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> The decision is one of local, state, and national importance alike...[1]

> If the claim of the plaintiffs had been substantiated, it would have not only challenged the title of every purchaser and holder of land included in the Ogden Land Company's purchase of August 31, 1826, but also the title to many millions of acres of lands in the state held under similar treaties with the Indians.[2]

INTRODUCTION

On January 21, 1974, the United States Supreme Court overturned one hundred forty-three years of American law. *Oneida Indian Nation of New York State v. County of Oneida* allowed this Indian nation access to federal courts in the pursuit of its land claims.[3] This landmark decision held the federal Trade and Intercourse Acts (Non-Intercourse Acts) applicable to the original thirteen states, thereby providing access of the federal courts to the Oneidas as well as to other Indians seeking their land returned to them. No longer would jurisdictional barriers obstruct their efforts. According to Justice Byron White's opinion: "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the

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1. *The Treaty Upheld*, N.Y. TIMES, Apr. 24, 1891.

2. *Against the Senecas*, CATTARAUGUS REPUBLICAN, May 8, 1891.

3. 414 U.S. 661 (1974). *See generally* GEORGE C. SHATTUCK, THE ONEIDA LAND CLAIMS (1991).

original 13."[4] Justice White reasoned the controversy arose under the laws of the United States sufficient to invoke the jurisdiction of federal courts and reversed the earlier federal court determinations, remanding the case for further proceedings to the Federal District Court for the Northern District of New York.[5]

This United States Supreme Court decision challenged *Seneca Nation of Indians v. Harrison B. Christy* [also known as *Christie*], a historic 1891 New York Court of Appeals case.[6] More than one hundred years ago, the Seneca Nation of Indians sought legal redress for the fraudulent "takes" of their lands by the Ogden Land Company in the 1820s.[7] This Article will trace the historical background that inspired the Senecas to seek legal redress. It will also discuss the convoluted reasoning of the Court of Appeals when making its decision in 1891.

On August 31, 1826, a "treaty" was negotiated at the Buffalo Creek Reservation between the Senecas and Robert Troup, Thomas Ludlow Ogden and Benjamin Woolsey Rogers, the trustees of the Ogden Land Company, represented by their attorney John Gray. Nathaniel Gorham was the representative of the State of Massachusetts and Oliver Forward was the Commissioner for the United States at the treaty grounds. In return for $48,260, the Senecas "sold" the entire Caneadea Reservation in Allegany County, the Big Tree, Canawaugus and Squawky Hill Reservations in Livingston County, the remaining lands of the Gardeau or "White Woman's" Reservation in today's Wyoming and Livingston Counties, 36,638 acres of the Buffalo Creek Reservation in Erie County, 33,409 acres of the Tonawanda Reservation in Erie and Genesee Counties, and 5120 acres of the Cattaraugus Reservation.[8] The largely anti-Indian New York State Legislature Committee of 1888, known as the Whipple Committee, readily admitted in its 1889 report that, "[t]his

4. *Id.* at 670.

5. *See id.* at 675.

6. Seneca Nation of Indians v. Christy, 2 N.Y.S. 546 (Sup. Ct. 1888), *aff'd*, 27 N.E. 275 (N.Y. 1891), *appeal dismissed*, 162 U.S. 283 (1896).

7. *See* Interview with George C. Shattuck, Attorney, Oneida Indian Nations of New York, in Syracuse, N.Y. (Aug. 25, 1983) (emphasizing the impacts of *Christy* on subsequent Iroquois land claims).

8. *See* REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK 23 (1889) [hereinafter WHIPPLE REPORT].

treaty was never ratified by the Senate of the United States, or proclaimed by the President, and the Indians have for a long time past claimed that the treaty was invalid for this reason . . . ."[9]

I. *SENECA NATION OF INDIANS V. HARRISON B. CHRISTY*: BEGINNINGS, 1881-1889

On January 5, 1881, the Seneca Nation of Indians filed a petition with the Bureau of Indian Affairs "praying that they may be put into possession of certain lands in the State of New York, accompanying which is copy [sic] of a treaty entered into in 1826, between said Indian and Robert Troup, Thomas L. Ogden, and Benjamin W. Rogers."[10] They appealed for federal intervention in the case on the grounds that this agreement was illegal because:

> 1st. No person or persons executing or siging [sic] the same was in any manner authorized to act for or bind the Seneca Nation or the people of the Seneca tribe of Indians. 2nd. The sale was not made by or under the authority of the United States and has not been ratified or confirmed or published by the President or Congress. 3rd. The sale was in violation of the laws and constitution of the State of New York, and of the Statutes of the United States. 4th. That the persons claiming title under the said pretended treaty procured the signatures of those pretending to act for your petitioners by paying them large bribes for their individual benefit, and by promising and paying the more influential, life annuities. . . . 5th. That the sum of $48,216 agreed to be paid to your petitioners by said pretended treaty, has never been paid to them. That a large part thereof was about that time deposited by the said Robert Troup, Thomas L. Ogden, and Benjamin W. Rogers, in the Ontario County Bank, subject to their own control, where it remained until about the year 1853, when it was removed without the knowledge or consent of the Seneca tribe or Nation; and is now in the U.S. Treasury.[11]

It took over a half-century for the Seneca Nation of Indians to attempt legal action. This delay was in part caused by the fraudulent Treaty of Buffalo Creek of 1838

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9. *Id.*

10. Letter from Hiram Price, Commissioner of Indian Affairs to the Secretary of the Interior 1 (Apr. 15, 1891) (on file with the Seneca-Iroquois National Museum, Seneca Nation of Indians, Allegany Indian Reservation, Salamanca, N.Y.).

11. WHIPPLE REPORT, *supra* note 8, at 1-2.

that not only led to the permanent loss of the Senecas' Buffalo Creek Reservation but to the Seneca Revolution of 1848. The political upheaval overthrew the old chiefs' system and replaced it with an elected system. The political fallout from these changes created an unstable Seneca polity leading into the late nineteenth century.[12]

Besides delaying legal actions over the Treaty of 1826 and over their Kansas claims under the Treaty of Buffalo Creek, the political chaos within the Seneca Nation allowed outsiders to make questionable leasing arrangements with individual Senecas. This situation gave rise to federal legislation in 1875, 1880 and 1890 confirming these leases for ninety-nine years, and creating the Seneca-Salamanca lease controversy which was recently settled by congressional legislation.[13] Thus, the Seneca Nation of Indians did not have enough political stability to bring legal action until the 1880s. This long delay had serious implications in *Seneca Nation of Indians v. Harrison B. Christy*.

The Senecas' appeal to the Interior Department in 1881 was largely ignored. In the meantime, the Seneca Nation of Indians filed a legal action in the Supreme Court of New York State in Erie County on October 13, 1885. The action was to recover lands in the Town of Brant, known as the "mile strip," that had been part of the Cattaraugus Indian Reservation under the Treaty of Big Tree in 1797 until the federal-Seneca treaty of 1826. This action of ejectment was brought against Harrison B. Christy, who fifty years previously secured one hundred acres of these lands from the Ogden Land Company.[14] The Seneca Nation brought the case under a New York State law of 1845 which gave the Nation the right to prosecute and maintain any action, suit or proceeding in all courts of law and equity.[15]

James Clark Strong was the Senecas' attorney in the case. Strong was a prominent lawyer and civic-minded

12. *See generally*, GEORGE H.J. ABRAMS, THE SENECA PEOPLE 61-83 (1976). *See also* Thomas Abler, Factional Dispute and Party Conflict in the Political System of the Seneca Nation: 1845-1895 (1969) (unpublished Ph.D. dissertation, University of Toronto (Toronto)) (on file with the University of Toronto Library).

13. *See generally* Laurence M. Hauptman, *Compensatory Justice: The Seneca Nation Settlement Act*, 71 NAT. FORUM 31-33 (1991) (providing a summary of the lease controversy).

14. *See* Seneca Nation of Indians v. Christy, 2 N.Y.S. 546 (Sup. Ct. 1888), *aff'd*, 27 N.E. 275 (N.Y. 1891).

