HOW THE MONTAUK LOST THEIR LAND

John Strong

PART ONE: "SMOK'ED WITH WHITE FACED RUM"

According to local folklore the Montauk lost their land by default. The Native Americans are said to have gradually moved away of their own volition or blended into nearby African-American communities, abandoning the vacant land at Montauk for the "more industrious" white race to occupy (Bayles, 1962:422-424; Furman, 1875:42-49; Thompson, 1918:Vol. I, 96ff, Vol. II, 111). A closer examination of the historical events reveals a much more complex and often unpleasant story. Marion Fisher Ales, whose scholarly account is, by far, the most carefully researched history of the Montauk yet written, describes some of the devious means used to drive the native peoples from their land (Ales, this volume). Although she provides some important insights into the process of land alienation, her focus on the broader scope of Montauk history precluded a more complete development of this theme. The purpose of this monograph is to supplement Ales' study with a more detailed account of the Montauk dispossession.

The first parcel of land was purchased in 1648 by the governors Edward Hopkins of Connecticut and Theophilus Eaton of New Haven to clear the way for an English settlement east of Southampton. This deed, negotiated with Wyandanch and three neighboring sachems, has been lost, but a copy was entered into the colonial records in 1661 (Document No. 1) following another controversial land transaction.

The English were also interested in blocking the Dutch, who wanted a foothold on Eastern Long Island. David Provost was sent from New Netherlands early in 1648 to obtain land lying east of Southampton (Ales, this volume). Provost went back empty handed after the Dutch plans were thwarted by the English governors. Rivalry between these two European powers was beginning to intensify during this period. Both based their claims to Long Island on voyages of discovery: Henry Hudson for the Dutch and John Cabot for the English. The English king sold or gave away as rewards to his supporters large parcels of land with extremely vague boundaries. Aboriginal title was of little concern at the time to either the monarch or the recipient.

Long Island was included in one such grant given to the Earl of Stirling in 1635. The Earl turned around and sold most of his grant to private companies of settlers. It soon became evident that the Native American inhabitants could not be ignored in this process. The claims based on discovery were tenuous and could not be secure until settlers began to occupy the area in question. At this point the cooperation of the native occupants became crucial. The English were reluctant, at first, to purchase land by treaty. Roger Williams criticized the Puritans for this and was careful to support all of his land titles with deeds signed by local Indians. When the Dutch began to sign deeds with Native Americans living along the Connecticut valley on land claimed by England, this policy was quickly changed.

One of the reasons that the English were so eager to put settlers on Long Island was to thwart the expansion of the Dutch into lands that the English monarchy claimed by right of discovery. Edwards and Eaton purchased the land from the Earl of Stirling's agent and then negotiated a second purchase from the Montauk. The signatures on the deed raise some interesting questions (Document No. 2). The Southampton deed signed in 1640 has the names of twelve Indians who were probably village headmen (Strong, 1983:36-37, 55; 1985a:188). There was no single Shinnecock sachem in 1640 who could speak for all the bands living at Shinnecock. The East Hampton deed, signed eight years later, presumed that one sachem had the power to sell the lands occupied by several villages. Wyandanch signed for the Montauk lands, and an Indian named Nowedonah signed for the Shinnecock. It appears that the English were imposing a new political system on the Indians, which would make the process of land alienation easier (Strong, 1983,1985a). The other two sachems, Momeweta from Corghaug and Poggatacut from Manhansett (Shelter Island), signed for their respective bands. These sachems may have been asked to sign in the expectation that their names would impress the Dutch.

When the 1661 copy was put in the official record book at Hartford by Thomas Stanton, who served as interpreter for the colony of Connecticut, the Native American signatures were not even reproduced. A notation, which appears to be in a different handwriting, asserts that *"here were the signs of the 4 sachems, of Pamantocott their captain"* (Document No. 2). The misspelling of Poggatacut's name also suggests that the note was made by a different person, perhaps at a later time. The absence of the original deed, which allegedly was stolen from the town clerk's office, makes historical interpretation difficult. William Wallace Tooker, an ethnographer who devoted his life to the study of Long Island Native Americans, noted that the name "Poggatacut" itself raises some questions. There is no reference to such a person anywhere else in the local colonial documents (Tooker, 1980:179). The sachem of the Manhansetts, the most influential of the eastern Long Island leaders, is named Yoco or Youghco in the Dutch and English records.

Nowedonah, the alleged sachem of the Shinnecock, is another name which has found its way into the local folklore because of the 1648 deed. Although Nowedonah appears on street signs and is frequently mentioned in local

histories, there is no mention of the name in any of the Southampton Town records. The sachem of the Shinnecock is listed as Mandush on the original 1640 deed for Southampton and again on a treaty in 1649. Nowedonah is not listed on either document (Strong, 1983:67-69). Tooker suggests that the reason for this may be in the Indian practice of changing their names during their lifetimes. He argues that Nowedonah had formerly been named Witaneymen and changed to Nowedonah, "I seek him" when he served briefly as a spy for the Dutch in 1649 (Tooker, 1980:179). The absence of Nowedonah's name on the 1649 treaty and anywhere else in the records after that raises serious questions about Tooker's theory. It is possible that Nowedonah and Poggatacut were not sachems at all. They may have simply been individuals from villages adjacent to the area specified in the deed, who were induced to endorse the transaction.

In spite of these questions about the deed, it remains an important source of information about the early contact period. Some of the misunderstandings which continued to cause conflicts for generations can be identified in the wording used by the English. One clause which often misled the Montauk gave them the liberty to fish, hunt, gather shells, and have the fins and tails of beached whales. As long as they could use the land, they saw no fundamental change in their sovereignty. In Native American tradition, the land was not a commodity which could be bought and sold. Agreements could be made about the use of the land, but the idea that the land could be used by the Native Americans and, at the same time, be owned by the English was completely alien to them. The indigenous peoples did not realize the distinction between tenancy and ownership until it was too late. For the English the deed was a simple exchange of real estate for 20 coats, 24 looking glasses, 24 hoes, 24 hatchets, 24 knives and 100 muxes (metal drills). In traditional Native American cultures such items were exchanged as gifts to celebrate an alliance or a special occasion. The Montauk may have accepted the goods as a gesture of English appreciation for permission to build homes and plant fields in East Hampton.

The English also agreed to honor another symbol of sovereignty related to Native American hunting practices. The Montauk frequently herded deer into ponds or bays where they could be killed more easily. When the prey was chased into a pond located in the hunting territory of a neighboring band, the skin of the animal was presented to the neighbors by the hunters in recognition of their control over the area. The English promised that *"...if the Indyans, hunting of any deare, they should chase them into the water, and the English should kill them, the English shall have the body, and the sachems the skin"* (Document No. 1). These clauses, noted Ales (this volume), signified to the Montauk that they still held a claim to the land described in the deed. Native Americans appear to have viewed such transactions as conferring their own form of land tenure to the English (Cronon, 1983:67).

In 1651 Governor Eaton transferred the title to the settlers of East Hampton for a payment of 30 pounds, four shillings and eight pence (Hedges 1887, vol. 1:4). Ales believes that this fee may simply reflect the price of the goods given to the Montauk in the 1648 deed. It is interesting to note here that, unlike the Southampton settlers, who negotiated directly with the local Indians, the East Hampton people bought their land from a third party.

The Montauk may have welcomed the settlement, believing that the English would protect them from Narragansett and Niantic raiding parties. Wyandanch, who had seen the devastating use of English military technology at Mystic where an entire Pequot town had been massacred in 1637, had eagerly sought an alliance with the victors. The Montauk sachem encouraged Lieutenant Lion Gardiner, the English commander of Fort Saybrook, to bring his countrymen to Long Island in hope that their presence would provide access to European trade goods and discourage his traditional enemies from raiding his villages.

In 1642 Miantonomoh, the Narragansett sachem, attempted to recruit the Montauk and Shinnecock to join him in an alliance which would draw them out of their dependency on the English. This shift in loyalty was viewed with alarm by the local whites who feared that the Narragansetts might assume jurisdiction over the unpurchased lands on Long Island. This concern may have been the underlying cause of widespread rumors claiming that there was a large scale Native American conspiracy to destroy the English settlements in New England and Long Island. Wyandanch was quick to assure Gardiner that he would remain loyal to the English. The absence of any evidence in the colonial records that the Narragansett sachem intended any hostile action against the English suggests that the alarm may have been used to block the new alliance and reinforce the Wyandanch faction among the Montauk. The Narragansett and Niantic leaders never forgave Wyandanch for his role in these affairs.

After the death of Miantonomoh in 1643, Ninigrit, a Niantic sachem and cousin to Miantonomoh, emerged as the most influential Native American leader in southern New England. Tensions between Ninigrit and Wyandanch were intensified in 1653 when the Montauk leader told Lion Gardiner that the Niantic sachem planned to get help from the Dutch for a new campaign against the English. There is no evidence in the records, however, that Ninigret had any such intentions.

The Niantic sachem, who was trying to expand his influence among the Native American peoples in southern New England and Long Island, apparently wanted to

forge an alliance with Wyandanch's rivals. Gardiner and Wyandanch, as they had done a decade earlier, isolated the rival faction by sounding the alarm about an impending attack on English communities. Nothing terrified the settlers more than the specter of "marauding Indians." The tactic was very similar to the manipulation of the communist "threat" in the post W.W.II period to silence dissent. Ninigret, perhaps out of sheer frustration, led an attack on the villages at Montauk, killing 30 men and kidnaping fourteen young women, one of whom was Wyandanch's daughter (Karabag and Strong, this volume).

Two years after the attack a dispute arose between the Montauk and their English neighbors. Livestock from the settlers' farms wandered into Montauk cornfields and destroyed food supplies which were needed to sustain the Montauk through the winter months. Wyandanch and two of his advisers, Sassakatakow and Pouquattouns, met with Lion Gardiner, the Reverend Thomas James, and four other East Hampton men and agreed that the settlers would build and maintain a fence which would protect the Montauk's crops (Document No. 3). The English also promised to pay for damages caused by any livestock that got through the fence. In return the Montauk allowed the English cattle and horses to graze at will after the fall harvest and until the spring planting.

The English settlement was expanding and their leaders knew that the day was soon coming when more land would have to be taken from the Montauk. Anticipating this eventuality, Gardiner and James included the following clause. *"...If at any time hereafter the sachem, his successors see cause to alienate the sd land att Montauk, that it shall not be sold or alienated to any person or persons but to the inhabitants of Easthampton aforesaid..."* In their innocence about the nature of the European market economy, the Montauk had signed away their right to sell to the highest bidder and had received nothing in return for such a major concession.

Another reference in the agreement was also related to strategies for obtaining Indian lands. Wyandanch was referred to here for the first time as the "Grand Sachem" of all Long Island. The title was an artificial invention, which Lion Gardiner used to legitimize his purchase of lands all over Long Island (Strong, 1985a). The English simply asserted that Wyandanch owned the land and then proceeded to purchase it from him. The obvious military weakness of the Montauk made a mockery of the presumptuous title. This sham enabled Gardiner and his associates to avoid the difficulties of negotiating with the numerous small bands living on the lands in question.

As the English settlement grew, the Montauk communities declined. In 1659 an epidemic took the lives of two thirds of the Native American population on Long Island. This figure was recorded by Lion Gardiner (Orr, 1897:146), but he gave no specific numbers, nor did he comment on the nature of the disease which took such a high toll. It was undoubtedly one of the common European viruses such as smallpox which found no resistance in the Native American's immune system. The close ties with the English, sought so eagerly by Wyandanch, proved to be a mixed blessing at best.

The Montauk sachem himself died during the epidemic, but, according to Lion Gardiner, he was poisoned. Unfortunately Gardiner does not give us any insights into the causes of the murder or the identity of the suspects. It is likely that the motive was related to Wyandanch's numerous real estate deals. During the two years prior to his murder, the Montauk sachem had signed several deeds, some for lands as far west as Huntington. Some of the local sachems and settlers west of Southampton rejected Wyandanch's authority to sign away these lands.

The Montauk were further demoralized by another one of Ninigrit's raids a year after Wyandanch's death. Several Montauk visiting friends on Gull Island were killed in a surprise attack, which sent a wave of fear through the small community. Soon afterwards a war party of Montauks were ambushed on Block Island and suffered heavy losses. The surviving Montauk, now led by Sunk Squaw Wicchitaubit, Wyandanch's widow, and her son Wiancombone, were forced to seek protection of the English settlers in East Hampton, who were quick to take advantage of their plight.

The Reverend Thomas James invited the Montauks to set up their wigwams in a calf pasture near his parsonage until the danger passed. The demoralized and frightened refugees, huddled under the shadow of the English "protectors," were at the mercy of the settlers. Wyandanch's widow, her son Wiancombone, and four of the deceased sachem's advisers, Paquatons (Paquattouns), Checkanows (Checkanoe), Powhe, and Massaquat, met with Lion Gardiner, the Reverend Mr. James and five other town officials and negotiated a most unusual pair of documents.

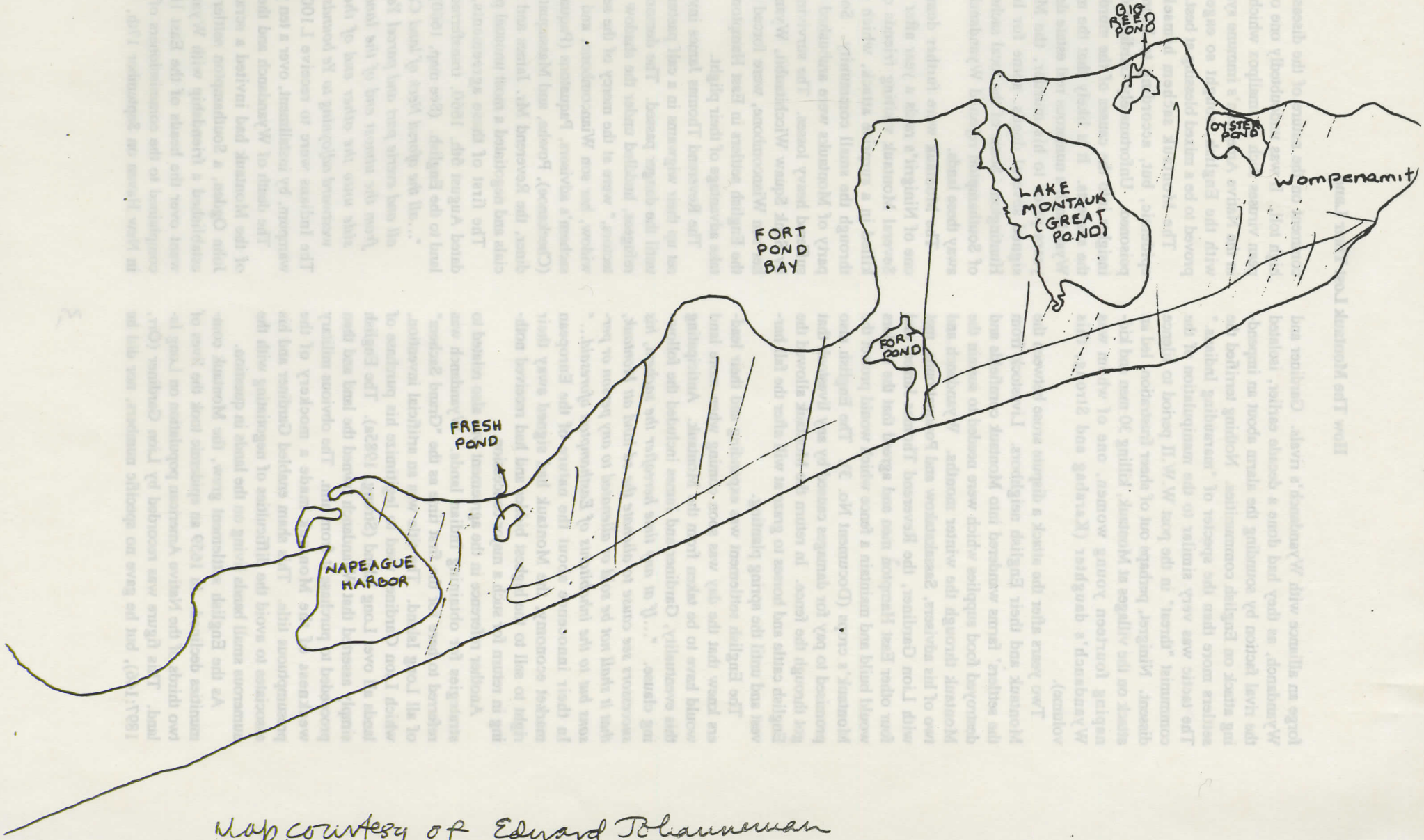
The first of these agreements, (Document No. 4) dated August 6th, 1660, transferred all of the Montauk land to the English. (See map, 1660)

> *"...all the aforsd Neck of land Caled Meantaquit with all and everie part and parcel Yereof from Sea to Sea from the utmost end of the land Eastward to th sea side unto the other end of the sd Land said land westward adjoyning to Ye bounds of Easthampton..."*

The Indians were to receive L100 worth of corn and wampum, by installment, over a ten year period.

The death of Wyandanch and the weakened condition of the Montauk had invited a scramble for their lands. John Ogden, a Southampton settler who had apparently established a friendship with Wyandanch, immediately went over the heads of the East Hampton leaders and complained to the commissioners of the United Colonies in New Haven on September 17th, 1660, that the young

Deed for Montauk (8-6-1660)



Map courtesy of Edward Bliumenman
Illustrated by Christopher Donovan

MAP II

Montauk sachem had been pressured into an agreement which Ogden feared "...wilbee his rewin" (Pulsifer, 1968, Vol. X:249-250). Ogden also claimed that before his death Wyandanch had appointed him to be Wiancombone's guardian with the authority to approve any land sales. The deed had been negotiated with out his knowledge, testified Ogden, therefore it was invalid.

