In the

Supreme Court of the United States

THE ONEIDA INDIAN NATION OF NEW YORK STATE, ET AL.,

Petitioners,

vs

THE COUNTY OF ONEIDA, NEW YORK, ET AL.,

Respondents.

Docket No. 72-851
C. 3

Washington, D.C.

November 6 and 7, 1973

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

THE ONEIDA INDIAN NATION OF NEW YORK STATE, ET AL., Petitioners,	:	
v.	:	No. 72-851
THE COUNTY OF ONEIDA, NEW YORK, ET AL., Respondents.	:	

Washington, D. C.
Tuesday, November 6, 1973

The above-entitled matter came on for argument at 2:34 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

GEORGE C. SHATTUCK, ESQ., One Lincoln Center, Syracuse, New York 13202; for the Petitioners.

WILLIAM L. BURKE, ESQ., 29 Lebanon Street, Hamilton, New York 13346; for the respondent, County of Madison.

JEREMIAH JOCHNOWITZ, ESQ., Assistant Attorney General of the State of New York; as Amicus Curiae in support of Respondents.

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-851, The Oneida Indian Nation of New York v. The County of Oneida, New York.

Mr. Shattuck?

ORAL ARGUMENT OF GEORGE C. SHATTUCK, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SHATTUCK: Mr. Chief Justice, and if it please the Court: I represent the Oneida Indians of New York State and the Oneida Indians of Wisconsin in a suit against Madison and Oneida Counties of New York State. This is an equitable type action concerning the lands currently being used by the defendant counties but allegedly owned by the Oneida Indians.

The sole issue on this appeal is the jurisdiction of the federal courts to hear this type of case. The complaint alleges and recites three treaties and one statute under which the United States has guaranteed to the plaintiffs the possession of the reservation, including the land which we are now talking about.

The complaint further alleges that in the year 1975 the State of New York acquired the land in question illegally in contravention of the treaties and in contravention of the state law -- of the federal law, excuse me, which holds that no purchase of Indian lands without the consent of the United States shall be of any validity in law or equity.

The complaint also alleges that the price received was unconscionable and inadequate. It alleges that the value of the land was misrepresented to the Indians. It alleges that at the time the sale took place, the Indians, the plaintiffs could not read or write. It alleges that two years after the purchase of the state, the land was resold at a profit of approximately 500 percent. I might point out that this resale of land was in the main to developers who resold shortly after at a further profit.

The complaint also alleges that the consent of the United States was neither sought nor obtained by the state to the sale. And further that the state knew of this requirement of federal law because just three years later, in 1798, the state legislature asked the federal government to appoint a commissioner who would represent the Indians at a purchase which took place in 1798 and which is not the subject of this case.

The Oneida Indians have sought to fulfill their obligations under their agreements with the New York and the federal governments. Therefore, in 1964, they appealed to the Attorney General of the State of New York for help and received none. In '67 we appealed to the Governor of New York, and he referred us to the constitutional convention. In '67 we appealed to the constitutional convention and at that time the Attorney General appeared and said this is a legislative matter.

In '68 we appealed to the President of the United States, as required by our treaty, and we also appealed to Congress. In all cases, we were denied any relief at all, and therefore at long last the Oneidas brought this case, which I consider to be an equitable type action, reciting the treaties, we are reciting the law, and we are reciting what happened, and we are asking the federal courts take jurisdiction and arrive at some kind of an equitable solution and answer to the pleas of justice for the Oneida Indians.

Q When you say equitable type action, it deals with real estate, doesn't it?

MR. SHATTUCK: Yes, it does, Your Honor.

Q Is it something in the nature of acquire title action?

MR. SHATTUCK: Well, as I see it no, Your Honor. The Oneida Indians were the only one of the Iroquois Tribes who helped the United States during the Revolutionary War, and then and since they have pursued a policy of friendship. They do not wish to dispossess anybody who is now in occupancy of their land. That is why this is a suit against counties who are occupying the land.

