

THE ERIE CANAL AND THE AMERICAN IMAGINATION: THE ERIE CANAL'S EFFECTS ON AMERICAN LEGAL DEVELOPMENT, 1817-1869¹

I. INTRODUCTION

Know then, that one tenth of the expense borne by Britain in the last campaign, would enable ships to sail from London, through Hudson's River, into Lake Erie; as yet my friend we only crawl along the outer shell of our country, the interior excels the part, we inhabit, in soil, in climate, in everything. The proudest empire in Europe, is but a bauble compared to what America will be, must be, in the course of two centuries, perhaps of one.

Mr. Gouverneur Morris²

The Erie Canal represented a new era in American commerce and ushered in a revived spirit of possibility. It helped forge a path into the rural wilderness and heralded the creation of new trading opportunities, both within the United States and internationally. But the Erie Canal was not important solely in economic development and in the American imagination; it made New York the "Empire State" and helped make American law what it was in the nineteenth century—a collection of doctrines designed to promote the American economy. Just as Americans harnessed new technology to create the canal and spawn the economic progress that it unleashed, American judges and lawyers used the canal as a vehicle for expanding and solidifying commercial law. The Erie Canal led to economic progress; it also led to legal progress. This essay explores the ways that the canal led to changes in New York law.

A. *The Erie Canal in the American Imagination*

In the early nineteenth century, progress and technology were beginning to blossom in America. The cotton gin, the steamboat, and power looms had

1. The author would like to thank Professor Alfred L. Brophy for the guidance, support, and ideas that made this Comment possible.

2. JOHN RUTHERFORD, 1760-1840: FACTS AND OBSERVATIONS IN RELATION TO THE ORIGIN AND COMPLETION OF THE ERIE CANAL (1825), available at <http://www.history.rochester.edu/canal/bib/rutherford/fact1825.htm>.

just been created, substantially increasing the ability of Americans to produce goods and services.³ However, these inventions had yet to directly benefit the majority of American citizens.⁴

Then came the Erie Canal. On Independence Day of 1817, the State of New York began construction on America's first man-made canal.⁵ "Amid an enthusiastic and popular celebration of the nation's Revolutionary heritage, the state of New York had begun construction on what was to be one of the longest artificial waterways in the world."⁶ Parades, speeches, and songs were amongst the festivities of the day.⁷

Citizens had imagined a canal such as the Erie for years prior to its creation.⁸ They wanted a waterway to bring the country together and expand the trading and commercial activities of all the small, rural communities that comprised the United States at that time.⁹ The founding fathers knew that in order to gain true independence as a nation, and to relinquish the United States' economic dependence on Western Europe, internal improvements were a necessity.¹⁰

The canal was seen as America's "triumph of art over nature."¹¹ No longer were the physical limitations of geographical terrain hindering American citizens—they had now created a man-made, technological marvel that helped conquer their natural boundaries.¹² The canal was made primarily of stone and iron, which was a change from the usual wood structures of the early nineteenth century.¹³ It was forty feet wide, four feet deep and stretched a total of 363 miles from Lake Erie to New York City.¹⁴ There were 83 locks and 18 aqueducts. These helped stabilize the water movement and allowed the water to ascend and descend a total of 680 feet—a true triumph over the hilly New York terrain.¹⁵

The canal became a mythical creature. "One farmer likened it to 'building castles in the air.'¹⁶ Another stated that "unmoved as I usually am by surrounding objects, I am willing to confess that I was more astonished than I ever was by anything I had before witnessed."¹⁷ These reactions illustrate the canal's effects on the American imagination and on the hopes of American citizens for the development of a prosperous and thriving new nation.

3. See CAROL SHERIFF, *THE ARTIFICIAL RIVER* 29 (Arthur Wang ed., 1996).

4. See *id.*

5. *Id.* at 28; see also Erie Canal Chronology and Bibliography, available at <http://www.history.rochester.edu/canal/chron.htm> (last visited May 15, 2005).