The United Colonies, formed in 1643 by representatives from the colonies of Plymouth, New Haven, Connecticut and Massachusetts Bay, was authorized to supervise all relations between Native Americans and the member colonies. The Articles of Confederation empowered a body of eight commissioners, two from each colony, to meet every September. One of their concerns was to prevent actions by local settlers which might provoke a military conflict that could spread to all of the colonies. In 1652 the commissioners interceded on behalf of the Manhansetts who protested the authenticity of the deed to Shelter Island and demanded that a new deed be negotiated (Tooker, 1980:181).

John Ogden was not a man to be taken lightly. He was a prominent and influential member of the community, who had served for several terms as the town magistrate and was, at the time, also serving as one of Southampton's representatives to the United Colonies. Ogden forced the East Hampton leaders to defend their actions before the commissioners. Lion Gardiner and Thomas Baker appeared at the same session with a most unusual story. They did not deny Ogden's claim to be Wiancombone's guardian, nor did they deny that they had negotiated the deed without Ogden's knowledge. Gardiner said that the deed was not a real deed; it was merely a ruse to prevent Rhode Island entrepreneurs from taking the Montauk lands while the Montauk people were living in East Hampton. The Niantic allies living on Block Island had apparently claimed that their victory over the Montauk gave them the right to sell Montauk lands. In support of his statement, Gardiner explained that a counter bond which allowed the Montauk to return to their lands once the danger from the Niantic was over was added to the deed (Document No. 5). The commissioners, who must have been rather suspicious of this defense, demanded that the documents be read into the records of the Connecticut colony, "...for the said Indians better security" (Pulsifer, 1968, vol.10:250).

The unusual and rather awkward explanation offered by Gardiner and Baker suggests the possibility that the counter bond might have been added after they learned that Ogden was going to bring the matter before the commissioners at the September session in New Haven. The document was not dated, nor was it signed by any representative from the Montauk. The counter bond is actually a minor variation on the 1655 agreement which gave exclusive purchase rights to Easthampton. The document begins with the assertion that *"...Ye Inhabitants of Easthampton have fully and firmly bought Ye neck of land caled meantaquit of Ye Sachem & Ye rest of Ye Indians...,"* but adds that the Montauk are at liberty to return home and stay there as long as they wish (Document No. 5). If they chose to do this, however, they would not receive any of the money. The agreement to sell the land for L100 was completed, but the actual sale would not be consummated until the Montauk left their lands and began receiving the payments. The counter bond merely guaranteed that the Montauk could return and live on their ancestral land under a rather ambiguous arrangement. The commissioners appear to have been satisfied with this and did not press the matter further.

Accounts of the circumstances surrounding the negotiations, passed down in Montauk folk history, were retold in 1796 by George Pharaoh, a Montauk elder (Pennypacker: Article 54), and repeated four years later in the testimony of Benjamin and Stephen Pharaoh to the New York State Assembly. The two Montauk men said that their ancestors, out of desperation, concluded that they, *"...had better give them a Sham deed which would save our land for us. We being half dead with fear and thinking the whites our friends readily consented..."* (Gonzales, this volume).

The deed and counter bond illustrate the basic attitude which governed East Hampton's Indian policy through the next century and a half. The Indians were a troublesome presence on the land, an obstacle to economic growth and development that had to be removed. The only question in the minds of the settlers was how to get rid of the Montauk without getting into legal or political difficulty. Another dimension of the continuing problem was that the whites were always getting the proverbial cart before the horse. The land was purchased before the question of the Indian presence was resolved. This forced the awkward practice of leasing back portions of the land for the Native American villages and fields. The lease implied a temporary solution, which would eventually be resolved when the Montauk "died out" or left of their own accord. The East Hampton leaders rejected the pattern of Native American affairs set in New England, which provided for a more orderly procedure. In New England the native peoples were given reservations where they could stay. Although the reservation system was also rooted in the same attitude towards the Indians, it avoided the chaotic legal problems and provided a clearly defined, safe refuge, for a time.

One of the more interesting characters involved in seventeenth century real estate dealings was John Scott, who arrived on Long Island in 1654 and settled in Southampton. Scott was a resourceful adventurer, who had left New England at the age of twenty on a privateering ship bound for the Caribbean. His exploits as a buccaneer won him recognition as a skilled sailor and a military leader. Scott was so attracted to the Arawack

peoples on the island of Tortuga that he learned to speak their language and became knowledgeable about their culture. These experiences undoubtedly enabled him to establish good relations with the Montauk and Shinnecock.

Scott soon learned to speak the Algonquian languages used on Long Island and appears to have won the trust and confidence of Wyandanch (Mowrer, 1960:52). This relationship must have placed him in direct rivalry with Gardiner and Ogden, but, unfortunately, there are few clues in the primary sources about the nature of the interaction among these three primary players in the Long Island "deed game". Scott purchased several tracts of land, presumably from the Montauk sachem, but none of these deeds appear in any of the surviving colonial records. Scott's claims must have been of concern to the East Hampton settlers, particularly now that Wyandanch was dead. In October, 1660 about the time that Ogden and Gardiner were in New Haven at the commissioners' session, Scott sailed for London to consolidate his land claims. In a petition to King Charles II, filed in 1661, he claimed that he owned nearly one third of Long Island and asked to be appointed governor over the "...said island and islands adjacent" (Hutchinson, 1865, Vol. II:104-105).

One can well imagine the alarm which must have spread through the towns on eastern Long Island when word of Scott's activities reached them. It may well be that this concern is what prompted East Hampton to send Thomas Stanton to the General Court in Hartford on May 16, 1661 to copy the 1648 deed into the official records. The general uncertainty about the validity of all of these claims sent the parties involved scurrying, anxiously looking for ways to improve their legal position.

John Scott was, by far, the most ambitious in this scramble. Not only did he claim most of eastern Long Island, Scott also petitioned Charles II to make Long Island an independent colony and appoint him governor. As governor, Scott would, of course, be able to nullify any rival claims made by Gardiner and Ogden. During the spring of 1661, the rumor that the King had actually granted Scott the title spread throughout the English towns on Long Island (Abbott, 1918:15). The King, in fact, did not respond to this audacious request until much later.

After a year and a half in exile the Montauk decided to return home. This decision may have been prompted by a concern for their land. The small band must have viewed the scrambles for real estate titles as a threat to their homeland at Montauk. Before they let them go, the East Hampton leaders wanted to secure absolute title to meadow lands eastward of the existing town boundary and to reaffirm the exclusive right to purchase the rest of the Montauk at a later time.

Sometime in the winter of 1661-62 another round of negotiations was initiated. This time Wyandanch's widow, his son, Wiancombone, their "chiefe Counsellors" Paquatons, Powhe, and Massaquat were joined by six other Montauk "trustie counsellors": Mokkatus, Aukkonu, Kowwonk, Syana, and Soukinoush. Checkanoe, Wyandanch's adviser for most of his land transactions and Long Island's most experienced Native American negotiator, was absent. Gardiner, Baker, and the Reverend Mr. James again led the East Hampton negotiators (Document No. 6).

Written in the first person, as if Wyandanch's son Wiancombone himself was speaking, the document asserted that Lion Gardiner and his son David were, *"...my Two Guardians left by my deceased father..."* This declaration contradicted Ogden's claim in his petition to the United Colonies' commissioners a year and a half earlier. Ogden's response to this challenge is not mentioned in the surviving records. Gardiner apparently managed to convince Wiamcombone and his mother to support his claim to guardianship sometime after the hearing in New Haven. The fact that Gardiner did not dispute Ogden's claim at the time of the hearing suggests that he didn't have Wiancombone's assent at that time. We have no hint as to what Gardiner did to induce the young Montauk sachem to officially recognize his guardianship.

The implications of the title "guardian" underscore the attitudes of the settlers towards Montauk sovereignty. Leadership patterns in small prehistoric bands are not well documented, but reports from the early Dutch and English visitors suggest that few structured institutions such as hereditary rule existed. Leaders were acknowledged by members of their communities because of their demonstrated capabilities. Small scale political systems do not have elaborate procedures to determine leadership. The East Hampton leaders simply ignored this aspect of Native American culture and imposed their own system because it gave them control over the selection process.

The assertion that the Montauk needed an English guardian to supervise their affairs reflects a common racial stereotype. The Native Americans were viewed as child-like and incapable of dealing with complex social systems. There was nothing paternal in the actual practice of this guardianship. The scramble to claim this title over the Montauk was little more than a strategy to get their remaining lands.

After the guardianship clause, the agreement reaffirmed the 1660 agreements, recounted the events which forced the Montauk from their lands, and established the specific boundaries for resettlement at Montauk. The Montauk were clearly treated as tenants and not owners even though the deed was not to go into effect until the payment for the land began and the Montauk left the land for good. In the meantime they were told where they could put up their wigwams and under what conditions they could gather firewood.

The agreement included a very generous gift of land which extended the bounds of East Hampton eastward to Fort Pond where the village of Montauk is located today. The "gift deed" was given, according to Wiancombone, as a token of Montauk appreciation for the protection from the Niantic war parties. The flowery language in the deed was probably for the benefit of the colonial courts, should the deed be contested. The East Hampton settlers were described as *"...beloved friends and neighbors...whom we found to be friendlie in our distress...In consideration of yt love which wee have & do bare unto these our trustie & beloved friends of Easthampton...all yt piece or neck of land belonging to Mantaucut...."*

Ironically, nearly all of the "gift deed" is now public park land. (See map, 1661/62) Half of it is included in the boundaries of Hither Hills State Park and an additional 777 acres was purchased by Suffolk County from Sunbeach Real Estate Development Corporation of New York for $17 million. Millions of dollars changed hands in such transactions in the twentieth century as the value of the land spiraled upward, while, during the same period, the Montauk were struggling to survive.

John Ogden, who appears to have been outmaneuvered by the East Hampton leaders, protected his rights to the beached whales on the property west of Southampton that he had purchased from Wyandanch in 1659. Wiancombone and his mother confirmed Ogden's right to all of the whales washed up on the beach, and Ogden promised to pay a fee of L5 in wampum for each whale. Ogden had made a very good deal because the oil from one whale could be sold to the merchants in Boston for enough cash to buy a small farm (Strong, 1983:232). This document, signed on April 15, 1662 was endorsed by Tobaconus and Wenckeaseum, sachems from the Unkechaug villages located west of Southampton (Albany, Vol. II:156-157). The oil extracted from beached whales was such a valuable source of income to the settlers on eastern Long Island in the seventeenth century that controversies over the rights to the carcasses frequently ended up in court. Ogden wanted to protect himself from such challenges.

While John Scott waited for the King's response to his request for a colony of his own, Governor John Winthrop, jr. arrived in London to negotiate a new charter for Connecticut. The governor claimed that Connecticut's boundaries ran east to Narragansett Bay, south to include all of Long Island and west to the Pacific Ocean. He submitted his petition to the king in council in February, 1661/62 and by April had his charter. The process was facilitated by a generous and carefully orchestrated distribution of an estimated 600 pounds sterling in bribes to influential people at court (Black, 1966:224; Andrews, 1936, Vol. II:135).

Winthrop, jr.'s charter ended Scott's campaign for a colony of his own, but it did little to dampen his ambition for power and influence. Soon after this setback, Scott decided to make what profit he could from his real estate deals before he returned to Long Island. In the summer of 1662 Scott drew up a most unusual agreement between himself and a London merchant named Daniel Gotherson. Scott sold Gotherson the right to sell all or part of 20,000 acres located *"...on the South side of Long Island, and between Acombamook and ye land of the aforesaid Daniel Gotherson, lying by Uncochaug on the south side of ye marsh land of the said John Scott, on which it butts south,..."* (Abbott, 1918:17-18). The exact location of this land is difficult to ascertain, but it probably ran westward from the Southampton town line into the Unkechaug lands. The amount of acreage is about equal to land purchased for the settlement of East Hampton in 1648 for L30. Gotherson agreed to pay Scott L2,000 for the right to sell land that appears to have still belonged to Scott. Gotherson was under the impression that he had actually bought the land, and when he died three years later the title was passed to his heirs. Scott's biographer says that Gotherson was a victim of John Scott's persuasive charm. The circumstances surrounding this agreement, as well as its legal standing remain unclear.

Both Scott and Gotherson were well aware of the tenuousness of the deeds negotiated with aboriginal people during these unsettled times. In order to reassure Gotherson that Wiancombone and the Montauk leaders would not ignore Scott's deeds and sell the same land to rival entrepreneurs, a clause was added in which Scott promised to block any such attempt. Scott also apparently turned over all of the original copies of the deeds he had signed with Wyandanch to Gotherson as a mark of good faith. The fate of these documents remains a mystery.

As long as Gardiner was recognized as the legal guardian to Wiancombone, Scott's deeds were in jeopardy. This advantage was lost when the young sachem contracted smallpox and died in 1662. The following year Wyandanch's widow and Lion Gardiner himself also passed away. The departure from the scene of so many key players made the deed game even more unpredictable. John Scott returned to Long Island in the fall of 1663 and renewed his ties with Quashawam, the only surviving member of Wyandanch's immediate family, who had been named Sunk Squaw over both the Montauk and the Shinnecock by the English (Strong, 1985a:191; Pelletreau, 1877, Vol. II:36-37).

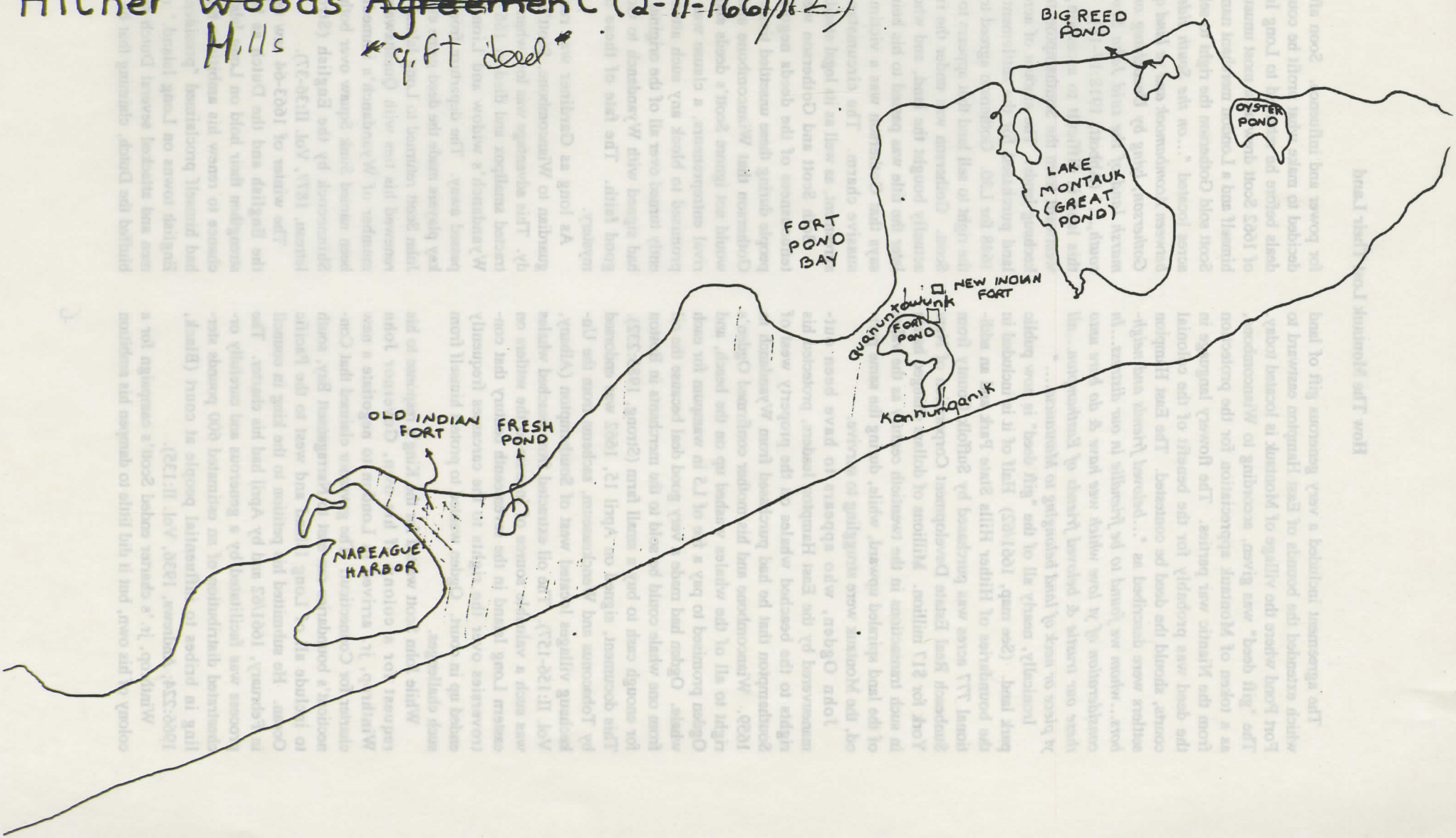
The winter of 1663-64 saw tensions rising between the English and the Dutch as both powers sought to strengthen their hold on Long Island. John Scott saw a chance to renew his ambitions for political power. He had himself proclaimed "president of the confederated English towns on Long Island," raised an army of 170 men and attacked several Dutch settlements. Scott also bluffed the Dutch, claiming that he had a valid title from

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~~Heather Woods Agreement (1658)~~

Hither ~~Woods Agreement~~ (2-11-1661/62)

Mills "gift deed"



Charles II to all of Long Island. Hoping to avoid a confrontation with England, Stuyvesant signed a truce with Scott .

