of England and America, and even less then that when they passed judgment on conditions on Long Island. Consider, for example, Judge Gray's reliance on Gould, an authority on water use who states unequivocally that "this right the privatum rights of the Crown has been abandoned in the colonies to the proprietors of the land from the first settlement of the province and exercised by them to the present day, so as to have become a common rights and thus the common law." From this, Gray deduced that, as a general observation, "of which judicial notice may wisely be taken," all riparian owners in the state exercised their easements or rights of access by constructing docks, piers, or wharfs to navigable waters "without interference from the state, where superior public rights have not been obstructed" (37). Gould erred in his assessment of practices in the colony and, as a consequence, so did Judge Gray. Again, one has but to read the local records to find that towns jealously guarded their proprietary rights and trust duties in local waters and the lands under them. Few would dare to dock out without license from the trustees unless they had been granted or allotted lands under water specifically for that purpose (38). If there were any doubt in his mind that the towns could exercise both dominium and imperium in the lands they held in trust, he had but to refer not only to articles 35 and 36 of the Constitution of 1777, as incorporated in later versions in 1846 and 1894, but also to legislation in the nineteenth century that clearly authorized the towns to continue in the mode to which they had become accustomed vis-a-vis ownership and control of local lands under water (39). In this respect, the decision can be faulted.

With due respect for the judicial process, it must be pointed out that this court leaned heavily on stare decisis, placing great reliance on prior decisions that had stated, in so many words, that riparian owners in the state had a right [inalienable?] of access to navigable water by means of docks, wharves, and piers, for their own or for public use, subject only to such general rules and regulations as the legislature saw fit to impose (40). From them, and a limited historical-political understanding, it was concluded by the court that its interpretation of previous court holdings "is opposed to no statute and accords better with the circumstances, under which in this country such rights are possessed," such a broad view finding justification in the "peculiar nature of our political institutions" (41).

But one more internal contradiction needs to be pointed out in the intellectual peroration of the majority of the court as it reversed the lower courts and held for Smith. The court stated the following:

> The right of access is conceded to be a valuable one and, unless the foreshore has been appropriated by the general government to some superior, and lawful, public use, as for example, by grant to a municipality [emphasis added], or for navigation purposes, it is entitled to the protection of law... The courts of this state have been careful..., while sustaining the rights of the riparian owner, to declare them subordinate to the exercise of the power of the legislature, or of the Congress, for the improvement of navigation, or for the regulation of commerce. They must yield to the demands of public commercial necessities... This structure is conceded to be proper... and it is no appropriation of the land under water; other than as the soil is used to hold the piles... It is a general rule

> that when the use of a thing is granted, everything is granted by which the grantee may enjoy such use. By analogy, we may reason that the riparian owner's right of access... comprehends, necessarily and justly, whatever is needed for the complete and innocent enjoyment of that right. The town of Brookhaven acquired its title under the royal grants; but it holds it in trust for the members of the community and, if we admit that the plaintiff, Post, as its lessee, took exclusive rights under its lease, they cannot avail to abrogate, or to destroy, a right which appertained to a riparian ownership, to make available the easement or right of access, by the construction of a landing pier, or wharf (42).

It is admitted that Brookhaven, by virtue of its charter, acquired fee title in trust for the public and that such a grant carried with it everything. The grant was lawful because it was to a municipality for public use. But, reasoned the court, despite this, one must not consider municipality or community as collective, but rather as consisting of individuals over whom the magnifying glass can be placed so that each looms up larger than the whole. By the same token, the town trustees, in the exercise of their duties and responsibilities in administering the trust for the benefit of the entire community, must accede to the wishes of a single individual, possibly in derogation of that trust, if he be uniquely situated as a riparian owner.

Assume, arguendo, that the riparian owner, Smith, had a right to dock out over land under water not being used at the time for other purposes by the trustees (ignoring for the moment the likelihood of shallow oyster lots near shore that the general public might wish to exploit). The trustees might decide in the interests of the public, and for a superior public use, a town dock should be constructed in front of Smith's property at and below the high-water mark, or that the public would benefit either from open shellfishing or through income from a lease. They must forbear from doing so because they would then infringe upon the rights of the riparian owner by blocking his access to the water. A logical inference from this would be that the riparian owners of the town could effectively negate the town's proprietary rights and nullify the public trust doctrine along the entire waterfront at least as far out as they might extend docks, short of interfering with navigation.

Fortunately, all seven justices did not agree. In fact, the court was divided four to three and Justice Hiscock entered a lengthy dissent refuting the main points of the majority. It is in accord with the position taken above, but too long to be cited in any detail here. Nevertheless, Trustees of Brookhaven v. Smith became a landmark decision. Ever since it was handed down, lawyers--and courts--have approached it with almost pentecostal fervor and it has survived to become one of the most quoted and cited decisions in litigation having to do with the rights of riparian owners and others to lands under water in the State of New York.

A liberal interpretation of the Brookhaven v. Smith decision might lead one to the conclusion that riparian owners, especially those with grants of underwater land, could construct whatever they wished to gain access to navigable water. Not so said the same court a year later in Barnes v. Midland RR Terminal Co (43). This case, although similar to the Brookhaven case, had significant differences. A riparian owner and the public used a beach at the

foot of a public road; neither had a specific grant to lands under water offshore. Midland Railroad Company received a grant from the state to construct piers and other structures on lands under water extending out from its property adjacent to land of the plaintiff but separated by the public road. In the exercise of its granted rights the company built a pier and placed obstructions under it blocking transit across the foreshore by the riparian owner and the public that had evidently used the entire beach frontage and foreshore, including plaintiff's foreshore, as a resort for recreational purposes.

The court based its holding squarely on the Brookhaven decision that it now interpreted as requiring a test of reasonableness in determining what access to navigable waters meant. Applying this test, the court said the rights of riparian owners have greater force when considered with respect to the right of the public to use of the foreshore of tidal waters for fishing, bathing, and boating, "to all of which the right of passage may be said to be a necessary incident." Obviously, the court did not intend to reverse itself and hold that the jus publicum was superior to the jus privatum of a riparian owner. It immediately qualified its "greater force" to exclude those areas where "the jus privatum of the Crown has devolved upon littoral and riparian owners"; but in all other areas of the foreshore and lands under water "that right now resides in the people in their sovereign capacity" (44). In either instance, however, the court felt that what is a "reasonable exercise" of riparian rights should be the guide in evaluating the consequences of a structure extending across the foreshore and lands under water to navigable waters, whether it be constructed by riparian owner or grantee with specific license to erect structures for certain purposes. If a riparian owner or grantee exercised his rights "reasonably," yet interfered with public access across the foreshore, he could not be faulted; if, conversely, he became "unreasonable" and went beyond the "prescribed bounds of necessity and reason," he could be stopped and forced to retreat to a less obstructive position vis-a-vis the structures he built (45).

Generally speaking, a riparian owner's rights are really in the nature of easements, either implied or stated expressly in law, over the foreshore and lands under water, included in which is the right to sink piles into the land under water to support docks, piers, wharves, and like structures (46). But, such an easement does not vest in the riparian owner any other rights in the land under water in front of his upland (47).

In Hedges v. West Shore RR Co., the court stated that in the absence of a license or grant of the fee from the appropriate state, town, or other owner, a riparian owner may not dredge one spoonful of underwater land nor can he bulkhead and fill (48). In the much-quoted decision in Tiffany v. Town of Oyster Bay, the court stated that "if plaintiff had succeeded in establishing his title to lands under water, below high-water mark, the filled-in lands in front of his upland would have lost their character of foreshore and would have become upland, stripped of all public easements, and his own easement as riparian owner would have been merged in his superior title," or, to put it another way, "when the sovereign grants to the owner of the adjacent upland the title to lands under navigable waters, such owner may, subject to the limitations imposed by the United States Constitution, fill in such lands, make upland out of them, and extinguish the jus publicum" (49).

The circumstances surrounding the Tiffany case could not, as the court appreciated, be resolved with a simple and straightforward solution. What are the rights of a riparian owner, and for that matter the public, if filling takes place in front of a riparian owner by him who holds the fee title to the lands under water but is not owner of the adjacent upland? Or, what if the fill is wrongfully or mistakenly placed so as to make upland and remove the riparian owner by that width from the water? Tiffany filled under color of a grant of the land under water from the state. The Town of Oyster Bay claimed the grant was invalid because the town owned the land by virtue of the Andros patent of 1677, rejected an offer by Tiffany to remove the fill, and proceeded to construct bath houses on the new upland.

The trial court judge held that Tiffany lost his riparian rights thereby and the town had every right to use its newly found upland as it deemed to be in the public interest. Even if Tiffany retained any rights, the town's use of the land did not interfere with them. However, the Court of Appeals softened this ruling because "justice mitigates and corrects the harshness of strict law." Because Tiffany had in fact acted under color of title, later proven to be in error, he should not be punished for an honest mistake, therefore, "he is not thereby estopped or barred from asserting his rights as riparian owner." Then the court went one large step farther and declared, "the town may not fill in, occupy and obstruct with buildings the foreshore under the pretext of providing for the public enjoyment, so as to interfere with the rights of owners of the upland, although they may still be able to reach the water" (50). In so many words, the court held that a riparian owner's rights encompassed the whole frontage of his property. Consequently, the owner of land under water who is not also owner of the adjacent upland cannot fill in and make new upland unless by mutual agreement with the existing upland owner.

It is clear by now that the courts have dealt quite favorably with riparian owners and their rights or easements. If they own to the high-water mark, they can erect structures of reasonable size and for reasonable purposes of access to navigable water regardless of who owns the land under water upon which piles must rest or over which docks are extended. If they are fortunate enough to have the fee title to lands under water adjacent to their property, they can fill in across the entire length, make new upland, and continue to assert their easements at the water's edge. Naturally, this obliterates any vestigial rights the public might have had in the foreshore and completely extinguishes any rights of navigation over the filled-in area, assuming, of course, the filling in has not been judged by appropriate public officials to be obstructive of navigation and commerce and not permitted. In effect, the riparian owner has almost, but not quite, a carte blanche to do what he will for his own exclusive pleasure, subject only to the rule of reason (51).

The rule of reason itself is no safeguard to be relied upon to protect and preserve the foreshore and lands under water from encroachment by riparian owners, for it has taken on, or inherently had when laid down, an elastic quality that might defeat its purpose. Two recent court decisions will suffice to illustrate this point.

In 1954, Riviera Association, owner of land fronting on Manhasset Bay in the Town of North Hempstead, built a seawall about 25 feet back from the mean high-water mark and then constructed a boat slip 125 feet long out into the bay. Later, the association filled in on both sides of the slip, extending the fill outward 100 feet from the seawall. In 1965 the Town of North Hempstead

sold the filled in portion, including the land under water beneath the outer section of the slip that had not been filled as well as additional land under water in front of the filled area, subject to "riparian rights, if any, of abutting upland owners" (52). The association obtained a temporary injunction as the first step in an effort to enjoin the sale and conveyance as an illegal act. The defendant, Town of North Hempstead, claimed it owned the land under water and, therefore, the newly created upland. The plaintiff did not dispute ownership, but alleged that it had preemptive rights in the area over all others by virtue of its position as adjacent upland owner. The second defendant in the action, Augustus, who had bought from the town, claimed he would use the property for his own personal use and not for public use. According to the plaintiff, this admission on the part of Augustus precluded him from consummating the purchase because there was no public benefit to be derived from his use.