Q What is the relief they want?

MR. SHATTUCK: Some kind of an equitable accounting for the fair rental value perhaps of the land as of today. They do not seek to eject either the counties or anybody else.

Q No declaration that title is in the tribe --

MR. SHATTUCK: Well, I think it is implicit somehow, there is a precednet for this kind of an action. The whole City of --

Q But underlying it all, does it have to be some kind of declaration that title is in the tribe?

MR. SHATTUCK: Yes, I would say so, Your Honor.

Q But they would say, those now in possession may remain but someone ought to account to them for some rental value or something else?

MR. SHATTUCK: That is what we are trying to achieve.

Q You are not content to be in state court?

MR. SHATTUCK: We are not allowed to be in state court.

Q Well, is that a decided issue?

MR. SHATTUCK: I believe it is, Your Honor.

Q I take it your opposition will disagree with you.

MR. SHATTUCK: It could be, Your Honor.

Q And you haven't tried?

MR. SHATTUCK: No. I might point out that in the court below, the Second Circuit, the sole reason, it seemed to me, for denying jurisdiction was that we are out of --

Q Is there a federal agency representing you here?

MR. SHATTUCK: No, they refused to take part in our case because of an alleged conflict of interest.

Q You got it before the Indian Claims Commission, didn't you?

MR. SHATTUCK: Yes, Your Honor.

Q For the value of what?

MR. SHATTUCK: For the value of what happened in 1795, without any interest, without any adjustment for the purchasing power of the dollar since then, without any adjustment of fair market value.

Q Does it concern the same property?

MR. SHATTUCK: It concerns the same property, yes, Your Honor.

Q And is there any contest about the jurisdiction of the Indian Claims Commission?

MR. SHATTUCK: No, Your Honor.

Q So the question is was there some unfair dealing at the time and, if so, how much is it worth?

MR. SHATTUCK: That is the Indian Claims case.

Q Well, can't you get in that case precisely the relief that you are asking in this case?

MR. SHATTUCK: We can get some part of it, but they can't get the full relief to which they are entitled.

Q Why is this? I thought the Indian Claims Commission had rather broad discretion if they determined there has been unfairness to the Indians --

MR. SHATTUCK: They could give --

Q -- in saying who has to pay and how much.

MR. SHATTUCK: They could give the difference between the fair market value of the land at that time and what was actually paid for it at that time, without any adjustment for interest and with an offset for all services which have been given to the Indians from that date down to this day.

Q But that is the remedy that Congress has provided in these circumstances, isn't it?

MR. SHATTUCK: Yes, it is, Your Honor.

Q And you want an addition, I gather, something you call fair rental value or something like that?

MR. SHATTUCK: Yes. I might point out --

Q Since 1795.

MR. SHATTUCK: -- that Congress, when it enacted the Indian Claims Commission Act, showed no intention of abrogating treaties with which the United States made agreements with the Indians, and so I think this is the basis. We could still recover there and still have a very just law suit because the remedy there is inadequate. It goes back so far, about 175 years of interest.

Q But this claim you have here, if you say it is for violation of a treaty, could be taken before the Indian Claims Commission too, couldn't it?

MR. SHATTUCK: No, Your Honor.

Q That is what I want to know.

MR. SHATTUCK: I don't believe it could.

Q Why not?

Q They could just give relief against the government, can't it?

MR. SHATTUCK: Yes.

Q They can't give relief against private parties.

MR. SHATTUCK: No. They could not, for instance, dictate what the state's liabilities or what the county's liabilities were.

Q That is where the conflict arose.

MR. SHATTUCK: Pardon?

Q That is where the conflict of interest arose.

MR. SHATTUCK: That is where the conflict of interest arose.

Q Well, the merits of this controversy aren't before us at all, are they?

MR. SHATTUCK: No, Your Honor.

Q You have to know enough about the case to know that it comes under Volume 28 of the United States Code, 1362, period.

MR. SHATTUCK: That is the issue.