During that winter the question of Montauk succession must have been a major concern on eastern Long Island. On the same day that Quashawam was recognized as the Sunk Squaw of the Montauk by the colonial authorities, she signed over her power of attorney to John Scott. Scott appears to have replaced the recently deceased Gardiner as guardian of the Montauk and assumed control over the future disposition of the land at Montauk. The town was now forced to deal directly with Scott, who appears to have convinced everyone except John Winthrop, jr. that he was an agent of the king. Scott was bought off with a bond of L450, four and a half times the amount promised to the Montauk (Ales, this volume).

Scott's rapid rise to influence ended soon after the English troops arrived to seize New Amsterdam from the Dutch. The newly established English authorities were soon convinced by John Winthrop, jr. that Scott was a trouble maker and, in the spring of 1665, exiled him to the West Indies. The colorful adventurer never returned to Long Island, and the authenticity of his claims to land at Montauk remain undetermined.

The new colony of New York under Governor Richard Nicolls established a code of laws called the Duke's Laws in honor of James, the Duke of York. A colonial commission now monitored Indian affairs under a new set of laws, one of which required that the purchase of Indian land be approved by the Governor. This provision had been enacted because so many private citizens and local towns were negotiating contracts with Indians, creating a chaotic legal nightmare for the colonial courts. The colonial authorities also wanted to prevent problems which arose when local settlers cheated Indians so blatantly that violence erupted. Questions now were raised about all the deeds signed prior to 1664.

In the fall of 1665, after the harvest was in, Governor Nicolls called the Long Island sachems and the leaders from the English towns to a meeting of his newly established court of assizes for a session which lasted several days (Albany, Vol. I:123-126). The governor established a precedent by meeting directly with the sachems and put the towns on notice that they no longer had a free hand in their dealings with Native Americans. The sachems and the governor agreed to eliminate, once and for all, the title of "Grand Sachem." This was undoubtedly a response to complaints from Native American leaders and settlers west of Southampton about the use of the title to validate Wyandanch's sales to Gardiner, Scott and others.

The following day Nicolls met with Quashawam and the East Hampton officials to settle the long standing controversy over the Montauk lands east of Napeague which had been signed over by Wiamcombone in the "sham" deed of 1660. The town signed a agreement with Quashawam on October 4, 1665, in the presence of the governor, which recognized the rights of the Montauk to all the land east of Fort Pond (Document No. 7). This important clause voided the 1660 deed negotiated by Gardiner and James, but it recognized the validity of the 1662 "gift deed" to Hither Hills. The Montauk agreed not to sell any of their remaining land to parties outside of East Hampton. The whites were given grazing rights at Montauk in exchange for a yearly fee of 40 shillings. Both agreed to pay for any damage done to each other's property. Quashawam also agreed to officially reject Scott's power of attorney.

The land agreements of 1665 were affirmed in a patent issued by Governor Nicolls in March, 1666/67 (Smith, 1926:30-32). East Hampton paid L150 to Governor Nicolls for a patent which included all of the land from the eastern border of Southampton to the end of Montauk. The patent officially endorsed the initial purchase of 1648 and the subsequent purchase of Hither Hills in 1662 (see map). The exclusive purchase rights to the remaining Montauk lands were authorized by the governor as a part of a political compromise between the colonial authority and provincial autonomy. The Governor wanted to bring some order to the chaotic scramble for Native American land on Eastern Long Island. East Hampton, jealously guarding its independence, was willing to acknowledge colonial authority in exchange for a guarantee that they could eventually annex the rest of the Montauk lands.

In 1670 the land question emerged once again amidst rumors of Montauk participation in a conspiracy to attack white settlements in New England and Long Island led by Ninigret, the Narragansett sachem (Trumbull, 1852, Vol. II:548-551; Bartlett, 1857, Vol. II:285; CAIP, I:18). The Reverend Mr. James reported these warnings to Nicholls' successor, Governor Lovelace, who refused to panic, noting that the Long Island Indians were in such a weakened state that they could not do much damage even if they had wanted (Ales, this volume). Lovelace also knew that the same Reverend James who sounded the alarm was still selling guns and powder to the Montauk (Thompson, 1918, Vol. II:101).

Ninigret went to the Governor of Rhode Island and assured him that he had no plans for attacking the whites. He did acknowledge, however, that he had negotiated with representatives from Montauk about an alliance as he had done in 1653. Apparently a schism had emerged in the leadership at Montauk, and Ninigret was attempting, once more, to gain support from one of the factions. Possibly Ninigret was encouraged by entrepreneurs in Rhode Island, who wanted to establish Narragansett authority over Montauk lands so they could buy the property in spite of the guarantees given to East Hampton in their patent. The crisis may have been a result of a con-

flict over succession following the death of Quashawam (Bartlett, 1857, Vol. II:270). The East Hampton officials moved quickly to disarm the Montauk and ended any further negotiations with Ninigret. On November 3, 1669 a new sachem, Poniutute, (also known as Mosup) along with five other Montauk, testified their loyalty to the governor of New York and the crisis was resolved to the satisfaction of the East Hampton officials (O'Callaghan and Fernow, 1887, Vol. XIV:627). Once again the East Hampton leaders appear to have intervened to make sure that factions friendly to them remained in control at Montauk.

The following year the connection between the new leadership and the land question became clear. The Montauk found themselves in debt to the colony of New York for 400 bushels of corn (Ales, this vol.). There is no explanation in the records for this unusually high debt, but Ales suggests that it was either a delinquent tax bill or related somehow to the "Ninigret scare."

The Reverend James, John Mulford, and Jeremiah Conkling from East Hampton agreed to pay the debt as long as the Montauk put up their land as a bond. This strategy was used successfully in many of the English colonies to force Native Americans to sell their land (Jennings, 1976:144-145; Strong, 1983:55). The Montauk had no way of making up the debt because they were living at a subsistence level on the margin of the colonial cash economy. It was inevitable that they would default on the debt. When this happened, the New York Colonial Indian commission recommended that the Montauks give a parcel of land to the three men. John Mulford, who was a member of the commission, had an obvious conflict of interest, but there was no one to raise the issue at the time (Albany, Vol. II:49-50).

Poniutute (Mosup) and several Montauk sachems signed a land transfer, recorded as the "Nine Score Acre Purchase" on December 1st, 1670 (Document No. 8). James, Mulford, and Conkling received a parcel of land running from Fort Pond eastward to the southern end of Lake Montauk and bounded on the south by the Atlantic Ocean. (See map, 1670) The town officials immediately challenged the deed as a violation of their exclusive purchase rights. The conflict between the town and the three private citizens was finally settled when James, Mulford, and Conkling accepted sixty acres of farm land in East Hampton for their Montauk parcel (Smith, 1926:131; Ales, this Vol.). Governor Lovelace refused to confirm the purchase until the town government had gained control over the land. Lovelace wanted to establish a clear precedent for public supervision and sanction of all purchases of Native American lands.

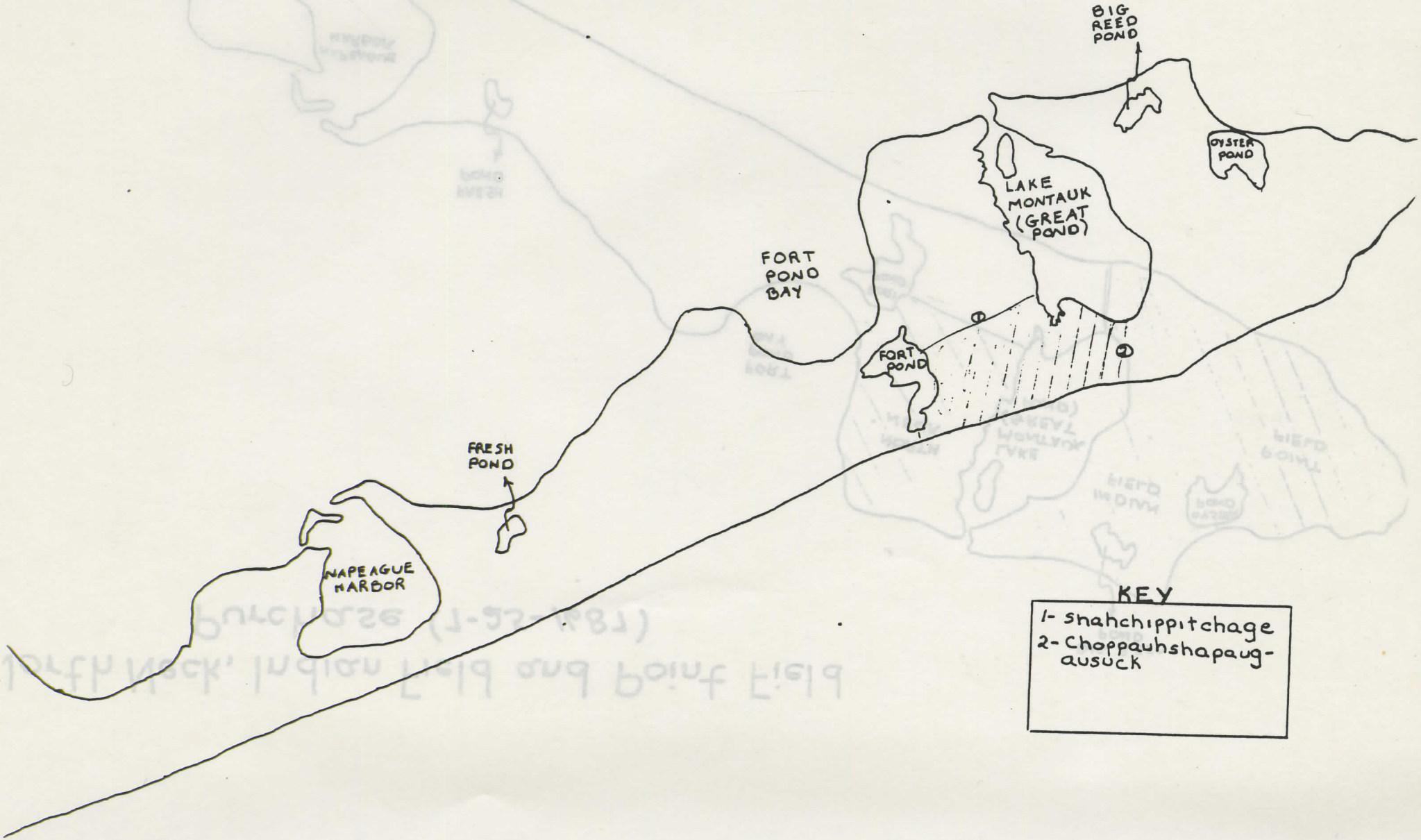
In 1686 Governor Dongan required all of the towns on Long Island to obtain new patents to replace the ones granted by his predecessors. The governor was seeking to gain more central control over the colony and to establish a greater degree of uniformity in administrative procedures. Dongan was particularly concerned with the disruptive potential of conflicts over land purchases from Native Americans. The governor realized, as had former Governor Nicholls, that the parcels of land in the towns which still belonged to Native Americans could become the center of future turmoil.

The new patent was similar to the existing Nicholl's patent with one very important exception. The new patent, which cost 200 pounds sterling, established a legal body called the Trustees of the Freeholders and Commonality of Easthampton. The trustees were vested with the power to supervise and sanction the purchase of land from the Montauk and to manage all of the undivided land in the town. The funds to make the purchase were put up by individual proprietors, however, not the taxpayers who elected the trustees. The patent, therefore, was a practical compromise between the feudal concept of crown property and the newly emergent concept of private property. The purchase of Native American land was clearly distinguished from all other real estate exchanges. This was consistent with the administrative strategy established by Governor Richard Nicholls and was designed to tighten control over the disruptive factors inherent in the purchases of Native American lands.

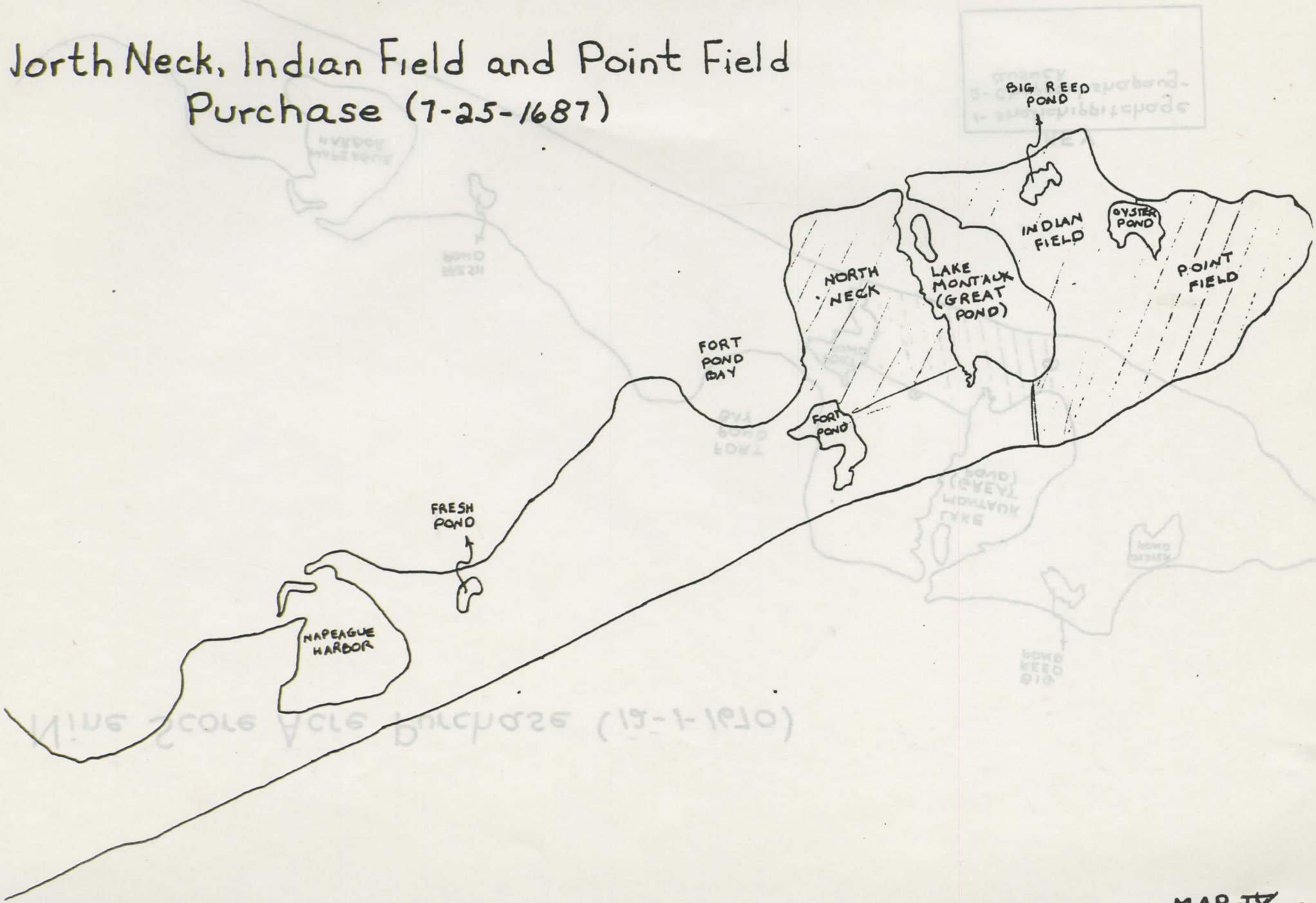
The following July the trustees negotiated the purchase the North Neck, Indian Fields, and Point Field at Montauk for 100 pounds sterling on behalf of the private proprietors. (See map, 1670) One of the Montauk sachems who negotiated the deed was identified as Wyandanch. Apparently Poniutute, who had sent a petition to Governor Andros in 1675 in which he said that he was the son and grandson of men who had been loyal to the English in times of troubles, had adopted his grandfather's name (O'Callaghan and Fernow, 1887, Vol. XIV:699-700). The other sachem was Sassakatakow, who had been one of Wyandanch's primary advisers in 1655. Sassakatakow, who had not been involved with the negotiations in 1660 and 1662 when Hither Hills was given away, may have disapproved of those transactions.

This new deed was written in the first person, as if Wyandanch and Sassakatakow themselves were speaking, giving the clear impression that the Montauk sachems' words were being carefully translated to the reader. According to the text of the deed, the payment was made in cash prior to the signing, "...a valuable sum of money in hand received to the value of one hundred pounds..." (Document No. 9). The next day, July 26th, the dilemma of the Native American presence on the land was again evaded with a "counter bond." The Montauk "...and their heirs Forever..." were given the right to plant corn on the land they had just sold (Document No. 10). Once again the "working misunderstanding" allowed Native Americans to use the land which absentee whites owned. The counter bond is also important because it underscores

Nine Score Acre Purchase (12-1-1670)



North Neck, Indian Field and Point Field Purchase (7-25-1687)



MAP IV

the role of the public trustees in the process. The bond is an agreement which guarantees that the trustees will protect the rights given to the Montauk in the initial deed. It is important to note that this agreement is between the Montauk and the trustees. The bond clearly demonstrates the intent of the Dongan Patent that all subsequent land transactions with Native Americans should be approved and monitored by the appropriate public body. This aspect of the Dongan Patent was to become a key element in the court battle which began in 1909.