In his decision, Justice Meyer first disposed of a number of secondary issues. As to the plaintiff's riparian rights, the filling did not affect them. Citing Gucker v. Town of Huntington and Tiffany v. Town of Oyster Bay, he held that "plaintiff's riparian rights continue notwithstanding the placing of the fill, and this would be true whether the fill was or was not authorized by the Town" (53). Thus, Augustus could take and use the property, but always with due regard for the association's easements across it. Next, even though the plaintiff had as much rights as any to obtain a conveyance from the town, he had no more than others because the law that bestows preemptive rights on adjacent upland owners applies only to state-owned lands (54). The town owned the lands in question by virtue of their colonial patents and, presumably, could convey them to whomever it wished.

Justice Meyer then considered the plaintiff's two main contentions: that filled land retains its character as land under water; and, the entire lot of land under water being disputed cannot be conveyed except for public purposes because it is held in public trust by the town. He dismissed the first as being contrary to the weight of past judicial decisions on such matters and rejected the second, inter alia, because "to deny the Town authority to convey the filled land is to ignore plaintiff's concession 'that navigation has been in no way adversely affected by the fill' and to accept the contradiction that dry land is navigable. Legal fiction need not be carried to that 'dryly logical extreme'" (55).

In support of his holding that the town's conveyance to Augustus was permissible and legal, Justice Meyer, applied the rule of reason:

> It is at once apparent that the only situation in which a grant to a private person or corporation has been held unauthorized is that in which the grant was of the entire ocean front of a county..., entire control of navigation of a large and important portion of a navigable river..., or of an area one mile wide containing 1,000 acres in the harbor of Chicago... That grants of land underwater have been upheld when made for a use beneficial to the public..., or to upland owners... does not necessitate the conclusion that only conveyances for a public purpose or to an upland owner is authorized. Limitation of the Town's authority to convey is implied in order to protect the public interest and should be extended no further than is necessary to protect that interest against impairment... [W]hile conveyance of lands under water for a public

> purpose is permissible because it accords with the public trust, purpose is not the determinative factor... Rather the validity of the conveyance turns on the degree to which the public interest will be impaired, and, therefore, a "grant of a few hundred feet, for enjoyment in a manner which does not interfere with navigation,"... may be sustained (56).

One could infer from this that the ancient Roman law principle that the foreshore and lands under water are open to the use of everyone for fishing, net drying, access to the water, tying of boats, and the like has been severely restricted. In like manner, that portion of the English common law that condemned as purprestures all unauthorized structures between high and low-water marks, although not neglected completely, has been constricted to the point that is applicable only to the dwindling amount of foreshore and lands under water not granted to anyone. And, by both statutory and decisional law, grants of land under water are now being recognized as valid for any purpose consistent with water use.

In support of this trend, however, one could argue with some justification that the ancient Roman law never had currency in this state, or the nation for that matter; that the rigid English common law in this respect, while it might have served a purpose generations ago, has been sufficiently modified by the efforts of individuals and public agencies so that, in reality, it is no longer applicable; and that, in any event, the public is protected in the lands and waters remaining. One must concede that such an argument carries weight, particularly if one is confined to a consideration of the many judicial decisions touching on the subject. Nevertheless, the point cannot be ignored that the Roman and English answer to the question of who had what rights in the foreshore and lands under water--that the jus publicum is paramount-- has a more fundamental purpose than the answer that has evolved in this state--that the jus privatum is paramount--because it served the interests of the community at large rather than the parochial interests of the individual when a unique natural resource was involved. Can individuals sequester large tracts of this resource so that the general public is barred from the use thereof, or so inhibit the exercise of the public rights of use that it is tantamount to a bar? In general, no, said the Romans and, to a slightly lesser extent, the English; yes, says this state through its courts.

To rely upon the belief that state or town grants of the foreshore and lands under water will be estopped as soon as it becomes apparent that they are "injurious to the public" or are a "substantial impairment of the public interest in the lands and waters remaining," borders on the frivolous. At what point does one draw the line? There is no law that states that beyond here thou shalt not grant. Only a few judicial decisions have nullified grants, and then only because in and of themselves they seemed overly large as discrete units. Assume, arguendo, that grants of a whole harbor frontage or a vast stretch of a navigable river proved to be abhorent to a court, what would that same court say if 20 grantees received fee titles, at different times, to the same land subdivided accordingly? What would it say if each riparian owner then exercised his rights to bulkhead, fill, and dock out? Would it stop the tenth owner from proceeding with construction? The fifteenth? The eighteenth? Or possibly the twentieth owner would finally have to be informed, by way of permanent injunction, that HE impaired the interests of the public. Since the 20 grantees, by their separate actions, equalled the impact that the single

grantee would have had on the same frontage, logic might compel one to conclude that an error had been made in denying a grant to the latter.

With all due respect to the judicial process and the well-reasoned articulation of the handiwork of that process by Justice Meyer, it must be recognized that the courts, by their very nature, cannot pass judgment on the future. By design, they are reflective not anticipatory agencies. Unless the consequences of a given set of actions are patently obvious, they cannot project what might or might not happen (57). It would simply be demanding too much of the courts to insist that they suddenly reverse two generations of decisions or that they make new law decisionally. In the absence of overwhelming evidence to the contrary, both historical and legal, any court would be extremely reluctant to overturn the accumulated bulk of proriparian rights decisions. Obviously, they are not legislative bodies and cannot make laws; that is for the state legislature to do. Yet, by subtle nuances in the interpretation of legislative enactments, courts embellish the law, direct its application broadly or narrowly as they conceive the legislative intent to be, and thus amend the law. If this process be carried far enough, it is equivalent to making new law, although few might be willing to admit it.

The most recent holding on the rule of reason that is available to us here was handed down by the Appellate Division in 1972. The facts in the case are rather straightforward and even reflect a common condition to be found in many harbors on Long Island. Oceanside Yacht Harbor, a commercial marina and owner of about 900 feet of frontage on East Rockaway Channel in the town of Hempstead, extended docks out into the channel about 100 feet. The town owned the land under water into which the marina had driven piles to secure floating docks. The marina accommodated 150 boats, 20 of which were moored in slips on its side of the high-water mark and 130 moored on slips extending like fingers from floats on the town side of the high-water mark. The town had taken steps earlier with the marina's predecessor to issue a license to maintain docks if the former owner would enter into a lease arrangement for use of land under water on which to rest pilings. When Oceanside Yacht Harbor came into possession of the upland it refused to sign a lease, insisting upon its riparian rights to maintain docks on town-owned lands under water without payment of rent. Hempstead brought an action to recover a fair rental value.

In the lower court the town argued, among other things, that to allow any marina to use town land under water without a lease would be tantamount to making a gift of publicly owned land. This contention the court rejected, stating that the town owned the land subject to the riparian rights of upland owners and no gift would be made if the owner used only what belonged to him. In other words, the marina was entitled to reasonable access to navigable water and would be well within its riparian rights in driving pilings into town property in exercise of that right (58). But, continued the court, the actual usage situation posed another issue. In addition to gaining access to navigable water, the marina extended a number of floats and slips over town land under water that did not serve the essential function of access but rather represented a distinct economic function above and beyond mere access. The marina charged rentals for use of the slips, thus exacting money from the public for use of public lands while at the same time depriving the general public of the use of those lands in the absence of payment. The court then concluded from the evidence presented that, even though marina customers might store their boats on marina property or purchase gasoline and other supplies from its facilities, the dock rental business, which took place preponderantly

on town land, was a separate and distinct primary activity. Finding no specific authority that discussed such economic usage, the court felt that "the public policies involved and rationale for riparian rights suggests... that profit-making business uses on another's property are beyond the characterization of riparian rights," and held that the marina must enter into a lease arrangement with the town (59).

Oceanside Yacht Harbor appealed the decision and on 14 February 1972, the Appellate Division reversed the judgment of the inferior court, granting judgment to the marina in its counterclaim that it had the right to maintain the docks and piles (60). In its decision the court disagreed with the lower court that the town could charge a rental for Smith and Tiffany v. Town of Oyster Bay, it stated that the right of access extended along the entire frontage of a riparian owner's property. Referring also to other cases covered elsewhere in this chapter, the court listed the various riparian rights that had come to be accepted by the courts.

The court then turned to the reasonableness of use by the marina. Finding that no one had objected that the floats and slips were impediments to navigation, the court reasoned that the real issue was whether the use constituted an unreasonable exercise of dominion over the town's lands under water. Acknowledging that "reasonable" is relative, the court found that, by itself, the erection of more than one dock was not unreasonable "if they are necessary to the upland owner's enjoyment of his riparian right of access"; that the right of access is not restricted to personal use, but may be shared with others or leased to third parties; and that the defendant had not overstepped the bounds of reasonableness by renting mooring slips, even though the resultant number of boats was considerable. The court concluded:

> The policy of the state, since an early time in the history of our state, had been directed toward encouraging the private development of waterfronts, subject only to the condition that the use be reasonable and not obstructive of navigation. If a different policy is to be formulated at this time, favoring the right of the foreshore owner to be compensated when the riparian owner uses the right of access by operating a marina accommodating the mooring of a substantial number of small private boats, the change ought to be accomplished by the Court of Appeals which established the policy (61).

On its face, this decision appears to accomplish nothing more than a restatement of riparian rights. But read in the light of its accompanying dictum (62) and the trend now going on in the waters of Long Island, it has disturbing overtones. When coupled with the Riviera decision, it could serve as the culmination of years of decisions supportive of the proposition that private rights should be maximized at the expense of the public. Taken literally, as some private and commercial riparian owners very probably will do, it destroys the public trust doctrine for all intents and purposes except where the state or a town also happens to be, in its own right, a riparian owner. Furthermore, it throws open the entire shore in front of private upland owners to the possibility of being obliterated by bulkheads and fill above high-water mark. Out from the shore will be thrust bigger and better structures of boardwalks, jetties, docks, floats, and whatever else takes the fancy of the owner in fulfilling his desperate need to gain unobstructed access to navigable water. Not so? Even a casual study of the histories of

Huntington Harbor, Three-Mile Harbor in East Hampton, the shore frontage in the town of Babylon, or the current transformation of Dering Harbor on Shelter Island might give pause for second thoughts. The rule of reason is a slender reed to lean on if past history is any indicator of the future.

The other disturbing feature of the Oceanside decision is the stated opinion of court, its obiter dictum to be more exact, that it was the Court of Appeals that established the policy many years ago to encourage private development of the state's waterfront. One would hope that this was but a megalomaniacal slip of the tongue or at the least a poor choice of words, but even then its mere utterance is disquieting. One is left with a nagging question: Did the highest court in the state intentionally, then or now, set out to subvert the English common law and some proven local customs on Long Island and brush aside the general public interest in order to promote exclusive private interests? Incidentally, it should be noted that the Court of Appeals affirmed the decision on appeal, without an opinion, in July 1973.