6. SHERIFF, *supra* note 3, at 9.

7. *Id.* at 27-28.

8. See generally *id.* at ch. 1.

9. See *id.*

10. See *id.* at 15.

11. *Id.* at 27.

12. See generally *id.* at ch. 2.

13. *Id.* at 30.

14. Erie Canal Chronology and Bibliography, *supra* note 5.

15. SHERIFF, *supra* note 3, at 30-31.

16. *Id.* at 31.

17. *Id.*

B. *The Erie Canal in the American Economy*

The creation of the canal brought almost immediate changes in the American economy. There were community-wide changes such that citizens could set up profitable businesses along the canal, attracting a wide base of traveling customers that would otherwise have been lacking.¹⁸ Streets alongside the canal were replacing other main streets as the center of each town's activities.¹⁹ There were larger changes as well. Sending goods to distant places required a team of laborers, all of whom were part of a new and thriving enterprise.²⁰ For example, if a farmer in New York wanted to make money selling wheat in Massachusetts, "the wheat had to pass through many hands. It had to be purchased, stored, milled, perhaps stored again, shipped, and sold once it reached port—all of which involved businessmen, including local merchants, millowners, commercial merchants, and forwarders."²¹ Thus, the canal created new jobs and opportunities for any American citizen with an entrepreneurial attitude.

This economic success had effects on other areas of law. Despite the previous century's insistence on natural rights, of which property ownership was one, American citizens began to realize that this interpretation of property rights would impede the country's ability to expand and prosper economically.²² To achieve this new economic development, it was necessary for private individuals to sacrifice their property for the canal.²³

To further enhance the possibilities for continued economic success in America, the concept of economic competition settled within the common law.²⁴ Judges began to incorporate this new concept into their decisions, which changed the eighteenth century's adherence to anticompetitive principles.²⁵ This new reasoning was necessary to allow businesses to continue growing with some assurance of stability and predictability within the legal system.²⁶ These economic changes illustrate a burgeoning new economy influenced by the Erie Canal and the American desire to maintain it.

C. *The Erie Canal and American Judicial Thought*

The nineteenth century fostered a new age for the American courts. No longer strictly imprisoned by legislative determinations and English common-law concepts, the courts expanded their powers and began to experi-

18. See generally *id.* at ch. 5.

19. *Id.* at 115.

20. *Id.* at 114-15.

21. *Id.* at 115.

22. *Id.* at 80-81.

23. *Id.*

24. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 109-11 (1977).

25. *Id.*

26. *Id.* at 111.

ment with the common law by bringing social change with their rulings.²⁷ Before the nineteenth century, the law was analyzed in a functional way—one in which the courts followed common-law rules to try to create an equitable solution for the parties involved.²⁸ The legislatures were the only bodies making any social changes or changes to benefit the general public welfare.²⁹

However, the nineteenth century changed this. American “judges came to play a central role in directing the course of social change.”³⁰ They began to take over what were previously considered only legislative powers.³¹ Judges were no longer constrained to interpreting the law; now, common-law judges began to expand their legal rulings.³²

Because of the growth of the American economy, fueled in part by the canal, American judges felt a need to restructure their ideas in response to these changing conditions.³³ Judges used their own morality and personal ideologies concerning the state’s needs and goals to create rules which helped grow the economy “while also casting an image of fairness.”³⁴ The fascination with progress, illustrated by the canal’s effect on the American imagination, fueled these changes.³⁵ Although Morton Horwitz notes that “it has never been entirely clear why at this particular time the legal system should have taken on such an innovative and transforming role,”³⁶ it is clear that, at least in New York, the Erie Canal is partially responsible for these changes in the court’s attitude. This essay illustrates the Erie Canal’s effect on New York law.

II. THE CANAL AS LAW

A. *Property Issues*

The Erie Canal was a catalyst for changes in real property law concepts. These changes were of three types. The Canal spawned cases that expanded the rights of the government to eminent domain, affected water rights, and developed a jurisprudence concerning access to the canal.