Q That it is a case brought by any Indian tribe or band with a governing body duly recognized. That is all we need to know about the merits of this case.

MR. SHATTUCK: Or --

Q Beyond that it is purely a matter of federal -- is it a matter of federal jurisdiction, is it not?

MR. SHATTUCK: Or 1331.

Q Is it not?

MR. SHATTUCK: Yes, Your Honor. The Indian Claims case is something that I think with other defenses would properly be raised in the trial of the case. I don't think it is before this Court.

Q Well, the only reason I asked the question is whether it provided another argument about whether a federal court should proceed with the case at all.

MR. SHATTUCK: I don't believe it does, Your Honor.

Q Well, I know you don't, but I was asking.

MR. SHATTUCK: Okay. I think what we are into, the way I see the case, is three treaties that promise the Oneida's possession of the land, and the federal law promises them possession. On a strictly jurisdictional issue, the Second Circuit has held that non-possession is what keeps us out of court, so that which the treaties and promises of the United States guarantee possession is what keeps us from getting equity or some kind of relief. This seems to be a very contradictory situation. I think that where certainly the rule and the ejectment cases that came up in a number of cases is a good one. The federal court should not and certainly in the past have heard every case from which where the title was

derived fromthe federal government, and that is where this kind of case came up that the Second Circuit is basing its opinion on.

As I read those cases, and there are certainly many of them decided by this Court, in every case there was an alternate state remedy, and we contend that both under the state law up to 1958 and the federal law down to this date there is no way that the Oneida Indians or any other Indian tribe can bring an action in a court, a state court of New York State for a question dealing with land claims. It seems pretty clear to me that under the law, the legislation giving civil jurisdiction to state courts, that Congress in the questions submitted in the debates intended or thought that a case involving Indian land claims belonged in federal court.

The Tuscarora case, which we urged to the Second Circuit, involved Indians who were at least under the state law not legally in possession of the land because a condemnation map had been filed, and under the condemnation law the state immediately became entitled to possession. Well, the courts took jurisdiction there and went on in the Tuscarora case, with which I am sure you are familiar.

Q Mr. Shattuck --

MR. SHATTUCK: Yes, Your Honor?

Q -- I have perhaps lack of knowledge of the best way to understand it about the rights of Indians to sue in state

courts. I take it that an individual Indian say could go into the Supreme Court of one of the New York counties and sue for a divorce from his wife without any grant of authority to that court from Congress, couldn't he?

MR. SHATTUCK: Since fairly recently, but not prior to I think it is about 1950.

Q Now, is that a matter of New York law or federal law?

MR. SHATTUCK: It has been a matter of federal case law, if not statutory law, since going back to Worchester v. Georgia.

Q Well, I think back to a case decided by the Supreme Court of either New Mexico or Arizona, a case called Begay v. Begay, some thirty years ago, saying that the state courts of one of those states had to afford an Indian who sought a divorce a divorce, and I don't recall that as depending on federal law in any way.

MR. SHATTUCK: Well, I think that very well could be. New York State has taken the position until recently that the federal government had no business in Indian matters in New York state. But they worked out a way though to keep questions like this from being raised because they said, one, an individual Indian cannot sue in behalf of an Indian tribe; and, then, two, an Indian tribe is not a person who can sue in the courts of New York. Now, this was a long-standing New York law

of the Court of Appeals up until 1958.

Q So then it would have been a matter of New York law that said in effect Indians can't raise particular kinds of claims that they might want to raise in New York courts?

MR. SHATTUCK: It was a matter of New York law and of federal law, as I understand it, Your Honor, especially since about 1952 when the Congress granted civil jurisdiction to the courts of New York over Indian matters, it specifically reserved to the federal courts jurisdiction over Indian land claims dealing with reservations, like the one we are talking about. So to me it is perfectly clear that both at least under prior New York law and always under federal law, whether that was recognized by the law of all the states or not is another question. The federal government has granted different powers to different states, and we are talking just about New York State.

