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SHORT FORM ORDER INDEX NO.

SUPREME COURT - STATE OF NEW YORK
IAS PART XXXVIII SUFFOLK COUNTY

PRESENT:
Honorable JAMES M. CATTERSON

R/D
MOTION NO. 15166/81 005 & Trial Motion In Limine - MOT-D
23703/82- 002 - MOT-D
23702/82 - 001 - MOT-D
24026/85 - 013 & 014 - MOT-D
2851/87 - 003 - MOT-D
31988/96 - 003 - MOT-D

x

THOMAS E. O'BRIEN, et al.	Index No. 15166181
THURSTON K. WITSON, et al.	Index No. 23703182
RUTH TERRY, et al.	Index No. 23702182
ROYCE W. TABOR, et al.	Index No. 24026185
MARGARET LOCKHART, et al.	Index No. 31988196
ROBERT D. DEASY, et al.	Index No. 285 1187
ROBERT D. DEASY, et al.	Index No. 23868189

Plaintiffs,

-against-

THE TOWN OF HUNTINGTON, et al.,

Defendants.

x

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UPON DUE DELIBERATION on the relevant submissions on the framed issue as well as the evidence adduced at the hearing held in this Court on January 31,2001, the issue of whether the complaints must be dismissed for failure of the various plaintiffs to name the Board of Trustees of the Town of Huntington as a necessary **party,** is decided as follows:

The plaintiffs in these six cases brought various causes of action to establish their claim and title to approximately 124.5 acres of undeveloped and wooded property located within the defendant Town of Huntington (hereinafter referred to as "the Town"). The impetus for these six cases occurred on July 25, 1972 when the Board of Trustees of the Town of Huntington (hereinafter referred to as "the Board of Trustees") adopted a resolution declaring their ownership of the real property in issue, over two hundred years after the bulk of the Town lands were obtained through royal patent. Thereafter, public notice was posted on the affected land whereby the Trustees claimed ownership of the subject parcels for the people of the Town of Huntington. Seven distinct civil actions followed, six of which are before this Court.'

PROCEDURAL HISTORY

The passage of time has only served to obscure the procedural history of the following six actions. As set forth in detail below, the six actions were filed at different times, concern different parcels, and were not originally consolidated before one judge. Some of the actions were marked off of individual calendars, presumably under C.P.L.R. § 3404.[2] Additionally, several cases were apparently inadvertently consigned to the proverbial dust bin of history in the transition in the Supreme Court from manual record keeping to computer-based record keeping. This Court has endeavored to resolve the procedural ambiguities of six of those actions in the following *summary*.

In 1981, the numerous plaintiffs under index number 15166/1981 (hereinafter referred to as "the O'Brien case"), brought their various causes of action to establish ownership of their respective parcels of real property (approximately sixty-four acres) incorporated into the 1972 Resolution. In the O'Brien case, after the passage of approximately twenty years, the Town filed several motions.[3] Under sequence number 005, the Town has moved to amend its answer to add the additional affirmative defenses of sovereign immunity and the plaintiffs' failure to serve a

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'In a related case, Crawford v. Town of Huntington (index #12137/85), involving the real property in issue, a jury trial on April 4, 2000 resulted in a verdict for the plaintiffs. That verdict was later overturned by the Court (Emerson, J.S.C.) in a decision and order dated October 5, 2000, on the grounds that, inter alia, plaintiffs failed to join the Board of Trustees as a necessary party to the action.

[2]That practice has since been condemned in the recent Second Department Decision of Lopez v. Imperial Delivery Service, Inc., 282 A.D.2d 190, 725 N.Y.S.2d 57 (2d Dept. 2001). The First Department came to the same conclusion in Johnson v. Sam Minskoff & Sons, Inc., 2001 W.L. 1637492 (1st Dept. December 20, 2001) (Ellerin, J.).