27. *See id.* at 1.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1-2.

32. *Id.* at 2.

33. Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161, 1164 (1999) (book review).

34. *Id.* at 1165.

35. *Id.* at 1212; *see also supra* Part I.A.

36. HORWITZ, *supra* note 24, at 1.

1. *The Canal and the Expansion of Eminent Domain*

To build the canal, New York had to acquire vast acreage through the use of eminent domain proceedings. Thus, even before the canal opened, it affected the development of takings law. The cases surrounding the construction of the canal expanded the rights of the government in what it could take, while lessening the rights of the property owners as against the government. These changes appear in several forms. First, a private condemnation theory permitted canal builders to appropriate land.³⁷ Second, the courts altered the conception of public use. Whereas “public use” was narrowly construed before the canal, after the canal, it was construed broadly.³⁸ Third, even when construction companies took property without a state or court order for use in the canal’s construction, they were required to pay damages rather than return the property.³⁹ Similarly, the courts limited recovery for property damaged during takings⁴⁰ and limited when individuals whose property was taken could sue to recover.⁴¹ All of those changes illustrate an important principle running through canal jurisprudence: that the New York courts were concerned with developing law that facilitated economic growth while respecting property rights.

One case, *Lynch v. Stone*,⁴² illustrates the government’s burgeoning rights during this time period. This case was an action for the wrongful diversion of waters by the state.⁴³ The plaintiffs claimed that the state, which had previously diverted their water temporarily and leased surpluses of that water to other private individuals, should use that excess water before attempting to divert more of the plaintiff’s property.⁴⁴ The state legislature required the use of surplus waters before any new water was taken.⁴⁵

The court held that the excesses of water running down from the plaintiff’s property, through other private mills, was continuously in the control of the state and being used for the canal.⁴⁶ Despite the fact that the water was leased to and ran through other mills, it eventually returned to canal use.⁴⁷ None of the water was wasted or technically surplus, and therefore the state was allowed to take from any source necessary when the needs of the canal later demanded it.⁴⁸

37. See *infra* notes 46-56 and accompanying text.

38. See *infra* notes 57-60 and accompanying text.

39. See *infra* notes 46-56 and accompanying text.

40. See *infra* notes 61-64 and accompanying text.

41. See *infra* notes 65-68 and accompanying text.

42. 4 Denio 356, 1847 WL 4281 (N.Y. Sup. Ct. 1847).

43. *Id.* at 356.

44. *Id.*

45. *Id.* The statute stated that the commissioners, upon a deficiency of water in the canal, should first use “surplus waters” and then they may proceed to take other waters. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

Although the court was merely interpreting the definition of “surplus waters” within a legislatively created statute, the holding shows the court’s treatment of the expanding rights of the government in eminent domain theory.⁴⁹ The meaning of the term “surplus” is narrowly construed so as to keep the government’s position feasible. Despite the fact that the water was used by other private individuals, it was not considered surplus by the courts.⁵⁰ Although the court argues that the water’s ultimate return to the canal is enough to keep it out of the surplus category, it is logical to think that the government could use the water being held at other private mills before taking more from the plaintiff.⁵¹ The expanded definition of acceptable takings by the state shows the government’s increasing powers.

Along with the expansion of the scope of acceptable takings came another area in which the government’s power was increasing. Specifically, canal builders (acting as agents of the state) were allowed to enter private lands and appropriate what they needed to build the canal. This is clearly illustrated in *Jerome v. Ross*,⁵² which was brought before the Chancery Court of New York early in the history of the canal. This case involved the taking of stones and rock from the plaintiff’s property. The defendants used the stones and rock in the creation of a dam on the canal.⁵³

Chancellor James Kent first found the takings to be a trespass and then set out to determine what types of damages were appropriate in this instance.⁵⁴ Assuming that they had no authority to take the rocks, the plaintiff would only be entitled to monetary damages.⁵⁵ The court reasoned that equitable damages, including the injunction that that plaintiff sought, are allowable only for extreme circumstances where pecuniary awards would not adequately compensate the property holder.⁵⁶

