

The Land Defended: The Cove Realty Case

Harriett Crippen Brown Gumbs

The Great Cove Realty Case: A Personal View

Tourists speeding along Old Montauk Highway past the Shinnecock Indian Reservation view a quiet landscape of scattered pine trees, scrub oak, and honeysuckle. This vegetation covers the scars on the land left by the bulldozers and concrete mixers of the land developers. This story began in 1952 when Cove Realty Company attempted to erect buildings on a strip of land running along the northern boundary of the Shinnecock Reservation.

In 1950 I moved a small house from the village of Southampton onto the Reservation. The house, built by my brother, Edward Crippen, was placed on a piece of land near Montauk Highway on the northern edge of the Reservation. I was employed at the time by Western Union in the Bronx and came home on Sundays and Wednesdays.

A year later I began to be harassed by representatives of the Adjunct Corporation with orders to get off their land. They sent the police out to tell me to move, but the policeman who delivered the order was very apologetic and kept saying that he was "just doing his duty." Finally the builders came on to the Reservation with bulldozers, moving slowly from Westgate on an eastward path toward my property. The day the invaders reached my doorstep my brother, Alfred, met them with a shotgun. He threatened to plant the driver there on Shinnecock land. The shotgun bluff convinced the intruders to beat a hasty retreat.

On April 24, 1952, a letter from Wrenn and Schmid (Document 1) informed me that I was a trespasser and that I must remove my building from their client's land. It made me so angry to hear an outsider tell me that I was a trespasser on the land of my ancestors. After the indignation had passed, I wrote the law firm an answer (Document 2), stating that I had no intention of moving my building. In desperation I sent a letter two days later to the Hon. Henry M. Hirsh, Director of the Department of Social Services. His reply referred me to the District Attorney of

Suffolk County who appeared to have jurisdiction under Section 8 of the Indian Law.

The intrusion of non-Indians on Shinnecock tribal land upset the whole tribe, but we had few written records which clearly defined our actual boundary lines. I started corresponding with various agencies in the country to arouse interest in our dilemma. I sent a telegram to J. W. Crocker of the Interdepartmental Committee on Indian Affairs on August 23, 1954. On the following day I wrote a letter to Mayor Harold Dufrane and sent telegrams to President Eisenhower and Senator Ives, notifying them of the intrusion by outsiders on Shinnecock land. Mayor Dufrane answered me saying that he had no jurisdiction outside of the village. Mr. Crocker informed me that an investigation was already in process by the District Attorney of Suffolk County.

The tribe joined together to fight for our rights; they all understood the danger we faced. We organized the Shinnecock Indian Community Group and elected Mr. Augustus Thompson president. The group called for immediate action. With this encouragement I sent another telegram to the Hon. J. D. Crocker, reiterating the concern of our people over the possibility of losing some of our sacred land. The construction crew continued to threaten us. At one point they actually broke into my house. To make matters worse Mr. Crocker's reply was not encouraging at all. He stated that Assemblyman Lupton of Riverhead had not planned to introduce legislation until the next year to provide for a survey of the Reservation and its boundaries. The letter did, however, make mention of a man who would be of great service to our cause: Attorney DuVivier.

A short time later, a very tall, pleasant-looking gentleman tapped on Western Union's door in the Bronx just before closing. He quickly let me know that he had come on much more important business. David DuVivier introduced himself as a neighbor to the Indian Reservation who wanted to help us. He told me that mem-



Members of the Shinnecock Tribe show their approval of Judge Edgar Hazleton's decision favoring the tribe in its legal battle against the Great Cove Realty Company which started a subdivision of small homes on land claimed by the Indians. Front row, left to right: Mrs. Edna Eleazer, oldest blood member of the tribe; Miss Lois Hunter, tribal historian; Harry K. Williams, chairman of the board of trustees of the Shinnecocks; Mrs. David Kellis and Mrs. Isadore Smith, well-known residents of the Reservation. Back Row, left to right: The Rev. Herbert Moyer, honorary member of the tribe; Elmer Smith, trustee of the Shinnecock Indian Reservation Presbyterian Church; David DuVivier, attorney and summer resident of the Art Village who is an honorary member of the tribe; Charles Smith and Avery Dennis, trustees of the tribe.