15. *See* Act of May 8, 1845, ch. 150, § 1, 1845 N.Y. Laws.

resident of Buffalo. Born in Phelps, New York on May 26, 1826, Strong had lived in Washington Territory from 1847 to 1856. During the Civil War he rose to the rank of lieutenant colonel in the Union army and was badly wounded, which led to a permanent limp in his gait. Breveted a general after the war, he joined the law practice of his brother, John C. Strong in Buffalo.[16] Besides the Senecas, James C. Strong represented the Cayuga Indians in their claim against the State of New York and wrote books about his earlier frontier and civil war experiences.[17]

The Supreme Court gave judgment to Christy. The Court insisted that the federal-Seneca treaty of 1826 was a valid transaction, not in contravention of the Constitution of the United States or of the federal Trade and Intercourse Act of 1802.[18] Section 12 of the 1802 act read:

> *And be it further enacted* that no purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same shall be made by treaty or convention, entered into pursuant to the Constitution; and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: Provided, nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at a treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by treaty.[19]

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16. *See generally* JAMES CLARK STRONG, BIOGRAPHICAL SKETCH OF JAMES CLARK STRONG (1910).

17. *See generally* GEORGE WHITCOMB, BUFFALO CITY DIRECTORY 1153 (1891); JAMES CLARK STRONG, WAH-KEE-NAH AND HER PEOPLE: THE CURIOUS CUSTOMS, TRADITIONS, AND LEGENDS OF THE NORTH AMERICAN INDIANS (1893); MARK M. BOATNER, CIVIL WAR DICTIONARY 156 (1959). *See also* NEW YORK LEGISLATURE, REPORT OF THE COMMISSIONERS OF THE LAND OFFICE IN THE MATTER OF THE CAYUGA INDIANS RESIDING IN CANADA, ASSEMBLY REPORT NO. 165 (N.Y. 1849).

18. *See Christy*, 2 N.Y.S. at 547.

19. U.S. CONST. art. I, § 10; Trade and Intercourse Act, ch. 13, 2 Stat. 139 (1802) (codified at 25 U.S.C. § 177 (1994)).

The Senecas appealed the unfavorable decision to the New York Court of Appeals.[20] Seneca attorney Strong argued that under the Constitution no valid purchase of Indian lands could be made unless it was under and in pursuance of a treaty between the United States and that Indian nation. Strong argued that agreements were entered into and executed under the treaty-making power conferred on the President and Senate by that instrument and the twelfth section of the federal Trade and Intercourse Act of 1802.[21]

The Court of Appeals rendered a unanimous decision in April 1891 rejecting Strong's arguments.[22] Justice Charles Andrews, a Republican and former mayor of the city of Syracuse, wrote the opinion for the court. Justice Andrews, who was chief judge of the court in 1881 and 1882 and again from 1893 to 1897, was one of the longest serving jurists on the state's highest court. In all, he served twenty-seven years, retiring in 1897.[23] Justice Andrews had no intention of casting aspersions on the major state political leaders of the past who had facilitated the "take" of Indian lands.[24] Moreover, at a time when Americans were reflecting on the closing of the frontier process and seeing the Indians as a vanishing race, Justice Andrews was not inclined to set a revolutionary precedent by finding justice for the Senecas. He would hardly agree to add lands to the Cattaraugus Reservation, an Indian landbase that was being considered for allotment at precisely that time.[25]

Justice Andrews saw the case through the eyes of a white politician from central New York. His contact with the Iroquois had been with the Onondagas, whose 6100 acre reservation lay at the southern boundary of the city of Syracuse. Much like the Senecas, the Onondagas faced increasing pressures for allotment. In fact, the pressures on the Iroquois reached their zenith in the last two decades of the nineteenth century. In 1889, the Whipple Committee's

20. *See* Seneca Nation of Indians v. Christy, 27 N.E. 275 (N.Y. 1891).

21. *See Christy*, 27 N.E. at 280.

22. *See id.* at 282.

23. *See* FRANCIS BERGAN, THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932, at 114 (1985); NEW YORK COURT OF APPEALS, THERE SHALL BE A COURT OF APPEALS: 150TH ANNIVERSARY OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 96-97 (1997).

24. *See Christy*, 27 N.E. at 279.

25. *See* WHIPPLE REPORT, *supra* note 8, at 75, 78-79.

report concluded that the "Indian problem" could be solved only by ending the Indians' separate status, giving them full citizenship and absorbing them "into the great mass of the American people. . . ."[26] The report, which cited the testimony of disgruntled Onondaga political leaders as well as the testimony and earlier studies conducted by Dr. C.M. Sims, Chancellor of Syracuse University, described in its culturally myopic way the conditions on each New York reservation.[27] Without question, the report had its harshest words for the Onondagas since both missionaries and state officials were frustrated in dealing with their conservatism and resistance to change. With no understanding of cultural relativism, the report condemned the traditional leadership on the reservation, characterized the religious practices as depraved, immoral and superstitious and described the social and industrial state as "chronic barbarism."[28] It insisted, "[t]heir present condition is infamously vile and detestable, and just so long as they are permitted to remain in this condition, just so long there will remain upon the fair name of the Empire State a stain of no small magnitude."[29]

The Whipple Committee's report maintained that reservation lands be allotted in severalty among tribal members with suitable restrictions as to alienation of whites and protection from judgments and debts. It urged the extension of state laws and jurisdiction over the Indians and "their absorption into citizenship."[30] Finally, the report concluded:

> These Indian people have been kept as "wards" or children long enough. They should now be educated to be men, not Indians, and it is the earnest belief of the committee that when . . . the Indians of the State are absorbed into the great mass of the American people, then, and not before, will the "Indian problem" be solved.[31]

These attitudes were not exclusively reflected by the state policymakers of the time. American Indians in the second half of the nineteenth century were faced with a prevailing white societal attitude that sought to absorb native peoples

26. *Id.* at 79.
27. *See id.* at 41-79.
28. *Id.* at 43.
29. *Id.* at 45.
30. *Id.* at 45.
31. *Id.* at 79.

into American society through a four-pronged formula of forced assimilation. This so-called Americanization process included: (1) the Christianizing activities of missionaries on reservations in order to stamp out "paganism"; (2) the exposure of the Indian to white Americans' ways through compulsory education and boarding schools such as Carlisle, Hampton and Lincoln institutes; (3) the break-up of tribal lands and allotment to individual Indians to instill personal initiative, allegedly required by the free enterprise system; and, (4) in return for accepting land in severalty, the "rewarding" of Indians with United States citizenship.[32]

This process was advocated by prominent reform groups such as the Indians Rights Association, the Women's National Indian Association, the Lake Mohonk Conferences of Friends of the Indian and the United States Board of Indian Commissioners. Exhibiting a Social Darwinism bias and advocating a similar paternalistic approach, these reformers believed that responsible men of affairs owed an obligation to what they considered "weaker races."[33] Behind these attitudes was the seldom-challenged assumption that it was possible to "kill" the Indian but "save" the man.[34]

Most of the five thousand reservations Indians in New York in 1890 did not share the reformers' views. Most believed that it was not worth saving the man at the expense of killing the Indian. They rejected Americanization and chose to preserve tribal identity by retaining their separate existence, speaking in their own languages, performing their ceremonies, continuing to observe their native religion, not pushing for suffrage and viewing themselves as citizens of sovereign enclave nation-states.[35] In short, many Indians, although not all, were in opposition to each and every item in the reformers' Americanization blueprint.[36]

Justice Andrews' Indian neighbors in central New York, the Onondagas, were among the most resistant to this

32. *See* Laurence M. Hauptman, *Governor Theodore Roosevelt and the Indians of New York State*, 119 PROCEEDINGS OF THE AM. PHILOSOPHICAL SOC. 1-2 (1975).

33. *See id.*

34. *See id.* at 2.

35. *See id.*

36. *See* Laurence M. Hauptman, *Secnecas & Subdividers: The Resistance to Allotment of Indian Lands in New York, 1887-1906*, *in* 9 PROLOGUE: THE JOURNAL OF THE NATIONAL ARCHIVES 105-07, 114-16 (1977).

Americanization formula. The Longhouse at Onondaga attracted the largest number of followers, and the Onondaga chiefs, who constituted the governing council of the reservation, continued to adhere to the Longhouse religion.[37] Although there were frequent calls from a small group of converted Christian Onondagas, who wanted this hereditary system abolished and replaced with an elected one, such change was not forthcoming. Out of 494 reservation residents (including eighty-six Oneidas) in 1890, there were only twenty-three professed Methodists, twenty-one Wesleyans and twenty-four Episcopalians.[38] Despite the frequent visits of Episcopal, Methodist, Presbyterian and Quaker missionaries and the building of a Methodist and an Episcopal Church as well as an Episcopal school in the nineteenth century, a minority of Onondagas were converted.[39] New York State's educational thrust, largely geared to assimilating Indians, was met with substantive resistance. In one school report for 1888, the superintendent observed revealingly, "[w]ith so much done for them, why should not the Indians be happy and prosperous?"[40] He then went on to answer his own question, blaming what he claimed as the lack of advancement on Indian "race customs," "practical communism" of the Indians and the Onondaga chiefs' alleged authoritarian rule.[41]

In this assimilationist-inspired setting, it is hardly surprising that Justice Andrews rendered the decision that he did. Justice Andrews insisted,

> These claims challenge the title not only of every purchaser and holder of lands within the boundaries of the grant of August 31, 1826, *but all the title to many millions of acres in this state, held under Indian treaties made by the state of New York with the Indian tribes within its borders or under grants made by Indians to individuals under the authority of the state, where no treaty had been made between the United States and Indian occupants.* [emphasis added][42]

37. *See id.*
38. *See id.*
39. *See id.*
40. NEW YORK STATE DEPARTMENT OF PUBLIC INSTRUCTION, 34TH ANNUAL REPORT OF THE STATE SUPERINTENDENT 763 (1888).
41. *Id.*
42. *Christy*, 27 N.E. at 278.