I think the question that we have here, as I said, is two policies, the policy against having the federal courts inundated with land cases and the policy on the other hand of the federal promises, the promises of the treaties, of the statutes, of George Washington, what have you, the federal promises and policies favoring and giving the benefit of the doubt to Indians. In fact, there is a special federal statute saying in a land case between an Indian and a white man, the burden of proof is automatically on the white man, so all the way through --

Q How can you establish that Congress, in enacting 1362 meant to let you into federal courts -- that is the end of the case, isn't it?

MR. SHATTUCK: Yes.

Q If you don't have to worry about this well pleaded complaint --

MR. SHATTUCK: Yes, Your Honor.

Q -- the notion that is involved in 1331, because the legislative history says that Congress meant you to get into court under 1362.

MR. SHATTUCK: That is what we claim.

Q You haven't argued it yet.

MR. SHATTUCK: Right. I haven't got that far. Okay. Well, in the legislative history under 1362, it seems to me that the Congress intended, and several of the examples given in the legislative history, the Indians would not have been in possession under the well pleaded complaint rule. And if that is the key, then Congress changed the lock a little bit when it enacted section 1362.

Q It did more than simply eliminate for purposes of this kind of case --

MR. SHATTUCK: Yes.

Q -- the jurisdictional amount.

MR. SHATTUCK: That's right.

Q It went beyond that and said --

MR. SHATTUCK: The heading of the case says --

Q -- a well pleaded complaint and everything else in the way of requirements are abolished as to Indian law suits.

MR. SHATTUCK: The heading of the case says it is to abolish the jurisdictional amount and for other purposes. And the only other purpose that I can think of is to set up a scheme which would go a little bit broader towards letting the American Indian pursue his own rights instead of depending on the federal government to act or not act.

Q Isn't that language "and for other purposes" almost boilerplate in that type of a situation though, that a legislature almost always puts in just to make sure they don't have the title too narrow?

MR. SHATTUCK: I would say that is completely accurate. I think that is what happened here.

Q Then you don't suggest that it was a conscious, deliberate choice on the part of Congress?

MR. SHATTUCK: I don't know, Your Honor, that the Congress had in mind the very narrow interpretation of arising under an Indian type case that has been used by the Second Circuit in this case. It was not used -- it was not used by the Ninth Circuit or the Second Circuit in the France and Tuscarora cases which are cited in the brief.

I think we come down to the fact of it seems to me the word of the United States. They said you will have

possession of your land.

Q Well, that again goes to the merits of the case.

MR. SHATTUCK: Well, I think, Your Honor, that to some extent the treaties here in part create our cause of action. Certainly where the treaties guarantee possession, the fact of non-possession should not be the factor which viciates our case.

Q It is the treaties which give you your asserted right to possession, but -- and which entitle you to bring this action of rejection. But you are still right up against the same settled established long ago rule of federal jurisdiction--

MR. SHATTUCK: Yes, we are, in section 1331 cases.

Q -- unless you can show that 1362 means something else than 1331.

MR. SHATTUCK: I think it does.

Q That is really what the case is about, isn't it, as my Brother Brennan has suggested?

MR. SHATTUCK: Well --

Q Are you really placing much reliance on 1331?

MR. SHATTUCK: Your Honor, I think that, considering the policy thing here, in the other 1331 cases that I have been able to find, there was an alternate remedy in the state court and every one that I can find, even Taylor v. Anderson, which was specifically an Indian case, the court there recognized that there would have been, the Supreme Court and the District

Court, that there would have been possible an action in the local courts. In fact, the District Court said you shouldn't have come here first, you should have gone to the local courts, and that is where I think under 1331 I think there is a serious question of distinction here. As the Justice says, probably our main argument should be under the 1362 where, if you read the legislative history, it seems clear that Congress intended a broadening out, not just the change of the jurisdictional limitation.

Yours Honors, I would like to close now and reserve my remaining time for rebuttal. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Burke?