[3]Not included in the above open motions are the following: Under sequence 003, the Town moved to vacate the Note of Issue, which relief was denied, and the plaintiffs cross-moved for a Trial Preference, which motion was granted, on July 19, 2000; additionally, the plaintiffs moved for an Order allowing the case to proceed as a class action, which motion was denied by Order dated February 3, 1982.

timely Notice of Claim. The papers included in this motion are: (1) Notice of Motion dated September 18,2000 and supporting papers by the Town; (2) Affirmation in Opposition dated September 26,2000 by the plaintiffs; and (3) Reply Affirmation dated October 4,2000 by the Town.

In addition, the Town, on the day of trial: moved to dismiss the complaint on the bases that: (1) the plaintiffs failed to substitute duly appointed representatives in place of the plaintiffs who had died; (2) the plaintiffs failed to name, serve, and join the Board of Trustees of the Town of Huntington as necessary parties; (3) the plaintiffs' first six causes of action are barred by various statues of limitations; (4) the plaintiffs' second through sixth causes of action seeking monetary damages are barred pursuant to the immunities and privileges afforded to municipalities; and (5) the plaintiffs' second through sixth causes of action are barred for failure to serve a timely Notice of Claim. The Town, within this motion, also moves for an Order in limine to preclude plaintiffs from proffering any evidence regarding the jury verdict (for the plaintiffs) in the related case of Crawford v. Town of Huntington, and to preclude plaintiffs from offering into evidence any documents or testimony relating to the acres involved in Crawford on the grounds that all of the owners have not been joined as necessary parties. Finally, within this same trial motion, the Town has moved to quash the plaintiffs' trial subpoena dated July 27, 2000 as overly broad and served after the conclusion of discovery. The papers comprising this motion include: (1) The Town's trial motion to dismiss, etc., dated August 1,2000 and supporting papers (including defendant's memorandum of law); (2) Letter raising argument by the Town dated August 16,2000 with the Town's Supplemental Affirmation dated August 16, 2000 and supporting papers (including the Town's Supplemental Memorandum of Law); (3) The Town's Second Supplemental Memorandum of Law; (4) Letter by the Town dated September 21,2000 with Third Supplemental Memorandum of Law; (5) Affirmation in Opposition dated August 31,2000 and supporting papers by plaintiffs (including plaintiffs' Memorandum of Law in Opposition); (6) Letter by the Town dated October 2,2000 with Reply Affirmation by the Town dated September 29,2000 and supporting papers (including the Town's Reply Memorandum of Law).

In 1982, the plaintiffs under index number 23703/82 (hereinafter referred to as "the Whitson case"), brought various causes of action to establish ownership of several acres of real property incorporated into the 1972 Resolution. In the Whitson case, the Town has moved almost two decades later (under sequence #002), to amend its pleadings to add sovereign immunity and failure to serve a Notice of Claim as affirmative defenses.[5] The Town also moves, within the same motion, for summary judgment on the grounds that: (1) the plaintiffs failed to state a claim; (2) all claims for a monetary damages are barred by sovereign immunity and the

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[4]The trial date was thereafter postponed indefinitely so that the underlying issues could be resolved in an orderly fashion.

[5]Not included in the above open motion is a previously filed motion by the Town for a Protective Order, which was granted by the Court on October 9, 1991.

failure to serve a Notice of Claim; (3) all claims against the Board of Trustees are time barred and barred by laches; and (4) the plaintiffs' failure to join the Board of Trustees necessitates dismissal. The Town further moves, within the same motion, for an Order of dismissal on the grounds that: (1) the plaintiffs' complaint failed to plead a case with "common certainty" under the R.P.A.P.L.; (2) the complaint failed to substitute fiduciaries and representatives for the plaintiffs who have died; (3) the complaint failed to join all potential claimants as tenants-in-common of the subject property; and (4) the plaintiffs cannot establish their title as their ultimate source of title (Thomas Powell) obtained an invalid title from an "aboriginal" source. The papers filed in this motion are as follows: (1) Notice of Motion dated September 13,2000 and supporting papers by the Town (including Memorandum of Law in Support by the Town); (2) Letter dated September 25,2000 by the Town with Supplemental Memorandum of Law in Support by the Town dated September 15,2000; (3) Affirmation in Opposition dated October 2, 2000 and supporting papers by plaintiffs; and (4) Letter raising argument dated October 5,2000 by the Town.