Actually, it is unlikely that the courts established such a policy independently of the state legislature. To mitigate its implication that the Court of Appeals conspiratorially set in motion such a policy, it must be remembered that the legislature had indeed legislated just that type of policy beginning with Chapter 232 of the laws of 1835 (63). The state has consistently adherred to that policy until 1970. In that year the legislature enacted the Environmental Conservation Law as a first major step in the direction of reversing the traditional policy (64). Within the past three years the legislature continued its attack on the older policy by passing legislation regulating water resources (65), creating the Department of Environmental Conservation (66), and most recently protecting tidal wetlands (67). Although courts cannot be expected to be cognizant of every piece of legislature that happens to be in any way relevant to the case at hand, surely they can be expected to be aware of general trends such as environmental protection and its accompanying legislative enactments when they are given prominence nationally as well as in local newspapers in the region affected by their decisions (68).

By now it must be apparent that the general public has but residual rights in the foreshore and large segments of lands under water. In this and the preceding chapter an occasional generalization has been offered to explain why this is true. For further understanding, one must look once again to the arbiter in the perennial dispute over the jus publicum and the jus privatum: the courts. In their attempts to define the rights of riparian owners they also defined the rights of the general public. Whether they did so inadvertently or overtly is of no moment; but the fact that they did so at all and the extent to which they did it is important, because it might require more than just one more judicial opinion to reverse the long-standing trend evident in the decisions respecting the rights of riparian owners.

It almost goes without saying that the public has a general paramount right to navigation in the navigable waters of the state. Fishing, also, is a public right, subject to state regulation. Obviously, neither right can be exercised where weirs or docks protrude into the water as a result of a specific grant. Shellfishing can be done in lands under water of the state, again, subject to regulation by the appropriate state agency. As for town-owned lands under water, a common commodity on Long Island, shellfishing can be carried on only insofar as each town permits it by local ordinance of either town board or

board of trustees (69). But what of other ancient rights?: the right of access to the water across the foreshore; the right to haul up a boat upon the foreshore; the right to transit across the foreshore; the right to bathe, using the foreshore as incident to that activity? It needs repeating at this point that when such a question is posed it is done so with respect to the foreshore in front of a private riparian owner whose title runs to high-water mark. It is not directed at state or town owned upland fronting on the foreshore. If so, it would produce the ridiculous situation of the public acting as both plaintiff and defendant arguing riparian rights against itself.

The English court decision in Blundell v. Catterall has been quoted frequently in this country both in the decisions of our courts and in scholarly law review articles in support of the contention that the public has only a limited right of access to the foreshore for bathing. That decision is an unhappy choice because the justices themselves were at odds with each other over legal precedents and authority found in Bracton and Lord Hale. To reiterate briefly: Justice Best found that the Crown granted the foreshore to the manor lord subject to the same rights of public passage as when the Crown held it, citing Lord Hale as his authority; Justice Holroyd, also relying upon the ancient authority of Bracton as well as Lord Hale, found that no such right of passage existed; Justices Bayley and Abbott again referring to the same sources for principles of law and to such decisions as Bagott v. Orr, decided that the right could exist if it could be shown it originated from custom, but both, confronted with the "new" fad of sea bathing (and apparently unable to cope with it), asserted that rights to use the foreshore for fishing did not include it and that no records existed of its being customary. The majority appears to have supported Holroyd in his opinion that:

> The practice of bathing may contribute to health, but it ought to be confined within reasonable limits, and it is by no means necessary that the right should be coextensive with the whole shore of the sea, or that it should extend to places where the right of fishing with stakes exists... it would be attended with great inconvenience to the public if a general rights, free from all regulation by the owner of the soil was to be exercised throughout the whole of the kingdom. I am of opinion that no such right exists... (70).

Somewhat in contrast to Blundell, in 1852 a New York court ruled in Gould v. Hudson River RR Co. that riparian owners had no "peculiar" rights in the foreshore and, although they might erect structures there, the state has the power to destroy them and to regulate the use of the foreshore in the general public interest and for the public good, "founded upon the principle, that the general good is to prevail over partial individual convenience" (71). This broad view maintained its hold in Murphy v. City of Brooklyn in 1885 when the court stated that everyone, barring interference by public authorities, could "go upon the sea shore between high and low water mark to fish, bathe, or for any lawful purpose," and in Barnes v. Midland RR Terminal Co. in 1908 when it held that "the question whether the public have any right to pass over the beach between high and low water mark at the defendant's summer resort... must be answered in the affirmative" (72).

By 1916, in People v. Steeplechase Park, the rights of the public to transit across the foreshore had been modified to the extent that if the state granted fee title to the foreshore to the adjacent upland owner the public could be barred from access by the acts of the owner (that is, docks, seawalls,

bulkheads projected into the water beyond high-water mark) (73). Three years later the decision in Johnson v. May agreed, declaring that "the public right is to pass and repass when the tide is out and to sail and fish over the foreshore when the tide is in, and to make such other reasonable use of the foreshore as may be consistent with the rights of others" (that is, riparian owners' rights of access by way of docks and the like) (74). However, the court stopped short of allowing the public to erect umbrellas, tents, or similar structures on the foreshore because it "seems to go too far." More recently, courts have held that, given such public rights, they do not extend to permitting the public to cross and recross over privately owned upland to reach the water (75).

This study has concerned itself with history and law, both decisional and statutory, as they relate to the foreshore and lands under water, which necessarily includes wetlands; that is to say, history in the sense of a chronicle of dates, events, and places; law insofar as it directed the conduct of those caught up in the historical flow. At various stages of the historical process the status of the jus publicum and the jus privatum relative to each other became inverted; first one was paramount, then the other. This cyclical relationship can be perceived as a reflection of the needs of a given society as expressed in its customs, which are, in part derived from its level of economic and technological sophistication.

Generally speaking, during the colonial period the freeholders and commonalty of Long Island towns accepted almost as an article of faith that each town owned and therefore could regulate the use of local waters and the lands under them for the benefit of all its residents. Admittedly, in the discharge of their duties as trustees of the undivided lands, the town fathers would convey to individuals the fee title to salt meadows and thatch beds. But, more often than not, these conveyances transferred title to areas subject only to infrequent flooding by very high tides. Easy access by horse or on foot to harvest the grasses was a prerequisite for anyone who requested a grant of such land. Susceptibility to alienation from the public lands seems to have been based on two considerations: the extent to which a salt meadow was surrounded by contiguous private uplands and thus relatively inaccessible by others and its natural characteristic as being more akin to upland than tidal or "low" marshes, thus making the harvesting of its grasses with sickle and scythe comparatively easy (76).

In contrast, thatch grass beds in low or tidal marshes situated below the high-water mark, and thus within the foreshore and the reach of diurnal tides, were reserved in most instances for use by the public. Trustees or other appropriate town officials auctioned off grass cutting rights annually at vendue sales, which were not then nor can now be interpreted as passing fee title of the thatch bed itself into private hands (77). Nevertheless, during the nineteenth century, families that could trace their use of a thatch bed to an early grantee of cutting privileges came to believe that they owned the bed outright. For whatever reason, town officials failed to keep track of all such parcels, or, in many instances, executed a conveyance of them so that by presumption or grant they came under private control. As a result, individual owners have felt free to fill in such areas as the demand for waterfront property rose or their own needs dictated. Others have bulkheaded and docked out over tidal marshes of shallow expanse for commercial or private purposes. The net effect has been the obliteration of vast expanses of wetlands and a

sufficient number of obstructions across the foreshore to extinguish its use for transit or access to and from the water by any other than the adjacent upland owner.

The courts have not been blind to this trend. In fact, one might say that they have adhered to the doctrine so aptly stated by Alan Harding in A Social History of the English Law, that "law is the expression of social needs, a system of law is a description of the society for which it was made" (78). During the nineteenth century the state courts dealt primarily with rights of navigation, fishing, and shellfishing in town waters held by colonial charters, reflecting an increased interest in these activities as town populations grew and their economies diversified. Whereas, formerly, hardly anyone questioned the rather strict control of the trustees or town boards of local waters and the lands under them, by this time not only a new generation of inhabitants but also nonresidents began to doubt their authority to do so. Population pressures and laissez-faire had caught up with and threatened to trammel underfoot older customs and traditions which, attuned to a by-gone simpler time, impeded "progress." Notwithstanding these legal skirmishes, the town trustees and officials continued to regulate use of lands under water and issue leases for docks and underwater lots.

The twentieth century has been witness to a shift in interest, but not necessarily of attitude on the parts of the antagonists. The issue of riparian rights came to the fore. Water related commercial activity, whether in the form of a large firm engaged in importing trap rock or oil, or small marinas and yacht clubs catering to the leisure time pleasures of a rapidly expanding population, advanced to the point where upland owners insisted upon unrestricted access across the foreshore to expand their operations. The legislature and the courts, one by law and the other by interpreting the law, supported these self-serving interests in the belief that greater benefits would accrue to communities in the form of business growth and in the protection of certain alleged private property rights than would be the case if the foreshore were left to casual use by the general public. Private owners of undeveloped wetlands and residential upland contiguous to the foreshore espoused a like cause, both in the interests of profit and of pleasure. They sought to maximize their exclusive personal use of the foreshore and wetlands at the expense of any general public rights that might interfere. In this century the courts supported their claims to exclusive rights, beginning with Brookhaven v. Smith in 1907 and culminating with the Oceanside Yacht Harbor holding as recently as 1973.

During the colonial period and well into the nineteenth century the jus publicum maintained its paramount position over private rights. For much of that time there seemed to be little need to challenge it. Population was relatively sparse; few settled along the water's edge, except possibly at a harbor earmarked for navigation and commerce. Foreshore and wetlands were viewed as having only peripheral value. In the twentieth century the jus privatum has gained ascendancy over public rights. Population has increased dramatically, causing real estate interests, whether speculative or otherwise, to exploit formerly marginal foreshore and wetland property. Concurrently, two forces have developed in opposition to the paramountcy of the jus privatum and claims of exclusivity of riparian owners: one insists that the greatly increased population with more leisure time available should not be restricted in its desire to indulge in water-related activities (that is, bathing,

boating, or even a casual stroll along the water's edge); the other warns that further misuse of wetlands, as well as the foreshore, will upset a natural balance upon which people ultimately depend for survival.

Historically, these problems and their solutions have been considered to be the concern of the community in which they manifested themselves. Gradually, however, the legislature and the courts have intruded upon this local prerogative. Sometimes they have done so in a supportive role, as in the cases when they reaffirmed the rights of trustees to lease land under water or reconfirmed the trust doctrine of the colonial charters. At other times, the consequence of such intervention has been a dimunition of the trust doctrine, almost to the point where it has become moribund (79).