Justice Andrews readily admitted improprieties. He pointed out that New York State's treaties "were generally negotiated by the legislature, acting in conjunction with the governor of the state. It appears that on two or three occasions a commissioner of the United States was present when treaties were made."[43] The justice then tried to explain why so many eminent New Yorkers in the past had violated federal Indian laws:

> The treaties were in no sense treaties made by the President and Senate of the United States. The list of governors, who participated in making them, embraces many of the great names in the history of the state. It includes the Clintons, Tompkins, Van Buren, Marcy, Wright, Seward. By virtue of these treaties this state entered upon the lands acquired thereby, and they have been sold and built upon and improved, and comprise some of the fairest and most prosperous districts of the state. It is evident that the eminent statesmen who participated in these negotiations, did not understand that the prohibition in the Federal Constitution that "no state shall entered into any treaty, alliance or confederation" (Art. 1, sec. 10), or the other provision vesting the treaty-making power in the president and senate (Art. 2, sec. 2, subd. 2), prevented the state from negotiating with the Indian tribes therein for the extinguishment of the Indian title. It is worthy of observation that the Articles of Confederation also vested in Congress the exclusive power of entering into treaties and alliances (Art. IX). The United States under the Articles of Confederation and afterwards under the Federal Constitution, assumed the position of protector of the Indian tribes.[44]

Despite his obvious qualms over state actions, Justice Andrews insisted the Ogdens' purchase of Seneca lands in 1826 was valid since it was done in the presence of and with the approval of commissioners both of Massachusetts and New York pursuant to the 1786 New York State-Massachusetts compact. To Andrews, the deed executed in 1826 was made valid also by voluntary surrender and abandonment by the Indian occupants of the land making the ratification of the federal treaty between the United States and the Senecas unnecessary.[45]

Justice Andrews was referring to the federally ratified accord between New York State and Massachusetts at

43. *Id.* at 279.
44. *Id.*
45. *Id.* at 281-82.

Hartford, Connecticut of 1786 that had settled their existing dispute over western lands. The two states drew a "preemption line" north from the Pennsylvania border through Seneca Lake to Sodus Bay. Massachusetts received the preemptive right to lands west of Seneca Lake and ten townships lying along the Susquehanna and Tioughnioga Rivers. New York State won title and political sovereignty over the entire disputed area. Subsequently, Massachusetts officials sold off their preemptive right to a huge six million acre parcel to Oliver Phelps and Nathaniel Gorham, two of the leading land speculators of the early Republic and the very same Gorham who was Massachusetts commissioner at the 1826 "treaty." In the second section of the 1786 accord:

> Massachusetts ceded to the state of New York the right of government, sovereignty and jurisdiction over the whole territory in dispute, and New York ceded to Massachusetts the right of preemption of the soil and to extinguish the Indian title to about 6,000,000 acres of land in the western part of the State of New York, described in the treaty, Massachusetts surrendering to New York all claim to any other territory therein.[46]

Justice Andrews added that the clause in the Federal Constitution prohibiting the states from entering into treaties, did not preclude a state having the right of dealing with the Indian tribes directly, for the extinguishment of the Indian title.[47] To Justice Andrews, the "true spirit and intent" of the 1802 federal Trade and Intercourse Act was to allow a state or its agents to enter into treaties or other agreements with Indian tribes within its borders:

> [P]rovided it was entered into in the presence of and with the

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46. *Id.* at 276-77. Under the Tenth Article of the Hartford Convention:

> The commonwealth of Massachusetts may grant the right of preemption of the whole or any part of the said lands and territories to any person or persons, who by virtue of such grant, shall have good right to extinguish by purchase the claims of the native Indians, providing, however, that no purchase from the native Indians by any such grantees shall be valid, unless the same shall be made in the presence of and approved by a superintendent to be appointed for such purpose by the commonwealth of Massachusetts, and having no interest in such purchase, and unless such purchase shall be confirmed by the commonwealth of Massachusetts.

Id. at 277.

47. *Id.* at 281.

> approval of a commissioner of the United States appointed to attend the same, and that such a treaty is, within the true meaning of the proviso, a treaty held under the authority of the United States, and required no ratification or proclamation by the federal authorities.[48]

Furthermore, Justice Andrews concluded the Senecas' sale of the land was subsequently confirmed by an act of Congress in 1846, which authorized the President of the United States to receive from the Ontario Bank money and securities representing the purchase price of the lands.[49] These moneys were deposited in the Treasury of the United States in 1855. Despite its retroactive nature, Justice Andrews insisted that the act of receiving these moneys under federal statute and its administration as a trust fund for the benefit of the Senecas, "furnishes the most emphatic evidence of a ratification . . . ."[50]

Five years later, the case, on a writ of error, reached the United States Supreme Court. In a brief opinion of the case decided 7-0 on April 18, 1896, Chief Justice Fuller dismissed the writ of error finding the federal courts did not have jurisdiction because the New York Court of Appeals decision was decided "upon a distinct and independent ground, not involving a Federal question . . . ."[51] Unlike the Warren court in 1974, the United States Supreme Court in 1896 held there was no constitutional issue because violations of the federal Trade and Intercourse Acts did not give Indians standing. The Court's defense of the Ogden Land Company's acquisition of lands of the Seneca Nation at the Cattaraugus Indian Reservation in 1826 appears egregious when judged in the context of Seneca history from 1797 to 1828.

Although *Christy* focused on the lands that the Ogden Land Company had acquired from the Cattaraugus Indian Reservation, the prime objective of their dealings from 1810 to 1828 was the Seneca lands in the Genesee Valley. This was a vast empire of rich agricultural lands highly coveted after the building of New York State's transportation system. The Ogdens' lust for these lands as well as the rest of the Seneca estate and the Seneca resistance to these

48. *Id.* at 281.
49. *See id.* at 282.
50. *Id.*
51. *Christy*, 162 U.S. at 289.

forces defined the Indian history of western New York State in the early decades of the nineteenth century.

A. *Genesee Fever*

The Genesee Country was recognized as Seneca under Article III of the Pickering Treaty of 1794 and specifically reserved for these Indians under the Treaty of Big Tree of 1797.[52] These lands were substantial, containing some of the richest farm lands in New York State: (1) Canawaugus; (2) Little Beard's Town; (3) Big Tree; (4) Squawky Hill; (5) Gardeau or White Woman's Reservation; and (6) Caneadea. The one square mile Oil Spring Reservation near Cuba, New York, in both Allegany and Cattaraugus Counties, appears to have been inadvertently left out during the Treaty of Big Tree negotiations.[53] From the signing of the Treaty of Big Tree, there were attempts to rid the Genesee region of its Indian population. Joseph Ellicott, the chief agent for the Holland Land Company who surveyed the Seneca reservation boundaries in 1798, predicted the Genesee Valley would be rapidly settled by non-Indians if transportation could be improved. He wrote to the directors of the Holland Land Company, "[i]t is something to know that the Genesee River which is called and generally supposed to be a fine navigable stream, is like many others navigable in theory and conjecture only."[54] In a treaty of June 30, 1802, the Senecas sold the two square mile parcel of the Little Beard's Town to Oliver Phelps. With a federal Indian commissioner, John Tayler, the present agreement was ratified by the United States Senate in 1803. Among the signatories were Cornplanter, Red Jacket, Young King and Captain Pollard.[55] In order to make the region more attractive to white settlement, the Holland Land Company and the Ogden Land Company promoted road-building

52. *See* The Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44 (Nov. 11, 1794); Contract between Robert Morris and the Seneka [sic] Nation, Sept. 15, 1797, 7 Stat. 601 (Sept. 15, 1797).