In 1982, the plaintiffs under index # 23702/82 (hereinafter referred to as "the Terry case") brought various causes of action to establish ownership of parcels of real property incorporated into the Town of Huntington's 1972 Resolution. In the Terry case, the Town of Huntington moves almost two decades later (under sequence #001), to amend its pleadings to add the affirmative defenses of sovereign immunity and plaintiffs' failure to serve a Notice of Claim.[6] In the same motion, the Town moves for an Order dismissing the plaintiffs' complaint on the grounds that: (1) the complaint failed to plead a case under R.P.A.P.L. with "common certainty;" (2) the complaint failed to join all heirs and distributees as necessary and indispensable parties; (3) the complaint failed to join the Trustees of Town as necessary parties; and (4) there is another action pending for the same relief as to the claim of Josephine E. Sanford under index #24026/85. Finally, in the same motion, the Town moves for an Order granting summary judgment on the grounds that: (1) the plaintiffs' claims are time barred; (2) the claim for damages is barred for failure to serve a Notice of Claim and due to sovereign immunity; and, (3) the plaintiffs cannot demonstrate any viable claim to title to any portion of the subject "Melville Parcel." The papers filed under sequence #001 include: (1) Notice of Motion dated September 19,2000 and supporting papers (including Memorandum of Law) by the Town; and (2) Affirmation in Opposition dated October 2,2000 and supporting papers by the plaintiffs.

In 1985, under index #24026/85 (hereinafter referred to as "the Tabor case"), the plaintiffs brought various causes of action to establish ownership of parcels of real property incorporated into the 1972 Resolution. In the Tabor case, the Town moves, almost fifteen years later (under sequence #013), for summary judgment dismissing the Complaint on the grounds that: (1) all claims against the Board of Trustees are time barred; and (2) the plaintiffs cannot

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[6]Not included in the above open motion is the plaintiffs' motion for an Order allowing a class action, which relief was denied by the Court on February 14, 1983, and which decision was affirmed by the Appellate Division, Second Department, on May 14, 1984.

establish claim to any portion of the "Melville Parcel" in issue.[7] In this same motion, the Town also moves for an Order dismissing the plaintiffs' complaint on the grounds that: (1) it failed to plead a case under the R.P.A.P.L. with "common certainty;" (2) the plaintiffs' failed to substitute fiduciaries and representatives for all of the heirs of presently deceased plaintiffs; **(3)** the plaintiffs failed to join heirs of Charles R.S. Magilton as plaintiffs; and, **(4)** the plaintiffs failed to join the Trustees of the Town as necessary parties. The papers filed under sequence #013 include: (1) Notice of Motion dated August 11,2000 and supporting papers (including Memorandum of Law) by the Town; (2) Letter raising argument, dated August 15,2000 by the Town; **(3)** Supplemental Affirmation dated August 15,2000 and supporting papers by the Town; (4) Supplemental Memorandum of Law dated August 15,2000 by the Town; (5) Letter dated September 6,2000 with Second Supplemental Memorandum of Law dated September 5,2000 by the Town; (6) Letter dated September 21,2000 with Third Supplemental Memorandum of Law dated September 18,2000 by the Town; (7) Affirmation dated September 18,2000 and supporting papers (including Memorandum of Law in Opposition) by the plaintiffs; **(8)** Supplemental Affirmation in Opposition dated September 19,2000 and supporting papers by the plaintiffs; and (9) Letter dated October 2,2000 by the Town with Reply Affirmation dated September 29,2000 and supporting papers, and Reply Memorandum of Law dated September 29,2000, by the Town.