Second, the court examined the authority of the builders to take the stones and rocks.⁵⁷ Relying on New York statutes, the court made it clear that the builders, attempting to construct a public work, had every authority to go onto the plaintiff’s property and take the stone as long as they made no more damage than necessary.⁵⁸ Having already analyzed the need for anything other than monetary damages, the court denied the plaintiff’s request for equitable relief.⁵⁹

Jerome illustrates how, even in the creation of the canal, New York courts began to view the economic benefits of the canal as a controlling factor. The public good that the canal could do outweighed the specific re-

49. *Id.*

50. *Id.*

51. *Id.*

52. 7 Johns. Ch. 315 (N.Y. Ch. 1823).

53. *Id.* at 334.

54. *Id.* at 334.

55. *Id.* at 334-36.

56. *Id.* at 336-37.

57. *Id.* at 337-38.

58. *Id.* at 339.

59. *Id.* at 345.

lief sought by the plaintiff.⁶⁰ Chancellor Kent spent a few paragraphs praising the goals of the canal and the benefits it can bestow on the public.⁶¹ He further explained that private rights will inevitably be eroded, but in interpreting the statutes allowing for the public good, the court should always do “as little damage as possible to the private interest.”⁶² *Jerome* is a perfect example of the approach the New York courts seem to take in their analysis of the Erie Canal cases—supporting the growth of commerce while trying to minimize the damage to the private interest.

Another change to takings law appears in the early 1850s with the expansion of the definition of “public use.” In 1851, a New York trial court held that once property taken for public use is no longer needed to serve a public function, both the constitutional rights of the property owner and the legislative intent behind eminent domain statutes require that the land be returned to the original owner.⁶³ This seems to be fitting with the original ideas behind eminent domain, as the court cited precedent in other areas of governmental takings, including public roads and streets.⁶⁴ The court interpreted the fee granted upon the governmental taking to be a fee determinable.⁶⁵ However, only a few years later a New York appellate court held differently. This court determined that the fee granted upon governmental takings is a fee absolute, giving the state an unending, unalterable right to the land notwithstanding any changes in the land’s use.⁶⁶ In only four years, eminent domain powers eroded the personal property protection of owners. Even when the land is not in use for the canal, the state still maintains title to the property and leaves property owners without a defense.

Yet another way in which personal property protection was limited is evidenced in *Turrell v. Norman*.⁶⁷ Damage to the plaintiff’s property, used during the enlargement of the canal, included damages to crops, soil, and grass.⁶⁸ The plaintiff, who had brought an action against the actual workers on the canal, was not allowed to sustain that action.⁶⁹ Instead, the court held that the plaintiff was entitled to receive the normal compensation for land appropriation, and inferred that the damages to be received were enough to adequately replace his crops, soil, and grass.⁷⁰ Eminent domain law, which encompassed damage to the land, not just physical appropriation, now limited damages dramatically. Where *Jerome* had limited the power of injured parties to obtain specific relief and left them with only monetary damages, injured plaintiffs now received only limited compensation for their property.

60. *Id.* at 341-42, 345.

61. *Id.* at 341-42.

62. *Id.* at 342.

63. *People v. White*, 11 Barb. 26, 32 (N.Y. App. Div. 1851).

64. *Id.*

65. *Id.* at 27-30.

66. *Rexford v. Knight*, 11 N.Y. 308, 314 (1854).

67. 19 Barb. 263 (N.Y. Ch. 1855).

68. *Id.*

69. *Id.* at 266.

70. *Id.* at 265-66.

In essence, the canal expanded the power to take while at the same time limiting the damages for land that was taken.

