ful, would afford only a partial solution of the problem, as it would still leave the property rights of those Indians under existing treaties with the United States to be dealt with. In this connection it may be pointed out that by the treaty of November 11, 1794 (7 Stat. L. 44), with the Six Nations of New York, these Indians were practically guaranteed peaceful possession of their soil until they chose to sell the same "to the people of the United States, who have the right to purchase" (art. 2). Just what is intended by the expression "people of the United States" is not entirely clear; that is, assuming these Indians to be ready to part with their title whether the same is to be sold only to the United States Government or may be sold to the State, or even to nonalien third parties, including individual citizens of the United States, artificial entities organized pursuant to State laws as a corporation or even to unincorporated joint stock companies or associations. In this latter connection, attention is invited to pages 15 to 19, inclusive, of House Document No. 1590, Sixty-third Congress, Third session, with respect to the claims of the Ogden Land Co., successor in interest to the Holland Land Co., in and to the lands embraced in the Allegany, Cattaraugus, and a part of the Tuscorara Reservations in New York.

Frankly, the situation with respect to these Indians is so complex that before offering any definite recommendations as to the form of legislation best calculated to afford an effective solution of the entire problem, and in view of the jurisdiction heretofore exercised by the State of New York over the Indians within her borders, I am moved to suggest that your committee consider the advisability of inviting representatives of the State to present their views with respect to the matter.

We will be glad, of course, to cooperate at all times with any representatives of the State and other parties interested in working out an effective solution of the problem, legislative and otherwise.

Very truly yours,

Ray Lyman Wilbur.

Robert Morris acquired from Massachusetts the "preemptive right" to much of western New York, including the present Niagara County. The deeds of 1791 and 1792 which accomplished the transfer are printed in the "Indian Problem" at pages 112-117. He deeded the lands, the present Niagara County and much more, in 1792 and 1793, to Dutch capitalists subsequently known as the Holland Land Company. The deeds are printed in the same volume pages 117-131. Morris thereby bound himself to extinguish the Indian title for the benefit of his grantees. The Senecas had that title.

The original Indian Non-intercourse Act was approved July 22, 1790 (1 Stat. 137) and contained in section 4 the following language:

> "No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, *or to any state, whether having the right of preemption to such lands or not*, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

That act was in effect less than three years. The Indian Non-intercourse Act of 1793 (1 Stat. 329) very significantly omitted the language which I have underlined above, and (like the subsequent acts, to be found at 1 Stat. 469 and 743, also 2 Stat. 139 and 4 Stat. 729, and the present provision of 25 U. S. C. § 177) contained an authorization for a state, when represented at a treaty held under authority of the United States, to extinguish Indian claims to land within the State.*

* Facts, chronologically arranged, and not the legal arguments of subsequent years, are the function of this affidavit. However, it may be appropriate to observe here that the Indian Non-intercourse Acts have never been held to provide an exclusive method by which New York State can acquire Indian land titles. See *Seneca Nation* v. *Christie*, 126 N. Y. 122 at 140-146 (aff'd 162 U. S. 283), and *United States* v. *Franklin County*, 50 F. Supp. 152 at pages 154-156. Titles to large areas of the State would be invalidated, as well as important rights upon the existing reservations (such as the railroad line and utility lines and highways across the reservation now involved) if the plaintiff's contentions were upheld.

New York had made six treaties obtaining Indian land cessions in the period 1785-1790. Such treaties had been made with the Oneidas and Tuscaroras in 1785 ("Indian Problem", pages 234-236), with the Oneidas in 1788 (pp. 237-241), with the Onondagas in 1788 (pp. 190-191) and June, 1790 (pp. 191-192), and with the Cayugas in 1789 (pp. 216-220) and June, 1790 (pp. 220-224). On April 10, 1793, Governor George Clinton sent those six treaties to Secretary of State Thomas Jefferson, who had asked in his letter of March 13 for the "treaties made under the State of New York", and who acknowledged on April 27 receipt of the "treaties". When the United States first published a volume of "Indian Treaties" (Washington, 1826) these six transactions were summarized at pages 17-25, under the caption, "Contracts between the State of New York and different tribes of Six Nations of Indians, specifying their several cessions and reservations of land." The euphemism obviously was invented by some person subsequent to the Jefferson-Clinton correspondence.