Additionally, in the Tabor case, the Town has moved almost fifteen years later (under sequence #014), to amend its pleadings to add the affirmative defenses that: (1) the plaintiffs' action is time barred by various statutes of limitations; and (2) the plaintiffs' complaint failed to state a claim for which relief can be granted against the Town as the subject land is owned and/or claimed, by the Board of Trustees of the Town of Huntington in an express trust. The papers submitted under sequence #014 include: (1) Notice of Motion dated August 18,2000 and supporting papers by the Town; and (2) Affirmation in Opposition dated September 18,2000 by the plaintiffs.

In 1987, the plaintiffs under index #2851/87 (hereinafter referred to as "the Deasy case"), brought various causes of action to establish ownership of certain parcels of property included in

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[7]Not included in the above open motions are the following: In February of 1986, the Court granted an Order authorizing the service of the summons and complaint in this action upon the defendants Darragh by publication. In addition, the Court granted the plaintiffs' motion to appoint a guardian ad litem for the defendants Darragh in June of 1986. Further, in December of 1991, the Court granted the Town's motion for a Protective Order. The Court also granted an additional motion by the Town for a Protective Order in October of 1993. The Court denied the plaintiffs' motion to preclude the Town in November of 1994. In June of 1999, the Court, in denying the plaintiffs' motion and the Town's cross-motion, directed the plaintiffs to substitute properly appointed representatives of the estates involved within three months. Thereafter, in October of 1999, the Court extended the plaintiffs' time to substitute through January of 2000. In May of 2000, the Court decided the Town's motion to strike the Note of Issue as moot and set a discovery schedule.

the 1972 Resolution. In the Deasy case, the Town has moved approximately thirteen years later (under sequence #003), to add as affirmative defenses the statute of limitations and laches.' Within the same motion, the Town moves for an Order dismissing the complaint on the grounds that: (1) it failed to plead a case under the R.P.A.P.L. with "common certainty;" (2) the plaintiffs failed to substitute fiduciaries and representatives of deceased plaintiffs; (3) the plaintiffs failed to join all potential claimants as tenants-in-common of the subject property; and (4) the plaintiffs failed to join the Trustees of the Town as necessary parties. Furthermore, the Town also moves within the same motion for summary judgment on the grounds that: (1) the complaint failed to state a claim for which relief can be granted against the Town; (2) all claims are time barred and barred by laches; and (3) the plaintiffs cannot demonstrate any viable claim to title as the plaintiffs cannot demonstrate that their ultimate source of title (Thomas Powell) obtained a valid title from an "aboriginal" source in the late 1600's. The submission under sequence #003 are: (1) Notice of Motion dated November 2,2000 and supporting papers (including Memorandum of Law) by the Town; (2) Affirmation in Opposition dated November 15,2000 and supporting papers by the plaintiffs; and (3) Reply Affirmation dated November 21,2000 by the Town.

In 1996, the plaintiffs under index #31988/96 (hereinafter referred to as "the Lockhart case") brought various causes of action to establish ownership of certain parcels of property included within the 1972 Resolution. In the Lockhart case, the defendant moves almost fourteen years later (under sequence #003), a motion to amend the Town's answer to assert the affirmative defenses of various statutes of limitations.' Within the same motion, the Town moves for an Order dismissing the plaintiffs' complaint on the grounds that: (1) it failed to plead a case under R.P.A.P.L. with "common certainty;" (2) it failed to join all necessary and indispensable plaintiffs; and (3) it failed to join the Trustees of the Town as necessary parties. The Town, within this same motion, also moves for summary judgment on the grounds that: (1) all claims against the Board of Trustees are time barred; and (2) the plaintiffs cannot demonstrate any viable claim to title to any portion of the subject "Melville Parcel" as the plaintiffs cannot show that their ultimate source of title (Thomas Powell) obtained a valid title from an "aboriginal" source. The submissions under sequence #003 include: (1) Notice of Motion dated September 20,2000 and supporting papers (including Memorandum of Law) by the Town; (2) Affirmation in Opposition dated October 2,2000 and supporting papers by the plaintiffs; and (3) Letter dated October 5,2000 by the Town.