Traditionally, charter towns felt that they were quite capable of coping with their local situations. History does not bear them out if one uses preservation of local natural resources such as the foreshore and wetlands as a measure of success. Over the years towns have granted away much of their water frontage and thus, by virtue of the exercise of riparian rights by the grantees and their descendants, have drastically diminished the areas available to the public. They have catered to upland owners by issuing licenses for bulkheading and filling, docking out, marina construction, and, until very recently, occasionally closed their eyes when such was done without authorization. However, it must be admitted that within the past decade they have passed a variety of ordinances designed to counteract past permissiveness and moved to regulate more closely dredging, filling, shellfishing, and construction along the waterfront. But, no two towns have the same ordinances; at least one has none to speak of. Some boards of trustees still persist in selling, for a nominal price, small parcels of wetlands, or issuing licenses to developers, in the belief that the areas affected are too small to be concerned about (80).

To argue that colonial charters granted certain exclusive and unassailable rights to town boards or boards of trustees to manage tidal lands proprietarily and in their corporate capacity is to deny the fact that the towns are creatures of the state. A clear statement of the relationship between town power and state power can be found in the Poveromo decision, citing from Hunter v. Pittsburgh:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them... Such corporations are the creatures, mere political subdivisions of the state for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanctions of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged or altogether withdrawn at the will of the Legislature. The authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of a municipality shall not thereby be destroyed (81).

The state, by its voluntary confirmation of colonial charters, by accepting the English common law (subject to later modification), and by empowering local governments "to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law," has clearly indicated that the towns are, in every respect, subordinate to the state (82). Nor can the powers of the boards of trustees, created by colonial charter, be held immune from state control. Too many past legislative enactments exist that altered the composition of boards of trustees or redefined their powers to make that a tenable position from which to argue. In reality, the present controversy between towns in Suffolk County and the state over regulation of tidal lands, the foreshore, and wetlands, has its origins not in whether the public trust obligation legally exists, but rather in a dispute over whether the state or local town boards or boards of trustees are more capable and better equipped to enforce it. The historical evidence is against the towns.

Obviously, one must look elsewhere if the interests of the general public are to be served. The state legislature has already begun to exert its influence through acts such as the Environmental Conservation Law as recently amended by the Tidal Wetlands Act. Despite its need to be amended further to eliminate problems of some overlapping or conflicting jurisdictions, it is a long step forward in imposing much needed tighter controls over tidal areas.

The other state agency that could prove to be invaluable is the courts. But, they have assumed a stance that they might consider difficult to alter in view of the many decisions handed down favorable to riparian rights and the maximization of private use of waters and the lands under them. Nevertheless, the courts have the power to determine whether stare decisis shall become a well-tailored and comfortable coat or a straight-jacket. In their determination the courts would do well to bear in mind that:

> Perhaps the main practical value of legal history is simply to remind law that it exists for society and must constantly be reforming itself up to date with social change (that is, history). Law which forgets society is, "in danger of becoming an occult science, a black art, a labyrinth of which the clue has been lost" (83).

The courts have at least two alternative paths they can follow. They can parrot Justice Hopkins in the Oceanside Yacht Harbor decision and simply declare that "change ought to be accomplished by the Court of Appeals which established the policy" (for example, encouraging the private development of waterfronts, "subject only to the condition that the use be reasonable and not obstructive of navigation"). In its bluntest terms, this could mean that all challenges to riparian rights in the courts could be dismissed as no longer having practical significance. Or, the courts could quietly ignore the assertion of Judge Hopkins, even though his four colleagues sitting with him on the case and the Court of Appeals concurred, that the highest court in the state could make such a policy early in the state's history and maintain it through so many generations. Then, the courts could reread their own past decisions, paying careful attention to the innumerable citations to other judges' dictums and holdings, for clues to how to break the present-day lockstep. No new theories need be propounded; no new guidance from the legislature need be sought.

For example, in the absence of exhaustive research into Magna Carta and the extent to which the kings of England granted the foreshore and lands under water for the exclusive use of individual subjects in subsequent centuries, they could take a hint from Blundell v. Catterall. It will be remembered that Justice Best relied upon custom to frame his opinion that a public right of access for bathing existed; whereas, Justices Bayley and Abbott, while agreeing that custom would be a ruling factor, had not seen nor read of anyone who had seen, even fleetingly, bare legs dashing to the water for a dip after 444 AD. Custom, according to Webster's Unabridged Dictionary, is "usage or practice that is common to many or to a particular place." The courts might then reflect on local customs in Long Island's colonial charter towns as illustrated in the many volumes of printed town records spanning more than 300 years. They will discover, as has been pointed out elsewhere in this study, that grants of land under water were for specific commercial ventures, that if a resident wanted exclusive use of a portion of the foreshore (that is, wetlands) or a plot of land under water he applied for and usually received a lease for a term of years. They would learn that even after the Brookhaven v. Smith decision, town trustees, supported by statutes confirming their rights, continued this custom well into the twentieth century. They might also learn that that decision, rather than recognizing an existing custom, actually created a custom by fiat. Subsequent decisions based on it merely reenforced the new "custom," but it took the Oceanside Yacht Harbor holding to give the older custom of three centuries standing the final coup de grace.

The courts should then read with care the Brookhaven v. Smith decision, upon which Riviera, Oceanside, and others are based, particularly the dictum that states that rigid common law doctrines should not control present (1907) decisions. Although Judge Gray might not wish to be bound by the common law doctrine of England, should he not be bound by the state constitution that accepted the common law and confirmed the right by charter to manage, even lease, the land under water in question? In construing the "exclusive nature" of the town grant as a private proprietary right to restrict Smith's access, Justice Gray seems to have misinterpreted the basic public trust doctrine so as to apply it in a lopsided, "more equitable sense" favorable to one individual, Smith, as against the remainder of the town residents. In doing so, he did, in fact, brush aside the significance of long-standing custom. Later court decisions have done little to alter this interpretation and have themselves fallen victim to the rigidity in the English common law about which Justice Gray complained by rigidly enforcing riparian rights in the face of some local customs and evolving public policy to the contrary.

Justice Gray offers a way out of the dilemma of whether to recognize the paramountcy of the jus publicum and the public trust doctrine in the foreshore and wetlands or to continue to espouse the superiority of riparian rights, the jus privatum. Did he not state that "new conditions, or a different public policy [could] demand that the rule contended for be modified by our courts in its application"? Admittedly, he had reference to the older "rigid" common law rule, but that should not detract from the significance of the statement when applied to the rule he espoused that has since become rigid. Public opinion, local ordinances, and state legislation have already clearly signalled a change in policy with respect to use of the foreshore and lands under water. Should not the courts take cognizance of this and then reassess older decisions from bygone eras to redetermine their applicability to the situation today?

A lower court in the fourth district in Suffolk County has already recognized this. Reasoning that no person has the absolute ownership of land and that such ownership must, of necessity, be vested in the state as sovereign "because it is the only one which is certain to survive the generations of men as they pass away," the court contended that the state thus assumed the role of trustee for the people, especially with respect to lands under water that are vested with a public trust (84). Such a public trust, said the court, is not passive but rather is "governmental, active, and administrative." It follows, the court continued, that, as laid down in Illinois Central RR Co. v. Illinois and Milwaukee v. State (85), the state may not divest itself of the duty to regulate the use of these areas, and, even though it could grant limited privileges of use to individuals, it could not do so "so as to divert [lands under water] or the waters thereon from their proper use for the public welfare." Then, directing its attention specifically to tidal lands, the court properly took note of recent legislation.

> The entire ecological system supporting the waterways is an integral part of them (the waterways) and must necessarily be included with the purview of the trust. We now know that wetlands perform useful functions indeed. Wetlands are presently regarded as valuable national natural resources. They are sufficiently important to our environment to be accorded protection by state and national legislation (Conservation Law, 429-a, subd. 3[3]). Concern about the loss or destruction of natural resources of the state, including forests, soil, water, fish, and wildlife is expressed in Section 429-a, subd. 3[3]. The wetlands function as a buffer against the ravages of the sea, cleanser of the incoming tide, a base for the marine food chains, nesting grounds for birds and particularly endangered species and sanctuary to a variety of animals ferae naturae (a national natural resource in itself). (Geer v. Connecticut, 161 US 519...) (86).

The court concluded that "the public interest demands the preservation and conservation of this vital natural resource," and strongly implied that the legislature and the courts should enforce protective measures against infringement by nominal owners, "be they private or governmental" (87).

That the state could grant tidal lands to private owners cannot now be denied at this late date, or for that matter, at any time after 1777. To do so would be to deny one of the sought after goals of the Revolution, to wit, to preempt the power of the Crown and substitute for it the proposition that, regardless of the Revolution, the state is still subordinate to Crown policy respecting grants of land as circumscribed by the rules of English common law. It is a little late for that. Nevertheless, it cannot be denied either that the state and the courts have accepted the proposition that they have adopted the concept for the common law, firmly embedded in which is the public trust doctrine and its applicability to tidal waters and the lands under them (88). To argue that riparian owners have exclusive rights as against all but the state and that those rights are even inviolate against the state except for its superior power to regulate only navigation and commerce, as some courts have, is to deny the power of the state to act in other matters relating to use of tidal lands in the interests of the general public (89).

At some point the courts, as arbiters and interpreters of the law, must strike a balance between the states, the towns, and the interests of the

general public on the one hand, and the developers and riparian owners, the advocates of the jus privatum, on the other. If not, then developers will continue to obliterate wetlands and riparian owners, whether they be marinas, yacht clubs, or home owners, will bulkhead, fill, and dock out with few restraints. If the present trend persists, supported by the courts' continued adherence to outmoded rules of law, then, when all has gone under the bulldozer, the bulkhead, the hardtop driveway, and condominium, the riparian rights advocates will turn to their antagonists and say, "Ah, we have found the balance; what is left is yours."

CHAPTER VII FOOTNOTES

(1) Reinsch, Paul S. English Common Law in the Early American Colonies (New York: reprinted by De Capo Press, 1970), for an early study of this problem and a somewhat simplistic analysis that concludes that the first colonial legal systems were innovative and not English common law oriented. It is his belief that the common law came in belatedly and sparingly. In contrast, Chafee's article, "Colonial Courts and the Common Law," in Massachusetts Historical Society, Proceedings, vol. 68, 1952, p. 132-159 effectively rebutes Reinsch on this point and concludes the common law arrived in part at the outset and was made more pervasive and secure in the system as the colonists, their needs, and the law became more sophisticated.

(2) Goebels, Julius, Jr., "Courts and Law in Colonial New York," in Flick, Alexander C., ed. History of the State of New York (New York, 1933 (10 vols.); see also his "Law Enforcement in Colonial New York," in Flaherty, David H., ed Essays in the History of Early American Law (Chapel Hill, NC: Unversity of North Carolina Press, 1969) p. 367-391, in which he also takes the opportunity to castigate lay historians for daring to delve into legal history without benefit of a full course of legal training. Possibly this present study will lend added support to that view.

(3) McKinney's Consolidated Laws of New York, Book 2, Constitution. See, Canal Appraisers v. People, 17 Wend. 570 (1836) for a learned discourse on the introduction of the common law into the colonies and its reception later in the State of New York.