A week later, on August 3rd, ten Montauk men were called back to confirm that they and their people fully understood the meaning of the deed and the counterbond. This endorsement was written on the bottom of the July 25th deed (Document No. 9). Undoubtedly the assurance given by the trustees that they would be responsible for protecting the rights of the Montauk described in the deed was a factor in persuading the Montauk to confirm the deal.

Some problems with the 1687 agreements did occur, and the trustees set up a committee in 1701 to investigate. The Montauk complaints were not mentioned, but the negotiations apparently did not go well because the committee reported that the Montauk were "...obstinate and averse to agreement...." The Montauk may have been concerned about a default in the corn payment promised by the proprietors because a year later the trustees agreed to send an amount of corn to them (Hedges, 1889, Vol. III: 7, 35-36).

During the fall of 1702 the Montauk seized an opportunity to improve their bargaining position with East Hampton. Lord Cornbury, who had been appointed Governor of New York that same year, ignored the guarantee of exclusive purchase rights claimed by East Hampton and sold a license to purchase all unclaimed Indian land in Suffolk County to Rip Van Dam, a wealthy New York merchant (Ales, this vol.; Strong, 1983:60). Sassakatakow and Wyandanch, who had signed the 1687 agreement, negotiated a deed with Van Dam to the area from Fort Pond to the eastern tip of Montauk. This grant included most of the area previously sold to East Hampton. The Montauk were given the right to plant and pasture anywhere east of Great Pond and a bond of 200 pounds sterling. Sassakatakow may have expected that the East Hampton trustees would renegotiate the 1687 deed with him if their monopoly over purchase rights was broken.

The trustees were alarmed and called upon the Montauk sachems to reject the Van Dam deed. Although a legal battle did develop between Van Dam and the East Hampton trustees that lasted until 1716, the Montauk were never able to gain any significant advantage. The trustees appear to have offset the improved bargaining position of the Montauk by employing a familiar tactic. The testimony given by Benjamin and Stephen Pharaoh to the New York Assembly in 1800 charged that alcohol was used by the trustees to confuse and distract the Montauk:

> *The agreement of 1703 is the one they are now oppressing us with every line of which is tinged with evident of fraud.... The East Hampton people have ever made it one rule when ever they want to make a bargain with us to attack us upon the weak side that is to say they always begin treating of us till they get us pretty well smo'd with white faced rum before they Devulge their business they always carry their points as they are often boasting of only get them in a right trim and we can do with them as we please* (Gonzales, this vol.)

This testimony was given nearly a century after the fact, so it does not carry the weight of an eye witness account, but it certainly is plausible. There is evidence that alcohol was used in a similar set of negotiations between Southampton and the Shinnecock later that same year (Strong, 1983:61, 88-103).

Four documents were signed on the third of March 1703, yet only a year before, the Indians were described as "obstinate" and refused to make any agreements. What accounts for their willingness now to reject Van Dam's deed and accept a far less favorable settlement with East Hampton? The only clue we have is the testimony of the Pharaohs, charging that the Montauk sachems had been "well smo'ked" with rum."

We do not know the exact order of the documents, but the texts suggest that the first agreement (Document No. 11) was the one endorsing the 1687 deed. It was written in the same style as the earlier deeds, as if the words were coming from the mouths of the Montauk through the pen of the translator to the reader. The Montauk confirmed the 1687 deed and defended it from the people who *"...reported that our deed of conveyance to the said proprietors for the said tract of land was but a pretended deed...."* We do not know who the critics were, but the accounts in the town records of Indian complaints and "obstinacy" indicate that many Montauk did not agree with the words which were attributed to Sassakatakow and his associates in this document.

After confirming the 1687 deed, the sachems went on to explain that they had received only half of the 100 pounds payment and could have received all of it if they had wanted it, *"...but we are willing the money should lye in the said proprietors hands...and do by these presents fully and clearly acquit and discharge the said proprietors of and from the whole sum of one hundred pounds on said deed mentioned."* The Montauk were to be paid a yearly interest of forty shillings on the initial purchase price. The trustees apparently believed that this settlement would protect the Montauk from being cheated out of their money as soon as the deed was signed. Once again the paternal role of the trustees in Native American affairs was clearly demonstrated.

The second document also asserts the role of the trustees established in the Dongan Patent as arbiters in disputes between the proprietors and the Montauk (Document No. 12). It must have been very difficult, however, to convince the Montauk that the trustees were an objective and disinterested third party. The document is a guarantee from the trustees, promising the Montauk that they will monitor the payments from the proprietors. The trustees certified that the price for Montauk was 100 pounds sterling, but warned the Indians that none of this sum nor the interest would be paid until the Rip Van Dam claim was voided. Once that issue was settled, the proprietors were to begin a yearly payment of forty shillings in interest. The Montauk were guaranteed that they could demand the full amount any time after the Van Dam claim was cleared. Once this was paid, of course, the yearly income of forty shillings would cease.

The trustees, anxious to deflect any hint of manipulation or intimidation, called in colonial officials from outside the town to witness the signing. The great concern to establish the appearance of fairness undoubtedly reflects the atmosphere of suspicion which surrounded the majority of dealings between Native Americans and whites during this period. These strategies failed to impress many of the Montauk, who passed along to succeeding generations the accounts of fraud which were written down by the Pharaohs in 1800.

The third document provides some insights into the political relations which were developing between Montauk and East Hampton (Document No. 13). The Montauk were not citizens of the town but the town had, over the preceding half century, gradually increased its authority over them. The East Hampton leaders appear to have included the Montauk in a general political category with "propertyless" whites, slaves and servants. These people had no vote but were expected to obey all of the laws passed by the town. The Montauk, however, were not so easy to control because they had never accepted membership in the East Hampton community. Individual Montauks who violated town ordinances were hauled before the town court and punished, but different mechanisms had to be employed to regulate the collective actions of the Montauk band. There was no precedent in English law for this situation.

The solution seized upon by East Hampton was a variation of the traditional English bond system, which used the threat of property confiscation and debt to control behavior. This approach had often been used as a means of social control over Native Americans on Long Island, but this time the amount of the bond was most unusual. The Montauk agreed to a bond of 2,000 pounds sterling, payable to the trustees, if the Montauk should ever challenge the 1687 deed or interfere with the town's use of the land in the future. This was an exorbitant amount, well beyond the means of the small community, and may reflect the anger and frustration felt by the whites over the Van Dam deed. If the Montauk violated the letter or spirit of any existing "agreements" they could lose their lands and, perhaps, even their individual freedom. The bond was a legal club which could be wielded any time the trustees wished. This reduced the Montauk to the position of serfdom, with no rights of redress whatsoever. The East Hampton trustees must have put considerable pressure on the sachems to gain their approval.

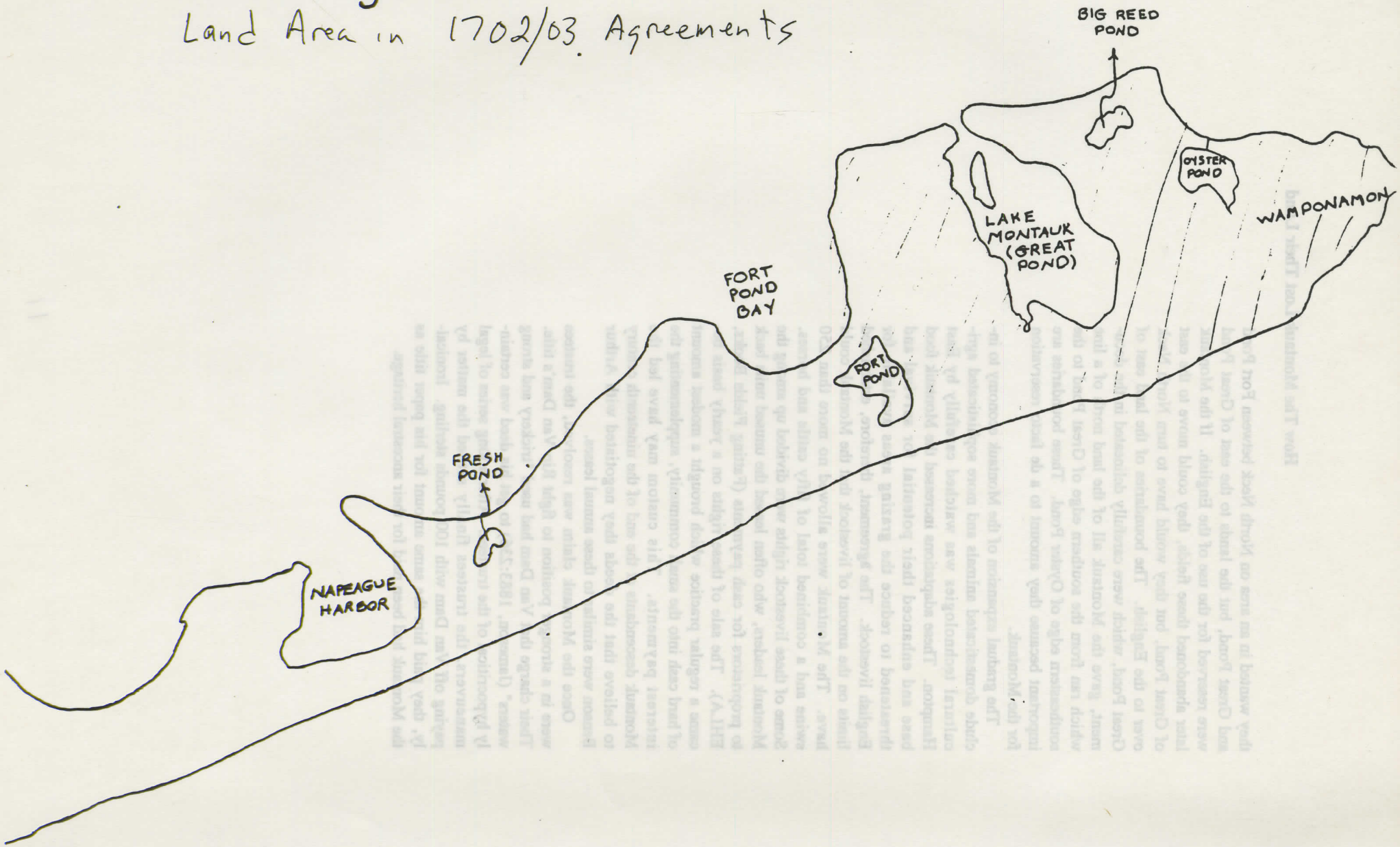
The fourth document set the terms for land use at Montauk. (See map, 1702/03) The first issue addressed was the long history of conflicts over this issue. These *"...sundry differences between the ...proprietors...and the Meantaukett Indians concerning the Indians improving a part of the said land..."* (Document No. 14) were rooted in the ambiguous nature of the 1687 deed and counter bond. The Montauk tenancy was never clearly defined in terms that bridged the enormous cultural gap in attitudes towards the land.

The agreements regulating access to grazing lands at Montauk which had been established back in 1655 were restated. At that time, apparently, the Montauk were not planting extensive fields of their own, nor were they raising much livestock. By the end of the century, however, more acreage was under cultivation, and domestic animals had become essential to the Montauk economy. Many of the old customs, of course, were continued with some modification. The Montauk, like many eastern coastal bands, used fire to open up new planting fields. Often large areas of wood lands were also burned over. This pattern of seasonal burnings, considered both wasteful and dangerous by the English, may have been a factor prompting the East Hampton trustees to carefully regulate the land use at Montauk. The impact of these fires on the ecology was not entirely negative; in fact, modern ecologists have concluded that the selective burnings cleared out the understorey trees, allowing growth of strawberries, blueberries, blackberries, and grasses which attracted large game animals such as deer and elk (Cronon, 1983:48-50). The plants which were nourished by the ashes actually promoted an increase in other important sources of the Native American diet such as hare, turkey, quail, and grouse.

Another related characteristic of the eastern coastal bands was the mobility of their settlements. Village sites were easily shifted prior to adaptation of European manufactured goods and wooden houses. Although the Montauk were gradually becoming less and less mobile during the later decades of the seventeenth century, they apparently wanted the option to relocate across Great Pond (Lake Montauk) at some time in the future. The agreement, therefore, permitted the Montauk to occupy either North Neck between Fort Pond and Great Pond or the land east of Great Pond, but never both areas at the same time. The Montauk could fence as much land as

~~1701 Agreement~~

Land Area in 1702/03 Agreements



they wanted in an area on North Neck between Fort Pond and Great Pond, but the lands to the east of Great Pond were reserved for the use of the English. If the Montauk later abandoned these fields, they could move to the east of Great Pond, but they would have to turn North Neck over to the English. The boundaries of the land east of Great Pond, which were carefully delineated in the document, gave the Montauk all of the land north of a line which ran from the southern edge of Great Pond to the southeastern edge of Oyster Pond. These boundaries are important because they amount to a de facto reservation for the Montauk.

The gradual expansion of the Montauk economy to include domesticated animals and more sophisticated agricultural technologies was watched carefully by East Hampton. These adaptations increased the Montauk food base and enhanced their potential for survival and threatened to reduce the grazing areas available for English livestock. The agreement, therefore, established limits on the amount of livestock that the Montauk could have. The Montauk were allowed no more than 250 swine and a combined total of fifty cattle and horses. Some of these livestock rights were divided up among the Montauk leaders, who often leased the unused units back to proprietors for cash payments (Fatting Fields Books, EHLA). The sale of these rights on a yearly basis became a regular practice which brought a modest amount of hard cash into the small community, supplementing the interest payments. This custom may have led the Montauk descendants at the end of the nineteenth century to believe that the deeds they negotiated with Arthur Benson were similar to these annual leases.

Once the Montauk claim was resolved, the trustees were in a stronger position to fight Rip Van Dam's title. Their charge that Van Dam had used "trickery and strong waters" (Jameson, 1883:236) to get his deed was certainly hypocritical of the trustees. After a long series of legal maneuvers, the trustees finally settled the matter by paying off Van Dam with 100 pounds sterling. Ironically, they paid him the same amount for his paper title as the Montauk had been paid for their ancestral heritage.

Part Four:
"...NOT A NATURAL PERSON, NOR A CORPORATION..."

Austin Corbin and Charles Pratt revealed their plans for Montauk when they had a bill introduced into congress in 1894 asking for authority to operate a duty free port facility at Montauk. Corbin had organized an international steamship line, which he planned to link up with a railroad terminus at Montauk. In June of 1895 Corbin and Pratt purchased 5,000 acres of land in Hither Hills and around Fort Pond from the Bensons, for $200,000. The following month the two developers founded the Montauk Company, a multi-million dollar corporation, to take the lead in their ambitious plans. Later that year the railroad terminus was completed on the northern shore of Fort Pond Bay right on top of the most productive cranberry bog on Montauk. Harriett Crippen Gumbs, a member of the Shinnecock reservation whose ancestors include both Shinnecock and Montauk, recalls hearing her uncle tell about Montauk women who gathered cranberries there for jelly (Document No. 18). The amount of money received by the Bensons must have come as quite a shock to the Montauk, who had signed away rights to nearly twice as much land for a few hundred dollars.

When the word of these transactions spread to Montauk people living in New England, Pennsylvania, and other areas of Long Island, several of them contacted the Pharaohs and the Fowlers. Some were angry with Maria and her family for signing individual deeds, but the Pharaohs argued that they had been deceived by Benson. The Eastville and Freetown bands, stung by such criticism, raised questions in turn about the claims being made by some of their critics to Montauk ancestry. Such divisions are an inherent potential in any community and should be considered in that context. Anthropologists refer to such temporary divisions as part of a process of fission and fusion, wherein communities under stress often resolve internal tensions by splitting into smaller groupings and moving apart for a period of time. These groups, or remnants of them, frequently "fuse" when an external threat faces them. The move to unify the scattered Montauk groups in a fight for the land was a part of the fission-fusion process, but it was later characterized by Benson's lawyers as evidence that the plaintiffs were merely a few individuals who had temporarily joined together to squeeze more money out of the Long Island Railroad and the Benson family.

When the members of the Montauk "Diaspora" came to understand the pressures and tactics used by Benson, they put aside most of their differences to join with the Pharaohs in the struggle. Although these tensions did reemerge after the court battle was over, the united front held through a long and difficult struggle against overwhelming odds. Maria's son, Wyandank Pharaoh, who had been born at Indian Fields on Montauk in 1863 or 64, reminded the reporter from the *Brooklyn Daily Eagle* that he was not *"...the last of the Montauk ... There are from one hundred to one hundred and fifty of our tribe still left, and although they are scattered all over the country from Montauk to California, they are all interested in this suit"* (*Brooklyn Daily Eagle*, Oct. 20, 1895).

Did this fusion of interests constitute a community? That question became central to the struggle for restitution of the Montauk lands. Although there was no geographic base and no political structure beyond the committee which met to oversee the court battle, there was a community of interest, a shared goal, and a shared historic and cultural tradition, which inspired some of the Montauk to perceive of themselves as a "Diaspora" in search of a homeland for the scattered tribal remnants. Ironically, the extension of the railroad and the development of land around Lake Montauk now made the resurrection of a viable community at Montauk possible. Many of the native peoples had left Montauk during the nineteenth century because of its isolation from jobs and markets. The possibilities for a cultural and economic rebirth undoubtedly encouraged many to consider returning to Montauk.