In addition, the Town has submitted a ten page letter (dated August 28, 2000), containing

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'Not included in the above open motion are the following: Prior motions by the defendant Broadhollow Estates and the Town for protective orders which were granted in January of 1992 and November of 1993, respectively.

'Not included in the above open motion are the following: On December 26, 1996, the Court granted the plaintiffs' motion for an Order for Service of Summons by Publication; and, on June 16, 1997, the Court granted the plaintiffs' motion for an Order for Appointment of a Guardian Ad Litem.

additional arguments in support of its motions presently filed in all six cases regarding the statue of limitations, the relation back doctrine, and against monetary damages on behalf of the Trustees. The Town has also argued, in letter form (dated December 1, 2000), to vacate all of the notes of issue filed by the plaintiffs pursuant to the Court's direction on the record on October 26, 2000.[10]

After the hearing held in this Court on January 31,2001 on the Town's motions in all six cases to dismiss all of the complaints on the ground that the plaintiffs' failed to join the Board of Trustees as necessary parties, the defendant Town has submitted the following: (1) Supplemental Memorandum of Law in Support of the Defendant Town's Motion to Dismiss for Failure to Join the Trustees as a Necessary Party, dated January 31,2001; (2) Sur-Reply Affirmation[11] dated February 20,2001 and supporting papers with letter dated February 20,2001; (3) Letter raising argument dated February 21, 2001;[12] and, (4) Reply Post-Hearing Memorandum of Law.[13] The plaintiffs, after the hearing, have submitted the following: (1) Letter dated February 21,2001 with Affirmation dated February 21,2001 and supporting papers (including Memorandum of Law). Furthermore, after being granted specific permission, by letter dated March 20,2001, the plaintiffs submitted the legislative history of the New York State Legislative Act of 1962 regarding the Trustees of the Town of Huntington, (1962 N.Y. laws Ch. 865) without argument. The Town, in response to the above submission, submitted argument against what it deemed "an apparent argument that the Trustees of the Town of Huntington are not a distinct separate entity from both the Town and the Town Board" in a letter dated March 22, 2001.[14]

At this juncture, this Court holds that all motions not previously determined are hereby reserved for decision after completion of all six trials, except for the Town's motion raised in all cases for a dismissal of the complaints on the ground that the plaintiffs failed to join the Board of Trustees as a necessary party. On that issue alone, and in light of the hearing on that issue held before this Court on January 31,2001, the decision of the Court is a follows:

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[10] "This relief is denied as stated on the record October 26,2000.

[11] "The Town stated at footnote #1 that this affirmation was in lieu of a sur-reply memorandum of law

[12] This letter will not be considered as the defendant Town had no permission to file further submissions.

[13] As the Town's Sur-Reply Affirmation was in lieu of a Memorandum of Law, and as the Town has already submitted its complete post hearing submission, this Reply-Post-Hearing Memorandum of Law will not be considered.

[14] As this "opposition" is well outside the accepted submissions on this hearing and made without prior permission, it will not be considered.

> to govern part of the given land in his stead. Our specific concern is with the East Riding of Yorkshire, which today we know as Suffolk County in the State of New York.

id. Similarly, the Second Department wrote (somewhat closer in time to the events in question):