53. *See* The Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44; HOLLAND LAND COMPANY'S PAPERS: REPORTS OF JOSEPH ELLICOTT I, at 51, 87-89 (Robert W. Bingham ed., 1937) [hereinafter HOLLAND LAND COMPANY'S PAPERS]. *See also* Contract between Robert Morris and the Seneka [sic] Nation, Sept. 15, 1797, 7 Stat. 601. *See generally* EDWARD DOTY, HISTORY OF LIVINGSTON COUNTY, NEW YORK 60-103 (1876).

54. HOLLAND LAND COMPANY'S PAPERS, *supra* note 53, at 66.

55. *See* 7 Stat. 72 (June 30, 1802).

projects in the region. Ridge Road was improved and the Genesee Turnpike was built in stages from the 1790s to 1813.[56] Other roads followed, laid out largely as a result of Ellicott's efforts. Ellicott concentrated his attention on building two major routes running from the Genesee River to Buffalo. The first was the Middle Road or Big Tree Road, which ran from Big Tree (Geneseo) to Lake Erie just south of the Buffalo Creek Reservation. The second was the Buffalo Road, a section of the Genesee Turnpike between Batavia and Buffalo.[57]

In the first years of the 1800s, Ellicott also initiated smaller projects such as the Oak Orchard Road from Batavia to Lake Ontario, where he planned a trading post. He also connected the Big Tree Road with an already existing road built by Genesee land speculator Charles Williamson that connected southeastward to Bath and Painted Post. These efforts were followed by the Holland Land Company's subsidies of roads or road improvement along the entire New York State Lake Erie frontier south of Buffalo, as well as Adam Hoops' efforts to extend roads in the southern Genesee region to connect with the Allegany River at Olean.

Long before his appointment in 1810 to the New York State Board of Canal Commissioners, Ellicott also pushed canals as a way of making western New York attractive to non-Indian settlement. His survey maps and fieldbooks were employed in the first decade of the nineteenth century to determine the feasibility of developing the connection between the Genesee River and Lake Erie. He also promoted the possibilities of navigation along the Tonawanda Creek, Tonawanda Swamp and through the Tonawanda Valley as a whole. A hard-driven, determined fellow, Ellicott successfully battled with General Peter B. Porter over the site of the western terminus of the Erie Canal—Ellicott favored Buffalo (New Amsterdam) and Porter favored Black Rock. At other times, he came in direct conflict with his employer, Paul Busti, the Chief Agent of the Holland Land Company, over his elaborate and expensive efforts to promote roads and canals or sell

56. *See* WILLIAM CHAZANOF, JOSEPH ELLICOTT AND THE HOLLAND LAND COMPANY 80-83 (1970); PAUL D. EVANS, THE HOLLAND LAND COMPANY 275-87 (1924) (discussing policies related to expenditures for development purposes).

57. *See* CHAZANOF, *supra* note 56, at 157-80; EVANS, *supra* note 56, at 287-89.

Holland Land Company property off to the state. Consequently, Ellicott must be considered the chief architect of the state's early development in the lands from the Genesee River to Lake Erie. Without his surveys, fieldbooks, town-site development projects and, most importantly, his promotion of the regional transportation network, New York would not have emerged as the empire state as rapidly.

A major obstacle for non-Indian development in the Genesee was the existence of nearly 100,000 acres of Seneca Indian lands in the region in 1797. Peace with Great Britain in 1815 and the renewed push for canal development in western New York created new pressures for the Seneca Indians living in Genesee Country. Although Little Beard's Town was lost in 1802, the Senecas did resist other efforts to dispose of their lands. As early as 1813, they had rejected all attempts to consolidate their populations onto the Allegany Indian Reservation. However, they now faced a more determined foe, David A. Ogden, who had purchased the preemption rights to the Seneca reservations.[58]

B. *The Ogden Land Company*

In a September 1810 deed the Holland Land Company conveyed preemptive rights to the Cattaraugus, Buffalo Creek, Allegany, Tonawanda, Caneadea and Tuscarora Reservations. This was more than 196,000 acres, for fifty cents an acre, with "all the estate, right, title, interest, property, claim and demand whatsoever" of the first parties, "subject only to the right of the native Indian and not otherwise." [59] The deed contained a covenant stating,

> they, the said parties of the first part are seized of an indefensible estate or inheritance of and in the above mentioned and described premises, and are lawfully authorized to sell the preemption right of, in and to the several tracts, pieces or parcels of land above

58. *See* Conable, A Steady Enemy: The Ogden Land Company and the Seneca Indians (1994) (unpublished Ph.D. dissertation, University of Rochester) (on file with the University of Rochester Library) (analyzing David Ogden's efforts to take possession of the Seneca lands).

59. *Id.*

mentioned and described.[60]

David A. Ogden, a former Federalist congressman and Holland Land attorney, created a "trust with twenty equal shares."[61] Ogden held title to the land when obtained from the Senecas and "would receive 10 per cent of the proceeds from all sales."[62] The shareholders included other members of the Ogden family, David Ogden, Thomas L. Ogden, Charles Le Roux Ogden and Abraham Ogden, along with Thomas and Aaron Cooper and Joshua Waddington.[63]

On February 8, 1821, David A. Ogden transferred his preemptive right to Robert Troup, Thomas Ludlow Ogden and Benjamin W. Rogers as trustees. This trust officially became known as the Ogden Land Company on February 8, 1821.[64] On December 19, 1829 Robert Troup, Thomas L. Ogden, and Benjamin W. Rogers, as the Ogden Land Company trustees, conveyed their interests to Thomas L. Ogden, Charles G. Troup and Joseph Fellows. Right through the early 1840s, these individuals sought to rid New York State of its Indian populations.[65] The Ogden Land Company was especially interested in expanding its holdings in two areas. It knew that the emerging metropolitan giant, Buffalo, needed lands to the east to expand, namely lands held at the Buffalo Creek Reservation. The Land Company also recognized the potential of the Senecas' Genesee River lands. Growing Indian dependence, the pressures the canal created for the Seneca Indians and increased white leasing of Seneca lands strengthened the position of the Ogden Land Company. As legal holders of the preemption rights to all of Seneca lands, the company's profits depended on getting the Indians to sell their lands to the company. Consequently, on the company's payroll from 1811 onward was met through actions of Horatio Jones, the white captive and Seneca adoptee who "aided" in the negotiations of most of the

60. WHIPPLE REPORT, *supra* note 8, at 138.

61. Conable, *supra* note 58.

62. *Id.*

63. *See* id. at 53.

64. *See* WHIPPLE REPORT, *supra* note 8, at 172-83.

65. *See id.* at 183-89; Conable, *supra* note 58, at 1-2. *See also* Henry S. Manley, *Buying Buffalo from the Indians*, 28 N.Y. HIST. 313 (1947). *See generally*, SOCIETY OF FRIENDS, THE CASE OF THE SENECA INDIANS (photo reprint 1979) (1840).

swindles of Seneca lands (including Grand Island) from the 1790s to 1826.[66] Jellis Clute, who lived at Mary Jemison's Gardeau Reservation, also worked for the company and "facilitated" the transfer of the lands of the "White Woman" to the Ogdens between 1817 and 1826.

By 1821, the three most powerful voices and active players in securing Seneca lands were Troup, James S. Wadsworth and Peter B. Porter. Wadsworth was the largest land speculator in Livingston County and the son of the founder of Geneseo. As a state commissioner, Porter had negotiated the New York State-Seneca "treaty" of 1815 that "acquired" Grand Island and other islands in the Niagara River. These three men conspired with the Ogdens to secure the Senecas' Genesee lands and subdue "the opposition of Red Jacket."[67] Troup, one of the nation's leading attorneys, not only represented the Ogdens but was an agent for the Pulteney Estate as well. By the mid-1820s, he was also a promoter of land speculation in Indian lands in Georgia and lobbied for new roads to open up his holdings in Allegany and Steuben Counties in order to connect with the Erie Canal sixty miles away.[68] Even though Porter had withdrawn from company operations by the mid-1820s, as a hero of the War of 1812, Porter was active in helping the Ogdens secure Seneca lands at the "Treaty" of 1826.[69] Later, Augustus wrote to him about the economic opportunities provided by acquisition of Squawky Hill, Big Tree and Canawaugus Reservations. The surveyor-land speculator described half of these lands by the company as "the finest quality of cleared, high-cultivated Genesee flats," property that could draw a resale price of $100 per acre.[70] It should

66. *See* Conable, *supra* note 58, at 27, 73-74; LAURENCE HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE (forthcoming Feb. 1999) (developing the connections among land speculation, transportation interests, national security concerns, and the interlocking conflicts of interest at every turn).

67. Letter from Peter B. Porter to T.L. Ogden (June 14, 1823) *microformed* MSS, MR 4 (Buffalo Erie County Historical Society).