No treaty seems to have been entered into between the Indians and the State during the period the 1790 act was effective. A few months after it was replaced by the 1793 act New York resumed its accustomed course of dealing.

During the next fifty-two years it made at least thirty-nine treaties with various bands of New York Indians, all without any participation by the United States. Titles to very large and important tracts of the State are held under those treaties. New York departed from that practice on five occasions, all in the period 1797-1802, and for those five treaties availed itself of the procedure suggested by the proviso to the 1793 act.

On August 25, 1796, Robert Morris wrote to President Washington, saying in part:

> "Being desirous to comply with formalities prescribed by certain laws of the United States, although those laws probably do not reach my case, I now make application to the President of the United States and request that he will nominate and appoint a commissioner to be present and preside at a treaty, which he will be pleased to authorize to be held with

This is not a brief and we are frank to state that we do not completely comprehend the _Tuscarora_ case at this point. The briefs on appeal to the U. S. Supreme Court have been obtained and are available for your review.

The State's position in the _Tuscarora_ case is described in a Buffalo Law Review article thus:

> ". . . sweeping assertions such as these mark this latest revival of New York's claims to a unique state power over Indian lands."

Although the District Court agreed with the State, 164 Fed. Supp. 107, the Second Circuit took great pains to assert the applicability of federal power, including the Non-Intercourse Act, to New York State. As the Buffalo Law Review states:

> "This untenable challenge to federal authority was flatly rejected in every significant respect by the Court of Appeals for the Second Circuit."

See 257 Fed. 2d 885, cert. den. 79 S. Ct. 66; "Governmental Power and New York Indian Lands" _8 Buffalo Law Review_ 1, 19-20 (1958).

It may be that the Second Circuit's decision on the above was dicta, or moot, in view of the subsequent condemnation under federal authority. But the conflict is certainly brought out in the open and the thinking of the Second Circuit is evident.

The case of _Seneca v. Christie_, referred to as the leading New York State case, dealt with lands sold under a treaty with the State under the auspices of a federal commission. We have found no case other than _U.S. v. Boylan_ where title to lands acquired in violation of the federal Non-Intercourse Act was involved.

It may be jumping the gun, but the following is a possible conclusion to be drawn from the _Tuscarora_ case:

1. _Major Premise_. Many New York purchases of Indian lands were not participated in by the U.S., and if the Non-Intercourse Act applies then "titles to large areas of the State would be invalidated". See _Manley Affidavit_ pp. 7 & 8.

2. _Minor Premise_. The Non-Intercourse Act did and does apply to New York State. 257 Fed. 2d 885.

3. _Conclusion_. Therefore titles to large areas of the State would be invalidated. See Maps

V-A. RECENT FEDERAL CASES WHERE RECOVERY ATTEMPTED

Attempts to obtain a transcript of the Seminole Case, decided in 1964 by the Indian Claims Commission, have been unsuccessful. The Commission ruled that the Seminoles should recover for the taking of unceded lands in Florida. The amount of the award remains to be determined.

Other recent federal cases have shed some light on the required elements of proof, possible defenses and the chances for success of the proposed case against the state.

Sioux Tribe (Lower Brule Reservation) vs. U.S., 315 F.2d 378 (1963), involved the taking and resale of part of this reservation due to a survey error. The Court of Claims upheld the Indian Claims Commission's decision that the taking was without due process of law, and required compensation. It also affirmed allowance of an offset in the amount of payments made by the United States to purchase other lands for the plaintiff tribe. This type of gratuitous payment is one specifically allowable under the Indian Claims Commission Act.

Finally, the judgment affirmed the disallowance of certain other gratuitous expenditures alleged as counterclaims, but stated that this might be used as an offset.

The decision with respect to offsets was grounded on the following language from the Indian Claims Commission Act, 25 USCA §70a:

> "The Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, (with

certain such offsetting expenditures excepted, including among others those for administrative, educational, health or highway purposes)."

In Sac and Fox Tribe of Oklahoma vs. United States, 315 F.2d 896 (1963) the Court of Claims discussed the elements required to prove Indian land title where such title is prerequisite to the claimant's recovery.

Either of two types of title is acceptable. One is "recognized" title, meaning legal title recognized by the United States. The other is "aboriginal" title - a title showing that the land involved once belonged exclusively to the claimant trible. Aboriginal title can be terminated unilaterally by the United States, however, where recognized title cannot (see below).