Cases also show courts putting the burden on property owners to recover their damages. There is no longer a definitive right to receive appropriations; the courts force land owners to demand damages within a certain limited time period or waive all rights to compensation and automatically lose title to their property.⁷¹ Generally, title is allowed to pass only once an assessment is made for any damages sustained by the owners.⁷² However, by limiting this principle, courts decreased the overall protection for property holders. Although the courts were interpreting legislative statutes requiring rights to be exercised within a certain period of time, the courts exacerbated this condition in their interpretation of the statute. One statute read that “no claims other than those so exhibited [within a year] shall be paid.”⁷³ The original idea surrounding eminent domain theory—that land should be taken only with fair compensation—was thus limited by both the courts and the legislature during the building of the Erie Canal.

Canal jurisprudence fits with how some scholars have characterized the antebellum period. There was, as Morton Horwitz described, a change in the law towards the promotion of economic growth.⁷⁴ That self-conscious position of favoring economic growth appears in particularly stark form, as the New York judges made important and significant changes in their approach towards eminent domain jurisprudence.⁷⁵ Before the canal, New Yorkers whose property was taken by private individuals had the right to have that property returned.⁷⁶ Afterwards, New Yorkers were entitled only to the value of their property—and that was limited to the fair market value of the property rather than the value of the crops that were lost.⁷⁷ These findings add important weight to other analyses exploring the increased power of the state to use property to promote economic growth.⁷⁸ During a time when first the Federalist Party and later the Whig Party encouraged national spending to promote commerce, canal jurisprudence bent eminent domain law to meet those goals.⁷⁹

71. See *Rexford*, 11 N.Y. at 314 (holding that land title passed to the state, despite no damages being paid, because no damages were claimed within one year); *People ex rel Bank of Monroe v. Canal Comm'rs*, 5 Denio 401, 401 (N.Y. Sup. Ct. 1848) (holding that interest is payable on damages only if the damages are requested within a certain time period).

72. See, e.g., *Brinckerhoff v. Wemple*, 1 Wend. 470, 474 (N. Y. Sup. Ct. 1828) (holding that title is not allowed to pass entirely to the state until damages are officially assessed).

73. *Rexford*, 11 N.Y. at 312.

74. See generally HORWITZ, *supra* note 24, at ch. 4.

75. See generally *id.* at ch. 2.

76. See generally *id.* at ch. 3.

77. See *supra* notes 67-70 and accompanying text.

78. See generally GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY* ch. 5 (1997); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE* ch. 1 (1996).

79. See SHERIFF, *supra* note 3, at 99, 111.

2. *The Canal's Effect on Water Rights*

Once land had been taken and the canal had been built, further issues arose to illustrate the changing ideas of state judiciaries. These included the responsibility of maintaining the canal and its accessories, and the ownership interests of private individuals and the government in the water within the canal system. Courts showed an increasing trend towards decreasing governmental responsibility as they relied on the economic benefits of the canal as the justification for such a switch.

In maintaining the canal, two Pennsylvania cases show a changing judicial attitude. In 1851, the Pennsylvania Supreme Court manifested a desire to keep the traditional common law alive.⁸⁰ Discussing the party responsible for the maintenance of bridges which were erected as an accessory for the canal, the court held that the duty to fix and preserve those bridges belonged to the state.⁸¹ So long as the bridge was one designed for public use, the state's role still included widespread public protection.⁸²

However, eight years later the court's ideology transformed. No longer a champion of an overarching governmental protectorate, the court left an injured citizenry with only self-help as a remedy. *Commonwealth v. Reed*⁸³ concerned a suit against the Erie Canal Company for the failure to clean a large, stagnant pool of water that was created by the building of a dam in conjunction with the canal. The main issue was whether this created a public nuisance such that the company should be liable.⁸⁴ The court held that nothing created by the state for the benefit of its citizens could be a nuisance.⁸⁵ Just because the erection of the dam was accomplished by a private company, the goal of enhancing the lives of the general public still existed and was carried out by an agent of the state.⁸⁶ Thus, the company was not liable.⁸⁷