One of the people who came back was the Reverend Eugene Johnson, a Presbyterian minister from Philadelphia. In 1895, at a Montauk community meeting, a committee was established to hire an attorney and challenge Benson's purchase of the Montauk land claims. Johnson served as secretary, but, unfortunately, no minutes of the proceedings have survived. Wyandank Pharaoh was chosen to take over the leadership of the Montauk from his mother. Wyandank's father David, who had been recognized as the leader of the Montauk community, died when Wyandank was only eleven. The young Montauk, who had been named after his famous ancestor, never had much formal education, but he set forth to challenge the combined strength of several large corporations. It was a struggle that impoverished him and contributed to his early death at the age of 57.

When word of the Montauk intentions reached the local whites, they openly ridiculed the Montauk. An East Hampton resident, quoted in a *Brooklyn Times* article, stated that the Montauk were "darkies" not Native Americans. Many of the whites held similar views, but one distinguished citizen came to their support. When William Wallace Tooker, a nationally recognized expert on Native American culture, championed the Montauk cause, people were forced to take them more seriously. Tooker was a life long resident of Sag Harbor who had taken a personal interest in the local Native Americans. Tooker wrote a lengthy rebuke to the *Times* article in which he made three major points. First, he testified that Native American features were still prominent in many Montauk; second, he quoted from Judge Dykman's confirmation of Montauk tribal status in the Grinnell case; and, third, he

concluded that the sale of Montauk land by individual members of the tribe had no standing in law (Tooker, this volume). Although Tooker's article had given the Montauk cause more credibility with some local whites, the real battle was in the courts.

Austin Corbin suffered an untimely death in 1896 when he was thrown from a runaway carriage while vacationing in New Hampshire. Soon after, the U.S. Congress rejected the proposal for a duty free port at Montauk on constitutional grounds. In spite of these setbacks, the Montauk Company completed construction on new roads, a post office and a pier in 1897.

Wyandank contacted lawyers in Washington and was advised to get permission for the Montauk community to bring suit in the New York courts against the Long Island Railroad Company. This advice is rather curious in light of the 1871 ruling which accepted the right of the tribe to sue in the New York courts. Even more curious is the fact that Judge Downing's findings were never used in any of the subsequent trials involving the Montauk land claims in spite of their direct relevance to the crucial questions about tribal recognition.

Judge Eleary Scott and his New York firm of Curtis and Scott were retained by the Montauk to handle the case. They were aided by Francis Morrison, a lawyer from Worcester, Massachusetts who was experienced in Native American law. Morrison, in 1879, had successfully argued for the rights of Native peoples in Massachusetts to be enfranchised and to be eligible for some monetary compensation from the state (*The Sag Harbor Corrector,* Dec. 16, 1899). Since that time, the Massachusetts lawyer had been involved in cases for many other Native American groups, including the Mohegan, who were close relatives of the Montauk. During the early fall of 1896, Morrison learned of Nathaniel Dominy's estrangement from the Benson family and visited him in East Hampton. No record of this meeting exists, but it must have been approached rather cautiously by both men. Dominy knew that Morrison was working on the case for the Montauk against Benson, yet he was willing to help him. Morrison later told a reporter that there was an interesting story behind this meeting, but the details were never revealed. All we know for sure is that Dominy showed Morrison copies of his correspondence with the Bensons during the time that they were negotiating with the Pharaoh family for the Montauk land. The letters revealed the nature of the Bensons' campaign to force out the Montauk (Senate:60-78).

Morrison tried unsuccessfully to review the Montauk documents taken by Benson from the Montauk Trustees. Although the documents were public records, and Arthur Benson had once promised to make them available to the public, Frank Benson responded to Morrison's request, in a letter written on October 26, 1896, telling him that he was not *"...willing to grant your request that you be allowed to examine the papers in my keeping at Montauk"* (Senate:78, Exhibit 50). Benson's actions were never challenged by the Trustees of Montauk, who were, according to their charter of incorporation, responsible for the treaty rights granted to the Montauk tribe.

In spite of this disadvantage the Long Island Railroad Company was issued a summons by *"The Montauk Tribe of Indians by Their Chief and King, Wyandank Pharaoh, plaintiff"* on December 6, 1896, and a month later an application was filed to bring suit in the New York State courts. This action was approved by Judge Benjamin Reeve in January, 1897 at the county court in Riverhead. Reeve, a local resident whose family had lived in the area since 1656, was applauded by the local press for *"...his sense of fairness and his conclusion to give the Indians full opportunity to establish their rights...."* (*Brooklyn Daily Eagle*, January 23, 1897). By this time, however, the development of Montauk involved several interconnected corporations: The Long Island Railroad, The Montauk Company, The Montauk Extension Company, and the Montauk Improvement and Dock Company. Lawyers for these corporations were now arrayed against the small Montauk community.

The Montauk suit against these powerful interests, filed on February 5, 1897, charged that the defendants were in unlawful possession of all the land from Napeague beach to Montauk point (Senate:119-124). The attempt to reclaim all of the land from Napeague to Montauk point may have been a tactical error because it required that all of the existing deeds be declared void. The analysis of these deeds presented in chapter one certainly suggests that the transactions were quite vulnerable to such an attack, but the mood of the times was far too sympathetic to the business interests intent on developing Montauk to expect that all of the land from Napeague to Montauk point would be returned. The Montauk, however, apparently decided that they could not compromise on such an important issue.

In his response to the suit, William Kelly, the attorney for the railroad, set the strategy which would become the cornerstone of their defense against Montauk claims. The legitimacy of the Montauk land claims was not addressed; instead, Kelly filed a demurrer, objecting to the plaintiff's case on the grounds that a Native American tribe had no legal standing before the New York State court and could not, therefore, bring suit. The fact that David Pharaoh, acting for the Montauk tribe, had sued in the New York supreme court in 1871 was simply ignored by the defense because the plaintiff never mentioned the precedent.

Morrison had collected an enormous amount of data about eastern coastal Native Americans, which he stored in the "Indian Room" of his home, to support the legal argument for the continuous existence of the Montauk as an organized community. According to an article in the

The Sag Harbor Corrector, one item in his collection was *"...a battered and worn ledger, thin in size and yellowed by having been long buried in the earth."* The book was reportedly a membership role for the Montauk, containing a record of tribal actions from 1800 to 1896. These documents would have been vital to the Montauk case because they were evidence of organized tribal existence, linking the current generation of Montauk to their ancestors. In order to protect these data from the fate of the East Hampton records taken from the trustees by Benson, the Montauk elders apparently buried them in a safe place on Montauk. Morrison told the reporters that the elders had turned them over to him and that he would enter them into the trial records at the appropriate time.

Morrison also told *The Sag Harbor Corrector* about the packet of twenty-eight or thirty letters written by the Bensons and Nathaniel Dominy. These letters, said Morrison, would prove that deceit, fraud, and intimidation were used to get the Montauk signatures on the bills of sale. According to the reporter, there was an "exciting" story about the manner in which Morrison obtained the letters, but the lawyer merely shook his head and smiled when asked about the details, saying *"...it will all come out at the right time."* The lawyer also had other valuable materials relating to the history and culture of the Montauk, including wills, military records, and photographs. These materials would be of great value, he believed, in determining that the tribe had a continuing existence over time.

Unfortunately for Morrison and the Montauk, none of these data were considered by the court when Kelly's demurrer was reviewed. Why Morrison did not introduce the 1871 findings by Judge Downing is indeed a puzzle. It is difficult to imagine how such an important precedent could have been overlooked by the plaintiff's attorney. The only question considered was the right of the Montauk people to bring suit, a consideration which had been settled in 1871 by Judge Downing when he accepted Chief David's suit. State Supreme Court Judge S.T. Maddox, on October 4, 1897, agreed with Kelly and ruled that *"...the plaintiff has not legal capacity to sue, in that said plaintiff is not a natural person, nor a corporation...authorized by law to maintain an action as a tribe* (Senate:125). The court suggested that the legal technicality could be overcome if the case were brought in the name of a citizen who had a legal standing rather than in the name of the tribe. The case was appealed by Morrison, but the Appellate Division of the State Supreme Court agreed with Maddox, stating that *"...the Indians were never recognized either by Congress or the Courts as a separate power that could sell land or maintain an action at law"* (*The Sag Harbor Corrector*, April 23, 1898). Yet the Montauk had done so in 1871.

Judge Maddox's ruling reflected the ambiguous legal status of Native American peoples prior to June 2, 1924 when Calvin Coolidge signed a bill imposing U.S. citizenship on all *"...noncitizen Indians born within the territorial limits of the United States and they are hereby declared to be, citizens of the United States."* The question of citizenship status differed from state to state, but in most of the eastern United States, the issue was often settled on a *de facto* basis. If Native Americans voted and were not challenged when they went to court, they would likely be treated as if they were full citizens. The legal standing of Native American tribes was equally ambiguous.

Undaunted by these technical uncertainties, the Montauk engaged the Brooklyn law firm of Leman Treadwell to work with Francis Morrison on their case. In June of 1898, the Reverend Eugene Johnson, who was both a certified citizen and a Montauk, sued the Long Island Railroad Company. Unlike Wyandank, Johnson sued in his own name as an interested party in the land claims of the Montauk tribe. Once again Charles Kelly, who led the team of lawyers for the corporations, demurred, raising the same objections as he had in the Wyandank case.

In an ironic footnote to these court proceedings, the U.S. Army occupied the Montauk land on North Neck. On August 9, 1898, thousands of soldiers returning from a very popular war began arriving at Montauk. One section of the encampment was located on the high ground overlooking Fort pond where several burials had been found earlier in the century. The military construction may well have destroyed valuable archaeological data and disturbed sacred burials, but there was little concern, at the time, for such matters. The nation's attention was focused on the soldiers, who were temporarily stationed there under quarantine to make sure that they were free of all contagious diseases before they could be sent home. The U.S. government leased the land from the Long Island railroad, subject to any claims that the Montauk might have. The War Department demanded that the railroad issue a bond protecting the federal government from any legal actions in this regard (Senate:36).

That same year Wyandank Pharaoh married Florence Van Houten, the daughter of musician and orchestra leader James Van Houten. The couple established their home in Freetown, a segregated suburb of East Hampton, where they lived for several years. The Montauk leader supported himself and his new bride by working as a carpenter and a mason, but a large share of his earnings were used to help pay for the court costs. Although he was reputed to have been an excellent craftsman, his earnings were undoubtedly meager.

The first ruling in the special term sustained Kelly's objection on the grounds that Johnson could not bring an action for an entity which had no standing. This decision was overruled on July 1, 1899 by the appellate court on the grounds that Johnson was acting in accordance with

the Maddox ruling (*The Sag Harbor Corrector*, July 15, 1899). Later that year, Morrison and Treadwell won another procedural victory. On December 9, 1899, the Montauk lawyers were given permission to reopen their case. The powerful forces behind the developers refused to accept this turn of events and rallied their lawyers to appeal. The Court of Appeals Judge, J. Bartlett, reversed the previous ruling on April 17, 1900 on the grounds that Johnson's suit was *"...contrary to the policy and which have been long established in our treatment of Indian tribes. They are regarded as wards of the State, and, generally speaking, possessed of only such rights to appear and litigate in courts of justice as are conferred upon them by statute"* (Senate: 27). Before the tribe could initiate any action in court, the state of New York had to grant permission for the tribe. At every turn another difficult obstacle was pushed in front of the small Montauk community, yet they refused to give up the struggle.

Although the 1871 Montauk suit was again ignored, Judge Bartlett did address an issue which was relevant to both court actions. Morrison argued that Johnson could sue on behalf of the Montauk tribe because of a precedent set in a previous supreme court decision involving a charge of trespass brought by the Seneca against some whites who were encroaching on their land. The Seneca were not a legally recognized body and, like the Montauk, had no remedy before the law to protect their lands. The court ruled that two Seneca chiefs, Strong and Gordon, could bring suit on behalf of the tribe. Judge Bartlett rejected this precedent on the grounds that the Seneca case involved the trespass of outsiders onto land in possession of the Seneca, whereas the Montauk case sought the eviction of parties who sat in possession of lands claimed by the plaintiff. It is possible that Morrison was discouraged from raising the 1871 precedent because of its obvious similarity to the Seneca trespass case.

The following fall Morrison and Treadwell reviewed the Montauk case in a hearing before a subcommittee of the U.S. Senate Committee on Indian Affairs held at the Fifth Avenue Hotel in New York (Senate Hearings, 1900). They appealed for the United States to take action which would enable the Montauk to get their day in court. In lengthy testimony the Montauk lawyers presented evidence supporting their case. The letters described to the reporter for the *The Sag Harbor Corrector* a year earlier were entered into the record, but the "exciting" story describing Morrison's acquisition of the correspondence was never told. All of the documents which Morrison could locate were placed in the record and several friendly witnesses were called to testify about the Montauk case. Morrison called Nathaniel Dominy to the stand to testify but he was very reticent and frequently cited poor memory when pressed about his relationship with the Bensons (Senate, 51-59).

Treadwell told the subcommittee that New York state law cited in Birdseye's Revised Statutes, Codes and General Laws of New York, vol. 2, page 1511, section 12., had been clearly violated by both Benson and the Long Island Railroad Company. When Benson purchased the land claims from the Montauk, said Treadwell, he broke the following statute:

> *A person who, without the authority and consent of the legislature, IN ANY MANNER OR FOR OR ON ANY TERMS PURCHASES ANY LANDS WITHIN THIS STATE OF AN INDIAN RESIDING THEREIN, OR MAKES ANY CONTRACT WITH ANY INDIAN for or concerning the sale of any lands within this state,or gives, sells, demises, conveys, or otherwise disposes of any such lands or any interest therein, or offers to do so, or enters upon or takes possession of or settles upon any such lands, by pretext or by color of any right or interest in the same, in consequence of any such purchase, or contract made or to be made, since October 14, 1775, IS GUILTY OF A MISDEMEANOR.*

Treadwell also argued that the Long Island Railroad violated a law which had been passed in 1900 to regulate the purchase of native American land by railroad companies. Any railroad corporation may contract with the chiefs of any nations of Indians, over whose lands it may be necessary to construct its railroad, for the right to make such road upon such lands,

> *BUT SUCH CONTRACT SHALL NOT VEST IN THE CORPORATION THE FEE TO THE LAND NOR THE RIGHT TO OCCUPY THE SAME FOR ANY PURPOSES OTHER THAN MAY BE NECESSARY FOR CONSTRUCTION, OCCUPANCY AND MAINTENANCE OF SUCH RAILROAD, AND SUCH CONTRACT SHALL NOT BE VALID OR EFFECTUAL UNTIL IT SHALL BE RATIFIED BY THE COUNTY COURT OF THE COUNTY WHERE IT SHALL BE SITUATED* (Senate:127-128).

It seemed clear to both Treadwell and Morrison, at the time, that once the issue of tribal standing was resolved and the case came before a judge, the Benson deeds would be declared void.

There was, however, no consensus among jurists, politicians or anthropologists about what constituted a "tribe." The term "nation," which had been used prior to the twentieth century, had gradually been displaced by "tribe" in most federal government references (Weatherhead, 1980:6). It was, nevertheless, an arbitrary label imposed on the native Americans by whites as a convenient way of distinguishing between "tribal" society and "civilized" society. A.L. Kroeber, one of the early pioneers in the development of modern anthropological theory, noted that, *"It was we Caucasians who again and again rolled a number of obscure bands or minute vil-*

lages into the larger package 'tribe' which we then putatively endowed with a sovereign power and territorial ownership which the native nationality had mostly never claimed." (Quoted by Weatherhead, 1980:6).

The complicated question of legal standing for Native American "tribes" came before the Supreme Court several months after Bartlett's decision on the Montauk case. Argument began on December 14, 1900 in a case involving events far distant from Long Island, but the outcome was to have a crucial impact on the Montauk case. In 1891 a law was passed which enabled settlers in the southwest to recover damages done by Native Americans who left their reservations and raided isolated ranches and small settlements. The law stipulated that attacks by *"...Indians belonging to any tribe, band or nation, in amity with the United States..."* could be recovered from the Federal government and the tribe (*U.S. Reports*, 1901:261-262). The premise here was that the U.S. and the tribal authorities were responsible for maintaining law and order and had to take responsibility for the actions of individual members. In the event that the band, tribe, or nation was at war with the United States, no such recovery was possible.

The law enabled many property owners in the southwest to apply for the recovery of damages incurred during the preceding decades of conflict involving Native Americans who resisted forced settlement on the barren reservation lands. The case before the court in 1900 was brought by Estanislao Montoya, a New Mexico rancher, to reclaim damages caused by a raiding party of Apaches led by the legendary warrior, Victorio, in 1880 (Montoya V. United States, *U.S. Reports*, 1901:260-263).

Victorio, a Chiricuahua Apache, led a small group of followers off the San Carlos reservation at the beginning of 1879 and was soon joined by members of Mescalero and other related Apache bands. By the spring of 1880, Victorio's small band included about ninety men and over one hundred women and children. For about two years this rather unwieldy community outwitted, out fought, and out maneuvered a well equipped U.S. Cavalry troop of one thousand men, who chased them back and forth across the southwest. In March the Apache stole an estimated $3,000 worth of horses, mules, and cattle from the Montoya ranch. Several months later, with food and ammunition running low, Victoria and his people sought refuge in Mexico. The Mexican government, however, was cooperating with the U.S. in its campaign to destroy all Native American resistance to the forces of progress. Victorio's people were surrounded by a combined force of Mexican and U.S. cavalry and soon ran out of ammunition. In a final assault, which was described as more of a massacre than a battle, Victorio was killed, and over half of the men women and children were slaughtered (Terrell, 1969:342-343).