(4) Delancey v. Piepgras, 138 NY 26, 37-38 (1893), citing Martin v. Waddell, that colonial grants to colonies and municipal governments were not strictly proprietary, but in the nature of grants for political purposes "for the public good... their provisions must be liberally interpreted whenever necessary to accomplish the purpose of their creation." Trustees of Southampton v. Jessup, 162 NY 122, 125-126 (1900), that "title and sovereignty over the waters, and to the lands thereunder" became vested in the town "to permit the doing of all things that a government may do for the benefit of the people." Thousand Islands Steamboat Co. v. Visger, 179 NY 206 (1904), that grants for public purposes cannot be construed to the exclusive benefit of private interests; Matter of Mayor of City of New York, 182 NY 361, 365, (1905), that the rights of the sovereign to land under navigable waters is proprietary and governmental. "As proprietor, the sovereign may sell or convey to others, but as to the power to govern, the sovereign holds as trustee for the use of the public... [I]t was the intention of the sovereign [for example, the state] to delegate to the municipality the power to hold and control the tidewater in the interest of commerce and of the public"; Town of Brookhaven v. Smith, 188 NY 74, 78 (1907), in which the court declared that "the town of Brookhaven, under its grants, acquired the title to the particular lands under water of the bay was settled by the decision in its case against Strong (60 NY 56); but it took and held the thing granted in its corporate political

capacity, and as the representative of the crown, or of the colonial government, to be administered for the public good." Grace v. Town of North Hempstead, 152 NY 122 (1915), aff'd 220 NY 6 (1917), upholding the colonial patent to the town; Sammis v. Town of Huntington, 171 NY 965, 967 (1918), "the grant vested, ownership of the lands in the town in its corporate capacity, and not in the patentees named in the grant, nor in the freeholders and inhabitants individually... the phraseology of the grant to the patentees... was alone sufficent to constitute all the inhabitants a body corporate." Tiffany v. Town of Oyster Bay, 209 NY 1 (1918); 234 NY 15 (1922); Sammis v. Town of Huntington, 174 NY 610, 612 (1919), "colonial grants... were not to be named patentees individually, but were for the town." People v. Trustees of the Freeholders and Commonalty of the Town of Brookhaven, 261 NYS 598, 601 (1932), "it is no longer an open question that the colonial patents to the Long Island towns vested in the town the legal title to the soil under the waters of the bays and harbors within the bounds of the patent." Nance v. Town of Oyster Bay, 258 NYS 2d, 156, 23 AD 2d. 9 (1965), recognizing colonial patents, Dolphin Lane Estates Assn., Ltd. v. Town of Southampton, 239 NYS 2d, 966, 980, aff'd on appeal (1971, 1974), accepting that the trustees and town succeeded to sovereignty rights of the Crown in navigable and nonnavigable waters, and quoting with approval Martin v. Waddell and other cases cited therein. People, Town of Smithtown v. Poverome, 336 NYS 2d 764 (1972), in which the decision agrees with the above citations, but goes so far as to distinguish, rightly, between grants to bodies corporate and politic that include the foreshore and lands under water, and those to private individuals (that is, Richard Smith of Smithtown) where the grant goes only to the high-water mark. In this last case, the written decision contains errors of historical fact, such as the lack of a royal charter to New York (Ibid., p. 769) and cites with approval a work of questionable historical accuracy; Mershon, Stephen L. Power of the Crown in the Valley of Hudson (Brattleboro, VT: Printed by the Vermont Printing Co., c1925).

(5) Rogers v. Jones, 1 Wend. 237, 259 (1829).

(6) Ibid., p. 261. It should be noted that the court failed to distinguish between free floating fish and shellfish. It also treated the grant as a private proprietary, making no references to the public trust doctrine except indirectly in referring to De Jure Maris, 22. In this respect, Rogers v. Jones does not agree with the conclusions arrived at in Martin v. Waddell 14 years later.

(7) The circumstances surrounding this incident have been discussed at some length in Chapter IV.

(8) Trustees of Brookhaven et al v. Strong, 60 NY 56, 66 (1875). The court recognized that authority for almost any contention on types of fishery, whether free, common, or several, could be found in the literature. Citing to Blackstone, Schultes, Woolrych, and Chancellor Kent, it concluded that no one fully agreed on this point (Ibid., p. 64).

(9) Ibid., p. 65.

(10) Ibid., p. 73. In its decision the court seems to have indulged in some historical inaccuracies. At Ibid., p. 67, it mentioned that some defect might exist in the argument that the king could alienate fisheries, but that Parliament had such legislative power to grant. This power, according to the

court, was exercised by colonial governors and assemblies acting in the stead of king or Parliament. This accepts the partisan rebel view of 1775 that colonial assemblies were miniature parliaments in the dominions. It also postulates that Parliament's power in the colonies was probably paramount to that of the Crown. Prior to Campbell v. Hall in 1774, neither the Crown nor many colonial assemblymen might agree fully with this view. Calvin's Case, 1607, gave the prerogative power of lawmaking to the Crown, restrained only by the rule that such laws be agreeable to and not repugnant to English law. The Crown held the exclusive power to disallow colonial statutes, which it exercised frequently. For example, the court erred in referring to the voiding by the New York Assembly of excessive land grants made by Governor Fletcher. It was done by express royal instructions to Fletcher's successor, Bellomont.

(11) Town of Southampton v. Mecox Bay Oyster Co., 116 NY 1, 5-6 (1889). Cf. Lowndes v. Town of Huntington, 153 US 1, 26-27 (1893), in which the court stated that "no question exists as to the validity of these ancient grants, or that they were broad enough to include oyster rights in the waters within them."

(12) People v. Staten Island Ferry Co., 68 NY 76, cited in Matter of City of New York, 168 NY 134, 142 (1901); cf. citation to Bedlow v. New York Floating Dry Dock Co., 112 NY 273, that "the right of the people to use the natural public highways is jus publica and cannot be taken away or seriously impaired," Ibid., p. 145.

(13) Ibid., p. 144.

(14) Lewis Blue Point Oyster C. Co. v. Briggs, 198 NY 287, 292 (1910); Matter of Long Sault Development Co. v. Kennedy, 212 NY 1, 10 (1914); People v. Hudson River Connecting RR Corp., 228, NY 203, 218 (1920); People v. Systems Properties, Inc., 160 NYS 2d 859, 867-868 (1957).

(15) Ibid., p. 292. The court also held that if, when granted, waters became cluttered with fish weirs or nets that interfered with navigation, such objects became nuisances and could be abated as such. Quoting with approval from Sage v. Mayor, etc., of New York, 154 NY 61, 79, the court stated that "when any public authority conveys lands bounded by tidewater, it is impliedly subject to those paramount uses to which government, as trustee for the public, may be called upon to apply the waterfront for the promotion of commerce and the general welfare" (emphasis added).

(16) Laws of New York, 1786, Chapter 67.

(17) Ibid., 1813, I, Chapt. 9; Ibid., 1830, I, Chapt. 9; Ibid., 1894, Chapt. 317.

(18) The state could not, of course, grant lands under water that were within the boundaries of towns whose colonial charters had passed title to the towns. See, Grace v. Town of North Hempstead, 152 NYS 128 (1915), aff'd 220 NY 6; Tiffany v. Town of Oyster Bay, 209 NY 1, 7, 102 N.E. 585; Roe v. Strong, 107 NY 350, 358, 14 NE 294.

(19) Martin v. Waddell notwithstanding, the courts of the State of New York adhered to this position and accept that, as sovereign, the state can execute grants to private individuals of water and the land under it for commerce and

"beneficial enjoyment" by landowners adjacent to a body of water, whether it be navigable or not. In Den, ed dem, Russell v. The Jersey Company, 58 US (17 How.) 426, 14 C. 423 (1854), the US Supreme Court reiterated its decision in Martin v. Waddell and rejected the argument of the plaintiff that "the soil under navigable waters, disconnected from its public uses, is part of the domain of the Crown," and, therefore, can be alienated.

(20) Illinois Central RR Co. v. State of Illinois, 146 US 387.

(21) Ibid. This opinion, if fully accepted in this state, could be the basis for challenging the Blue Point Oyster Company's title to a substantial portion of underwater land in the Great South Bay.

(22) Matter of Long Sault Development Company v. Kennedy, 212 NY 1, 8 (1914).

(23) Ibid., p. 10. Cf. People v. Hudson River Connecting RR Corp., 228 NY 203, 218-219 (1920), in which the principle is restated. For other statements of the rights of states to grant lands under water for specific purposes, and not in derogation of the public rights of navigation and commerce, see, Langdon v. Mayor of City of New York, 93 NY 129 (1883); Rumsey et al v. NY & NE RR Co., 114 NY 423 (1889); Bedlow v. NY Floating Dry Dock, 112 NY 263 (1889); Barnes v. Midland RR Terminal Co., 193 NY 378 (1908); Thousand Island Steamboat Co. v. Visager, 179 NY 206 (1904); People v. Steeplechase Park Co., 218 NY, 459 (1916); Riviera Association, Inc. v. Town of North Hempstead, 276 NYS 2d 249 (1967).

(24) Roosevelt v. Godard, 52 Barb. 533, 550 (1868). Cf. Hodges v. Perine, 24 Hun. 516, 518 (1881). Cf. Smith v. Maryland, 18 How. 71 (Sup. Ct. 1885), in which the US Supreme Court also reiterated once again that states held navigable waters and lands under them in trust for the public, but such regulations as they might make with regard to navigation, could not conflict with superior federal powers; and Colon v. Lisk, 13 App. Div. 195, 198 (1897), Bedlow v. NY Floating Dry Dock, 112 NY 263, 274 (1889); Town of Brookhaven v. Smith, 188 NY, 82, 87 (1907); People, Town of Smithtown v. Poveromo, 336 NYS 2d 764, 774 (1972).

(25) Rumsey et al v. NY & NE RR Co., 114 NY 423, 428, (1889); Coxe v. State, 144 NY 407. Cf. People v. Steeplechase Park Co., "The contemplated use must be reasonable and one which can fairly be said to be for the public benefit or not injurious to the public... Grants to the owners of the adjoining uplands, either for beneficial enjoyment or for commercial purposes, have long been authorized and recognized as one of the uses to which the state may lawfully apply such lands," p. 477-478.

(26) Gould v. Hudson River RR Co., 6 NY 548-549. Fortunately, none have taken the view expressed in Canal Appraisers v. People, p. 595, where it is said that under both English common law and ancient Roman Law no rights passed to riparian owners other than those enjoyed by all because of necessity, but this was "before the more modern improvements to navigation had rendered the use of the banks for such purposes comparatively useless, "thus implying that the jus publicum in the foreshore had become outmoded.

(27) In Ibid., p. 549. The dissenting justice took the opportunity to enumerate those rights riparian owners allegedly had that, if abridged, were subject to recovery at least of damages: navigation not only up and down the

stream (or river), but across it as well to a landing; establishment of a ferry for private gain, with control of a landing on either side; fishing in the waters with a right to dry nets on his shore and erect building suitable for that purpose; the right to add to his property any additions by "alluvian or imperceptible increase"; use of the water for irrigation and other purposes of his farm as well as for personal pleasure such as bathing; loading and discharging of cargo on his shore and control of such activities by others; access to the navigable channel across the foreshore; and, finally the right to continue as riparian owner and, "to be protected against a third person's stepping in between him and the waters... without his consent."