Despite the expansive health problems cited by the lower court as being "to the great damage and nuisance of the citizens,"⁸⁸ the court relied on the benefits of economic growth in holding that the citizens had no remedy. The court declared that, even though the health concerns were created by agents of the state, the citizens must protect themselves from any adverse consequences of that work. Economic advantages had become increasingly important in case analyses. The court applied the traditional balancing test for modern purposes: Is the benefit of the alleged nuisance outweighed by the harm?⁸⁹ Nothing could outweigh the benefits of the canal, and hence it

80. See *Meadville v. Erie Canal Co.*, 18 Pa. 66 (Pa. 1851).

81. *Id.* at 68.

82. See *id.*

83. 34 Pa. 275 (Pa. 1859).

84. *Id.* at 282.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 276, 282-83.

89. See *id.* at 282-83.

would never be a nuisance. Those who had the misfortune to live alongside the canal were expected to bear the burdens of its development, much as those who lived alongside railroads were expected to bear the costs of sparks from railroad engines.⁹⁰ There seemed little that one living alongside the canal could do to mitigate the harm other than to move.⁹¹

To determine actual water ownership, the court made similar strides. Early in the building of the canal, two cases came before the Court for the Correction of Errors of New York—*Canal Appraisers v. People*⁹² (known as “Tibbits”) in 1836 and *Commissioners v. Kempshall*⁹³ in 1841. Both cases involved similar fact patterns but resulted in different holdings by the same court. Thus, they illustrate confusion—perhaps even growth—within the New York judiciary. Both deal with the taking of water in different forms for the building of a dam on the canal, and the main issue is who owns the water.⁹⁴ Do the private owners of the land surrounding the water own it or does the state own it as a public commodity? The court held that the water may be used by the state without compensation for damages in *Tibbits*,⁹⁵ however, in *Kempshall*, the court decided that compensation was due to the property owners based on common-law water principles.⁹⁶

These two divergent holdings showed the need for a conclusive decision in this area. The court was trying to hold on to common-law property ideas. These benefit individual property owners and declare that larger streams which are navigable belong to their private owners, while merely reserving a right of navigation to the public.⁹⁷ However, the courts were tempted by the new, invigorating property concepts spawned by the growth of the canal.

This is illustrated by a definitive holding twenty years later, written by a New York Appeals Court, after the Erie ideologies had grown, expanded, and settled within the judiciary. *People v. Canal Appraisers*⁹⁸ dealt with the diversion of water for use in building a dam on the canal. The court held that the government did not owe damages to the landowner and based this holding on a rejection of common-law water principles.⁹⁹ A lengthy discussion of the historically divergent holdings in this area was the crux of the court’s analysis, followed by a short conclusion deeming certain of those cases to be better decisions than others.¹⁰⁰ “All rivers in fact navigable, [are]

90. HORWITZ, *supra* note 24, at 74-78. In one railroad case, the court remarked that “private injury and personal damage . . . must be expected from . . . agents of transportation in a populous and prospering country.” *Id.* at 75 (quoting *Carson v. Blazer*, 2 Binn. 475, 475 (Pa. 1810)).

91. *Id.* at 74-78.

92. 17 Wend. 571 (N.Y. 1836) [hereinafter *Tibbits*].

93. *Comm'rs of the Canal Fund v. Kempshall*, 26 Wend. 404, 1841 WL 3920 (N.Y. 1841).

94. See *Tibbits*, 17 Wend. at 583 (discussing a waterfall destroyed in the creation of a dam); *Kempshall*, 1841 WL 3920, at *6 (concerning a diversion of water to create a dam).

95. *Tibbits*, 17 Wend. at 629-30.

96. *Kempshall*, 1841 WL 3290, at *8.

97. *Tibbits*, 17 Wend. at 595-96.

98. 33 N.Y. 461 (1865).

99. *Id.* at 496-500.