bers of the Shinnecock Indian Community Group had encouraged him to seek my help when he volunteered his services to them. Over a cup of coffee in a nearby snack bar, I told him that we had no specific maps or papers to designate the northern boundary of the Reservation. I further pointed out that the old Montauk highway had run on an east-west course behind the present Art Village site and that his own house was actually on Shinnecock land. His slight smile inspired me to ask him why we couldn't go to court and argue that possession and occupancy were sufficient grounds for the Shinnecock case.

I followed up on this idea. Taking time off from work, I collected testimonies from the elderly members of the tribe and older citizens from town. The many recollections of these people about activities on the intruded area could all be used as evidence. DuVivier was very enthusiastic about my data. I took many more

trips at my own expense to gather evidence. We were also encouraged by the response from Senator Ives's secretary informing us that people in Washington were aware of our problems.

On October 17, 1954 another community meeting was held. The group was informed about the work we were doing to strengthen our case. Mr. DuVivier continued to meet with me in the Bronx to keep me informed about the progress of the case. In turn, I kept collecting testimonies and feeding them to him.

The first round of the successful action began on January 17, 1955. The case continued in the courts for several years. The original decision of Judge Hazleton was upheld, with only one reversal, all the way to the U.S. Supreme Court. The highest court in the land rejected a final appeal by the Cove Realty lawyers on April 17, 1961. The arguments used by the Shinnecock lawyers against the various appeals can be found in Documents 3 and 4.

Document 1

WRENN & SCHMID
COUNSELLORS AT LAW
26 COURT STREET
BROOKLYN 2, NEW YORK

April 24, 1952

Miss Harriet Brown
c/o Emmett Crippen, Esq.
Hillcrest Avenue
Southampton, New York

Dear Madam:

It has come to our attention that you have moved a building on the property owned by The Adjunct Corporation, immediately north of the Shinnecock Indian Reservation, which premises are bounded northerly by Shinnecock Hills Road. It has also come to our attention that reasonable requests made to you through the Southampton Town Justice of the Peace and Police Department, that you remove said building from the premises by The Adjunct Corporation, have been completely disregarded.

Under such circumstances, notice is hereby given you that in the event this building is not removed from the premises owned by The Adjunct Corporation on or before ten (10) days after the date of this letter, we will refer the matter to the proper law enforcement agencies of the County of Suffolk and also seek redress in damages against you in the civil courts.

You are given further notice that in removing such structure from said premises, you are required to clean up all debris and place the premises in exactly the same condition as it was before you moved the building on said premises.

Very truly yours,
WRENN & SCHMID
By

Document 2

P.O. Box 459
Southampton, L.I.
May 6, 1952

Wrenn & Schmid, Esqs.
26 Court Street
Brooklyn 2, New York

Attention: Mr. Pinto

Dear Sirs:

Your letter of April 24, 1952, relating to certain allegations of The Adjunct Corporation, has been received.

Please be advised that the undersigned does not intend to remove her building on her property in the Shinnecock Indian Reservation, where it is located, without a determination of a court of competent jurisdiction.

Very truly yours,

HARRIETT BROWN

Document 3

Records from the Cove Realty Company Case Involving a Strip of Land on the Northern Boundary of the Shinnecock Reservation (1955)

207 Misc. 114

**DISTRICT ATTORNEY OF SUFFOLK COUNTY, Petitioner, v. GREAT COVE REALTY CO., Inc.,
Devonshire Construction Corp., their agents, servants and employees, and John Doe and Richard Roe,
Defendants.**

Suffolk County Court.