(28) It almost goes without saying that, in referring to foreshore, waters, and lands under water, wetlands (tidal marshes) are included because of their susceptibility of being filled in or docked out over to gain access to navigable water.

(29) Bedlow v. NY Floating Dry Dock, Co., p. 274. The court strongly implied, however, that since "the right... of the city to erect structures in the navigable waters of the state must necessarily remain subject to the sovereign authority over such highways," the state legislature could possibly make a grant so broad that it would allow virtually anything the legislature desired, allegedly in the public interest. But cf., Rumsey et al v. NY & NE RR Co., wherein it was pointed out, p. 432, that the intentions in a grant in dispute clearly reserved rights of passage of riparian owners across lands awarded a railroad company for tracks along a river, suggesting the legislature would take such considerations into account to protect at least individual riparian rights if not those of the general public relative to access to water.

(30) Matter of City of New York, 168 NY 143.

(31) Ibid., p. 144. An implied faith in the good sense of legislators (not always well-founded) is found here as well as in the statement in Thousand Island Steamboat Co. v. Visger, 179 NY 210, where the court said: "The proprietors of lands under navigable waters are entitled to the right of access to the navigable part of the river and to the right to make a landing, wharf, or pier for their own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever these may be" (emphasis added). This latter clause can be interpreted as either a question (what are these rights?) or as broad inclusion of present and future rights and uses (regardless of what the legislature wishes to add or subtract from an inchoate list of rights).

(32) Trustees of Brookhaven v. Smith, 188 NY 74, 76-77 (1907).

(33) Ibid., p. 77.

(34) Ibid., p. 78-79.

(35) Ibid., p. 79, 86. In support of this he averred, "such as were inconsistent with the spirit of our institutions... never became a part of our law," and citing Shively v. Bowlby, 152 US 1, he declared that that decision clearly stated the English common law rule on the subject in England, "but it is not, of course, obligatory upon this court to adopt such a rule in the decision of this case."

(36) Ibid., p. 79-80.

(37) Trustees of Brookhaven v. Smith, 188 NY 80.

(38) It is not the intention here to substantiate this statement with cited examples from these records; they are simply too numerous and scattered through the printed records cited in chapters III, IV, and V in this work. Reference should be had to them for amplification on this point.

(39) Laws of New York, 1818, "An act relative to the common and undivided lands and marshes in Southampton... "; Ibid., 1831, Chapter 283, for Southampton; Ibid., 1872, Chapter 492, for Huntington, to give but three examples.

(40) Trustees of Brookhaven v. Smith, 188 NY, 81-86, citing from Gould v. Hudson River RR Co. (with which this court disagreed, saying, in effect, it was bad law); Yates v. Milwaukee, 10 Wallace 497; Rumsey v. NY & NE RR Co.; Saunders v. NYC & IL RR Co., 144 NY 75; Thousand Islands Steamboat Co. v. Visger; and Shively v. Bowlby.

(41) Ibid., p. 86. In this manner the court allowed its pride in country to be debased by patriotic chauvinism; not a very sound basis upon which to render judgment.

(42) Ibid., p. 87-88.

(43) Barnes v. Midland RR Terminal Co., 193 NY 378 (1908).

(44) Ibid., p. 384. Thus, riparian owners' rights of access to navigable waters, whether by boat, float, dock, pier, or wharf, were left unmodified. See Matter of Del Balso H. Corp. v. McKenzie, 271 NY 313; Gucker v. Town of Huntington, 268 NY 43; Tiffany v. Town of Oyster Bay, 234 NY 15.

(45) Ibid., p. 384. In this instance, the test of reasonableness revolved around structures that intentionally blocked public transit in violation of the words of the state grant forbidding such obstructions. People v. Steeplechase Park Co. found that a pier allowing for public passage under or over it was permissable. Cf. Saunders v. NYC & H. RR Co., 144 NY 75. In 1931 the state's supreme court qualified the "reasonableness" rule to the extent that it must deal with actual rather than potential situations. In Village of Asharokan v. Metropolitan Sand & Gravel Co., 253 NY 294, that court held that riparian owners could not bring an action against adjacent riparian owners or grantees to uses of the foreshore and lands under water when the latter planned some structure (a seawall) which might adversely affect tidal flow and thus sand accretion along the beach, thus rejecting as unsound a claim of vested rights in possible future consequences based on nothing more than a hope or fear. But cf. Arnold's Inn v. Morgan, 310 NYS 2d 989, in which the court forced removal of existing constructions.

(46) Trustees of Brookhaven v. Smith, 188 NY, 188 NY 74; City of New York v. Swift & Co., 162 Misc. 581; Matter of Del Balso H. Corp. v. McKenzie, 271 NY, 313.

(47) Hinkley v. State of New York, 234 NY 309; People v. Jessup, 160 NY 249.

(48) Hedges v. West Shore RR Co., 150 NY 150. cf, Arnold's Inn, Inc. v. Morgan, 63 M. 2d 279. Absent a grant, the court warned to do so and then claim by right of prescription against a town would be very difficult to sustain; but cf. Lewis Blue Point Oyster C. Co. v. Briggs, 198 NY 287, in which the court held that rights of owners of underwater land were subordinate to federal or state power, to dredge to improve navigation even if the channel thus cut passed through valuable private land.

(49) Tiffany v. Town of Oyster Bay, 234 NY 15, 20 (1922).

(50) Ibid., p. 22, 23.

(51) Any uses to which a riparian owner might put his foreshore, or land under water to which he has title, must relate to navigation and commerce. His rights do not include the right to erect structures for purposes extrinsic to navigation and commerce. For example, although he can build a restaurant or an amusement park on his upland, he cannot extend structures on piers, wharves, and the like out into the water across the foreshore which are directly related to those activities and have no relation to water use, Matter of City of New York, 254 App. Div. 690; People v. Steeplechase Park Co., 218 NY 459.

(52) Riviera Association, Inc. v. Town of North Hempstead, 276 NYS 2d 249.

(53) Ibid., p. 252, and supra note 55. In this and similar situations two riparian owners now exist: Augustus and the association. In the exercise of riparian rights, each must do so without impairment to the other; that is, he cannot so exercise his rights as to block the other's easement across the land. Like it or not, they have to agree to a modus vivendi and modus operandi respecting mutual use.

(54) Ibid. See also note 4, supra. The law referred to is Public Land Law, sections 3, 6, 7, 8, 9, 75 (7). Plaintiff had no preemptive rights because the Public Land Law upon which he relied did not apply.

(55) Ibid., p. 254, and cases cited therein. Justice Meyer also rejected the conclusion reached in Coxe v. State that public trust lands could be conveyed only for some public purpose and not to individuals for private use by pointing out that a sufficient number of decisions both before and after held the contrary view.

(56) Ibid., p. 256-260. The reference to a restriction on conveyances to avoid impairment of the public interest was based on Long Sault Development Co. v. Kennedy, "not injurious to the public," and Illinois Central RR Co. v. State of Illinois, "without any substantial impairment of the public interest in the lands and waters remaining."

(57) Supra, note 45.

(58) Town of Hempstead v. Oceanside Small Craft Marina Inc., and Oceanside Yacht Harbor, Inc., 311 NYS 668, 672 (amended to delete Oceanside Small Craft Marina, Inc., since that party was not served). The town did not contend that the docks obstructed navigation because the channel width at the north end of the docks was 175 feet and at the southern end 350 feet.

(59) Ibid., p. 673-674.

(60) Town of Hempstead et al v. Oceanside Yacht Harbor, Inc., 38 AD 2d 263, 328 NYS 2d 894.

(61) Ibid., 328 NYS 2d, 898.

(62) Dictum simply means an opinion expressed by a judge on a point not necessarily arising or involved in the case in question or necessary for determining the rights of the parties involved. Nevertheless, it often has the implied weight of an authoritative utterance, possibly in the expectation that it will be accepted as such. Obiter dictum is an incidental and collateral opinion not material to a judgment and not binding.

(63) Public Lands Law, Art. 6, sec. 75, derived from Public Land Law, 1894, c. 317, sec. 70, as amended by the laws of 1895, c. 208, sec. 1, which in turn was derived from R.S. pt. 1, c. 9, tit. 5, sec. 67-69; laws of 1835, c. 232, sec. 1, 2; laws of 1850, c. 283, sec. 2.

(64) Laws of New York, 1970, Chapter 140; Chapter 43-B of the Consolidated Laws.

(65) Laws of 1972, Chapter 664, Environmental Conservation Law, Art. 15.

(66) Ibid., Art. 3, sec. 2.

(67) Ibid., sec. 25 (1973).

(68) The inferior court justice in the Oceanside case clearly signalled that it was very likely a "test" case, putting his colleagues in the higher courts on notice. Although not a test case having to do with wetlands per se, the facts were directly related to the jus publicum versus the jus privatum concept.

(69) Knapp v. Fasbender, 1 NY 2d 212; People v. Miller, 235 App. Div. 226, aff'd. 260 NY 585; Town of Southampton v. Mecox Bay Oyster C. Co., 116, NY 1; Lowndes v. Town of Huntington, 153 US 1; Trustees of Brookhaven v. Strong, 60 NY 56.

(70) Blundell v. Catterall, 106 ER 1190, 1193, 1196, 1203-1206; supra, chapter VI, for other comments on this case. It should be noted that the plaintiff, the lord of the manor, admitted that people had been accustomed to crossing "his" foreshore to bathe; his objection centered on the use of conveyances to get them from a hotel to the beach.

(71) Gould v. Hudson River RR Co., 6 NY 544.

(72) Murphy v. City of Brooklyn, 98 NY 642, 644-645; Barnes v. Midland RR Terminal Co., 193 NY 378, 387. But cf. Parsons v. Miller 15 Wend. 561 (1826) when the court ruled that public rights did not include collecting seaweed, and People v. Brennan, 142 Misc. 225, 355 NYS 331, which excluded the gathering of sand worms by members of the public, as cited in "Colonial Patents and Open Beaches," Hofstra Law Review, vol. 2 no. 1, 1974, p. 317. It should be remembered, also, that Barnes allowed obstructions to be placed by riparian owners on the foreshore.

(73) People v. Steeplechase Park Co., 218 NY, 459, 469, 474. Three of the seven justices dissented in this case, holding that a state grant should have an implied reservation of public rights.

(74) Johnson v. May, 189 App. Div. 196, 202-203 (1919).

(75) Fischer v. Amith Harbor Corp., 237 App. Div. 196 (1932); Dolphin Lane Association, Inc. v. Town of Southampton, 339 NYS 2d 966 (1972).

(76) In 1951 the Appellate Division in In re Schurz, 278 App. Div. 309, 104 NYS 2d 395, 396, gave the opinion that "salt meadows and sedge flats which only at extreme flood tides were under water and then only to the extent of a few inches... could not... be said to be reserved by the sovereign..."