The U.S. court of claims rejected Montoya's appeal on the grounds that Victorio's followers constituted an independent band, a legal entity at war with the United States, and therefore not under the jurisdiction of the U.S. or the Apache tribes living at peace on the reservations. Neither the United States nor the Apache tribes were liable for damage done by Victorio's followers. Montoya appealed to the U.S. Supreme Court, arguing that Victorio was a bandit leader of a small group who were under the jurisdiction of both the U.S. and the Mescalero Apache tribal leaders. The judges focused on the definition of an Indian "tribe, band and nation." Did Victorio's small group constitute a "band" acting independently of any other "band or tribe" ? The court defined a "tribe" as a *"...body of Indians of the same or a similar race, united in a community under one leadership or government , and inhabiting a particular though sometimes ill defined territory..."* (*U.S. Reports*, 1901: 266) Victorio's followers did not meet that criteria, but were they a band? A "band" was described as *"...a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design."* (*U.S. Reports*, 1901:266). The size of the band is not necessary to stipulate, said the court, because the controlling factor is evidence of leadership, continuity of existence, and independent, concerted action.

Victorio's small community, made up of remnants of at least three different Apache bands, therefore, met the standard for an independent existence beyond the control of the recognized Apache tribe. Montoya was again denied recourse for his claims. In another case argued about the same time, the question of what constitutes a "band" was also a central issue. In Conners V. United States (*United States Reports*, 1901: 271-276), the term band was applied to a group having *"...inferior and less permanent organization (than a tribe), though it must be of sufficient strength to be capable of initiating hostile proceedings."* A band, however, has no standing before the court, nor could it be given federal or state recognition.

The Montoya criteria soon became a fixed reference point in cases involving tribal status and Morrison and Treadwell undoubtedly realized that this might pose problems for them. The Montauk were scattered across Long Island and would have difficulty convincing a judge that they constituted a community under one leadership. Although the two enclaves in Eastville and Freetown, working together under Wyandank's leadership, might satisfy the definition set by a contemporary anthropologist today, the judges in 1900 were another matter.

The Montauk's lawyers hoped to avoid a challenge to tribal status by obtaining a legislative act which would both recognize the tribe and give it permission to sue. The courts would then have to accept the existence of the Montauk tribe as a fact which was not open to challenge. This was no easy task. Morrison and Treadwell went to

Albany to lobby for the bill, which was introduced in the judiciary committee early in 1901. Harriett Crippen Gumbs remembers her grandmother telling her about the trips she made to Albany with Morrison, helping him to lobby for the bill (Gumbs this Vol.). They managed to get Governor Roosevelt to speak to the chairman of the judiciary in favor of the enactment, but even Roosevelt's support was not enough to offset the influence of the corporate interests developing Montauk. The bill was not passed.

The Montauk were also unable to get any help from the United States government, in spite of the Senate Hearings. Wyandank left Long Island soon after 1901, perhaps in despair about the frustrating obstacles which he had encountered. He must have been sobered by his five year struggle against the combined strength of the Bensons, the Pratts, and the Long Island Railroad. The small community of uneducated Native Americans with meager finances had been defeated by the wealth and power of corporate interests dedicated to progress and development. Wyandank took a job in Connecticut where he lived for the next five years.

Unfortunately for the remaining Montauk, Francis Morrison died on July 15, 1901. Late in the summer of 1901, a meeting was held in Sag Harbor, probably at the home of Maria Banks, which was attended by Montauk, Shinnecock and Narragansett Indians. They decided to hire a new lawyer and continue their struggle for the Montauk lands (*East Hampton Star*, Sept. 6, 1901). The Reverend Eugene Johnson wrote an open letter to all members of the committee on February 3, 1902, informing them that he had visited Albany three times and Washington twice to lobby for legislation which would enable them to initiate a suit. Johnson also called upon the members to pay $1.50 in dues for six months' dues. Those who did not pay would be removed from the membership list.

In spite of Johnson's enthusiasm, Pocahontas Pharaoh lost hope and signed away her rights in 1903 in a deed negotiated by Frank Stratton (Cases and Points, Plaintiff's Exhibit L:395). The next year, however, other members of her family took the struggle to a new level. In the fall of 1904 four Montauk men, Ebenezer and Samuel Pharaoh and George and John Butler decided to take direct action and staged what may be the first non-violent sit-in for minority rights in U.S. history. The men built a wigwam at Montauk and stayed there for a time hunting birds and, according to the charges brought by Nathan Petty, the company lawyer, committing *"...various other forms of trespass."* When the company superintendent came to order the men off the land he was "...roundly cursed" and told to leave. The local police were notified and the four Montauk men were arrested and forcibly removed (*Brooklyn Daily Eagle*, Nov. 18, 1904). A charge of malicious trespass was entered against the men. Perhaps moved by a sense of the historic irony in such a charge against the descendants of the original inhabitants, the four Montauk remained silent and refused to defend themselves in court. Ebenezer, the younger brother of Wyandank, was apparently regarded as the leader by the court because he was sentenced to pay a fine of $5 or to spend five days in jail, but the others were given suspended sentences. Wyandank testified at trial in 1909 that he had plowed and planted on Montauk in 1906 to test the Montauk rights again (Cases and Points, Case On Appeal:188-199).

Unfortunately we have no documentation for the activities of the Montauk over the next two years. During that time Charles O. Maas, an attorney from New York city, was retained to pursue the case in court. Maas managed to get another enabling bill introduced into the state assembly in 1906. The bill was sent to the judiciary committee again, and this time several amendments were added (Document No. 17). One of the amendments stipulated that the enabling act did not grant state recognition of the Montauk's status as a tribe (Document No. 17). Benson's friends in the state legislature must have been pleased with this wording because the corporation lawyers could now challenge the existence of the Montauk tribe. The clause stated that *"The question as to the existence of the Montauk tribe of Indians shall be a question of law and fact to be determined by the court."* The act was finally passed but this clause put a weapon in the hands of the Bensons which was later used to their great advantage. Maas went to Washington as soon as the New York state act was passed to press for federal approval. The Office of Indian Affairs reviewed the case and issued a consent on July 7, 1906 (Cases and Points, Case on Appeal, Plaintiffs' Exhibit C: 362-364).

Part Five:
THE TRIAL

The long awaited day finally came in 1909 at a special term of the State Supreme Court in Riverhead, New York. Charles Maas represented the Montauks, who were the plaintiffs, and the law firm of Daly, Hays, and Mason led a team of lawyers for the defense, representing the Benson family, the Long Island Railroad Company, and the Montauk Improvement and Dock Company. George Carpenter and retired Judge Joseph Belford argued the case for the Daly firm. Belford, a prominent local lawyer who had served as chairman of the county Republican committee for several years, was widely reputed to be a fluent and convincing orator. His important position in the dominant local party, his long experience in the court system, and his oratorical skills combined to make Belford a most daunting adversary.

The case was tried before Judge Abel Blackmar without a jury. Blackmar, a political liberal from a distinguished family, graduated from Hamilton College, as had his father and grandfather, and then went on to Columbia law school. In a case involving the constitutional right of the state of New York to impose limitations on the working hours of women in factories, Blackmar ruled that the state could intervene on behalf of the women to protect them from exploitation by factory owners (Snyder, 1979:57).

The complaint brought by the Montauk was similar to the ones registered in the earlier cases by Wyandank and the Reverend Johnson. The Montauk charged that the Bensons and the various commercial interests were occupying land which had been taken from them illegally. The territory in the claim was narrowed from the claims to all the land from Napeague to the end of Montauk made in 1896 and 1898 to include only the specific areas on North Neck and Indian Fields described in the 1687 deed (see map, 1687). The Benson family was now represented by Arthur Benson's widow and daughter. Frank Sherman Benson died in 1907, causing several months delay in the court proceedings.

Mass had reason to be confident about his case. The existence of the Montauk tribe seemed easy enough to defend. The *"finding of fact"* by Judge Dykman in the Grinnell case had, Mass believed, established legal recognition for the Montauk. The Enabling Act passed by the state of New York and the approval of the federal government certainly recognized the existence of the Montauk as a corporate body before the court even if it did leave the technical question of tribal status unanswered. The Montauk, like most of the tribes east of the Appalachians, had never received federal recognition because they had sold their land long before the Revolutionary War. The state of New York took over the supervision of Native American affairs from the colonial government after independence. The federal government, therefore, never established a relationship with the Montauk.

Once again, however, the puzzling absence of any reference to the 1871 trespass case must be noted. Maas appears to have built his case entirely on the research done by Morrison for the 1896 and 1898 cases. The challenges to Montauk tribal status and their right to take action in the New York State courts could have been met by citing the 1871 precedent, yet Maas, like his predecessor, never brought the case to the attention of the court. It is possible that both lawyers knew of the case and, for some reason, did not feel that it was relevant. It is difficult to imagine what that reason might be. Perhaps Maas was confident that the Dykman ruling and the more recent actions of the state legislature and the Office of Indian Affairs were sufficient to prevent the defense from challenging the Montauk tribal status.

Maas was also confident about the facts of the case. He had testimony from Dominy that the Montauk had been misled with the promise that they could return to Montauk whenever they wished. A promise, ironically, very similar to the one made by the East Hampton leaders in 1660. Even if the deeds had not been fraudulent, their validity was questionable because they had not been approved by the N.Y. State legislature as stipulated in the New York state constitution and in subsequent legislation. Although it had not been determined by the court at the time, the 1790 U.S. law requiring U.S. Congressional approval undoubtedly applied as well. Such approval was unlikely, even if there had been no fraud, because of the approach used by Benson. Native American land may not be alienated by individual members of the tribe or band. No sale of tribal land by individual members would have been acceptable to federal or state legislatures.

The Montauk clearly stood on very firm legal grounds, but there was another issue as well. The money paid to the Pharaohs was clearly disproportionate to the sums which changed hands among the commercial interests developing Montauk. The Montauk believed that in the unlikely event the court ruled against them on the facts of the case, there were grounds for the state, as their legal guardian, to intervene and negotiate a resettlement giving them a fair price for their title.

The company lawyers opened with a legal theory that had been abandoned by the English colonial courts two and a half centuries earlier. The defense argued that the Montauk lost their claim to all their land when John Cabot landed in Newfoundland in 1497 and proclaimed that all of North America now belonged to England. One wonders whether this was a serious contention or simply a gesture to belittle the Montauk case.

Their next assertion, however, was very serious and was to become the crucial focus of the final decision. Carpenter and Belford denied that the Montauk were a tribe of Indians with legal standing before the New York courts. The plaintiffs, argued the defense, were a diffuse

social community of thoroughly assimilated individuals who were seeking a lucrative monetary settlement from the Long Island Railroad and the Benson family.

The claim to tribal status was open to challenge and the burden of proof was on the plaintiff, argued Carpenter and Belford, because Dykman's ruling in the Grinnell case was not sufficient proof of tribal status. Since the Montauk were not parties in Grinnell V. Baker, their existence as a tribe was never challenged. The fact that the judge acknowledged Chief David Pharaoh's claim to be the leader of a tribe of Indians known as Montauk did not amount to an official recognition of the tribe which would be binding on the courts of New York State, said Carpenter. Nor did the enabling act acknowledge tribal status, pointed out Carpenter, citing the disclaimer in the law which left that issue open.

The defense now introduced their own criteria for tribal status that went well beyond the Montoya definition. Carpenter and Belford presented the following list of characteristics which they urged the judge to apply. In order to be recognized as a tribe, the Montauk must be in conformity with statutes or a treaty, be governed by a leader whose orders must be obeyed, consist of members who have turned their back on *"civilized society,"* be able to make war and peace on their own, punish crime or administer civil justice among themselves, be recognized as a tribe by any public agency in the past thirty years, and have a continuous history of regularly scheduled meetings for tribal business (Brief For Defendants, Case on Appeal:26, 4344). Such criteria, if universally applied, would probably deny tribal status to most tribes in North America.

The Montauk tribe, continued the defense, had disintegrated and ceased to exist as a corporate entity long before the beginning of the trial. The remnants had adopted civilized habits, assumed U.S. citizenship, intermarried with *"alien races,"* and owned property as individuals in fee simple. Their *"Indian Blood"* had been diluted through mixture with *"inferior races."* The reference to *"Indian blood,"* albeit a biological anachronism, injected an emotional theme into deliberations and refocused attention on the question of tribal existence. The usual intent of the term *"blood"* is to describe genealogical patterns and establish connections which are vested with legal or psychological content. The defendants raised the issue of *"blood"* here, however, to suggest that the Montauk were no longer *"Indian"* and therefore had no claim on the land. The relevant documents, they argued, were the 1719 restriction on *"strange Indians"* and the 1754 agreement, which denied the right of inheritance to the children of Native American women who married African-Americans. These documents, however, were clearly imposed on the Montauk to speed their removal from Montauk and not to establish a criteria for group membership or Native American identity.

The federal government has no single criteria to determine *"Indianness"* which can be applied universally. Different definitions are used by government agencies for different purposes (Pevar,1983:10-12). The Bureau of Census, for example, lists anyone as a Native American who claims to be one. Felix Cohen, an expert on Native American law, wrote that the closest the courts had ever come to reconciling the issue was to regard as Native American any person meeting the following two criteria: 1. that some of his/her ancestors lived in America before its discovery by the white race, and 2. that the individual is considered *"Native American"* by the community in which he/she lives (Cohen,1972:2).

The company lawyers cleverly played upon prevailing racial and class prejudices. The surviving Montauks were poor, uneducated, and a few had intermarried with African-Americans. The defense attorneys knew that the Montauk would be vulnerable as witnesses in the prevailing climate of race relations. Throughout the trial references were made to the physiognomies of the witnesses. Even though the issue of racial homogeneity had not been a factor in the criteria set by the Montoya decision, Carpenter and Belford made this a central focus of their case. The prevailing hierarchy of stereotypes in the minds of prejudiced whites placed African-Americans below Native Americans. The Native American identity of those who intermarried with whites was seldom questioned, but those Native Americans with a mixed African-American heritage were continually challenged. These attitudes still distort white perceptions of eastern Native American tribes today. African-American features were viewed as evidence of *"racial degeneration"* and clear proof that all Native American culture was lost (Strong, 1983: 7-8).

The defense called Benjamin Barnes, a seventy year old white man, who had served as an East Hampton trustee for twelve years, as their first witness. The line of questioning reveals the intent to inject racial themes into the trial proceedings.

Defense: Would you say he [William Fowler, the father of Maria] was an Indian?
Maas: Objection!
Judge: Overruled.
Maas: Exception
Barnes: He was recognized as an Indian on Montauk.
Defense: Didn't he have kinky hair?
Maas: Objection!
Judge: Overruled.
Maas: Exception.
.....
Defense: What was Sam's [Sam Buck, Montauk Indian] appearance?
Maas: Objection!
Judge: Overruled.
Barnes: Sam's general appearance was Indian.

Defense: Didn't he have kinky hair?
Barnes: Hardly, it was straight.
Defense: Was it inclined to be kinky?
Barnes: More straight. He showed Indian; he had high cheek bones.
Defense: Didn't he show Negro blood as well?
Maas: Same objection.

The leading questions were designed to focus attention on racial characteristics in spite of Barnes' reluctance to make any conclusive statements. The judge encouraged this tactic by overruling Maas' objections. Maas should have realized that his case was in trouble when Barnes finished testifying. The judge was clearly unsympathetic, and the race issue had been successfully infused into the proceedings.

After a lengthy argument rejecting Montauk claims to tribal status, the defense shifted grounds and asserted that even if the Montauk were a tribe, they had no grounds for a suit because the grant of rights in all of the Montauk documents had been given to individual Montauks from the very beginning. None of deeds, they said, were agreements with the tribe as a corporate unit. *"We submit that the agreements of 1702/03 and 1754 did not confer any tribal rights, but merely personal privileges granted to individual Indians who should be born on Montauk of Indian blood, to be enjoyed by them as long as they reside on Montauk and no longer"* (Court of Appeals, Defendants Brief:58). Benson, according to this interpretation, had legitimately purchased the land title from individual Montauks. There was no need to negotiate with the community as a whole.

Maas had little difficulty countering this argument. The 1702/03 deed and lease made clear reference to the Montauk people, *"led by a sachem,"* as did all the other colonial records. There is absolutely no precedent in law and no basis in the anthropological record for the defendants' interpretation of the documents. One of the cultural values which has remained unchanged in spite of centuries of assimilation is the Native American concept of collective land title. There is no evidence that the Montauk ever abandoned this classic characteristic shared by all native peoples.

The relationship between U.S. citizenship and Indian status was complicated in 1905 when the Supreme Court ruled that citizenship excluded Native Americans from Federal benefits. Citizenship was viewed as evidence of assimilation into mainstream culture. Although the ruling was reversed in 1916, it was in effect during the Montauk trial. The relevance of the ruling for eastern Native Americans was never determined because few received federal benefits, but the issue was raised by the defendants as a part of their trial strategy. If any of the Montauks had ever voted, then they had, argued the defense, abandoned their Native American identity and embraced *"civilized"* society.

Maas countered the attempt to impugn the cultural identity of his clients by objecting to any references to racial identity during the examination of the witnesses. Although the weight of law was on his side, Maas underestimated the powerful appeal of racial stereotyping and prejudice. In the end the shadowy presence of such feelings undermined the best legal arguments.

Carpenter went on to argue that the land on North Neck had been abandoned by the Montauk in the eighteenth century and should not be included in the suit. Maas accepted this interpretation and redefined the claim to include only the lands at Indian Fields. This concession by Maas may have been a factor in the decision by the Montauk to get a new lawyer for the appeal after the trial.