Jan. 17, 1955

Proceeding, on application of District Attorney, to remove intrusions on tribal lands which had been allegedly acquired by Indians in exchange for other lands under provisions of an 1859 statute authorizing Indians to acquire lands bordered by a certain Indian ditch. The Suffolk County Court, Hazleton, Acting J., held that reputation evidence and other evidence establishing that ditch, subsequently obliterated, had been along road where it was contended to have been on behalf of Indians, and that defendants had intruded on Indian lands.

Judgment for petitioner.

1. Evidence + 298

Where declarations as to reputation relate to matters of public interest, actual knowledge or reputation on part of declarant is not prerequisite to admission of declaration.

2. Evidence + 66

All persons are presumed to have knowledge of public matters.

3. Evidence + 309

Where declaration as to reputation relates to matter only of general or community interest, such as ancient boundaries, there is no presumption of knowledge of reputation on part of declarant, and such knowledge must be proven before declaration may be admitted into evidence.

4. Evidence + 309

In action involving title to Indian lands the boundary of which was referred to as an old Indian ditch in 1859 statute under which Indians had acquired lands, evidence, on issue as to admissibility established that witnesses testifying as to general or community reputation of location of Indian ditch had personal knowledge of reputation. Indian Law, § 8.

5. Witnesses + 200

Where trustees of Indian reservation retained an attorney not for purposes of obtaining professional advice but merely as representative to negotiate purchase of realty, communications between attorney and trustees were not privileged and could be introduced in proceeding subsequent to trustees' deaths, as evidence of reputation of location of boundaries.

6. Indians + 27(6)

In statutory action to remove intrusions from Indian lands which had allegedly been acquired by Indians in exchange for other lands under provisions of 1859 statute authorizing Indians to acquire lands bordered by a certain Indian ditch, reputation evidence and other evidence established that ditch, subsequently obliterated, had been along road where it was contended to have been on behalf of Indians, and that defendants had intruded on Indian lands. Indian Law, § 8.

7. Courts + 37(3)

Where defendants, in statutory proceeding to remove intrusion on tribal lands, had, before the taking of testimony, expressly consented to jurisdiction of court, they could not, at conclusion of trial, successfully interpose jurisdictional defense. Indian Law, § 8.

8. Indians + 27(1)

An Indian tribe may not sue or be sued without express statutory authority.

9. Indians + 27(1)

Statute authorizing actions to remove intrusions on tribal lands is only remedy afforded to Indians to protect any lands owned or occupied by them against intrusions. Indian Law, §8.

10. Indians + 19

Indians are not "citizens" of the state in exact sense of that term, and rule which would authorize individual citizens to obtain possession of Indian lands, under any claim or pretense whatever, without sanction of government, and put them to slow and tedious process of action at law to recover land, would be destructive of their rights and subversive of duties and obligations which government owes them.

Harry C. Brenner, Dist. Atty. of Suffolk County, Riverhead, by Henry Tasker, Chief Asst. Dist. Atty., Greenport, of counsel, for petitioner.

Morris Permut, New York City, for defendants Great Cove Realty Co., Inc., and Devonshire Construction Corp.

William M. Kinn, Mineola, for Devonshire Const. Corp.

Joseph V. McKee, New York City, by John C. O'Malley, New York City, of counsel, for Realty Associates, served as John Doe.

Morris & Mitchell, Bay Shore, by Sidney L. Mitchell, Bay Shore, of counsel, for Monarch Power & Heating Co., Shillito Doors Corp. and Edelson Realty Co., served as John Doe.

David Du Vivier, New York City, of counsel to Trustees of Shinnecock Indian Tribe.

HAZELTON, acting County Judge.

In this proceeding brought by the District Attorney of Suffolk County as petitioner, under Section 8 of the Indian Law, petitioner seeks to oust defendants as intruders upon the lands of the Shinnecock Tribe, whose reservation is located in the Town of Southampton.