68. *See* Letter from Robert Troup to John Greig (March 16, 1826) (Skivington Collection on file with the University of Rochester); Letter from Masterton Ure to Robert Troup (Aug. 4, 1825) (on file with the New York Public Library).

69. *See generally*, Henry S. Manley, *Red Jacket's Last Campaign*, 31 N.Y. HIST. 149 (1950).

70. Letter from Augustus Porter to Peter B. Porter 2 (Sept. 29, 1826) *microformed* MSS., MR 4 (Buffalo Erie County Historical Society).

be noted that the Senecas ultimately received approximately $.50 an acre for this "sale."[71]

When the Senecas rejected company and state urgings to sell their lands and move west with the Oneidas and their missionary Eleazar Williams, the Ogden Land Company and its agents intensified its efforts to secure Seneca lands. They took advantage of the growing divisions within the Seneca world after the War of 1812. Although the Senecas had a collective estate and a valued position as the protector of the Iroquois Confederacy after the Revolution, the Senecas' individual needs conflicted at times with their national interests. Each reservation had a set of chiefs whose political base depended on their abilities to keep the land companies at bay, but who were sometimes susceptible to outright bribery through annuity payments.[72] As a result of land and population pressures, increased social disintegration caused by alcohol and economic dependence on the white world for survival, local chiefs could be manipulated or enticed by outside forces.[73] Fears of removal, a policy presented to them as "inevitable" at nearly every council and an increase of acculturated forces such as missionaries collectively contributed to land companies' leverage in certain Seneca communities after the War of 1812.[74] In addition, powerful leaders, such as Young King and Pollard, were willing to make deals with the devil, the Ogden Land Company, to fight their Seneca enemy Red Jacket.

The Buffalo Creek Reservation had more power and influence in the Seneca polity because it was a ritual center. From the 1780s to the 1840s the Iroquois Confederacy met at the Buffalo Creek Reservation. To most Senecas during this period, the retention of Buffalo Creek had greatest priority.[75] If and when the Senecas were pressured to cede some of their lands, Buffalo Creek would have to be maintained at all costs. Hence, the Seneca's collective estate had individualistic pulls that worked against the national interest of the Senecas as a whole. The strategy of

71. This figure is based upon my calculations under the "Treaty" of 1826: land "sold" divided by "payment" to the Senecas.

72. For a portrait of Seneca existence, see GEORGE H.J. ABRAMS, THE SENECA PEOPLE (1976); Abler, *supra* note 12.

73. Abler, *supra* note 12.

74. *See id.*

75. *See id.*

the Ogden Land Company was to manipulate these individualistic interests.

By the mid 1820s, through the efforts of Horatio Jones and James Clute, the company began making "gifts" to certain chiefs. Seneca leaders were enticed by $80 to $120 payments to their sell lands.[76] By the summer of 1825, T.L. Ogden convinced the War Department to hold a treaty negotiation with the Senecas and appointed Oliver Forward, a leading merchant and harbor promoter of Buffalo, to cooperate with the Ogden Company.[77]

Before the "treaty" of 1826, the Seneca lands at Gardeau, not the other Seneca reservations, were reduced in size. Gardeau or Gardow (Ga-da-oh or Kau-tau meaning "down and up," valley and hillside or bluff), the White Woman's Reservation, was occupied by Mary Jemison and forty-eight Senecas.[78] Jemison was the famous girl captive, the "white woman of the Genesee."[79] At the urging of two enterprising white men, Micah Brooks and Thomas Clute, the New York State Legislature passed a private bill on April 19, 1817 making Jemison a citizen of New York State and "confirmed" her title to the Gardeau Reservation.[80] Brooks, a congressman, was one of the founders of Livingston County and one of the earliest promoters of New York State's canal system. Thomas Clute was the brother of Jellis Clute, one of the main operatives of the Ogden Land Company.

On April 23, 1817, in return for $3000 and a mortgage to secure $4286, the aged Jemison executed a deed of 7000 acres on the east side of the reservation to Micah Brooks and Jellis Clute.[81] Because of her advanced age and her inability to manage her property Mary Jemison agreed to hire Thomas Clute as her guardian. In payment for his services, Jemison gave Thomas Clute a great deal of land on the west side of the Gardeau Reservation.[82]

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76. *See id.*

77. *See* Conable, *supra* note 58, at 82.

78. *See* DOTY, *supra* note 53, at 61.

79. *See* JAMES E. SEAVER, A NARRATIVE OF THE LIFE OF MRS. MARY JEMISON (Syracuse University Press 1990); JAMES E. SEAVER, A NARRATIVE OF THE LIFE OF MRS. MARY JEMISON 33 (University of Oklahoma Press 1992).

80. *See* SEAVER, *supra* note 79, at 119-24 (1990).

81. *See* RONALD SHAW, ERIE WATER WEST 67, 400 (1966); NOBEL E. WHITFORD, HISTORY OF THE CANAL SYSTEM I, at 65; LOCKWOOD DOTY, HISTORY OF THE GENESEE COUNTRY 597-98 (1925) (describing Micah Brooks' life).

82. See SEAVER, *supra* note 79.

On August 24, 1817, Mary Jemison leased all of the remaining Gardeau Reservation, except for 4000 acres and Thomas Clute's lot, to Micah Brooks and Jellis Clute.[83] Jemison's words are revealing about this transaction:

> Finding their [Brooks and Clute] title still incomplete, on account of the United States government and Seneca Chiefs not having sanctioned my acts, they [Brooks and Clute] solicited me to renew the contract, and have the conveyance made to them in such a manner as that they should thereby be constituted sole proprietors of the soil. [84]

By the winter of 1822-1823, Mary Jemison agreed to sell Brooks and Jellis Clute the Gardeau lands they desired, except for a tract "two miles long, and one mile wide, lying on the [Genesee] river where I should choose it; and also reserving Thomas Clute's lot.[85]

On September 3, 1823, at Moscow, New York in Livingston County, with Major Charles Carroll, a federal commissioner, Mary Jemison ceded all but two square miles (1280 acres) to John Greig and Henry B. Gibson.[86] Greig and Gibson obtained all of the Gardeau Reservation except the reserved two square miles, then in Genesee County and now in Wyoming County near Castile, New York, for $4286, less than $.30 per acre. Greig, a Scottish-born attorney from Canandaigua, was in the employ of the Ogden Land Company. Greig was, very much like Troup, amassing a fortune as a result of representing the land companies. Before serving the Ogdens, his firm, Howell & Greig, represented Thomas Morris, the Phelps-Gorham land company and the Pulteney Estate. He was also a major canal promoter and urban developer of Rochester, owning significant real estate in the city.[87] By the time of his death

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83. SEAVER, *supra* note 79, at 122. *See also* LOCKWOOD DOTY, HISTORY OF LIVINGSTON COUNTY, NEW YORK FROM ITS EARLY TRADITIONS TO THE PRESENT, TOGETHER WITH EARLY TOWN SKETCHES Vol. II (1905).

84. SEAVER, *supra* note 79, at 122.

85. *Id. See also* LOCKWOOD DOTY, HISTORY OF LIVINGSTON COUNTY, NEW YORK FROM ITS EARLY TRADITIONS TO THE PRESENT, TOGETHER WITH EARLY TOWN SKETCHES (1905).

86. SEAVER, *supra* note 79, at 123; DOTY, *supra* note 53, at app. IV, VI.

87. *See* Letter from Thomas Morris to John Greig (Oct. 2, 1805); Letter from Archibald Kane to John Greig (Jan. 15, 1807); Letter from Joseph Ely to John Greig (Oct. 26, 1807); Howell & John Greig to Henry Remsen (Nov. 25, 1808); Letter from John Greig to Ebenezer Wood (Mar. 17, 1821) (Skivington

in the 1850s, he had vast holdings, totaling over thirty thousand acres, predominantly located in the Genesee Valley.

Among his clients and partners were Thomas Morris, the Phelps and Gorham, the Pulteney Estates and the Ogden Land Company. Gibson, associated with Brooks and Jellis Clute, agreed to pay Jemison and her heirs and successors $300 a year forever. Previously, in November 1818, Thomas Morris, Robert Morris' son involved with the Treaty of Big Tree in 1797, conveyed to Greig the preemptive right to 9769 acres of Gardeau. Five years later, in June 1823, Joseph Higbee, a trustee for one of Robert Morris' creditors, conveyed to Brooks and Jellis Clute 3000 acres of Gardeau for $3800.

