

## An Outline of the Legal Terms used in the Case Law of the Erie Canal.

As we look at the late 1700s, around the time when both the State of New York and the United States of America were coming into existence, we find that the principles of the old English common law were continued in the legal framework of the new state and nation. Common law exists separate and apart from statutory law, and depends for its authority upon the recognition given by the courts to the principles, customs, and rules of conduct that have existed in society for many hundreds of years. Judicial opinions consist of the judge's decision in the case before the court, and the reasons underlying that decision. More information on this and on the other topics in this outline can be found in Leah Green's article *The Erie Canal and The American Imagination: The Erie Canal's Effects On American Legal Development, 1817-1869*, Morton Horowitz' book, *The Transformation of American Law, 1780-1860*, particularly chapter III, *Subsidization of Economic Growth through the Legal System*, and Professor John Fabian Witt's webcast lecture *The Erie Canal & the Transformation of American Law*.

In eighteenth century New York, judges applied fixed common law doctrines to resolve disputes between litigants, and all changes in the law were achieved through legislation. As the nineteenth century dawned, judges became increasingly aware that the decisions they made had public policy implications and, as legal historian Morton Horowitz stated, the courts "came to play a central role in directing the course of social change." It is interesting to note that this legal evolution occurred just at the time when the Erie Canal was being constructed, and it was the changes made to the common law of property (both land and possessions), contract and tort that made the construction and

successful operation of the Erie Canal possible. At this time also, the common law courts started to recognize a limited statutory right of the citizen to sue the State for damages--the beginnings of statutory waiver of sovereign immunity.

### Judicial Restraint and Judicial Activism.

The landmark opinion in *Rogers v Bradshaw*, written in 1823 by one of America's outstanding jurists--Chancellor James Kent--shows how suddenly and completely this change toward judicial activism in the common law courts occurred. Recognizing the importance of the Erie Canal project, Kent described it as "that great undertaking, which, in the language of one of our statutes, was 'to advance the prosperity and elevate the character of the United States.'" He then stated that "if private rights of every description were not to give way, upon such an occasion, to the permanent interest of the public, upon fair and reasonable compensation, it would have been difficult even to explore and examine, and make surveys and levels; and it would have been quite idle to think of adopting and acting upon any plan, suitable to the boldness of the design, and adapted to the success of its execution." More information on this topic can be found in Leah Green's article.

Today, the argument over judicial activism versus judicial restraint continues. It is very difficult to ascertain where the boundary between activism and restraint lies, and a recent study indicates that judges who most vocally support a policy of restraint are, in fact, among the most activist. You can read more about this report and the nomination of Judge Sonia Sotomayor of New York to the United States Supreme Court in Marcia Coyle's article "*Is Sotomayor a Judicial Activist? New Studies May Shed Some Light*" on the essay competition website.

### The Law of Property

One of the fundamental principles of the common law (and a reflection of the agrarian society from which it developed) was the protection of landowners' rights. At the Philadelphia Convention of 1787 and in the ratification debates that followed, we see that rights of property owners were a major ideological concern. In 1790, John Adams wrote that "property must be secured or liberty cannot exist." The eighteenth century New York courts acknowledged the right of landowners to absolute dominion over their lands.

With the early nineteenth century decision to build the Erie Canal, the rights of landowners came into immediate conflict with the needs of the canal authorities. The legal mechanism used to solve this problem was *eminent domain*, the name given by the sixteenth century Dutch jurist Hugo Grotius to the power of a government to take private property for a public purpose, even where the owner objects. This power is authorized in the Fifth Amendment to the United States Constitution and in Article 1, Section 7 of the New York State Constitution.

In the eighteenth century, *eminent domain* cases rarely came before the New York courts because the government was not involved in major public projects. All this changed with the construction of the Erie Canal. Almost overnight, through judicial decisions, the New York courts expanded the power of *eminent domain* by (1) recognizing that the Legislature could give *eminent domain* powers to the canal authorities; (2) expanding the definition to allow the canal authorities to also take movable property needed for canal construction such as rock, water or trees, from land that was not subject to *eminent domain*; (3) making monetary compensation the only remedy available to the landowner whose land or other property had been taken (before the Erie Canal project, a landowner could bring an action in nuisance or trespass and obtain an injunction [a court order] that

either prevented the wrong or commanded restoration); (4) limiting the amount of compensation payable to the land owners; and (5) limiting the time within which landowners could bring a claim for compensation. More information on this topic can be found in Leah Green's article.

Today, the law of *eminent domain* has been codified. Now known as the Eminent Domain Procedure Law, it constitutes Chapter 73 of the Consolidated Laws of New York. It remains a formidable governmental power and an everyday force in the lives of New Yorkers. There is a proposal to build a new stadium for the New Jersey Nets in Brooklyn as part of the Atlantic Yards redevelopment. Another proposal would enlarge the Peace Bridge in Buffalo, N.Y., an international border crossing between New York and Canada, so that the delays that tourists and truckers now experience can be reduced. Both projects highlight a problem common to major civic redevelopments -- the land needed for the undertaking is owned by a large number of individual homeowners and businesses. So that such projects can go forward, the land needed for the redevelopment must be acquired by the governmental power of *eminent domain*. In the Atlantic Yards case, the litigation is pending before New York's highest court, the New York Court of Appeals. You can see the legal arguments that both sides are making in this case by reading the briefs submitted to the Court. These are available on the essay competition website.