The defendants further argued that the deeds negotiated by Benson were all valid and did not have to be approved by the state of New York under the statutes requiring approval for all sales of Native American land. The 1686 Dongan Patent had endorsed the earlier agreements and approved any new purchases of Native American land. This grant, they argued, was similar to the colonial charter granted to Dartmouth College in New Hampshire. In the historic Dartmouth College case, the Supreme Court ruled that the charter could not be altered by the new state government after the American revolution. There was no need, therefore, to obtain approval from the state of New York, because the permission given to the proprietors in East Hampton by Governor Dongan had been passed along to Benson when he purchased Montauk from the descendants of the former proprietors.

There is considerable irony in citing the Dartmouth case against the Montauk. Samson Occom had intended to use the money he raised in England to build an Indian college on or near Montauk lands. He never forgave The Reverend Eleazer Wheelock for taking the funds to establish Dartmouth on the northern frontier of New Hampshire, far away from his people in southern New England. Now a case involving that college was being wielded against his Montauk descendants.

The Dartmouth case, countered Maas, involved a contract between a government body and a private corporation. John Marshall wanted to guarantee that state governments could not arbitrarily alter private business contracts. Maas pointed out that the Dongan Patent was an agreement between a municipality and the colony of New York; there was no private party involved. States have an undisputed right to overrule municipal ordinances and do so regularly. The Dongan Patent did not absolve the defendants from obeying the state requirement to obtain its permission prior to the purchase of Native American land. In fact, the patent by its very definition, established the legal precedent of public control over all purchases of Native American land. No one could dispute the fact that the U.S. government and the state of New

York assumed all of the sovereign power previously held by the crown.

Although no laws and few tribal records were ever written by the Montauk, there were procedures for determining descent and rules about the distribution of land and livestock rights. The chief or *"king"* of the Montauk supervised the distribution of these rights among his people (Shepherd, 1981: 40-41). Succession to tribal leadership was generally determined by descent, but when there were two or more claimants with strong kinship ties to the former chief, an election was held to make the final selection. Two leading families, the Fowlers and the Pharaohs, often contended for the position. David Pharaoh, Wyandank's father, had won a close election over a representative from the Fowler family. Wyandank's claim to leadership was much stronger than his father's because he could claim descent from the Fowlers through his mother Maria.

All of this information about Montauk tribal organization was published in an article which appeared in the New York Sunday Sun on September 14, 1879 and was reprinted in the Sag Harbor Corrector on September 20,1879 (Shepherd, 1981:38-41). The irony here is that none of these institutions which later became evidence of *"tribal existence"* were present in Montauk culture prior to the arrival of the English. It is possible that some of the records taken by Benson from the trustees in 1881 might have provided evidence of regular payments and receipts over the years which would have helped the Montauk's lawyers. Unfortunately Maas never raised the issue of the missing documents before the judge, nor did he mention that Benson had refused Morrison's request to review the East Hampton trustee records taken by his father. Instead, Maas argued that the absence of written records documenting tribal elections and meetings did not mean that no community organization existed.

Maas was absolutely right about this, but he did not realize that the fledgling science of anthropology could have been used to support his argument. Franz Boas, curator of the American Museum of Natural History, and Otis Mason, the first curator of ethnology in the National Museum in the Smithsonian, were encouraging the new discipline in American universities around the turn of the century, but most Americans knew very little about these developments in academia. All of the lawyers and judges involved in the case went through their university training in the late nineteenth century, long before modern concepts of culture, race, and traditional social organization were studied in a scientific context. Even so, Maas could have made some attempt to understand the culture of his clients. Unfortunately for the Montauk, he did not introduce any ethnographic data or use expert witnesses to support his case. The question of tribal existence, Maas said, would have to be settled by examining the oral testimony of the witnesses, and he accepted the defendants' interpretation of the Montoya decision.

Maas now had to convince a skeptical judge that the Montauk had a social organization which had been in continuous operation since the colonial period. He did such a poor job of preparing his witnesses for the trial that he was unable to effectively draw out a convincing description of the community institutions which did exist.

Ephriam Pharaoh was asked about the process of selecting a leader. Instead of describing the heated elections which had been documented in the local press (Shepherd, 1981), Ephriam said only that he was at the doorway when they had a meeting which put a *"king"* in office. Maas did not pursue the issue with the witness. It appears that Maas himself did not know much about the oral history of the Montauk. He gave witnesses no help in getting an accurate description of Montauk community structure into the record.

Charles Fowler and Maria Pharaoh were understandably vague when asked about tribal institutions, because these social forms had always been unstructured in their culture. Maas did not remind the court that the political systems of the Cheyenne and Apache bands were also unstructured. Fowler remembered a ceremony at Montauk when David Pharaoh was chosen *"king"* but said that he had not attended the proceedings. When Belford cross examined Fowler, he asked him to describe the meeting in 1895 when the tribe met to organize the struggle for their land. Fowler's simple honesty played into Belford's hands. He said he couldn't recall much about the meeting. Maria was the wife of former *"king"* David and the mother of *"king"* Wyandank, yet Maas did not elicit any meaningful testimony from her about tribal organization or the role of leaders in the Montauk community.

Ironically, Maria did give an accurate and perfectly valid account of leadership in a prehistoric Native American community on eastern Long Island when she responded to Belford's cross examination. Belford was trying to demonstrate that the Montauks had no institutionalized leadership structure. He asked Maria if her son Wyandank ever gave orders to people. Maria was confused by the question. *"What do you mean?"* she asked. Judge Blackmar rephrased the question: *"did he ever boss anyone around?"* *"No,"* said Maria, *"he would tell people things. Give advice, but I don't know what you mean by bossing"* (Court of Appeals, 172-179). In fact, Maria had given a description of leadership patterns which most anthropologists would immediately recognize as characteristic of small scale political organization. Maas did not understand the implications of what she had said and lost an opportunity to build on Maria's testimony.

Another opportunity was lost by Maas when Wyandank was on the stand. Maas did not ask him questions about Montauk community affairs in his brief examination (Court of Appeals:188-190). Belford cross exam-

ined Wyandank extensively on the issue. He continued his strategy to discredit Wyandank's role as a leader of the Montauk by asking him who obeyed his orders and when he started calling himself *"king."* Belford was successful in leaving the judge and the white courtroom observers with the impression that Wyandank had only taken up the title after he decided to pursue the land case. Once again we see a tragic note of irony in the trial, because Belford had actually drawn attention to a characteristic leadership pattern in small scale social systems.

When Nathaniel Dominy, who was now 83, took the stand, Maas asked him about his relations with Benson but did not raise any questions about the letters which Morrison had presented to the Senate committee in 1900. This is puzzling because the correspondence certainly cast Benson in a bad light and would have helped the Montauk case. Dominy did testify that he had promised the Pharaohs that they could return to Montauk after they turned their land rights over to Benson.

Maas: Did you tell her (Maria) that after she moved away and was given this deed, she could move back?

Dominy: I told her this.

Maas: Did you tell Wyandank too?

Dominy: Yes, everyone that called themselves an Indian.

Maas: Who else?

Dominy: "...I told everyone of them."

(Cases and Points, Case on Appeal:182-184)

In spite of the damaging nature of this testimony to his case, Belford did not even cross examine Dominy, nor did he challenge his credibility as a witness.

Rather than dispute the Dominy testimony the defense shifted once more to the question of *"Indianness"* by calling John Osborne, the town clerk, to the stand. Osborne told the court that the Montauk were not Indians anymore. He said that they lived and worked in town and dressed and acted like everyone else. At this point Maas apparently became angry and frustrated with the direction and tone of the questions. He objected, saying that he never claimed that the Montauk wore war paint and shouted war hoops, but that didn't mean that they were no longer Native Americans. Once again Maas' case could have been aided with the introduction of a basic anthropological definition of a band and some comparative examples of assimilation patterns among native peoples.

A second defense witness followed Osborne with a similar theme. John Mulligan, a local justice of the peace, told the court the Montauk were *"...just like any other citizens no different."* He also introduced hearsay about animosity between George Fowler and Wyandank without objection from Maas. The defense used this information in an attempt to show that Wyandank did not have support among the Montauk and that there was, therefore, no effective leadership holding the community together. Mulligan and Osborne were the last to testify and their testimony was not effectively challenged by Maas in cross examination.

The plaintiffs and defendants rested at that point, and Judge Abel Blackmar retired to his chambers to study the testimony and the documents presented by both sides. These documents included sixteen agreements between the Montauk and the Town of East Hampton from 1660 to 1754, all of the deeds signed by Benson and members of the Montauk community, the New York state enabling act, the approval from Washington for the Montauk to bring suit, the Grinnell case, and the bills of sale between Benson and the various developers. What was missing, of course, were the packets of East Hampton trustee records held by the Benson family, which may have included records of transactions between the Montauk and East Hampton in the eighteenth and nineteenth centuries. These papers might have provided proof of a continuity of organized community existence connecting Wyandank's people with their ancestors.

The case remained with the judge for a year. The following summer, on the fifteenth of June, Nathaniel Dominy passed away. He never lived to hear the decision rendered. Judge Abel Blackmar finally sent word in the fall that he would announce his findings and conclusions of law on October 10, 1910.

Part Six:

"...A Peculiar People in the Midst of Civilization"

Judge Blackmar's decision began with a list of *"findings of fact."* He acknowledged that the Montauk Indians had owned Montauk prior to 1660, thereby rejecting the assertion made by the defendants that the English owned Long Island by right of discovery. The judge also agreed with the plaintiff that the 1687 and 1703 treaties granted land rights to the Montauk tribe, not to individual Montauk people, but Blackmar ruled that the Dongan patent did extend to and authorize Benson's purchase of the Montauk lands. He agreed with the defendant's argument that the Dongan Patent had granted the rights of purchase to private individuals. These purchase rights granted to the original East Hampton proprietors were private property rights and therefore protected from any interference by governmental bodies which might replace the colonial government. Blackmar agreed with the defendant that the Dartmouth College decision by John Marshall applied here. *"There was no need,"* said Blackmar, *"for Benson to seek approval from the New York State or federal government for his purchase."*

Here the judge made a radical departure from existing interpretations of New York State Indian law. Section 37, in article one of the 1777 New York State Constitution, which prohibited the purchase of Native American land without the approval of the state legislature, had been written by John Jay to protect Native Americans from *"...the frauds too often practiced towards the said Indians in contracts for their lands..."* (quoted in Lincoln, 1906, Vol. IV:153). This provision was a continuation of the colonial policy which called for supervision of all trade and treaty relations between colonists and Native Americans.

The Dongan Patent reasserted the intent of the colonial authorities to monitor all purchases of Native American lands. The proprietors were granted a license by the colonial authorities to purchase land at Montauk under this general policy. Benson, therefore, bought the land from the trustees of Montauk, but he could not buy the license to purchase Montauk residence rights because that was a colonial action and the colonial authority was now replaced by the state of New York. Blackmar's ruling that this was a "private property" right runs counter to Jay's reasoning.

The eminent New York jurist, James Kent, also commented on these issues a generation after the state constitution was ratified. *"...the protection of the property of the feeble and dependent remnants...within our limits is...a fundamental article of government."* It is true, Kent continued, *"...that the British Crown granted charters and issued patents for large tracts of land before the Indian rights had been extinguished; and these instruments purported to convey the property in fee... But these grants were not intended to convey, and the grantees never pretended that they had acquired, an absolute fee in the land."* (Quoted in Lincoln, 1906, Vol. IV:167). Kent concluded that *"...the original states, before and after the adoption of the Federal Constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdictions"* (Lincoln, 1906, Vol. IV:170). Kent also pointed out that New York State had acted on this assumption regularly. Blackmar never addressed the contradictions between the interpretations of these prominent jurists and his own opinion on the Dongan Patent.

Judge Blackmar went on to discuss the land at North Neck, which Maas had conceded to the defense during the trial, and determined that it had been lost through *"...abandonment many years before the trial"* (Court of Appeals: 56). The other lands at Indian Field had been purchased by the Benson family in a series of valid deeds negotiated between 1885 and 1903. The Montauk, said Blackmar, had agreed with the terms of the deeds and moved away voluntarily. He found no convincing evidence of fraud or coercion.

Blackmar simply ignored the testimony of Dominy and Maria Banks on this issue and ruled that:

> *...each and all of the releases and instruments of conveyance above set forth were voluntarily executed and delivered by the said Indian grantors thereof in good faith and for good and valuable considerations, and were not obtained by any fraud, undue influence or duress* (Court of Appeals:65).

Apparently the judge did not believe Dominy or, perhaps, he did not feel that Dominy's false promise that the Montauk could return to their land amounted to fraud. Blackmar may simply have been caught up in the enthusiasm of the times for growth, expansion, and development. There was little patience in the public mind for the tiny community of native peoples whose stubborn presence blocked the new order. This same judge who had so courageously defended the rights of women factory workers from exploitation by the forces of industrial growth abandoned the Montauk to those same forces. The Montauk homeland was to become a playground for the rich.

When he came to the crucial question of tribal existence, Blackmar rejected the plaintiff's arguments that Judge Dykman's findings in the Grinnell case established the legal status of the Montauk tribe. Blackmar agreed with the defendants that the ruling merely accepted the unchallenged assertion of fact by Chief David that he was the leader of a tribe of Indians called Montauk. Blackmar also noted that the New York State enabling act and the document from the Bureau of Indian Affairs did not certify the existence of the Montauk tribe as a corporate entity.

The question of tribal identity remained open and the

burden of proof, said Blackmar, was on those claiming to be tribal members. In his twenty third "finding of facts" the racial biases and cultural confusions which played such an important role in the case emerged. The Montauk, said the judge, had "lost" their native American traits.

> *They had no internal government and they lived a shiftless life of hunting, fishing and cultivating the ground and often leaving Montauk for long periods and working in some menial capacity for whites* (Court of Appeals:56).

The comment tells us more about Blackmar and the class and racial prejudices of the times than it does about the "Indianness" of the Montauk. Ironically, this very same description often appears in the colonial records in reference to Native American peoples. Whites frequently commented contemptuously about the "lazy" Indians who hunted and fished while their women tilled the fields. Seventeenth and eighteenth century ethnographic accounts by English observers also commented on the "lack of leadership" and the absence of anything similar to their own governmental institutions among the Native peoples. These negative stereotypes which had been used to describe the Native peoples during the colonial period were now cited as evidence that the Montauk were no longer Indians. In both instances the stereotypes were part of a rationalization defending the alienation of Native American lands.

The "leadership" criteria is particularly ironic because the hierarchical model presented by the defense had never existed among the Long Island bands before the English arrived. The concept of an absolute leader or "grand sachem", first introduced by Lyon Gardiner as a mechanism to facilitate the purchase of land, was now turned upside down and used for the same purpose. Now the Montauk were denied their right to protect their lands in court because they did not have a chief whose every order must be obeyed.

Blackmar had actually demonstrated that there were still many aspects of the Montauk culture which had survived generations of acculturation. Some of the changes cited by Blackmar as evidence of tribal disintegration since 1885 had actually taken place during the early eighteenth century. The integration of the Montauk into the fringes of the English economy as menial laborers, for example, was not a pattern which developed in the late nineteenth century as Blackmar implies. This accommodation to the English economy began soon after the arrival of whites in the New World and remains a common pattern among native American groups (Strong, 1986). These cultural adjustments to the economic realities have seldom been used in a court of law as a criteria for determining "Indianness".

Blackmar ruled that there was no Montauk "tribe" subject to the protection of the laws of the state of New York or the federal government. The tribe, he said, *"...has disintegrated and been absorbed into the mass of citizens and ..at the time of the commencement of this action there was no tribe of Montauk Indians."* The "tribe" had been in decline for decades, said Blackmar; all Benson did was to give it the final "death blow". Following this line of reasoning, Blackmar held that Benson was not required to negotiate with the Montauk community as a whole.

Ironically, Blackmar's ruling, with its grim ring of finality, is similar to the wording in the 1637 treaty ending the Pequot War wherein the British announced, somewhat prematurely, that the Pequot Nation no longer existed. The Montauk who, under Wyandanch, had taken the path of peaceful accommodation in order to survive as a people now found themselves pronounced extinct. The Pequot survived the English obituary notice and have emerged as a thriving community today with a flourishing reservation economy. The surviving Montauk remnant groups may also give the lie to their untimely death notice.

In his concluding statement, Blackmar again acknowledged that the Montauk were Indians and wards of the state. As such, said the judge, *"...I do not think that the costs should be imposed on the plaintiff."* It was a gratuitous gesture at best, but it did affirm that the Montauk were recognized as Indians by the court in spite of the racial references admitted into the record by the judge.

Wyandank and the other Montauk leaders decided that they needed a new lawyer to handle their appeal. They hired Allen Caruthers, a New York lawyer, who filed an appeal on January 28, 1911. The Montauk were hard pressed to obtain the necessary funds to finance the expensive legal process. The appeal procedures require that the appellant pay the costs of printing all of the records of the original trial which are then submitted to the appeals court and the respondents. Caruthers sent the material to the printer, but it was nearly a year before he could raise the money to get them released.

The Montauk were struggling desperately to get the necessary funds. This was a daunting task because the Montauk were not a wealthy community, and they were scattered across New England and Long Island. Nevertheless, they sent out appeals to their membership for contributions and managed to raise the money to pay the printer in the spring of 1912, just in time to prevent their appeal from being declared void by the court. The Bensons had tried to take advantage of the situation by demanding that the appeal be denied charging that the case had been abandoned by the Montauk (SCCCR: file # 3567).