By Chapter 46 of the Laws of 1859, the trustees of the Tribe were empowered to convey to the trustees of the lands of the Town of Southampton, all their interest in certain lands generally known as Shinnecock Hills and Sebonack Neck lying north of a certain line commencing at the head of the creek and running along the Indian ditch, where a fence then stood, to the Stephen Post Meadow, thence along the Old Ditch on the south side of said Meadow to the Old Fort Pond. And the trustees of the lands of the Town of Southampton in turn were authorized to receive such conveyance from the Indians in consideration of a deed conveying to the trustees of the Indians in behalf of the Shinnecock Tribe, all the land commonly called Shinnecock Neck, lying south of the before described line, commencing at the head of the creek on the east side of said Neck, and running along the Indian Ditch, where the fence at that time stood, to the Stephen Post Meadow; thence along the Old Ditch on the south side of said Meadow to Old Fort Pond. The statute states that "The true intent and meaning of this act is, and it shall be construed to be, to enable the said Shinnecock Tribe of Indians to exchange all their rights in and to the land north of said line, for a full release to them by said trustees of said proprietors of all their rights in and to all land south of said line."

The preamble to the statute recited that the Shinnecock Tribe was in occupation of attractive land called Shinnecock Neck by virtue of a lease; that the Tribe lived on the land, had rights of pasturage, and that the rights of the Tribe and the trustees were in conflict and causing frequent and expensive litigation. It was also stated that a verbal agreement and arrangement had been entered into between the Tribe and the trustees for the full release, each to the other of all their rights on either side of an established line to the end that each might improve and own in severalty all the lands on their side of the line. Conveyances accordingly were executed and exchanged.

In May of 1954, one of the respondents, the Great Cove Realty Company, entered upon a triangular parcel of land of about nine acres, located at the northwesterly end of the reservation, prepared same for development, and have in part constructed a number of homes. This was done

according to Charles Smith, a trustee of the Tribe, after he had warned a representative of the Great Cove Realty Company that the land was part of the Shinnecock Reservation.

The question presented is "Where was the old Indian Ditch mentioned in the legislation of 1859 located when the above conveyances were exchanged." The petitioner and the Shinnecock Tribe contend that the ditch ran along the southerly shoulder of an old sand road that is now Montauk Highway. The defendants claim the ditch was of sufficient distance to the south of the highway, so as to include the tract under consideration.

[1-4] Two rulings must be made upon certain evidence. The petitioners submitted declarations made by people who are now dead, as to what they said was the location of the old ditch that is the northern boundary of the Reservation. Such evidence is known as reputation evidence and may be received under certain circumstances when the evidence relates to matters of public or community interest. Proof of actual knowledge upon the part of the declarant is not necessary when the declarations relate to matters of public interest because all persons are presumed to have knowledge of public matters. However, when the testimony relates to matters of only general or community interest, as in this proceeding, then there is no presumption of knowledge, so that such knowledge by the declarant must be proven. I am of the opinion that from all the surrounding circumstances, it clearly appears and has been proven that declarants had such knowledge. I therefore deny defendants' motion to strike such testimony from the record.

[5] A letter was written by an attorney for the trustees of the Tribe, which trustees are now deceased. This letter and its reply were offered in evidence by defendants, and objected to by petitioner upon the grounds that the contents of the letters constituted a privileged communication between the trustees and their attorney. It appears that the attorney had been retained not to give professional advice, but rather as a representative to negotiate for the Tribe in the purchase at a nominal price of the triangular parcel in question, and that the attorney had been authorized to transmit to others what was said in the letters. It may have been that since the parcel first came into existence by conveyance as an entity in itself in 1925, and had been the subject of various conveyances since that time, the Tribe was endeavoring to clear up the question of title by purchase at a nominal price for the reason that Indians are circumscribed and restricted by statute as to when they may sue or be sued. I do not know; but in any event, the trustees were not asking the attorney for professional advice, but rather to represent them in negotiations to acquire the land. This in itself indicates that neither the conversations between the attorney and the trustees, nor the letters, were privileged. See *Avery v. Lee*, 117 App. Div. 244, 102 N.Y.S. 12, where almost precisely the same facts that exist here were before the Court. Since the communication made by the trustees was not intended for the attorney alone, but by its very nature was to be disclosed to third parties, the privilege arising out of the relationship of attorney and client does not apply. *Richardson on Evidence*, 7th Edition, Section 486. Both the conversation and the letters therefore are accordingly admitted in evidence.