This land cession, as well as others involving the Gardeau Reservation, was never submitted to or ratified by the United States Senate. In attendance at the treaty grounds in 1823 were United States Commissioner Carroll, Indian Agent Jasper Parrish and Interpreter Horatio Jones. According to Mary Jemison, Nathaniel Gorham, the leading New York land speculator, and Judge Howell "acted in concert with Maj. Carrol" and "upwards of twenty chiefs" signed this "treaty."[88] As early as 1799, Horatio Jones had been involved in land schemes in the Genesee Valley with Thomas Morris and Oliver Phelps, Gorham's business partner. Parrish was collaborating with General Peter B. Porter, the New York State Indian Commissioner and a

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Collection on file with the University of Rochester). *See also* Greig-Morris connection (Skivington Collection on file with the University of Rochester); Letter from Joseph Fellows to Greig (June 6, 1836) (delineating Greig's connections to canals and to the Ogden agenda); Letter from Humphrey Howland to John Greig (Sept. 13, 1836); Letter from T.L. Ogden to John Greig (Feb. 15, 1836); Letter from John Greig to James Stryker (Jan. 25, 1833); Letter from L.R. Lyon to John Greig (Oct. 12, 1836) (Skivington Collection on file with the University of Rochester); Letter from Joseph Fellows to John Greig (May 1, 1837); Memorial of John Greig (Nov. 1837-Dec. 1, 1837) (Skivington Collection on file with the University of Rochester); Abstract of Real Estate (Jan. 1, 1850) (Skivington Collection on file with the University of Rochester) (detailing Greig's vast fortune); Property and Estate of John Greig (Skivington Collection on file with the University of Rochester); LOCKWOOD DOTY, HISTORY OF GENESEE COUNTRY (1925) (portraying John Greig).

88. *See* Letter from Oliver L. Phelps to John Henry (Sept. 3, 1799) (Skivington Collection on file with the University of Rochester); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 144-45 (1994); 2 CHARLES J. KAPPLER, LAW AND TREATIES 1033-34 (1904) (describing the document as an "unratified" treaty).

major investor in the Ogden Land Company at the time. Parrish was "rewarded" with Squaw Island in the Niagara River after the so-called "Seneca-New York State Treaty of 1815" in which the empire state allegedly acquired Grand Island.[89]

On February 17, 1824, Secretary of War John C. Calhoun, soon to be elected Vice President of the United States, wrote to sub-agent Jasper Parrish of the Six Nations Agency. He told him that the "treaty" between John Greig, Henry Gibson and the Seneca Indians with regards to the Gardeau Reservation did not need formal United States Senate approval. He reasoned that since it was "considered in the nature of a private contract [it] does not acquire the special ratification of the Government as in treaties between the Indians and the United States."[90] Calhoun further added, "[c]onsequently there is nothing to prevent its execution by the parties concerned, as soon as they may think it proper."[91] Later, on February 16, 1827, the Commissioner of Indian Affairs wrote the Secretary of War indicating that the "treaty" of September 23, 1823 did not need Senate approval since it "was esteemed to be a useless ceremony; the President approving it only."[92]

By 1825, both Gibson and Greig had developed their plans for pursuing the remaining Seneca lands in the Genesee Valley. Working closely with the Clutes as well as Jasper Parrish, they pushed for new treaty negotiations. Until the Fall of 1825, these negotiations remained on hold since the newly-elected Adams administration had other priorities and the Indians themselves wanted to learn more about the new "Great Father" in Washington.[93]

II. THE TREATY OF 1826

The push for a new Seneca treaty entailing much of the tribal landbase gained impetus in the late Winter of 1826. On March 10, 1826, Congressman Garnsey of New York offered a resolution "proposing to instruct the Committee on

89. 1816 N.Y. Laws 65-66 (describing Parrish's "reward").

90. Letter from John C. Calhoun to Jasper Parrish (Feb. 17, 1824) (Skivington Collection on file with the University of Rochester).

91. *Id.*

92. 2 AMERICAN STATE PAPERS 868 (1827).

93. Letter from Henry Gibson to John Greig (Skivington Collection on file with the University of Rochester).

Indian Affairs to inquire into the expediency of making an appropriation for holding a treaty with the Indians west of the Genesee River, in the State of New York."[94] On March 10 and 11, the House of Representatives debated the merits and need to hold a Seneca treaty, but the discussion centered mostly on states' rights issues and whether states had jurisdiction over the Indians. Congressmen from New York, Georgia and Connecticut dominated the debate. They discussed a variety of issues including: whether there was a need at all to appoint a special federal commissioner to treat with the Indians, the strange history of the preemption right to Indian lands in New York, and Albany's position on the matter.[95] One congressman predicted that "whenever your Agent shall go there and propose such a sale, Red Jacket will be ready to meet him, and will drive him from his purpose by arguments which he will find it in vain to resist."[96] The same congressman wondered why a treaty was needed since neither Red Jacket nor the New York State Legislature had actually petitioned for it.[97] New York Congressman Henry Storrs' position eventually won. Referring to the Trade and Intercourse Acts, Storrs explained why a federal commissioner had to be appointed and was required under law.[98]

On May 13, 1826, the House Committee on Indian Affairs issued a report: "To Hold a Treaty with the Seneca Indians."[99] The report falsely claimed that the majority of Senecas were "favorably disposed to the sale, or some parts of their land."[100] It added that the Senecas were desirous of "civilization" since their lands "are mostly situated near flourishing villages."[101] The report then concluded by recommending the appointment of a federal Indian commissioner to treat with the Senecas.[102] Oliver Forward was the federal commissioner to treat with the Seneca Indians at Buffalo Creek Reservation. Forward's first priority was the shrinking of the Buffalo Creek Reservation,

94. *Id.*
95. *See id.*
96. 2 CONG. DEB. 1604-06 (1826).
97. *See id.*
98. *Id.* at 1604.
99. *Id.*
100. *Id.*
101. *Id.*
102. *See* H.R. Rep. No. 209, 19th Cong. (1st Sess. 1826).

not the securing of Genesee lands.[103] After all, the opening of the Erie Canal a year earlier made Buffalo real estate more attractive. The presence of a large Indian reservation stretching from near the Buffalo waterfront eastward twelve miles thwarted white efforts to expand the city.[104] Any chipping away of this landbase made Buffalo's emergence as a major metropolitan area and Great Lakes port more likely.[105] In contrast, Red Jacket, the great orator, had his political base at Buffalo Creek. Although at times in his illustrious career he reluctantly agreed to land cessions (1797, 1802, 1815), none involved Buffalo Creek. The reservation was not only the seat of Red Jacket's power, but was also the ceremonial center of the post-Revolutionary War Iroquois Confederacy. Hence, for Forward and Red Jacket alike, but for two distinct reasons, Buffalo was the Holy Grail.[106] Nevertheless, the Genesee was the homeland of the Seneca and had special meaning to the people. Canawaugus, for example, was both the birthplace of Handsome Lake and the Cornplanter.[107] To the white settlers, the Genesee Country was to be a major center of agriculture, flour, timber and canal transportation from the 1820s to the Civil War.[108]

On August 31, 1826, in a "treaty" held under the authority of the United States at Buffalo Creek with Oliver Forward, the chiefs and warriors of the Seneca Nation reached agreement with the trustees for the Ogden Land Company. John Greig represented Robert Troup, Thomas L. Ogden and Benjamin W. Rogers. John Greig was the same fellow who had secured much of the Gardeau Reservation in the "treaty" of 1823.[109] Nathaniel Gorham, a leading speculator in Indian lands, was appointed, as he had been in 1823, as a superintendent on behalf of the claims of the State of Massachusetts under the terms of the December 16, 1786 Hartford agreement.[110] Besides Forward, Phelps, Greig and the Seneca representatives, six interpreters also

103. *See id.*

104. *See id.*

105. *See* Marvin Rapp, The Port Of Buffalo, 1825-1880, at 11-17 (1947) (unpublished Ph.D. dissertation, Duke University) (on file at Duke University).

106. *See* HAUPTMAN, *supra* note 66.

107. *See id.*

108. *See* NEIL ADAMS MCNALL, AN AGRICULTURAL HISTORY OF THE GENESEE VALLEY, 1790-1860 (1952).

109. *See* DOTY, *supra* note 53.