(77) In Roe v. Strong, 107 NY 350, 375 (1887), the court correctly interpreted these annual grants of cutting privileges: "Assuming that the town was cognizant of the acts of... grantees in cutting the thatch, and that they [the grantees] claimed an exclusive right, and [the town] acquiesced therein, this, at most, would give them a prescriptive right, as against the town, to take the thatch, without conferring title to the soil which would be unnecessary to the enjoyment of the right... a title in fee would not be implied from user where an easement only would secure the privilege enjoyed."

(78) Harding, Alan. A Social History of English Law (Baltimore, MD: Penguin Books, 1966), p. 7.

(79) Specific reference here is to the much cited cases of Brookhaven v. Smith, 188 NY, Riviera Association v. Town of North Hempstead, Tiffany v. Town of Oyster Bay, and Town of Hempstead v. Oceanside Yacht Harbor, Inc. which have been discussed extensively in this chapter.

(80) Reference here is to the sale by the Trustees of Southold of slightly over a half acre of wetland to a builder in 1973, and the issuance of a license by the Town of East Hampton to a developer to "improve" land at Hook Pond.

(81) People, Town of Smithtown v. Poveromo, 71 Misc. 2d 524, 336 NYS 2d 764, 779, citing Hunter v. Pittsburgh, 207 US 161, which had been quoted in People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 NY 148, 161, 162, 85 NE 1070, 1074.

(82) Article 35 and 36, of the Constitution of 1777; Article 9, sec. 2, subd. c, para. 1, Constitution of 1938.

(83) Harding, A Social History of English Law, p. 8.

(84) People, Town of Smithtown v. Poveromo, 336 NYS 2d 775.

(85) Ibid., p. 774, citing to Illinois Central RR Co. v. Illinois, 146 US 387, and, Milwaukee v. State, 193 WI 423, 456, 214 NW 820, 832.

(86) Ibid., p. 775.

(87) Ibid. Citing Shively v. Bowlby, 152 US 1, the court said that "[The] title, jus privatum, whether in the king [state] or in a subject, is held

subject to the public right, jus publicum," and that, therefore, authority is provided "for the management and control of soil below high water mark whether the title is vested in the sovereign or in private ownership." One must assume here that the reference to authority is not only to the case cited, but also to other decisional law and statutory law. For example, see Gould v. Hudson River Connecting RR Corp., p. 544; Barnes v. Midland RR Terminal Co., p. 387; People v. Steeplechase Park Co., p. 469, 474; other cases cited in this chapter, and the laws cited, supra, notes 78, 79, 80, 81, 82.

(88) One of the few decisions that seems to deny this can be found in Town of Islip v. Estates of Havemeyer Point, 224 NY 449 at 452 (1918). The court held that the town had been granted by the state lands under water "in private as distinguished from public ownership." It ignored the trust doctrine and the fact that the state made the grant of public lands to the town to be managed by the town for all its residents.

(89) For example, Town of Hempstead v. Oceanside Yacht Harbor, Inc., and cases cited in notes 8, 29, 37, supra, but cf. note 40.

EPILOGUE

By definition, an epilogue is "the final part that rounds out or completes the design of a nondramatic literary work" (1). In that sense, more often than not, epilogues become conclusory, even repetitious. Such epilogues are really concluding chapters and should be so labelled. In another sense, they are useful, even necessary to explain away otherwise incomplete features of the text or to update events. Thus, they become apologies and postscripts, which is exactly the rationale for this one.

Studies such as this, timely when made, were designed to respond to activities in the public and private sectors vis-a-vis wetlands and increased concern about the imminent loss of a valuable natural and irreplaceable resource. Its original purpose was to present a historical-legal analysis of a critical area in order to sway public opinion and public officials toward definitive action. As will be noted subsequently, some action was taken by the New York Legislature and the State Department of Environmental Conservation anyway. Nevertheless, the New York Sea Grant Institute felt the manuscript was of sufficient historical interest and, I am happy to say, contained considerable information still relevant to the present, to retrieve it from literary limbo.

To amplify that somewhat, it should be pointed out that the chapters on the governmental structures of the Long Island towns, the present-day powers emanating from 300-year old charters, and the intensity (or lack of it) with which each town has discharged its obligations over the years is as important to know and realize today as it was in prerevolutionary or nineteenth century America. The legal discussion in the later chapters is, in my opinion, indispensible for local attorneys, town attorneys, owners of shore frontage, and the general public. Much time and many dollars have been expended needlessly arriving at the generalizations made in these chapters because of lack of knowledge on the part of someone claiming, rightly or wrongly, exclusive rights in the foreshore and lands under water. To say nothing of the loss of such areas to private encroachment because towns failed to exercise their rights forcefully or did not exercise them at all.

Because of the lapse of time between submission and publication of this manuscript, a few loose ends must, of necessity, be tied up. For example, Chapter III discusses Huntington Harbor, making specific reference to the dock site of W. Wilton Wood. The legal controversy that came to a head in the early 1970s has since been resolved by the New York Supreme Court. On 29 December 1976 Judge George F.X. McInerney held that Wood had the fee to the upland, but the trustees continued to hold the fee of the land under the waters of the docks. This vindicated the charter rights of the trustees, yet this was mitigated by the court's ruling that Wood had riparian rights of access to the harbor. Therefore, he and the trustees must share use of the dock.

One other example in that harbor must be cited. On the east side, north of the Knutsen complex and adjoining trustees' property is the Nick Brothers Fuel Company. Sometime during 1974 that firm discovered that a portion of its bulkhead had deteriorated and was in danger of collapse. Without receiving trustees' permission or any form of permit, the company proceeded to repair the damage by constructing an entirely new bulkhead 20 to 25 feet offshore of the existing structure for a length of 150 feet and filling in behind it. The town and the trustees brought an action in court in the form of an injunction before the work was completed. A temporary injunction was granted, but then lifted within days; the work was completed. To the best of my knowledge nothing has been done since to establish the company's rights of ownership of the land under water thus taken nor have the trustees pressed the issue. Consequently, approximately 3,000 square feet of underwater land was lost to private interests.

As for Fresh Pond, Southold's West Creek, Indian Island County Park, and Southampton's Hayground Creek, there is little to say other than that conditions remain essentially the same as they were in 1974. However, the nuclear power plant site at Wading River has progressed considerably. The plant is now 80 percent complete and emphasis has shifted from preserving tidal wetlands to preservation of human life--or energy, depending on which side of the fence one is on. Ever since the Three Mile Island nuclear disaster in Pennsylvania in mid-1979, the public has become more aroused about the construction and (mis)management of nuclear facilities. In fall 1979, mass demonstrations were held outside the fence surrounding the Long Island plant. Police were present in force; demonstrators used force to break through the chain link fence. Many were arrested for trespass. One is currently on trial, representative of the remaining 62 who declined the offer of a fine by the court. The crux of the defense is justification in the face of an imminent danger and provocation by the Long Island Lighting Company (2). However, the outcome of the trial or of the more general public debate over nuclear power is not within the purview of this work. I leave that subject to other more knowledgeable people and to the future.

The question of boundary lines and ownership of the Great South Bay has changed only to the extent that the towns of Brookhaven and Islip reached a tentative agreement to agree on a boundary along the northerly side of the bay based on a survey and monuments generally placed at the mean high water mark. The western boundary remains in limbo. In all candor, it must be pointed out that the Town of Islip has in its hands an in-depth analysis of ownership with possible alternate methods of settlement of the current dispute. The solution to the northern boundary would accrue to the benefit of Islip; the one presented for the western boundary hangs by a tenuous legal technicality and interpretation of past actions, official and otherwise, by each town. To date, neither town has progressed beyond that point.

One area that has not been touched upon in the preceding text is the impact of recent federal, state, and local legislation relating to water resources, including tidal and freshwater wetlands. In one way or another, at each level, laws enacted during this decade have focused on water pollution abatement by means of controlling sewage discharge, dredging, filling, and various forms of construction in and on such areas. These laws also involve one in a guessing game: under which shell (federal, state, county, or town) is the jurisdictional pea of power?

Under the first shell lies the Federal Water Pollution Control Act as amended in 1972, the intent of which is the elimination of the discharge of pollutants into navigable waters by 1985; the improvement of water quality to protect the natural resources of the nation's waters and provide for recreation in and on them by 1983; the development of area-wide waste treatment management planning processes to assure control of pollution sources; and the construction of public waste treatment works with federal financial assistance. To avert a possible public reaction to what might otherwise be interpreted as one more step toward centralism, Congress specifically declared that it was the primary responsibility and right of the states to develop and use their own land and water resources, and to prevent, reduce, and eliminate pollution within their respective borders (3).

At first glance the primary focus of the act appears to be on the navigable waters of the United States. By definition, this would eliminate most of the areas covered in this manuscript, except, of course, for the larger bodies of water: the Great South Bay and Huntington Harbor. "Navigable waters of the United States" refers to those waters subject to the control of the federal government for the regulation of commerce with foreign nations and among the several states (4). For a body of water to come within this category it must not only be suitable for use for the transportation of persons and property, but must also serve as a connecting link in the nature of a public highway in interstate commerce. If it fails to form such a link or constitute such a highway, even though navigable, it is not considered a part of the navigable waters of the nation (5).

A second reading dispels the notion that the act is so narrowly applied. In order to prepare, develop, and implement comprehensive national programs for water pollution control, the administrator of the Environmental Protection Agency shall, in cooperation with other federal agencies, interstate agencies, municipalities, and industries, develop comprehensive programs to prevent, reduce, and eliminate the pollution of the navigable waters and ground waters and improve the sanitary condition of surface and underground waters (6). This permits a broader reach.

The next shell to look under for the jurisdictional pea of power is the state. Prior to the enactment of federal legislation, New York, of course, had the power to regulate intrastate pollution and the use of navigable waters within the state. However, once Congress stepped into the picture, and did so constitutionally, then the question of a conflict of laws arose. The authority of the federal government in federal matters is supreme and where it has cognizance there can be no conflict of authority between a state law and a federal law. The former is subordinate to the latter even where the field is one of concurrent power (7). Before it can be said that federal legislation has preempted state legislation it must be found that it was the express intent of Congress to do so (8). In Marino v. Ramapo the court laid down three guidelines to determine if the preemption doctrine would require a state to defer to federal legislation: (1) the scheme of federal legislation is so complete and pervasive that no room is left for a state to supplement it; (2) federal interest is so dominant that state laws on the same subject must yield; (3) enforcement of state statutes presents substantial conflict with administration of a federal program (9). Yet, state and local legislation will be upheld in the absence of a firm showing that Congress intended to preempt the field and create an exclusive system of regulation (10).

Thus, one must look to the intent of Congress in enacting such legislation to ascertain whether the preemption doctrine applies insofar as waters and waterways are concerned. It is apparent that Congress had no such intentions. That it is the primary responsibility and right of the states to prevent, reduce, and eliminate pollution is stated as policy by Congress in the act (11). Throughout it are references to the role of the states in initiating their own programs. Nevertheless, underlying the act is a "big stick" policy that seems to pervade it. There are specific provisions for compliance with its intent and goals on an "or else" basis. This would probably not be sufficient for a court to construe the act as preemptive in the field; rather, it would be interpreted as urging the states to exercise their jurisdiction to the fullest with Congress reserving the right to do so in the event that they did not.