The Sac and Fox case discusses the elements needed to establish recognized title at 315 F.2d 897:

> "Congress, acting through a treaty or statute, must be the source of such recognition, and it must grant legal rights of permanent occupancy within a sufficiently defined territory. Mere executive 'recognition' is insufficient, as is a simple acknowledgement that Indians physically lived in a certain region. There must be an intention to accord or recognize a legal interest in the land."

And in Minnesota Chippewa Tribe vs. United States, 315 F.2d 906, at 911, the same court added:

> "There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation."

The Sac and Fox case discussed aboriginal title at 315 F.2d 903:

> "To be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property."

It went on to rule against the tribe since its occupancy of the lands claimed was not exclusive "for a long time". The claimant had settled the area in 1730, but had warred with several other tribes, gaining exclusive possession only toward the end of the 18th century. The treaty ceding the lands involved was signed in 1804, at which time possession had not lasted long enough to ripen into aboriginal title. (The case earlier had affirmed a finding of no recognized title, either.)

Proof of aboriginal title is required only where recognized title cannot be established, and (unlike recognized title) is permissive and temporary and may be extinguished by the United States with or without consent of the Indians, and by any means which the sovereign may deem appropriate. (See Miami Tribe vs. U.S., 175 F. Supp. 926 and companion case, Miami Tribe vs. U.S., 281 F.2d 202, both discussed below.)

Skokomish Indian Tribe vs. France, 269 F.2d 555 (1959) ruled on various procedural bars to recovery against a state which were there advanced by the State of Washington. The tribe's action to quiet title named the state as one defendant. The state's motion to dismiss as to it raised several procedural questions among which were: (1) No substantial federal question was raised under 28 USCA §1331, setting forth original jurisdiction requirements on federal district courts ("matters arising under the constitution, laws and treaties of the United States"). The court ruled against this contention on the ground that the rights involved stemmed from a treaty between the Skokomish and the United States. (2) The federal government is an indispensable party, and a motion to join it having been denied (on the ground it had not consented to be sued as sovereign under such circumstances), the action necessarily was at an end. The court cited Choctaw & Chicasaw Nations vs. Seitz, 193 F.2d 456, 458-460 to the effect that actions brought by a tribe recognized as a juristic entity can be prosecuted to a judgment that is consistent with equity and good conscience. The various appeals decided on the merits in such cases by the United States Supreme Court (the United States not having been a party) necessarily decided this by implication. The Choctaw & Chicasaw case dismissed out of hand any question of prejudice to the United States as grounds for making it an indispensable party. (3) The state cannot be sued in federal court without its consent, and Washington had not consented. This contention the Skokomish court upheld. The tribe had appealed from dismissal on this ground, claiming that the state constitution incorporated by reference the terms of a federal treaty granting the rights now being sued upon. The court responded: "The state contracted to recognize certain Indian rights, but it did not thereby agree to stand trial in federal court with regard to those rights." The decision went on to note that the state had by its own statute waived sovereign immunity as to actions brought in its own courts. This third holding is subject to the qualification that the United States (if it elects to sue in behalf of a tribe) is excepted from its application (U.S. vs. State of Minnesota, 270 US 181, 46 S.Ct. 298 (1925)).

Pottawatomie Tribe vs. United States, 111 F.Supp. 256 (1953) is an older case which ruled on the validity of certain annuity commutations. The tribe's petition before the Indian Claims Commission had alleged that the purported commutation (value of annuities capitalized at a stated percentage, plus interest paid the tribe on this principal sum at the time of its distribution in 1910) was invalid because a majority of the tribe had not executed the commutation agreement, because of misrepresentations involved, and because the tribal council had not signed it. The petition sought value of these annuities from 1910 to judgment less the principal and interest received in 1910.

The Court of Claims upheld the Commission's order dismissing the petition. Ground: "Congress had the right to commute these annuities without the consent of the tribe." (Citing Lone Wolf vs. Hitchcock, 187 U.S. 553, 25 S.Ct. 216 (1902), which held that Congress had the power to enact statutes abrogating treaty provisions which forbade cession of Indian reservation lands without consent of three-fourths of the adult male Indians on the reservation.)

Seneca Nation of Indians vs. Brucker, 262 F.2d 27 (1958), cert. den. 360 US 909, held simply that Congress has power to condemn by statute lands reserved to Indians by validly executed treaty - subject, of course, to the payment of just compensation.