110. *See* WHIPPLE REPORT, *supra* note 8.

attended the meeting. The interpreters included Horatio Jones, who had served for over three decades in this capacity, as well as Dr. Jacob Jemison, Mary Jemison's grandson, a trained physician who had attended Dartmouth College. Parrish, the Indian agent, was also in attendance. Parrish had played various roles at treaty negotiations since 1788, had close ties to Porter and was in the pay of the Ogden Land Company.[111] At this "treaty," the Senecas ceded all of their remaining Genesee Valley lands, including Big Tree, Canawaugus, Squawky Hill, and the Gardeau Reservation in Wyoming County, and the sixteen square mile Caneadea Reservation. In addition, under the "treaty," the size of the Buffalo Creek, Tonawanda and Cattaraugus Reservations was substantially reduced as well. Buffalo Creek was reduced by 36,638 acres, Tonawanda by 33,409 acres, and Cattaraugus by 5120 acres.

Among the Seneca signatories to this "treaty" were Young King, Pollard, Little Billy, Governor Blacksnake, Captain Strong, Seneca White, White Seneca, Henry Two Guns, Captain Shongo, Big Kettle and Red Jacket, many of whom objected to the "treaty" but had distinct motives for signing the agreement.[112] Some chiefs defined their interests narrowly, namely to protect their individual reservations and immediate interests, rather than fighting for the sanctity of all of the Seneca lands.[113] Despite his signature on the "treaty," Red Jacket never truly supported the "treaty" and led the opposition to it until his death in 1830.[114] Red Jacket and his supporters questioned the legal validity of the "treaty" of 1826. According to Henry S. Manley, the former Assistant Attorney General of New York State, United States Indian Commissioner Forward received money from Troup, the Ogden Land Company trustee, for unexplained expenses of the treaty.[115] The Ogden Land Company also had Dr. Jacob Jemison on its payroll since the physician favored Indian land sales and pushed for Seneca emigration to the West. Some of the

111. *See* William N. Fenton, *Answers to Governor Cass' Questions by Jacob Jameson, a Seneca [ca. 1821-1825]*, 16 ETHNOHISTORY 114-19 (1969) (describing Dr. Jacob Jemison).

112. *See* WHIPPLE REPORT, *supra* note 8, at 23.

113. *See* HAUPTMAN, *supra* note 66.

114. *See* HENRY SACKETT MANLEY, RED JACKET'S LAST CAMPAIGN 149-62 (1950).

115. *See id.*

chiefs who signed this 1826 "treaty" were apparently "bought off."[116] On July 20, 1827, Forward defended the practice: "[s]mall annuities may have been allowed the principal chiefs, but the payment of such gratuities I believe has been practiced under every treaty with Indian tribes of this state since the organization of its government."[117]

As a result of Red Jacket's unbending opposition to the "treaty," the pro-treaty group deposed him as a Seneca chief on September 15, 1827. He was later reinstalled after a public outcry against such action.[118] From the beginning, Forward's actions came under fire. Consequently, on January 30, 1827, he wrote President John Quincy Adams to justify his actions.[119] Forward insisted that Red Jacket opposed the sale "of any of the Indian lands from commencement of negociations [sic]."[120] Forward added that because of his attentiveness and the work of Jemison, Gorham, Parrish and Jones, "no part of it [the "treaty"] could have been misunderstood. Having been thus read, explained and declared to be satisfactory, it was executed by every one of the chiefs present."[121] Red Jacket was joined by a "number of the Tonnewanta [Tonewanda Seneca] Indians" whom Forward claimed were not chiefs.[122] Later in his letter, Forward insisted that the anti-treaty forces at the Buffalo Creek council were largely outnumbered and were composed mainly of "a few of the indians [sic] who are scattered over the small reservations upon the Genesee River, and a part of the Tonnewantas [sic] . . . ."[123]

On February 16, 1827, Commissioner of Indian Affairs Thomas McKinney questioned whether Senate approval was even necessary on Indian treaties since the 1826 "treaty" had a federal commissioner present. President John Quincy Adams submitted the "treaty" to the Senate "for their advice and consent" on February 24, 1827.[124] On May 19, 1827, Red Jacket and other prominent Senecas,

116. *See id.* at 150-56.
117. *Id.* at 153.
118. *See id.* at 155.
119. *See* Letter from Oliver Forward to the President of the United States (January 30, 1827), *microformed MSS.*, M234, MR 832, RG 75 (National Archives).
120. *Id.*
121. *Id.*
122. *Id.*
123. 2 AMERICAN STATE PAPERS, *supra* note 92, at 866.
124. *Id.* at 868.

including many of the earlier signatories of the "treaty" of 1826, appealed directly to President John Quincy Adams. Those who signed this memorial included leading Tonawanda Senecas such as Jemmy Johnson and John Blacksmith. In the memorial, these anti-treaty Senecas insisted that "there are 2606 who are opposed to the sale of their lands, while on the other hand it has been ascertained that the number in favor are 430."[125] The memorial went on to describe why Forward was appointed commissioner in the first place. It claimed that Forward was merely appointed "to save expenses of travel, he being at Buffalo and could attend to it without much trouble, whereas great expenses would be incurred by sending a man all the way from the City of Washington."[126] Forward only gave the Senecas two days to decide on whether they would sell land. The memorial further described how Red Jacket, fearing a trick, took his own interpreter with him rather than relying on Dr. Jemison whom he did not trust.[127] The chiefs also decided to inform the Senecas on the other reservations about what was sought by Forward. Greig, of the Ogden Land Company, who arrived after Forward at the treaty grounds, then "told Red Jacket that he would have the land."[128] Forward arose and informed the chiefs that it was in their best interest to sell their land. He reasoned that the Ogden land company would prefer them to refuse to sell so they could employ the President of United States to drive them off without having to pay them any money.[129] Soon after, Parrish added a threat of removal: "that if they did not sell it would be a serious thing for them," since the President had already appointed a set of commissioners "to go to the west and look out a tract of land for them."[130]

The memorial also claimed that Red Jacket was offered $260 to "compel" him to sell land while "other men of our nation" were offered and received $100.[131] Parrish and Jones offered the "chief warrior" at Cattaraugus an annuity of

125. Memorial of Red Jacket and Seneca Chiefs and Principle Men to President of the United States 8 (May 19, 1827) (on file with the Buffalo and Erie County Historical Society).

126. *Id. at 3.*

127. *See id. at 5.*

128. *Id.*

129. *See id. at 5-6.*

130. *Id. at 6.*

131. *See id. at 7.*

$100 per year, and Jones offered a similar amount to one of the principal chiefs at Tonawanda, both of whom rejected the overtures to sell Seneca lands. The memorial castigated both Parrish and Jones, whom the Senecas had formerly trusted, but who had become "fattened. . .until their bellies [hung] over their knees. . ."[132] The Seneca memorial then called for the dismissal of Parrish and Jones and the appointment of future federal commissioners "living out of our immediate vicinity."[133] It also sought Adams' support for the retention of the Seneca lands lost in the "treaty" of 1826: "Your red children feel determined not to release their lands and possessions unless compelled to do so by our father's power which we are unable to resist, but we have every assurance that the hand of our father will not be raised against a handful of his suffering Red children."[134]

On September 13, 1827, the pro-treaty group led by Young King sent a memorial to President Adams defending the actions of Forward, Parrish and Jones, insisting that "there was no force, no threats, and no coercive language" used by the federal commissioner, agent or interpreters. They challenged Red Jacket's veracity as well as his mental state. They claimed that Red Jacket purposely overestimated the number of Indians "opposed to the late treaty."[135] The memorial concluded:

> We would now request our Father the President to ratify the said Treaty, and to pay no further attention to the communication of Red Jacket on the subject. Red Jacket is an old man, his mind is broken, his memory is short, and he is devoid of truth. He is not, and never has been the First Chief of our Tribe or our Nation. Young King is and has been the first and Great Chief of the Seneca Nation.[136]

On December 28, 1827, Young King and his supporters sent a second memorial to President Adams, now explaining the "real" reasons why they put their names on the "treaty" of 1826. They indicated that they had become "surrounded" by a growing number of "white settlements" and that Forward had suggested "that if we [the Seneca]

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132. *Id. at 8.*
133. *Id.* at 8.
134. *See id.*
135. Memorial from Young King to the President of the United States (Sept. 13, 1827), *microformed MSS.*, M234, MR832, RG75 (National Archives).
136. *Id.*

were more compact in our settlements, it would give greater facility to our Father to attend to the wants of his red children."[137] Greig, the attorney for the Ogden Land Company, now pictured as the real enemy, informed the Senecas that if they "would part with such a portion" of their lands, the company "should forever after be left in quietness upon that subject. For these reasons we parted with a portion, with a fixed resolution to keep the remainder for our posterity."[138]

On March 24, 1828, Red Jacket and two other Seneca Indians were accompanied by the Secretary of War at an audience with President John Quincy Adams at the White House. The Indians insisted that their lands should "not be taken away from them, nor they compelled to remove to Green Bay."[139] They also urged President Adams to immediately replace Parrish as their Indian agent because they "charged him with having defrauded them of great part of their annuity, of receiving money from their adversaries [Ogden Land Company] and generally disregarding the interest of those whom he was bound to protect."[140] The Senecas also beseeched the President to appoint a special emissary to "investigate these charges, which they said, could easily be proved."[141]

The United States Senate took up debate on the "treaty." On February 29, the Senate failed to ratify the "treaty"by a vote of twenty to twenty.[142] John C. Calhoun, the Vice President of the United States, did not even vote to break the tie although treaties need two-thirds approval by the Senate. Nor did Calhoun participate in the debate over the treaty. Until April 4, 1828, the Senate also placed an "injunction of secrecy" over deliberations over the "treaty" of 1826 with the Senecas. The Senate passed the following ambiguous resolution:

> That by the refusal of the Senate to ratify the treaty with the Seneca Indians, it is not intended to express any disapprobation of

137. *Id.*

138. Memorial from Young King to the President of the United States and the Secretary of War (Dec. 28, 1827), *microformed MSS.*, M234, MR 808, RG75 (National Archives).