100. *Id.*

deemed public rivers, and subservient to public uses.”¹⁰¹ Thus, without much express justification, the court sided with the idea of a water law that aids in the economic growth of the state while impacting private property and water rights.

3. *The Canal's Effects on the Development of Water Access Jurisprudence*

The cases in the area of water access jurisprudence mimic the same trends apparent from the water rights cases. After the building of the canal, issues naturally arose involving access to it. Courts developed water access jurisprudence through two different types of cases: actions brought against individuals attempting to use the canal for their own private purposes, and cases against canal commissioners for failure to keep the canal easily accessible.¹⁰²

An 1836 case was brought to dissolve an injunction which had stopped private mill owners from destroying an embankment to the canal in an effort to more easily supply their mill with water.¹⁰³ The embankment, according to the canal commissioners, was an essential element of the canal which maintained its water level.¹⁰⁴ The court, siding with the commissioners, held that the maintenance of the canal was more important than the individual's unauthorized use of the public waters.¹⁰⁵ This same theme of valuing the canal's public benefits over private gains resonates again in the area of water access.

Another example of this rationale lies in the court's decisions interpreting the responsibilities of the canal commissioners. These commissioners had a general duty to protect the public's access to the canal as well as the canal's navigability. The main issues in these cases revolved around the amount of discretion given to the commissioners in deciding when to take action. With the exception of the extremely obvious cases where boats were lodged in the canal, thus stopping the flow of boats,¹⁰⁶ New York courts gave much leeway to the commissioners to determine when and how to preserve the safety of the public.¹⁰⁷ In *Griffith v. Follett*,¹⁰⁸ the Supreme Court of New York County held that the commissioner had no duty to pre-

101. *Id.* at 500 (quoting Chancellor Kent's desire to overturn *Tibbits* within his opinion in *Canal Appraisers*).

102. *See, e.g.,* Attorney Gen. v. Cohoes Co., 6 Paige Ch. 133, 134 (N.Y. Ch. 1836) (discussing private access and the use of public canals); *Griffith v. Follett*, 20 Barb. 620, 630-35 (N.Y. App. Div. 1855) (discussing the responsibilities of canal commissioners in preventing obstructions to the access of the canal).

103. *Cohoes Co.*, 6 Paige Ch. at 134.

104. *Id.*

105. *Id.* at 134.

106. *See* Adsit v. Brady, 4 Hill 630, 635 (N.Y. Sup. Ct. 1843) (holding that commissioners should act promptly in removing obstructions from the canal).

107. *See* *Griffith*, 20 Barb. at 620.

108. *Id.*

vent a canal breakage that some citizens had anticipated.¹⁰⁹ Even though the banks did eventually break, the canal commissioner was not liable for the damages.¹¹⁰ The court mentioned that the commissioner was on notice of an extremely weak bank, but his failure to repair it was merely an incorrect decision as to the weight of the problem.¹¹¹ In the spirit of the state's economic boom, the courts granted the government broad discretion to allow the free flow of commerce. This attitude seems fitting in light of previous Erie decisions which helped to propel the economic growth of the state through the newly built canal.

However, this line of thought is limited in two respects. First, the court had previously held that, even when the commissioners have discretion as to when action is necessary, they are liable for injuries occurring once they affirmatively decide to repair.¹¹² This helps minimize the seemingly unlimited liability of commissioners in repairing the canal, thus aiding in the protection of individuals.

Second, it must be mentioned that not all courts followed this economic goal in reaching their decisions. Some courts continued to favor personal protection over the commercial benefits of the canal. One such case involved a lock which had overflowed and caused a boat to become lodged in the canal, impeding traffic.¹¹³ The court noted that there were four possible ways in which to fix the traffic impediment, some of which took longer than others and some of which injured personal parties.¹¹⁴ The canal commissioner was held liable for choosing an option which impeded the rights of an individual party by destroying his boat.¹¹⁵ The court held that the commissioner should have chosen an option which did not destroy personal property, even though it might take longer for the canal to be traversable again.¹¹⁶ Thus, the court emphasized the protection of private property over the commercial gain from a functioning canal. Despite this deviation from the general philosophy of the time, there still remains a majority of cases supporting commercial enhancement.