Typical of much of the testimony offered by respondents was that of Mr. Edward A. Howell, President of the First National Bank of Southampton, who testified that he had lived near the Reservation for eighty years, and was familiar with it since he was seven or eight years of age. He said Montauk Highway was first a dirt road, and the old Indian ditch ran along the southern shoulder of the highway; that a fence was in the ditch; that the ditch was a marker for the boundary of the Reservation; that he never saw a ditch on the north side of the Highway, and that he last saw the fence about forty or fifty years ago. This witness also clearly identified the Stephen Post Meadow mentioned in the legislation of 1859 and referred to in the two conveyances exchanged in accordance therewith.

Charles Smith, a thirty-six-year-old trustee of the Tribe, testifies that when he was sixteen years of age, he saw two ditches, about nine feet apart, about sixty-five to seventy feet south of the Highway at the westerly end of the Reservation, and that these ditches ran on a slant about two hundred feet upward into the southerly side of the Highway, which at that time was an improved road. What this witness related ties in with the evidence of Timothy Downs, which I will later comment upon.

One Augustus Raynor, seventy years of age, who has been acquainted with the Reservation and its people since boyhood recalled that he hauled gravel for the construction job, and distinctly remembered the old ditch running along the southerly side of the Highway. He

"The Court: Because I don't want to waste a lot of time and money taking proof, and then have a question of jurisdiction or a procedural question raised. If such a question were to be raised, I would pass upon that as we do in the Surrogate's Court, preliminarily, and then move on to the matter of substance.

"Mr. Permut: There is no question on that score on behalf of my defendants."

[7] Nevertheless, in spite of what they unquestionably had agreed to, defendants, after the close of this case, moved to dismiss the proceeding upon the ground that the Court lacked jurisdiction. In the event defendants had chosen to change their position anent jurisdiction after they had consented to same, they should have done so at the earliest possible time, and not have waited until the taking of testimony had ended. Such a stratagem fails utterly to impress this Court.

[8,9] It is well-settled law that an Indian Tribe may not sue or be sued without express statutory authority. *King v. Warner*, Sup. 137 N.Y.S.2d 568 (Cuff. J.) Such express statutory authority for the present proceeding is Section 8 of the Indian Law. Take it away from them and the Indians would have no relief against the intrusion of which they here complain. It is the sole and only remedy afforded to Indians to protect "any lands owned or occupied" by them against intrusions.

[10] The status of Indians is succinctly stated in *People ex. rel Cutler v. Dibble*, 16 N.Y.203, at pages 212,213:

"The Indians are not citizens of the state in the exact sense of that term. They have been treated, since our first intercourse with them, as quasi independent nations or tribes, having governments and institutions and national attributes of their own; but, both collectively and individually, feeble and helpless compared with the whites, and therefore, needing constantly the protection and paternal care of the government.

* * *

"A rule which would authorize individual citizens to obtain possession of their lands, under any claim or pretense whatever, without the sanction of the government, and put them or it to the slow and tedious process of an action at law to recover it back again, would be destructive of their rights and subversive of the duties and obligations which the government owes them."

The motion to dismiss the petition is denied; judgment as prayed for by the petitioner is granted, and it is directed that a warrant of removal be issued to the Sheriff of the County of Suffolk commanding him to remove the defendants from the lands described in the petition.

Note: The Cove Realty Company appealed to the Court of Appeals of New York (6 NY 2d 435) on July 8, 1959 where they won a reversal. This reversal was overturned by the Supreme Court of New York, Appellate Division Second Department (9 A.D. 2d 948) Dec. 31, 1959. The Cove Realty Company appealed to the United States Supreme Court (No. 675, April 17, 1961) but their case was dismissed and certiorari denied.