139. *Id.*

140. *Id.*

141. JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS VII, at 484-85 (1875) (Charles Francis Adams, ed., J.B. Lippincott & Co. 1875).

142. *See* 3 CONG. DEB. 601, 19th Cong. (1828).

> the terms of the contract entered into by individuals who are parties to that contract, but merely to disclaim the necessity of an interference by the Senate with the subject matter.[143]

According to historian Francis Paul Prucha, the United States Senate was "torn between two provisions" of the federal Trade and Intercourse Act of 1802:

> . . . one stipulated (following the act of 1790) that no purchase of Indian land was valid "unless the same be made by treaty or convention, entered into pursuant to the constitution," while the other authorized state agents, with the approval of the United States commissioners, to be present at an Indian treaty council and to deal with the Indians regarding compensation for claims to land extinguished by the treaty.[144]

Prucha's contention does not appear to legitimize the so-called "treaty" of 1826 since all treaties, to be treaties, must be ratified by a two-thirds vote of the United States Senate. Prucha's contention is naïve because it suggests that the senators simply had a different interpretation of this "treaty." Vice President Calhoun, Commissioner of Indian Affairs McKenney and the new Secretary of War, Porter, were all clearly avoiding their federal trust responsibilities in protecting the Seneca interests. Embarrassed by the revelations of fraud under the treaty and by Red Jacket's effective campaign to publicize the fraud, Senate action on the "treaty" came to a halt.

To his credit, the President followed through with Red Jacket's request. On May 9, 1828, because of growing Indian and Quaker protest against the validity of the 1826 "treaty," the Secretary of War appointed Richard Montgomery Livingston of Saratoga, New York to investigate the events surrounding the 1826 "treaty."[145] Livingston's report is both revealing and disturbing. The report was ironically sent on December 28, 1828 to Peter B. Porter, the newly-appointed Secretary of War. It clearly delineates the fraud perpetrated at the "treaty." Livingston maintained that, until August of 1826, the Seneca chiefs "disputed about religion, but clung to the common object of retaining their lands."[146] At no time since the founding of

143. *Id.* at 603.
144. PRUCHA, *supra* note 88, at 144-45.
145. *See id.*
146. *See id.*

the Ogden Land Company in 1810 until ten days after the council of 1826 had been in session "were any of the chiefs, willing to convey any of their lands."[147] The investigator then explained what had transpired to get Seneca "approval."[148]

Livingston indicated that immediately after the War of 1812, the Ogdens gave $5000 each to the Government Agent and interpreter and one other interpreter in order to "influence" the Seneca to extinguish their title. "The Agents [probably meaning Parrish and Jones] thus retained were empowered to enlist in the service, by liberal . . . stipends for life, such as the chiefs as might be won."[149] Until 1826, these efforts failed. The appointment of Forward to push a land transaction was done "without the solicitation or privity of the tribe." Forward then convened a council on August 11, 1826, employing arguments "addressed to the hopes and fears of the nation," implying that removal to the West was the only other option.[150] "The terrors of a removal enchained their minds in duress," leading them to submit "to sell a part to preserve the residue."[151]

Livingston suggested several other ways Forward gained approval. He claimed that the Ogden Land Company proprietors and Forward had a secret rendezvous at Rochester prior to the council in which they perfected their strategy. Dr. Jacob Jemison, described by Livingston as a "civilized native," was "retained by the Proprietors."[152] He and five others were hired as interpreters, but served the interests of the Ogden Land Company first and foremost. Livingston also pointed a finger at many of the chiefs, especially the Christian faction who resided around the Seneca Mission at Buffalo Creek, who had become dependent on federal annuities and other "rewards."[153]

Thus, largely because of the negative findings expressed in the Livingston Report, the "treaty" of 1826 was never resubmitted to the United States Senate for its advice

147. *See id.*

148. *See* Report from Richard Montgomery Livingston to Peter B. Porter, Secretary of War (Dec. 25, 1828), *microformed MSS.*, M234, MR808, RG75 (National Archives).

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.*

153. *See* WHIPPLE REPORT, *supra* note 8.

and consent. Red Jacket was politically rehabilitated as a result of the overwhelming support by reservation residents for Red Jacket's anti-treaty stance in 1826 and the recantations by almost all of the chiefs who had agreed to the massive land sale. However, with the aged chief's death in 1830, Seneca resolve weakened and new fissures in the tribal polity erupted. By that time, the Senecas faced off against new threats largely aided by a national policy of forced Indian removal to the west, articulated by Andrew Jackson and his Vice President, Martin Van Buren, a New Yorker.

CONCLUSION

The Treaties of 1823 and 1826, although fraudulent at their roots, were allowed to stand. The legal obstacles to Indian land suits at the time made it almost impossible to obtain redress until monetary compensation was awarded the Senecas under the Indian Claims Commission in the late 1960s and early 1970s.[154] In the meantime, Genesee Country became white man's territory, with rapid settlement before the Civil War. Livingston County, formed from Genesee and Ontario Counties in 1821, had a population of 35,140 by 1840.[155] Despite its split into several separate counties, Genesee County's population rose from 12,588 to 59,587 from 1810 to 1840.[156] Wyoming County was formed from Genesee in 1841, while Allegany County, in its present form, was established in 1856 after a series of annexations and cessions of land from 1806 onward.[157] From the summary of events that transpired in the 1820s regarding Seneca lands, it is clear that Justice Andrews and the Court of Appeals in *Seneca Nation v. Christy* invented history in the 1891 decision. Because the 1826 treaty did not receive the required vote for confirmation from the United States Senate, it could never have been passed after Richard Montgomery Livingston's scathing report. Hence, Andrews concocted a legal argument that the treaty never had to be ratified in the first place since the

154. *See generally* 28 Ind. Cl. Comm. 12.

155. *See id.*

156. *See id.*

157. *See* BUREAU OF THE CENSUS, UNITED STATES CENSUS (1810); J.H. FRENCH, GAZETTEER OF THE STATE OF NEW YORK 168-77, 320-28, 380-87, 710-21 (1860); WHITFORD, *supra* note 81, at 914-19.

Hartford Convention of 1786, a federally-ratified accord, had allowed for the 1826 "sale" with or without United States Senate approval. Furthermore, in the eyes of Justice Andrews and other judges, the Senecas made no timely effort to seek redress. Justice Andrews attempted to bolster his argument by insisting that since some public monies had eventually been deposited in trust for the benefit of the Senecas in the mid 1850s, this somehow retroactively confirmed Seneca acquiescence to the 1826 "deal." At the time of the so-called "closing" of the frontier, four months after the Wounded Knee Massacre, chapters in the history of earlier frontiers had to be rewritten by the courts. Courts tried to excuse the actions of great statesmen who had contributed so much to the rise of the Empire State and with it to the fall of the Iroquois Indians. One year later, the ninety-nine year lease to Salamanca went into effect, with the Senecas receiving a pittance under the provisions of this act. The implications were clear, namely that a vanishing, "antiquated" race had to give way to American progress symbolized by the railroad yards in the white city arising on the Allegany Indian Reservation. Transactions in New York State were parallel to those occurring to American Indians throughout the nation. Furthermore, the same United States Supreme Court that insisted no federal issues were involved in the *Christy* case, decided seven years later the abominable *Lonewolf v. Hitchcock*.[158] Indeed, *Lonewolf* allowed for the unilateral abrogation of a federal-Indian treaty by Congress under the conveniently invented Doctrine of Plenary Power.

158. 187 U.S. 553, 567 (1903).