It was to be two years more before the appeal was heard. The long delay must have placed quite a strain on the Montauk patience and resources. Their endurance

was tested again with another defeat as Appeals Court Justice Joseph Burr affirmed Blackmar's decision. The burden of proof was on the Montauk to prove that there was sufficient tribal structure to satisfy the criteria set in the Montoya decision, ruled Burr. They were *"...impaired by racial miscegenation, particularly with the Negro race..."* and were not living together as a tribe. Burr's affirmation is marred by the same racial bigotry and anthropological inaccuracies which distorted the arguments in the original case.

The Montauk responded with another appeal in 1915. In his opening statements Caruthers focused on the question of tribal existence. He took up the argument presented by Maas that it was not necessary to prove that the Montauk were a tribe in 1909 when the trial began and strengthened it by pointing to the language in Benson's deeds wherein it was clearly stated that the Indians were selling land which they held as members of the Montauk tribe (Document No. 16). Citing an established rule of law called "estoppel," Caruthers reminded the court that if in making a contract the parties agree or assume the existence of a particular fact as the basis for their negotiations, they are "estopped" to deny the fact so long as the contract stands. The Montauk left the land and were scattered after 1885 because of the deeds which Dominy acknowledged had been drawn up under false pretenses. No testimony, argued Caruthers, had been introduced by the defense to refute Dominy's statements. The defendants could not admit that the Montauk were a tribe in 1885, push them off the land, and then argue in 1909 that the Montauk were no longer a tribe because they had no land and were scattered in nearby communities. The law does not allow a party to benefit from an illegal action. The findings by Blackmar and Burr that the Montauk were no longer a tribe were invalid anyway, said Caruthers, because the court had ruled in Buttz V. Northern Pacific Railroad (119 U.S. 55) that:

> *Neither lapse of time, allotment of a portion of the tribal lands in severalty, immigration of a majority of the tribe, nor the fact that habits and customs of the tribe has changed by intercourse with whites will authorize the courts to disregard tribal status.* (Appellants points in Court of Appeals: following pg. 510:p.26)

Caruthers didn't cite two relevant cases which would have supported his position. In Tiger V. the Western Investment Company, 221 U.S. 286 (1911) and United States V. Rickert, 188 U.S. 432 (1903) the court held that only Congress can determine when changes in customs are sufficient to invalidate tribal status (Weatherhead, 1980:9). The historical fact is, continued Caruthers, *"..that the tribe at the present time consists of over 377 beings, 237 adults 48 minors, all of whom are accounted for, and 92 whose place of residence is unknown, this appears in the files in Washington"* (Appellants' points:p. 28 and see Miller, this volume). Blackmar, therefore, had overstepped his authority when he declared the Montauk tribe to be extinct.

Having asserted tribal existence, Caruthers argued once more that Benson had violated state law by failing to obtain permission from the state. He repeated Maas' position that the Dongan Patent established a municipality not a private corporation and could be modified by state action. Caruthers added that in 1703 Lord Cornbury had actually given a license to purchase Montauk to a New York merchant named Rip Van Dam. Clearly the patent, said Caruthers, was never meant to be an absolute license to purchase Native American lands which could be passed down to succeeding generations of purchasers. When the proprietors won the clear title from the East Hampton trustees in 1852, they formed a corporation under the laws of the state of New York, which was obligated by those law to protect the rights of the Montauk.

The defense began by simply asserting that Judge Burr had made the correct decision and then reviewed the previous arguments. The Montauk, they said, were extinct in 1909. No evidence to the contrary had been presented to the court, continued the defense lawyers, leaving the court no alternative but to declare them extinct. The "racial degeneration" assertion was again emphasized. The Montauk, said the defense, were a "mixed race", had become "shiftless", and allowed their tribal organization to disintegrate. There was, as both Blackmar and Burr had stated, no such tribe as the Montauk. They had scattered and abandoned their land after 1885 when they sold their rights to Benson.

The defense hammered away on two themes. The Montauk did not meet the Montoya criteria because they did not live in a united community under one leadership or government, and they had disintegrated from their aboriginal tribal status because they had adopted "habits of civilization" and intermarried with African-Americans. The criteria were again inflated beyond Montoya, but not so grossly as in the earlier hearings. The defense expanded the reference in Montoya to *"unity in a community under one leadership"* to read *"...maintaining an organization in conformity with statutes, or in conformity with a treaty...."* In other words the Montauk had to come forth with minutes of meetings, a constitution, or a treaty to satisfy the defenses' definition of a tribe. These arguments struck a responsive chord in every judge that the Montauk faced from the beginning of the struggle when Wyandank sued the Long Island railroad in 1895.

The Montoya criteria were required, said the defense, because of the absence of any official governmental recognition of the Montauk. Tribes often establish their existence through actions by the legislature, the executive or the judiciary, but none of these, said the defense, had ever recognized the Montauk. *"So much for governmental recognition"* concluded the defense lawyer with a glib

and arrogant assurance. Once again the 1871 trespass case was not mentioned, and Judge Dykman's finding in Grinnell V. Baker was declared irrelevant.

Had Caruthers attacked these arguments head on, he might have had a stronger case. Certainly the 1871 trespass case would have established an important precedent for governmental recognition. The emphasis on a community with a history of united action would have posed some problems for the Montauk, but they had been united in a common effort in the courts to regain their land for over a decade. The Montauk had been meeting regularly to make decisions about the court battle and to raise funds for the case since 1895, but, unfortunately, they did not have written records for most of these meetings.

The defense dismissed the issue concerning the legitimacy of the initial purchases by Benson by characterizing Dominy as a nice, "...old man of 83 years" whose testimony and memory were of questionable reliability. They knew, of course, that Dominy could not be recalled for further investigation of the matter. The defense next addressed the assertions by Caruthers that Benson had violated a state law requiring that all sale of native American land be approved by the state legislature. Once again they turned to the Dongan Patent, and once again they argued that the grant from Governor Dongan *"...gave to the inhabitants of East Hampton AND THEIR SUCCESSORS the right to extinguish the Indian title claims by purchase without restraint as to its terms and conditions, and without the necessity of recourse to the sovereign for further consent or confirmation."* (Brief for Respondents last entry in Cases and Points: 32). Caruthers erred, said the defense, when he characterized the patent as merely a license to a subordinate public body. The defense acknowledged that the patent did establish the town of East Hampton, but it also gave private proprietors the right to purchase land at Montauk. Having repeated the same major points once more, the defense rested and the case went to its third judge.

While awaiting the decision, the Montauk continued to meet and discuss tribal business. One of the few surviving documents is the annual report for 1916 describing a meeting On August 31 under the leadership of Chief Wyandank and James Waters (Wild Pigeon), Chief of the Montauk Tribal Council (EHLA). The two men represented factions of the Montauk community who did not always agree, but they were unified on this issue at this time.

When Allen Caruthers addressed the tribal meeting in 1916 to explain the current status of the trial, one of the first topics raised was a concern that the court would place an undue emphasis on the issue of record keeping. The Montauk were urged to write down and preserve all of their records so that they could be used in court when needed. Caruthers played into the hands of the opposition because he did not challenge the arbitrary and inappropriate application of criteria which the Montauk could not satisfy. There was certainly evidence of *"...leadership and a concert of action,"* but neither Maas nor Caruthers pressed this issue effectively in court. In fairness to the lawyers who represented the Montauk throughout the long court battle, it must be said that, given the racial climate of the period, perhaps no lawyer could have won a case for the Montauk no matter what strategy was taken.

The appeal was denied without opinion in January, 1917 and Caruthers again appealed, but the long legal battle finally ended when state supreme court judge James Van Sicely dismissed the last appeal at a special term of the court in Brooklyn on March 8, 1918. The loss was a severe blow to the small Montauk community. Their meager financial resources had been drained by the years of struggle. The stress of the long struggle and the pain of the loss may well have been responsible for the factions which emerged in 1919 at the annual meeting. A controversial tribal election was won by James Waters. According to an article in the Brooklyn Daily Eagle (June 1,1919), Wyandank was named assistant chief and Israel Quaw, Walter Halsey, Christopher Cuffee, and Mrs. Melanethon L. Cuffee were elected to the Tribal Council. Wyandank protested publicly against the election, stating that he had not even been present at the meeting and that he did not recognize the validity of Water's election. *"I am the chief and the only chief of the Montauk Indians,"* he said.

These elections and the heated controversies they generated do suggest that this was proof of a continuous tribal existence during those years. The "fusion" of the band segments in the struggle for land rights had given way to a process of fission which saw the emergence of two small segments, one living in the Freetown section of East Hampton and the other in the Eastville section of Sag Harbor, a few miles east of East Hampton village (this Volume, p. 203217).

Wyandank's rejection of the election was based on more than his demotion to a secondary role in the organization. All of the executive officers elected at the 1919 meeting were from the Eastville band except for Wyandank and Israel Quaw. Wyandank undoubtedly saw this as a take over by the rival faction, who assigned him a token position. The limited role of simple geography in the complex process of fission and fusion is underscored by the fact that Wyandanch had recently moved to Eastville from Freetown (Personal Communication, Philip Wyppensenwah-Rabito, August, 3, 1990).

Letters written on the fifteenth and sixteenth of May, 1919 by Wild Pigeon to his followers indicate that he went on with his plans to give a modern political structure to the Montauk community in spite of Wyandank's opposition (HCGFP). *"One hundred and fifty people of*

Montauk have voted for me to be Sachem of Montauk and Dank to be Assistant Chief," he told his readers and urged them to not fight among themselves. Waters enclosed the draft of the constitution with his letter of the sixteenth and asked the group to consider it for adoption at the annual meeting in August, 1919. The new government was to be a union of small bands which would incorporate several scattered Montauk enclaves primarily on Long Island. A membership role was established and dues were set at $1.00 per year. Much of the new structure simply put into writing practices which had been followed for many years. The executive council, for example, continued to consist of a Sachem, an Assistant Chief, who served as Chief of the Tribal Council, and four Councilmen.

The annual meeting was held in Sag Harbor on August 29, 1919. Waters' opening speech recalled the traditional importance of a fall gathering for the Montauk. The ancestors, said Waters, held ceremonies at this time of year to thank the great spirit for the harvest. He urged his listeners to study their tribal history and customs and rebuild their unity (HCGFP). He then called for the new constitution to be read and discussed. After a lengthy debate the document was adopted. At one point in the discussion about the question of a quorum, Waters said that there were two hundred members on the tribal roles but the list, unfortunately, was not among the surviving papers (HCGFP).

The next order of business was to discuss the strategy for the land case. A resolution was passed calling for the tribe to petition the U.S. Congress for redress. They appointed Dr. Charles Eastman as their delegate to carry the struggle to the new battlefield in Washington. The meeting was then adjourned until that evening when they recovened to hear Waters deliver the annual address. *"While our people are scattered before the wind,..."* he said, *"...yet our interests, our aims, our sympathies must not be divided..."* We are, he continued, *"...a peculiar people in the midst of civilization..."* (HCGFP). This "peculiarity," said Waters, was their sense of membership in a community with shared traditions, a love of kindred and a pride of ancestry. The meeting ended with the appointments of local leaders for the dispersed Montauk communities in New England, Long Island and Brotherton, Wisconsin.

The following year Wild Pigeon again sent out an announcement for a meeting at Sag Harbor. No agenda was listed in the leaflet, but the land case was undoubtedly a major concern. The leadership remained the same except for Lewis H. Wright from New York City who had replaced Wyandank as Chief of the Tribal Council. Wyandank may have retired from an active role in Montauk affairs after the 1919 election because of his failing health. The years had also taken a toll on the courageous Montauk leader. In 1921, at the age of 57, he died, penniless and alone in his cottage. His wife, Florence, who worked as a live-in domestic in Bridgehampton, found him when she returned home for the weekend.

Wild Pigeon attempted to revive the struggle after the war and the loss of Wyandank. The Brooklyn Eagle carried the announcement of a Montauk tribal meeting in August, 1922, which had been called by Wild Pigeon, who was still serving as Sachem (Brooklyn Eagle, August 6, 1922). The primary item listed on the agenda was a lobbying effort in Washington to get federal help in their land case. Apparently Wild Pigeon was not successful in engaging a significant number of Montauk, because nothing more about his efforts were recorded in the press.

Maria and the members of the Freetown band carried on the struggle for a time. They also decided to pursue the case in Washington DC. In the winter of 1923, Maria went to Washington DC with her brother George and her two children, Samuel and Pocahontas, and appealed in vain for help from the Bureau of Indian Affairs. The bureaucrats in the Indian affairs office were primarily concerned with problems on the western reservations and had little time or patience with eastern native Americans. Maria returned to her home in Sag Harbor where she lived out her days in peace, but she never forgot her early life at Montauk. She closed her biography with these sad words, *"...how I have longed to be back home and live the same life over again, but it is too late now. Those days will never return".*

In an ironic postscript to the land case, the state of New York bought the land at Indian field where the Montauk homes stood and turned it into a public park. The Benson family took the state to court and forced a settlement which was more than twice what Caruthers had estimated in 1915. The Bensons were reported to have received three million dollars from the state (Martin :59). When Mary Benson died in 1918, she left $10,000 to the American Church Institute for Negroes, $25,000 to Sean's Church Institute, $2,000 to the Grace Church of Brooklyn Heights, $5,000 to the Society for Prevention of Cruelty to Children, and, along with most of the papers which the Bensons withheld from the Montauk lawyers during the trial, $5,000 to the Long Island Historical Society of Brooklyn (Benson Will, BHSL). The Montauk, denied their rightful inheritance by the Benson family, were ignored.

This is not the end of the story. In spite of the tragic loss of their land, the Montauk have survived. Although many of them are scattered now, some have chosen to remain on Long Island near their ancestral home. In 1969 an attempt was made by Harriett Crippen Gumbs to organize some of the Montauk descendants. A call went out to revive the tribal council as a first step in a new effort to restore the ancient Montauk land claims (HCGFP). Although the limited response discouraged Ms. Gumbs

from continuing her efforts, she did raise the standard briefly and may have helped to keep the keep the issue from dying out completely.

Wyandank's nieces and nephews, who formed the nucleus of the Freetown Band, now live in Eastville. Robert Pharaoh, Wyandank's grandnephew, has been studying the court briefs and the family records in preparation for a renewed struggle. Robert is not alone in this renaissance of the Montauk people. In East Hampton another Montauk descendant, Robert Cooper, a detective recently retired from the town police force, has also been gathering information about his people which will become extremely important if the case should ever be reopened. More recently Howard and Donald Treadwell, Montauk decendents living on the Poosepatuck Reservation have held several meetings to discuss the revival of the Montauk community. If these small enclaves of Montauk people can overcome their minor differences and fuse together as they did in the past, they may once again establish a viable community.

Robert Cooper has recently won an important symbolic victory with the establishment of the Fort Hill cemetery at Montauk. The cemetery is located on the high ground overlooking Fort Pond and the contemporary village of Montauk. When archaeologist Edward Johanneman found prehistoric burials there several years ago, Robert Cooper and Eugene Cuffee, a Shinnecock tribal trustee, led a campaign to stop all development in the area and lobbied successfully to have a tribal monument erected and a burial ground set aside for both Montauk Native Americans and local whites. The sacred ground was dedicated in an historic ceremony conducted by Robert Cooper and Anthony Bullock, the Town Supervisor, on June 23, 1991.

POSTSCRIPT

The criteria used to determine the outcome of the Montauk trial was applied a half century later in a very similar case, with a similar resolution. In 1976 the Mashpee Indians in Cape Cod sued a group of wealthy and powerful developers to recover damages resulting from invalid land transactions in the nineteenth century (Brodeur, 1985:3; Sturtevant, 1983; Weatherhead, 1980; Campisi, 1990:182183).

The Mashpee case was tried by a jury, but the judge, Walter J. Skinner, instructed them with an interpretation of Montoya very similar to the one given by Abel Blackmar (Mashpee Tribe Vs. New Seabury Corporation, 592, F. 2nd 575, 1979). The developers in this case were represented by James St. Clair, a prominent Republican lawyer who had served as legal counsel to President Nixon during the Watergate hearings. Judge Skinner told the jury that the burden of proof was on the Mashpee to demonstrate that they were a united community under a leader who commanded obedience from a majority of his people. "*Sporadic grouping, sporadic leadership...,*" Skinner told the jury, is not enough to determine that a tribe exists (Mashpee Vs. New Seabury, 1979:583).

The judge's instruction was based, as we have demonstrated, on a questionable interpretation of both Montoya and Connors. This ruling left the jury very little latitude for their determination. The judge gave these instructions in spite of expert testimony given by three prominent anthropologists who spoke for the Mashpee. Dr. William Sturtevant, an anthropologist from the Smithsonian Institution, Dr. Jack Campisi, Associate Professor of anthropology at Wellesley, and Dr. James Axtell, a National Endowment for the Humanities research fellow at the Newberry Library in Chicago, all argued that the Mashpee met the criteria set in the Montoya case (Brodeur, 1985:4243). Both Axtell and Sturtevant have well deserved national reputations in their field and have published extensively on native American history and political systems. Judge Skinner ignored their testimonies and accepted a contrary interpretation presented by Dr. Jeanne Guillemin , a sociology professor from Boston College who spoke as a witness for the New Seabury Corporation. Guillemin stated that the Mashpee were not a tribe because they did not have an independent political organization or an independent economy and were not "culturally distinct." The fact that each of Guillemin's criteria had been rejected or qualified by the courts in related cases over the years and had also been challenged by nationally recognized scholars because they rested on highly questionable premises was simply ignored by Judge Skinner.