Source: *New York Supplement*, Second Series, Vol. 137. St. Paul, Minn.: West Publishing Company, 1955, pp. 570-577.

New York Supreme Appellate Division
Second Department
(December 31, 1959)

POINT I

The order appealed from is substantiated by the overwhelming weight of the credible evidence.

The evidence which we have just summarized and reviewed points overwhelmingly to but one conclusion: that in 1859 there was a fence and a ditch which ran parallel with and close to the south side of the Montauk Highway; that at the western end of the fence there was a wooden gate known as the "West Gate" which marked the western entrance into the Indian Reservation; that the distance from the gate to the south side of the highway was approximately 32 to 40 feet; that after the pasturing of sheep in Shinnecock Hills was discontinued around 1886, the fence and later the West Gate gradually fell into disrepair, but the old Indian Ditch remained visible as late as 1917 and was even then considered the boundary of the Indian lands; the Halsey's survey in 1921 fixing the boundaries of School District No. 6 clearly shows the highway to be the northern boundary of the Indian Reservation; and that the triangular parcel now in dispute first appears as a separate parcel of non-Indian ownership in the Shinnecock Hills Sales Map of 1925.

To controvert the foregoing which so clearly supports the position taken by the District Attorney in the Court below and also in this Court, what do the appellants now adduce?

First, they stress the fact that ever since 1926 taxes have been assessed against the lands in dispute as a separate parcel and that the southern boundary of the lands so assessed, for 1912 until 1925, was described as "Indian Reservation" and after 1926 as "Indian Land," but never as "Montauk Highway" (App. Brief, pp. 12, 14; 96-97). We submit that the short land descriptions which are recorded in the office of the County Treasurer for the purpose of identifying taxable lands have little or no bearing on the ultimate question of fact which had to be determined here, namely, the actual location of the old Indian Ditch referred to in the legislation and deeds of 1859.

Secondly, the appellants rely on certain alleged admissions against interest made in a lease between the Trustees of the Shinnecock Indian Tribe and Uriel A. Murdock in 1891 (App. Brief, pp. 15, 24-25; 1193-1197) and in two other leases, dated respectively 1895 and 1915, between the Trustees of the Tribe and a certain student colony residing in the nearby Art Village (App. Brief, pp. 15, 25; 1204-1205, 1206-1210). The lease to Murdock, however, relates to a point in the Reservation boundary line lying to the west of the lands now in dispute. As for the leases with the art colony, the right therein granted to the students to cross not merely tribal lands but also the lands of the Shinnecock Land Company referred to that very narrow pie-shaped strip or gore which lay between the south edge of the Montauk Highway and the Indian Ditch itself, a strip or gore which at its westernmost end according to the testimony of the witnesses who recalled and identified the old ditch—was between 32 and 40 feet wide.

Finally, we come to the argument based on the attempt of the Indian Trustees in 1943, through their then attorney, to purchase the triangular parcel now in dispute (App. Brief, pp. 15-16, 25; 1242-1248; Def. Exh. H-1). Perhaps that argument can best be answered by quoting the Court below (49-50):

"It may have been that since the parcel first came into existence as an entity in itself in 1925, and had been the subject of various conveyances since that time, the Tribe was endeavoring to clear up the question of title by purchase at a nominal price for the reason that Indians are circumscribed and restricted by statute as to when they may sue or be sued."

Upon the entire record, we submit, as previously outlined and summarized, the conclusion is inescapable that the triangular parcel here in issue was undisputably Indian Land; that the

appellants were justly found to be intruders thereon and were properly ordered to be removed therefrom.

POINT II

The appellants' contention that the Court below lacked jurisdiction of the subject matter is without merit.

At pages 30-40 of their brief, the appellants argue that the Court below did not have power "to determine as an issue of fact where the Indian Reservation boundaries were located and the adverse claims of title to the land in dispute." Such contention, we submit, is without merit.