ORAL ARGUMENT OF WILLIAM L. BURKE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. BURKE: Mr. Chief Justice, and may it please the Court:

Federal jurisdiction to hear the petitioners' complaint is bottomed primarily upon 28 United States Code, sections 1331 and 1362. And in 1958, when section 28 United States Code, 1331 was amended, the increase in the jurisdictional amount was from $3,000 to $10,000, and that was the only change that was made. There is nothing in the statutory provisions or in the legislative history that would indicate that Congress intended to revamp the well pleaded complaint rule to which Your Honors have referred.

It is submitted that the provision under which these petitioners have bottomed their case is section 1362, and there is no language in the change that would indicate direct or indirect that Congress intended to change or alter the well-pleaded complaint rule. Thus, the question presented is whether or not Congress repealed that rule when it enacted section 1362 and employed the identical language.

And we further contend that there is no jurisdiction because of the diversity of citizenship rule. The Oneida Indians, it is alleged, do reside in Madison County and Oneida County and also in Wisconsin and on that basis the courts below said no, and I can only reiterated what the courts below said.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Jochnowitz?

ORAL ARGUMENT OF JEREMIAH JOCHNOWITZ, ESQ.,

AS AMICUS CURIAE, SUPPORTING RESPONDENTS

MR. JOCHNOWITZ: May it please the Court: I represent New York State, which is amicus in this case.

Now, this certiorari arises here from the dismissal of their complaint. Now, their motion to dismiss contained eleven separate grounds, and they are grouped into four basic groups. The first was lack of original jurisdiction of the federal courts. The second was the controversy was in fact against the State of New York and the United States and not against these defendants; thirdly, that there was an identical

claim pending against the United States before the Indian Land Commission; and, lastly, that the complaint there, an amended complaint there, followed this course of action.

I believe not only before Your Honors is the question of the jurisdiction but all of those because this was what the motion originally was made for, and this was the motion that was granted.

Now to succeed here, therefore, it is my contention that they must establish, one, the original jurisdiction of the federal courts; two, their right to sue the defendants who are holding the lands in this case for the benefit of the people of the State of New York, all of the people of the State of New York in their governmental capacity; three, their right to maintain this action despite the fact that, as the court below noted, that there was pending before the Indians Land Commission a claim for damages which would include these damages; and, lastly, that their complaints face a course of action.

Q Mr. Jochnowitz, am I mistaken in having the impression that the Court of Appeals dealt only with the question of federal jurisdiction?

MR. JOCHNOWITZ: The Court of Appeals --

Q It didn't mention the other branches of your motion.

MR. JOCHNOWITZ: The Court of Appeals dealt namely with that. The court noted the other action pending in its

opinion, but basically before they can be in the federal court they must have a good complaint. If their complaint fails, it is jurisdictional and --

Q Am I mistaken in my impression that --

MR. JOCHNOWITZ: No. Basically, the court went on jurisdiction.

Q So if we disagreed with the Court of Appeals on that, we would presumably remand the case to that court to consider the other branches of your motion, wouldn't we?

MR. JOCHNOWITZ: Now, it is our contention here, first, that the well pleaded complaint rule is -- they contend that the well pleaded complaint rule was inapplicable to 28 U.S.C. 1362, despite the fact that it has always been held to be applicable to 1331(a). Both of these are jurisdictional sections and provide that the course of action must arise under the Constitution, laws and treaties of the United States. The same language was used in both, and there was no change in the language. The difference in one was that the claim must exceed $10,000 and the other that the claim must be brought by an Indian.

Now, these statutes are in pari materia. The same language was used, when Congress uses the same language, and that language has been always interpreted to include the complaint rules, then it was certainly meant to include it in this case, too.

MR. CHIEF JUSTICE BURGER: We will resume there in

the morning.

[Whereupon, at 3:00 o'clock p.m., the Court was adjourned, to reconvene on Wednesday, November 7, 1973, at 10:00 o'clock a.m.]