Yuchi Tribe vs. United States, 145 F.Supp. 206 (1956) reaffirmed an earlier award by the Indian Claims Commission (Creek Nation vs. United States, 4 Ind. Cl. Comm. 140) to the Creek Nation as a whole for the value of land ceded in 1814 without compensation (Treaty of Ft. Jackson, 1814). The lands ceded were some eight million acres belonging to friendly Creeks with whom the United States had allied itself in a Creek civil war, and was ceded, over protest of the friendly Creeks, as part of supposed war reparations from the unfriendly Creeks with whom the war had been fought. The award was based on the value of the lands at the time of their taking.

Two most important federal cases were Miami Tribe of Oklahoma vs. United States, 175 F.Suppl. 926 (1959) and its companion case, Miami Tribe of Oklahoma vs. United States, 281 F.2d 202 (1960). These two cases held, between them, that:
(1) Certain Miami cessions of land in Ohio were made for an unconscionable price. Unconscionability can be shown in part by

evidence of contemporaneous sales of lands comparable in nature and amount between white and white, i.e. the value in fee simple, including minerals, etc. (2) All prima facie amount of recovery in such case is the difference between the capitalized value of the annuity, per acre, and the actual value, per acre, at time ceded. (3) Interest can run against the United States as severeign only where there is a taking entitling claimant to 14th Amendment just compensation, and that unauthorized allotment to others of land rightfully belonging to a tribe is such a taking. (4) Indiana Miami who, with consent of the tribe and the United States, failed to join migration to Oklahoma, lost tribal status and could not share in recovery for Oklahoma land claims because they could not share in tribal assets or property. (5) Right of Indian use and occupancy by aboriginal title is subject to being extinguished by the United States without Indian consent and by any means which it may (as sovereign) deem appropriate. This is not true of recognized title. (6) Where a United States treaty conferred upon Indians the right to permanently use and occupy, then Indians have recognized title to that land then marked out as "reservation land". (7) Lands out in Indiana were selling for as much as 40 cents an acre in 1795 (up from 9 cents an acre in 1787). (8) Public auctions sometimes brought more per acre than the statutory minimum price for United States lands in effect from 1804 to 1820 ($2 an acre - a nominal figure designed to make the lands available for quick settlement) and open market land prices in the vicinity (of Indiana reservation lands) ran as high as $8 an acre between 1815 and 1818. (Figures were cited as ground for reversing the Commission's 75 cents per acre valuation as not supported by the evidence.) (9) There should be deducted from any recovery amounts the Indians actually were paid as annuitants' principal fund at the time of "commutation", plus any gratuitous amounts falling within the offset provisions of the federal Indian statute, but not annual amounts paid on account of a perpetual annuity.

Other federal cases not discussed here undoubtedly would affect the outcome of any case brought by the Oneidas against New York State. Practical time limitations forbid further search, however. (But see discussion of the apparently controlling Tuscarora case above.)

If the case is presented as a matter of federal question jurisdiction in a federal district court, however, major substantive and procedural questions dealt with in the cases cited should have a major bearing on the manner of presentation and the substantive rule of law governing its outcome.

VI. THE CLIENT

In a case like this, the character of the client is highly important. George Shattuck attended a meeting of the Oneida Nation several weeks ago at which its President, Jacob Thompson, of Nedrow, New York, presided. Mr. Thompson, who has been President for about five years, is likeable, well-spoken, intelligent, and educated. Above all, he impresses one as being reasonable and sound despite, perhaps, his great dedication to his project.

Mr. Thompson's mother-in-law is Mrs. Delia Waterman. The rule of the Oneidas descends through the matriarchal line even though a man does the ruling. Mrs. Waterman is about 65 years old and has devoted years to the cause of the Oneidas. Both she and Mr. Thompson have appeared before various legislative committee hearings.

Both the state and federal Indian departments recognize the Oneidas to some extent, send them bulletins, recognize them at hearings, etc.

Part of the cloth required to be distributed under the 1794 treaty with the U.S. is sent to Mrs. Waterman by the U.S. and distributed by her to those of the local Oneidas who are interested. By this distribution is kept a record of the local Oneidas who are recognized as part of the Oneida Nation.

Attached is a swatch of the treaty cloth distributed a few weeks ago and a copy of the shipping notice of the cloth sent to Mrs. Waterman.

We think we have a client we can deal with.