Section 8 of the Indian Law specifically empowers the County Court to oust any non-Indian person "who shall settle or reside * * * upon [the] lands owned or occupied by any nation, tribe or band of Indians." Obviously, since that is the language of the statute, one of the facts which the trial court necessarily had to determine was whether or not the lands allegedly intruded upon were in fact Indian lands. This determination the Court made, not summarily, but after what amounted to a plenary trial. To claim, as do the appellants here, that the Court was without power to make such a determination, is patently absurd.

As was said by Freeman on Judgments Vol. 1 (5th Ed.) §250, pp. 719-721:

"If the circumstances which gave rise to the jurisdiction do not exist in a particular case, the authority to act does not arise. But the question as to whether or not they do in fact exist is a matter primarily for the Court whose powers are invoked, and it has jurisdiction to examine and determine whether the particular application is within or beyond its authority."

To the same effect, see 21 C.J.S., Courts §113, p. 174:

"Every court has judicial power to hear and determine, or inquire into the question of its own jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction."

Finally, at pages 28-38 of their brief, the appellants urge that since it does not "indisputably" appear upon this record that the lands allegedly intruded upon are Indian lands, the District Attorney had no right to initiate the present proceeding. Instead, they claim, the matter should have been tried in the Supreme Court in a suit to quiet title or some such similar action.

The only difficulty with this argument is that Section 8 of the Indian Law does not specify that the ownership of the lands in question must, in all cases where the statute is invoked, be undisputed. All that the statute says is that where Indian lands are in fact intruded upon, the summary procedures set forth therein shall apply. The Court below found as a fact—and as it had a perfect right to do—that the lands in dispute are part of the Shinnecock Indian Reservation. Having so found, the Court's decision ordering that the appellants be removed therefrom was quite proper.

True, there is some language in *Peo. ex rel Cutler v. Dibble* (1857), 16 N.Y. 203, aff'd 21 How. (U.S.) 366, sustaining the constitutionality of Chapter 204 of the Laws of 1821, the direct predecessor of the statute at bar, to the effect that in those cases where the statute would as a rule be invoked, the lands would "indisputably" be Indian land and the only question therefore, left to be determined would be whether or not the intruder was a person of Indian blood. This consideration, however, was not the only one in the Court's mind for in another part of the same majority opinion, Judge BROWN makes it clear that he would not wish to put the Indians, "feeble and helpless compared with whites" as they are—whenever their lands are intruded upon—"to the slow and tedious process of an action at law to recover it back again" (16 N.Y., p. 213). This, too, was the rationale of the decision rendered by the court below (66-68).

To the same effect, see *King v. Warner* (Sup. Ct. Suffolk Co., 1953) 137 N. Y. Supp. (2d) 568 (CLIFF, J.).

The appellants in this case have not merely had their day in court, but they have had ten full days in court, in which they were given every opportunity to prove their case. Having had that opportunity and having lost, they should not now be permitted to re-litigate the matter.

As is aptly said in the Restatement of the Law of Judgments, §3, page 14:

"Where a reasonable opportunity has been afforded to designated persons to litigate their rights in

property before a court which has jurisdiction over the property, and the court has finally decided the controversy, the interest of the State and of the parties requires that the rights of the parties in the property shall not be litigated again by them."

So, too, the statement of the late Mr. Justice ROBERTS in *Baldwin v. Iowa State Traveling Men's Association* (1931), 283 U.S. 522, at page 525, 51 Sup. Ct. 517, at page 520, although uttered in a somewhat different context, seems applicable here:

"Public policy dictates that there be an end of litigation: that those who have contested an issue shall be bound by the result of the contest, and that matter once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgement of the tribunal to which he has submitted his cause."

CONCLUSION

The order appealed from should be affirmed, with costs.

Respectfully submitted,

JOHN P. COHALAN, JR.,
District Attorney of Suffolk County,
Attorney for Petitioner-Respondent.

JOHN P. COHALAN, JR.,

DAVID DU VIVIER,

On the Brief.