- - -

IN THE SUPREME COURT OF THE UNITED STATES

THE ONEIDA INDIAN NATION OF NEW YORK STATE, ET AL., Petitioners,	:	
v.	:	No. 72-851
THE COUNTY OF ONEIDA, NEW YORK, ET AL., Respondents.	:	

Washington, D. C.
Wednesday, November 7, 1973

The above-entitled matter came on for further argument at 10:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

GEORGE C. SHATTUCK, ESQ., One Lincoln Center, Syracuse, New York 13202; for the Petitioners.

WILLIAM L. BURKE, ESQ., 29 Lebanon Street, Hamilton, New York 13346; for the respondent, County of Maidson.

JEREMIAH JOCHNOWITZ, ESQ., Assistant Attorney General of the State of New York; as Amicus Curiae in support of Respondents.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 72-851. You may continue.

ORAL ARGUMENT OF JEREMIAH JOCHNOWITZ, ESQ.,

AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS--Continued

MR. JOCHNOWITZ: Mr. Chief Justice and may it please the Court:

When the red light went on yesterday, we were talking about section 1331(a) and 1362 being in pari materia. And I maintain that if the well pleaded complaint rule is applicable to 1331(a) it must also be applicable to 1362. As a matter of fact, the Senate report -- and I have got a quote here from it, that was made at the time of the enactment of these bills, and the House report contains similar language -- says, "The purpose off he bill as amended is to permit Indian tribes to bring civil actions arising under the Constitution, treaties and laws of the United States without regard to the $10,000 limitation, and accordingly amends Chapter 85, Title 28, U.S. Code, by adding a new section."

Now, the same report -- and I have got it as an appendix to my brief -- states that the reason this was necessary or came about was a federal case, Yoder v. Assinborne, 339 F. 2d 360. In that case, the Court held there was a federal question, but because the jurisdictional amount wasn't met, the claim was dismissed, and it was because of the Yoder case that they felt

it was necessary to amend the law by giving the Indians the right to sue where the amount was less than $10,000 since most of the Indian claims being individual were less than $10,000 and they couldn't group them or total them to get jurisdiction.

Now, yesterday Your Honors went into the question of whether plaintiffs have a right to sue in New York State. It is our contention that plaintiffs do have a right to sue in New York State. That is they have standing. We don't concede that they have a case in this.

Now, plaintiffs say that they don't have this right. We maintain that New York State's Indian law, sections 5 and 11(a) give them that right to sue in New York State. Now --

Q Mr. Jochnowitz, is it enough that New York State's Indian law gives the petitioners here the right to sue, or do you have to show too that federal law gives New York courts the authority to entertain such a suit?

MR. JOCHNOWITZ: Right now, on that question I think I call your attention to the Seneca v. Christy case in 1981. In Seneca v. Christy, the Seneca Nation sued, they had been given special permission by a New York State statute to sue. Now, New York State upheld their right to sue but decided against them. It decided against them first on the question of the Indian non-intercourse act. It stated that the original act passed in 1790 contained a statement, any state, whether having the right of preemption to such lands or was banned.

They went in under 1800-something statute, ours is the 1793 statute, but both had this portion deleted, and the New York State Court of Appeals at that time held that the deletion of these words indicated that the Congress intended that the pre-emption state should not be barred from having deals with the Indians, and this as a matter of fact the Christy case shows New York followed for over a hundred years.

Now, the second reason why the Indians were denied relief in New York was the statute of limitations. The act which they sued under said they could sue to the same extent as other persons, and statute of limitations is a bar for anybody who brings his action too late, and they had. Now, there is similar wording in New York State in the Indian law, section 5.

Now, Seneca was appealed to the United States Supreme Court and the United States Supreme Court held that it was -- it was decided on two issues, one of them the federal question, the first question which I discussed, and the second limitations which was a state question, and it said since it could be maintained under the state question the decision of the Court of Appeals would not be vacated. And so in Seneca -- in the Seneca case, I say this Court has already ruled that where New York State grants the right to sue, there is the right to sue.