> The litigants agree that in the seventeenth century the Town of Huntington, through the trustees for the freeholders and commonalty thereof, succeeded to the rights of the British crown and of the Indians, and became the owner of the land in dispute, and of the adjoining lands. This town was settled from New England, and it sent delegates to, and was governed by, the General Court of Connecticut, until December 1, 1664, when Long Island was adjudged to belong to New York by a Royal Commission and the Governor and Commissioners of the General Assembly of Connecticut, (3 Colonial Hist. of N.Y.27, 197; Smith, Hist. N.Y.52), and March 1, 1965, two deputies from every one of the towns of Long Island assembled at Hempstead and an acknowledged the authority of the colony of New York. (Smith's Hist. of N.Y.55; 3 Colonial Hist. of N.Y.91.) It was a custom of the early inhabitants of New England, for several persons to acquire and settle a tract of wild land, and erect it into a township, under the form of town government peculiar to that section. Part of the land was allotted to the original proprietors, which was thereafter held in severalty, though sometimes with restrictions in regard to alienation, and the undivided lands were held and managed by the trustees for the benefit of all. Frequently, additional lands were acquired by the town in the name of trustees, as was done by the Town of Huntington. From time to time parcels of the lands held in common were allotted to such new settlers as were admitted into the Township, upon such terms as were agreed upon, and the allotments entered upon the records of the Township. In some of the New England states, lands so held could be partitioned by vote, and perhaps by vote vested in a new settler, without a conveyance (Coburn v. Ellenwood, 4 N.H.99; Corbett v. Norcross, 35 id. 99; Folger v. Mitchell, 3 Pick. 396); but it is unnecessary to ascertain the law of Connecticut on this subject, for Huntington became a part of New York long before [17931.

Sanger v. Merritt, 120 N.Y. 109, 112-113, 24 N.E.386, __, (Ct. Of Appeals, Second Department 1890).

The legal effect of the Nicolls Patent described in Town of Smithtown, supra, unfortunately is not clear due to both subsequent conflicts with the Dutch as well as successive patents.

> [On] March 12, 1664, Charles 11, King of England, granted to his brother James, Duke of York, lands on Long Island with rights of government,

There is an old adage that time .is the destroyer of evidence and the perfecter of title. The history of the events giving rise to these cases may ultimately prove the truth of that adage.

The Town presently contends that the Board of Trustees is the correct party defendant to this action as it is the Trustees who own the property in issue. The Town argues that the Trustees' proprietary interest stems not from the 1972 Resolution but, rather, from the Dongan, Nicholls, and Fletcher Patents.

The Court of Appeals previously considered the history of the Town of Huntington in the seminal case of Knapp v. Fasbender, 1 N.Y.2d 212,221,151 N.Y.S.2d 668,674 (1956):

> By three separate grants of Colonial Governors of New York, certain uplands and lands under Huntington Harbor and Huntington Bay were given to the trustees of the freeholders and commonalty of the Town of Huntington, who were thereby created a corporate body. They were given the express power necessary to manage and preserve the trust estate. These grants were confirmed in the first Constitution of the new State of New York and in all subsequent Constitutions. Such grants were recognized by this Court in Trustees of Brookhaven v. Strong, 60 N.Y.56.

This pronouncement is but a mere introduction to the tumultuous events that shaped the social and political landscape of both the Town of Huntington and all of Suffolk County. The late Justice John P. Cohalan, Jr. eloquently commented on the difficulty of reconstructing the colonial period to resolve current disputes:

> Three hundred years of history and legend have obscured the original scene: beds, marsh and meadow; and many documents and records have been submitted to the Court to establish its pristine status, which we now seek to resolve.

Town of Smithtown v. Brooklyn Gun Club, 58 Misc.2d 708,709-710,296 N.Y.S.2d **633,** 644 (Sup. Ct., Spec. Term, Suffolk Co. 1968). Although Town of Smithtown, supra, concerned the status of a particular property in Smithtown rather than Huntington, Justice Cohalan's introduction to the colonial history of Suffolk County is nonetheless pertinent:

> In the year 1664 Charles 11, y-clept 'The Merry Monarch', sat on the throne of England. Repute has it that 'he never said a foolish thing, nor ever did a wise one'. But, in that year with royal largess, he gave away by right of conquest vast portions of land along the Atlantic seaboard to his brother, James, then Duke of York, **as** a crown colony. In the latter end, it turned out to be a wise 'thing' indeed.
>
> James, in turn, deputized Richard Nicolls as his ancient with plenary powers

> which grant included the tract in suit. At this time the Crown was not in possession. This fact bears on the legality of this act of King Charles; the Dutch then being in possession.
>
> A few months later, on August 30, 1664, New Amsterdam was surrendered by the Dutch, and on February 22, 1665, the English Crown declared war Holland. Meanwhile King Charles appointed one Nicolls Governor of the territory granted to the Duke of York.