### The Law of Contract

A contract is an agreement between two or more parties creating obligations that are enforceable at law. In the eighteenth century, the courts enforced contracts only if they were basically fair to all parties -- thus, a court would refuse to enforce a contract against one party where it determined that the consideration (the promise of the other party) was inadequate. But in the beginning

of the nineteenth century, a very different judicial philosophy suddenly took hold. By examining the case of *Seymour v Delancy*, we can actually watch it emerge. In 1822, the illustrious New York Chancellor James Kent, following a long line of precedent (earlier controlling cases), refused to enforce a contract on the grounds of the unfairness of the bargain. Two years later, when the case was appealed to the highest court in the State of New York at that time,\* that court reversed the Chancellor's decision and ordered the contract to be enforced even though "the bargain was hard, disproportionate and unequal in its terms."

New York courts in the nineteenth century regarded the interests of individual enterprise and a free market economy as paramount, and upheld contracts whenever possible. Once the Erie Canal went into operation, the courts were reluctant to put any impediments in the way of commercial progress and, as Morton Horowitz states, "gradually came to accept the proposition that many legal duties imposed by the state could be modified or abrogated by contract." Thus, by the 1850s, common carriers, who up to then were held strictly liable for the safe transit of goods in the absence of "an act of God or the public enemies," were able to reduce their liability by contract. More information on this topic can be found in Leah Green's article.

Over time, this laissez-faire attitude moderated, and business practices became more standardized. The Uniform Commercial Code (UCC) is one of a number of standardized statutes that have been promulgated nationwide to harmonize the law of sales and other commercial transactions. The UCC deals primarily with transactions involving personal (movable) property as opposed to real (land) property. New York State has enacted the Uniform Commercial Code as Chapter 38 of the

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\*Court for the Trial of Impeachments and the Correction of Errors

Consolidated Laws of New York. Its purpose is to simplify, clarify and modernize the law governing commercial transactions, and to permit the continued expansion of commercial practices through custom, usage and agreement of the parties.

Commercial litigation is highly sophisticated and businesses and their lawyers must have confidence that business and commercial disputes will be decided with informed reasoning. In 1993, the Commercial Division of the New York Supreme Court was established in Manhattan to handle commercial litigation. The Unified Court System's experience with the Commercial Division has been positive and the reaction of commercial practitioners to the court has been very favorable. You can find a link to the New York Commercial Division on the essay competition website.

### Torts

"Tort" is the legal term used for injury arising from actionable conduct, other than a breach of contract, and includes negligence, malicious prosecution, invasion of privacy and defamation (libel and slander). As Justice Oliver Wendell Holmes stated, "the business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not." Today, torts fall into three general categories: intentional torts (e.g., intentionally hitting a person); negligent torts (e.g., causing an accident by failing to obey traffic rules); and strict liability torts (e.g., liability for making and selling defective products).

Up to the nineteenth century, actions for injuries were brought under the law of trespass which imposed a standard of strict liability. By the nineteenth century, New York courts recognized negligence as the basis for liability. As Chief Justice Nelson of New York stated in the 1843 case of *Harvey v Dunlop*: "all the cases concede that an injury arising from inevitable accident, or, which in

law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility." In the context of the Erie Canal litigation, however, the courts restricted the liability of the canal authorities even where there was negligence. This left the injured citizen without a legal remedy. More information on this topic can be found in Leah Green's article.

Increasingly, New York courts today are seeing the emergence of a new form of tort, the cyber tort. As Jay C. Carle and Henry H. Perritt Jr. state in their article, *Civil Liability on the Internet* : "Cyber tort harm includes financial injuries, reputational damage, theft of trade secrets, and invasions of privacy. The information industry is insulated from accountability for this harm, much as the railroads, canals, utilities, and factory industries of nineteenth-century America were shielded from liability. The harm caused by Internet-related frauds, defective software, and the failure to adequately secure online data is increasingly commensurate with our dependence on computers and the Internet. The common law must expand to perform its traditional function of allocating the burdens associated with risks of harm so as to maximize social welfare, which includes both technological innovation and consumer peace of mind." You can read this article on the essay competition website.

### Sovereign Immunity

Under the common law doctrine of sovereign immunity a government cannot be sued in its own courts without its consent. Sovereign immunity traces its origins to early English law and the doctrine that "the king can do no wrong ". Today, Congress has waived most of the federal government's sovereign immunity in the Federal Torts Claims Act. New York State also has waived its immunity and permits civil litigation seeking damages against the State of New York to be brought in the New York

Court of Claims. In the early nineteenth century, although it was possible to sue the government under certain circumstances, there was no general waiver of sovereign immunity. Among the first statutes to set up a mechanism allowing claims against the State in specific circumstances were the Canal Acts of the early 1800s. More information on this topic can be found in Leah Green's article and there is a link to the New York Court of Claims on the essay competition website.