Now, Indian law, section 5, was first enacted in 1902. That was right after Seneca, the Seneca case -- in 1892, rather. In 1902, the New York State Land Commission, acting through the

Attorney General, issued an opinion stating that the law gives the Indians the right to ejectment in courts of record to the same extent as other citizens. Here the action is basically an ejection action, in an ejection action the right is based on the right to possession of property, here a right to damages would only be because they were being denied possession, in other words they must have had a right to possession.

Now, in the petition for certiorari, the proponents give excerpts from an affidavit by Donald Segrin, an Assistant Attorney General, in that case he took the position at that time that there was no capacity to sue in New York State. However, that was our position only in the Court of Claims, that position we changed, because we found we were wrong, and in the Court of Appeals' opinion it says as follows -- and that is St. Regis v. State of New York, 5 N.Y. 2d 24, and it is on page 35: "On this appeal, the state concedes that the claimants have capacity to sue." They do not argue there is a defect in indispensable parties.

Q Is that cited in your brief?

MR. JOCHNOWITZ: St. Regis is cited in my brief.

Now, if they sue under New York State law, there is a possibility of the defense of the statute of limitations. As a matter of fact, standing to sue doesn't mean that they are going to win. If they sue us in the State of New York, we are going to fight like the duce to keep them from winning, and I

think we have grounds, the merits of this. But we would not raise, if they brought an action against the state in the Court of Claims, we would not raise the question of standing. I have been authorized to say this by the Solicitor General of the State of New York.

Now, in the brief, plaintiffs contend further that the New York State -- that the right to sue was brought about because of 25 U.S.C. 233. Now, 25 U.S.C. 233, they say, and it does, contains a limitation that the right to sue is for transactions and events transpiring after September 13, 1952. Well, let's say assuming they are right. What are they suing for here? Rent damages in the form of rent that occurred after January 1, 1968. Their course of action approves after the deadline date of 1952, so even on their own interpretation of the statute they have no right to be here.

And we also maintain that 25 U.S.C. made it mandatory for New York State to permit Indians to sue in their state for events that occurred after September 13, 1952. But it didn't prevent us from giving them a right to sue for events that occurred prior to that. This we say we could do and that we did do it, and this we say your Court has held we could do in the case of Seneca v. Christy.

Now, plaintiffs here state that Indian law section 11(a), and that is the law that says not only do Indians have the right to sue but Indian tribes and Indian bands have the

right to sue in New York, was passed as a result of 25 U.S.C. 233. In this they are wrong. This is not the section that was passed. The section that was passed at the time of 233 was the amendment to Indian law section 5, and we have a letter that we cite the contents of it in our brief by the Attorney General of the State of New York to the government at the time that was being enacted, and it says: "The bill will not take away jurisdiction from the peacemakers court but will give the state courts concurrent jurisdiction. This step is authorized by Congress if such authority was needed." We questioned the need even then of the authority, and we maintain that we could grant the authority. And they refer to the act of September 13, 1952, 25 U.S.C. 233, thus it was the amendment to section 5.

Now, section 11(a) was passed in 1958, this removes any doubt on their right to suit, in that it has granted the right not only to individual Indians but Indian tribes and Indian bands. In other words, whatever the status of an Indian tribe is, whether corporate or not corporate or whatever it is, New York State, by section 11(a), recognizes their right to sue.

Now, we also say the action must be dismissed because there is another action pending at this time, and the other action pending is the claim by the Indians before the Indian commission. It was cited in the -- now, Your Honors were

questioning my opponent here on whether -- why that wasn't a duplication of damages. I don't see why it isn't. He makes some sort of distintion. He says that before the Indian Court of Claims, all they could get is the damages they suffered at the time that the transaction was made. Actually, if the United States has given them the right to sue for what they were damaged and if they have a right to sue for their damages, it would be total damages, including interest if interest are damages, and if they suffered them.