People v. Foote, 242 A.D. 162, 165, 273 N.Y.S. 567, 571 (2d Dept. 1934)

Governor Nicholls, by patent dated November 30, 1666, granted certain lands, "unto the inhabitants of Huntington." Charles R. Street, Huntington Town records 1653-1688, pages 140-151 (1887).

> At this time a state of war with Holland existed. An area on Long Island which included the land in question was retaken and reoccupied by the Dutch on July 30, 1673. The state of hostilities continued apace until February 7, 1674, when the Treaty of Westminister concluded the war. Under that treaty Long Island was ceded to the English Crown by the Netherlands.
>
> Charles II made a new grant on June 29, 1674, to his brother James, the Duke of York. This grant covered the area described in the first grant, of March 12, 1664. This was after February 7, 1674, when the area was receded to the Crown by the Netherlands, but before October 21, 1674, when the Crown in fact took possession of Long Island.
>
> King Charles II appointed Dongan as successor to Governor Nicolls. On February 6, 1685, the Duke of York (James) became King of England, and his charter or patent rights merged in his title as King. He continued Dongan as Governor of the territory, renewing Governor Dongan's commission on June 10, 1686. Governor Dongan and the Council of New York in 1686 declared that patents issued under the first grant to the Duke of York were insufficient and required new applications by all claimants.

242 A.D. at 166, 273 N.Y.S. at 571-572.

On August 2, 1688, Governor Dongan issued a new charter wherein he purported to confirm the original Nicholls Patent of 1666. Street, supra, at pages 532-543. Thus, the Town's claim that the Board of Trustees owns the land issue can only rightfully flow from the Dongan Patent rather than an uninterrupted chain of title from the earlier patents.

> A patent from a sovereign to a subject is to be construed more strictly

> in favor of the Crown than a patent by a sovereign to a town, which is to be construed liberally to effect its object, since it concerns the conferring of governmental powers as well as title to land. (People ex rel. Howell v. Jessup, 160 N.Y. 249,259; De Lancey v. Piepgras, 138 id. 26).
>
> These doctrines lead reasonably to a further one: When a patentee applies for a confirmatory patent, his title thereafter depends wholly upon the terms of the confirmatory patent, even though his confirmatory grant is less in extent than that which he formerly claimed to possess under a prior grant. (Nicoll v. Trustees of Town of Huntington, 1 Johns. Ch. 166, 183; Town of Babylon v. Darling, 207 N.Y. 651,658; People v. Livingston, 8 Barb. 253,297; Jacob ex dem. Paine & Morris v. Smead, 1 D. Chip. 56; Jones v. Jones, 1 Call. 458 [Va. 17981; Attorney General for New South Wales v. Dickson, L.R. [1904] A. C. 273.)

People v. Foote, supra, 242 A.D.2d at 168,273 N.Y.S. at 574. See, e.g., Nicoll v. The Trustees of the Town of Huntington, 1 Johns. Ch. 166, 1 N.Y. Ch. *Ann.* 101 (N.Y. Chancery Court 1814).

The above history is but a mere backdrop to the murky waters that these parties must navigate at trial to prove their case. At the January 31, 2001 hearing, the Town was given an opportunity to clarify its position by putting forth its proof in support of its motion to dismiss these cases for the plaintiffs' alleged failure to name the Board of Trustees as a necessary party (instead of the Town), under the theory that the Board of Trustees somehow owns the property in issue separate and apart from the Town or the plaintiffs. The Town, however, has failed to meet its burden in two respects: (1) it failed to establish as a matter of law that the Town and the Board of Trustees are separate and distinct entities under the circumstances of this case; and **(2)** it failed to show that the Board of Trustees is the alleged owner of the property.