In the same year that Congress passed an expanded Federal Water Pollution Control Act, the State of New York updated many of its laws and incorporated them into the Environmental Conservation Act. Like the federal act, the ECL was enacted to "conserve, improve, and protect [the state's] natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the people of the state." An additional avowed purpose was to coordinate the environmental plans, functions, powers, and programs "in cooperation with the federal government, regions, local governments, other public and private organizations, and the concerned individual" (12). But, it stopped short of delegating, as did the federal act, primary responsibility for prevention, reduction, and elimination of pollution to lesser governmental agencies. The state assumed that primary responsibility with only one or two exceptions (13). The power to carry out the policies of the act is vested in the Department of Environmental Conservation (14).

Articles 15 and 17 deal with human despoliation of state waters. The former deals with iterference with those waters through unregulated filling, dredging, damming, impounding, and similar activities; the latter devotes itself to pollution and defines waters of the state as "lakes, bays... ponds... marshes... and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private," excepting from its provisions only "those private waters which do not combine or effect a junction with natural surface or underground waters" (15).

One other piece of state legislation must be noted. In the spring of 1975 the legislature enacted the Freshwater Wetlands Act as an amendment to the ECL It provides that the commissioner of the DEC shall conduct studies to identify freshwater wetland areas larger then 12.4 acres and publish a map indicating them. Once identified, these areas become subject to the restrictions imposed by the act. Certain activities are specifically proscribed: draining, dredging, excavating, filling, any form of dumping in them, the erecting of structures or driving of pilings, any form of pollution, including the installation of septic tanks, sewage outfall or sewage treatment discharge systems in or within 100 feet of the protected area (16).

There remain but two shells to look under for the jurisdictional pea of power over public and private use of tidal areas: the counties and the towns. By statute each local government can establish a department of public health, conservation advisory councils, and similar agencies with administrative or advisory functions. At the county level in Suffolk the relevant agency is the

Department of Environmental Control as created by County Law No. 3 in 1971. That department has been preoccupied with the Southwest Sewer District and its activities, to date, have had little bearing on the subject of this book (17).

Of the towns discussed in this study, Islip probably has the most ordinances on its books that could be used to regulate human activities in tidal wetlands and lands under water. Taking advantage of various state laws, the town has established an Environmental Control Department with a mandate to preserve and enhance the local environment, protect and preserve local natural resources, and oversee any environmental facilities, incinerators, landfill operations, waste disposal plants, animal shelters, pools, parks, trawlers, bulkheading, filling, dredging, abandoned vessels, pollution in marine and estuarine waters, excavation, top soil removal, noise, streams and water courses use, to name but a part of its purview. The town has also enacted legislation regulating wetlands, watercourses, and water pollution, which requires public hearings on dredging, filling, and bulkheading (18). The Town of Huntington has also taken full advantage of state and federal legislation and implemented a series of tough local ordinances similar to, and in some instances superior to, those in Islip. The Town of Southold relies heavily on the vestigial powers of its board of trustees and the wider powers of its town board.

As for the Town of Brookhaven, until recently little could be said about its desire to thwart developers, marinas, and similar private activities. It had no department or even advisory council concerned with environmental affairs. It eschewed state or federal aid, whether advisory or financial, in such matters (19). Yet, it cannot be said that the town has done absolutely nothing. It carried on its books for years two ordinances which, given a liberal interpretation, could be construed as an attempt to exercise some jurisdiction over its waterways and wetlands. The Board of Waterways and Natural Resources was charged with making findings and recommendations to the town board, under the marine law, respecting the condition of all navigable waters, specifically with regard to any need for dredging. It also used to maintain an inventory of the "significant land and water resources of the town... and keep an inventory of places of particular geological, ecological, or aesthetic interest." Its duties extended to formulating and reporting to the board policies for the best use, protection, or development of these resources and to study and keep abreast of all governmental and legal tools for carrying out such policies (20). In 1978 the town board created a department of environmental conservation modelled somewhat along the lines of the other towns.

Early in the past decade, pursuant to the ECL, the state DEC imposed a moratorium on any dredging, filling, or bulkheading or wetland areas for a two-year period. During that time the department inventoried wetlands on the island larger than 10 acres, filed a map of them in the Suffolk County Clerk's Office, and began a program of purchasing certain tidal wetlands from private owners for conservation purposes. During the moratorium, no one could engage in any activities that might alter the existing character of the wetlands; stringent permit requirements were imposed, since the filing of the map and termination of the moratorium period, the state, through the DEC, has exerted considerable control over these areas in the public interest. Consequently, bulkheading and filling have been reduced markedly, thus, preserving the foreshore and some lands under water from further damaging and destructive encroachment (21). Private interests seeking to exploit tidal areas must now first obtain permission from all four levels of government. In their search

for the jurisdictional pea of power from whence flow such permits, they will find a pea rests under each shell: federal, state, county, and town; for what has resulted from the flurry of protective legislation of the 1970s is a jurisdictional split-pea soup flowing though all levels of government.

This epilogue has taken us somewhat far afield from the main thrust of this book. Yet it was a necessary addendum to complete the picture of public versus private rights and the respective activities of each group in tidal areas. What legislative action has done in recent years is not to expand public rights *per se*, rather, it has curtailed private rights of use in disregard of the public interest in the preservation of a dwindling natural resource. Public rights of use remain unchanged; legislative and judicial action would be necessary to expand them beyond those outlined in the closing chapter.

EPILOGUE FOOTNOTES

(1) Webster's Third New International Dictionary, (unabridged). Exactly why the editors chose "nondramatic" as an appropriate adjective is not known. They could just as easily employ "undramatic" for most works, since they are, as with this one, decidedly undramatic.

(2) In an oblique sort of way, the furvor over nuclear plants is reminiscent of that over the introduction of the railroad back in the 1830s. One minister in Massachusetts, while inveighing against this engine of the devil in a Sunday sermon, noted that the railroad was a machine of death because no human could possibly remain alive under the stress of being pulled along at 25 miles an hour; it would surely break one's neck.

(3) 26 USC sec. 1251, 1251 (a) (1-6), (b).

(4) 78 American Jurisprudence, 2d., sec. 69, 70.

(5) Ibid., for judicial support for this rule of law see, for example, Van Cortlandt et al v. New York Central RR Co., 250 NYS 298 (1931); In re. Knowlson, 30 NYS 2d, 930 (1941); United States v. Cavalliotis, 105 F. Supp. 742 (1952).

(6) 26 USC sec. 1252 (1) (a).

(7) Schreier v. Siegal, 36 NYS 2d 97; 178 Misc. 711, rev'd 37 NYS 2d 624, 265 App. Div. 36 (1942). Cf People v. Broady, 186 NYS 2d 230, 5 NY 2d 500, cert. den. and app. dism. 361 US 8 (1959), where it was held that once Congress occupied a field a state statute is superseded whether it is contradictory or merely supplementary.

(8) Deveau v. Braisted, 174 NYS 2d 596, 5 AD 2d 603, app. den. 176 NYS 2d 230, 6 AD 2d 819, aff'd 183 NYS 2d 793, aff'd 363 US 144 (1958).

(9) Marino v. Ramapo, 326 NYS 2d 162, 68 Misc. 2d 44 (1971).

(10) Mobil Oil Corp. v. Town of Huntington, 339 NYS 2d 139, 72 Misc. 2d 530 (1972).

(11) 26 USC sec. 1251 (b).

(12) New York Consolidated Laws Service, annotated statutes with forms: vol. 12, New York Environmental Conservation Law (Rochester, NY), sec. 1-0101(1), (2). By a process of deletion and incorporation, the ECL, in addition to new features, absorbed many sections of the state's laws on conservation, public health, agriculture and markets, executive, and unconsolidated laws as well as earlier more limited versions of the ECL.

(13) One court has interpreted this law as reserving to the state the power to regulate and control water resources and precluding such control and regulation at the county and town levels, at least with respect to local requirements for permits for filling and dredging waterways. See People of the Town of Smithtown v. Poveromo, 336 NYS 2d 764, 71 Misc. 2d 524 (1972).

(14) ECL sec. 3-0101, 3-0301, 3-0303. It is empowered to classify bodies of water, based on certain characteristics, and the uses to which can be put in the public interest. After a public hearing the standards are put into effect. No powers vested in local governments can modify, alter, or diminish the power of the agency, although counties and towns can supplement, but not supplant, the state when it comes to anti-pollution and related measures (Ibid.), Sec. 17-0701.

(15) ECL sec. 15-0103, 15-0313, 17-0105.

(16) Laws of New York, 1975, Ch. 614, sec. 24-0301, 24-0701 (2). As with the tidal wetlands feature of the ECL, individuals and municipalities must apply for permits to engage in any activity that might directly affect the protected areas. Violations carry both administrative and criminal sanctions, including possible substantial fines and imprisonment. Provisions similar to those found in the coastal wetlands act apply also to freshwater wetlands insofar as local participation. Local governments may enact like protective ordinances in lieu of the state law. However, such ordinances must be at least as stringent as the state's regulations. If a local government fails to take advantage of this feature within a year from the effective date of the act, it is assumed it has transferred such powers to the county; if the latter fails to act, the presumption is that the powers are left to the state to exercise. ECL 71-2303, 24-0501.

(17) New York Public Health Law (1953), as amended 1972; ECL sec. 1-0101, 17-1503, 47-0105. The county law combined the duties of a former sewage agency, and the Departments of Sanitation, Public Works, and certain duties of the Health Department.

(18) Code of the Town of Islip, Ch. 10A, 10A-7, 10A-8, 10A-9, 13A, 66, 67.

(19) Unfortunately, some of the lack of action in the town can be attributed to former supervisors who adhered to nineteenth century libertarian views. One recent supervisor, in referrring to outside aid for local projects, expressed the rather Neanderthal political philosophy that if it couldn't be done using local resources it wouldn't be done at all. In a letter to the Supervisor of Huntington, the Supervisor of Brookhaven, in 1973, stated that he had no interest in nor would he cooperate in any meetings with state or federal officials to increase the amount of aid to towns. He further averred that such aid was nothing more than creeping socialism and federal paternalism, to be avoided at all costs. After serving three terms, he was defeated in his bid for reelection in 1975.

(20) Code of the Town of Brookhaven, Ch. 98 (1967).

(21) As an aside, this writer happens to live a few feet from the north shore of the Great South Bay. Until the mid-1970s, casual observations frequently showed signs of extensive bulldozing, filling, and bulkheading along the bay's shoreline as evidenced by small tree branches, scrap lumber, bushes, and like

debris washed ashore. Within the past two years or so these have all but disappeared from the area. Although disappointing for seekers of ornamental driftwood and flotsam and jetsam, it speaks well of the beneficial effects of state and regional actions to preserve what is left.

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