Now, in Seneca v. United States, 173 Court of Claims, 912, and in several other cases, the United States Court of Claims held that there is a claim in favor of Indians undr circumstances where Indian tribes sold land without being represented. It however did not reach the question of whether New York State was bound by the Non-Intercourse Act or not, it cited a number of authorities in the opinion which held otherwise but didn't reach a conclusion.

Now, we also maintain here that the Eleventh Amendment is a defense. The defendants here are the Counties of Oneida and Madison. In the complaint it is alleged that the lands were used for the building of roads and other public improvements. The use of property by a county in a governmental capacity is protected by the Eleventh Amendment. When a county does so, it is acting for the state and as such it enjoys the state's immunity.

Q Wasn't that contention foreclosed by R. Moore v. Alameda County decision last year? Didn't we say that a county doesn't partake of the state's immunity enough to invoke the Eleventh Amendment and cite some old cases of this Court?

MR. JOCHNOWITZ: I'm not sure, Your Honor, on that. And certainly if the Eleventh Amendment is a defense here, then the Indians would come in under the theory of -- either as suing the state, would be either a citizen of this state or a citizen of Wisconsin, in either case under the Parden case they could not sue.

Now, we also maintain here, and this probably would only go in the event Your Honors would decide that they have original jurisdiction on the question of 1362 and might be referred back to the Circuit Court, that the complaint does not state a course of action.

And one of the things that I want to call to Your Honors' attention is that there was a substantial difference, as it was cited in Seneca v. Christy, between the law of 1790 and the law of 1793. The law of 1790 specifically forbad states having the right of preemption to enter into agreements. The law of 1793, which was the law in effect at the time this transaction was made, had that portion deleted. It did not contain this ban.

Now New York State, as was shown in Christy, made 39 treaties during that period of time after the law of 1793

went into effect. In only five of them did it have a federal commissioner present. Now, the United States recognized this. The United States in many cases granted substitute lands to the Indians who had sold to the United States. They tacitly approved this. The Indians made no complaint. We have almost 200 years that have gone by, and a practical construction such as we had here, which the parties have undertaken for such a long period of time, should not be changed even if there is an equally tenable interpretation the other way. In the instant case, I say this is very necessary because if we follow through to the fruits of a decision against us, we would really have an economic upheaval in all of the preemption states where deals were made for the purchase of land approximately about 200 years ago and it would be upsetting titles all over the eastern part of the country.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jochnowitz.

Mr. Shattuck, you have about ten minutes left, if you wish to use it.

REBUTTAL ARGUMENT OF GEORGE C. SHATTUCK, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SHATTUCK: Your Honor, Mr. Chief Justice, and may it please the Court:

I won't use my ten minutes, Your Honor. I have a very short concluding statement to make.

As I listened to my brothers here, and as I listened to the questions of the Court, that the Court directed to me yesterday, I have this to say, that when you boil this case all down, the only question for this Court to decide is whether lack of possession will bar the Oneida Indians and other Indians throughout the United States from federal court.

Three treaties, federal statutes and the specific words of President George Washington to the six nations have promised possession to the Oneidas and the other six nations. The first President, in 1790, said to the Senecas, in behalf of the six nations, the general government will never consent to your being defauded but it will protect you in all your just rights. And further on, in the same speech, President Washington, in a slightly different context, I must admit, but he did say to the Senecas, that the federal courts will be open to you for your just claims, or words to that effect. This speech is printed in our brief.

Now, all the Oneidas want is a fair hearing and to me, under the very singular facts, treaties and laws present in this case, a hearing should be available to them even under the most restrictive interpretation of section 1331 and certainly under the broader meaning given to section 1362 in Congress in 1966.

Are there any further questions from the Court?

MR. CHIEF JUSTICE BURGER: I think not. Thank you,

Mr. Shattuck.

MR. SHATTUCK: Thank you.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:18 o'clock a.m., the case was submitted.]

- - -