Furthermore, the Town waited years, in most cases more than a decade, to raise this issue, and did so in the O'Brien case only at trial. The **Court's** equitable powers are not ***so*** circumscribed that the conduct of the Town may escape this Court's scrutiny and evaluation. It appears from the record, according to the answers submitted by the Town in each case and the delay in making these motions to dismiss, that the Town concluded and agreed with the plaintiffs that it in fact was the right party. Indeed, the Town answered in each case (except in the Lockhart case) that "the Town, by its Trustees" has enjoyed ownership of the property for approximately three hundred years, and that the Town has posted its ownership of the land from time to time, that the Town demands judgment "affirmatively declaring and confirming the defendant's [Town's] title in fee to said real property." The plaintiffs have expended years of effort operating under this not unreasonable premise, given the above language, that the Town is the rightful defendant. Moreover, the Town's own confusion as to its claim of ownership of the property in issue lent credence to the plaintiffs position. Therefore, this Court will not penalize

the plaintiffs for the Town's dilatory and belated "discovery" that it is separate and distinct from the Board of Trustees, that it (the Town) has no claim to the land in issue, and that the true defendant is the Board of Trustees. Thus, the Town's motion to dismiss the cases on that basis is denied.

The analysis, however, is not at an end. Given the complexities of proof that plague these six cases, this Court finds that the Board of Trustees must be added as a defendant in the interest of justice in all six cases so that there may be a complete and final disposition to these matters affecting claims to title. Despite the passage of time, there is little if any prejudice that can be claimed by the Board of Trustees as the Town Board and the Board of Trustees are comprised of the same people (donning different hats). Thus, the Board of Trustees certainly knew of these proceedings and the claims to the property in issue. Indeed, the same Town Attorney's office that represents the Town, also represents the Board of Trustees. Moreover, the Town Attorney answered in each case (except for the Lockhart case)" for the Town as well as for the Board of Trustees by setting forth in its counterclaim that "the Town, by its Trustees" claims ownership of the property, further evincing that the Board of Trustees has been well aware of their role in these action (for almost two decades in some cases). Accordingly, it is

ORDERED that the Town's motion in all six cases to dismiss for failure to join a necessary party is denied. It is further

ORDERED that the Board of Trustees is hereby added as a defendant in all six cases and is directed to answer to the complaints in these six cases within twenty days of the service of this decision and order to the extent that it finds necessary in light of the Town Attorney's answer submitted in its behalf. It is further

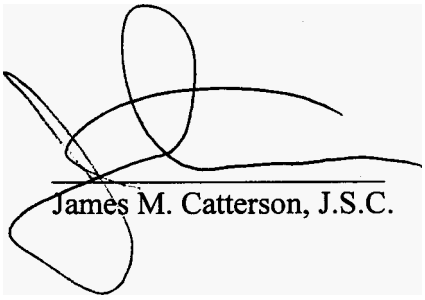
ORDERED that the Town is directed to serve a copy of this decision and order upon all parties in all six actions.

''While the Town Attorney for the defendant Town of Huntington did not set forth defenses or counterclaims in the Town's answer in the Lockhart case, the Town did deny each and every allegation in paragraph 14 of the complaint. In paragraph 14 of the complaint, the plaintiffs state, inter alia, that the defendants unjustly claim the parcel of land, that the plaintiffs allege that such claims are unfounded, and that the plaintiffs are seized of the property. If, by its answer, the Town is denying that it has a claim to this land, it is unclear. Given the inextricably interwoven history of the five prior cases with the Lockhart case, this Court finds the Town and the Board of Trustees to be in the same position as in the other cases. Therefore, for the reasons annunciated above, the Board of Trustees is added as a party in this case as well.

The above constitutes the decision and order of this Court.

ENTER

Dated: **January** 25,2002



___**FINAL DISPOSITION** ✓ **NON-FINAL DISPOSITION**