Even though the discretionary ability of the commissioners was limited by some courts, it remained unimpeded in others. One case held that, despite a deposit of "mud, rubbish and dead carcasses of animals"¹¹⁷ within a basin on the canal, a city was not required to repair this health hazard. The court took the concept of discretion to an extreme in this instance, but they also took the case one step further. In their analysis of the situation, the court emphasized that the role of the city in this situation was the same as

109. *Id.* at 634.

110. *Id.*

111. *Id.*

112. *See* *Shepherd v. Lincoln*, 17 Wend. 250, 252 (N.Y. Sup. Ct. 1837).

113. *Hicks v. Dorn*, 54 Barb. 172, 173-75 (N.Y. App. Div. 1869).

114. *Id.* at 175.

115. *Id.* at 179.

116. *Id.*

117. *People v. Corp. of Albany*, 11 Wend. 539, 544 (N.Y. Sup. Ct. 1834).

that of the private individual.¹¹⁸ They also noted that the canal needed to be cleaned by someone, so as not to impede the flow of traffic.¹¹⁹ These two conflicting concepts seemed to imply that individual citizens should take it upon themselves to clean the canal. Indeed, the court suggested that the expense should be placed on the individual land owners, who would not be bothered because of their desire to keep the canal in operation.¹²⁰

This analysis takes the discretionary philosophy even further. Not only is the city given strong liberties in what it is required to do to protect individuals, the court seems as though it is trying to win both battles here—it does not want the city to be liable but it wants the canal to be easily accessible to keep commerce moving. Although the court in no way mandated private cleaning of the canal, it is nonetheless interesting to see how the court approached this issue. It seems to be an extreme in the area of canal access in favor of both expanded governmental powers and commercial expansion on the Erie.

B. Contractual and Tort Issues in Building the Canal

The Erie Canal helped create changes in property law by emphasizing the goal of expanding commerce. The canal affected contractual issues in much the same way. New York courts used contract law as a vehicle to uphold the economic benefits of the canal while balancing these benefits with the needs of private individuals. However, this occurred in much the opposite way than it did in the property law context. Whereas in property cases the courts often enlarged existing law to benefit the canal's needs, in contracts cases the courts stuck with old legal interpretations of contract and tort rights, often failing to expand the law to help individual citizens.

New York courts effectively limited tort liability for injuries surrounding the canal. Those using the canal often suffered injury when canal commissioners—or people they contracted with—failed to keep the canal in repair. In *Fish v. Dodge*,¹²¹ the Supreme Court for New York County precluded recovery for such an individual. The canal commissioners had hired a contractor to maintain and repair a certain section of the canal who failed in his duty.¹²² As a result, one of the plaintiff's horses died and others were severely injured.¹²³ The court first held that the canal commissioners had no liability for the actions of an independent agent for the state.¹²⁴ In that respect, the New York court was on well-established ground. The court, how-

118. *Id.* at 542-44.

119. *Id.* at 543-44. The court noted that “[i]t would be a public calamity seriously to impair the existing advantages to commerce and navigation derived from the use of the basin, and every reasonable effort should be made and required to remove the evil short of so serious a consequence.” *Id.* Here the court emphasized the importance of commerce on the canal, which seems to shape its entire opinion.

120. *Id.*

121. 38 Barb. 163 (N.Y. App. Div. 1862).

122. *Id.* at 169-70.

123. *Id.* at 170-71.

124. *Id.* at 172.

ever, added that the contractor himself was not liable for the damages, leaving the injured citizen without a legal remedy.¹²⁵ The court stated that there is a distinction between contractual obligations and legal ones.¹²⁶ They held that because the contractor was not a public servant and was merely performing (or failing to perform) his contractual duties, his liability extends only to the state for breach of contract.¹²⁷ It also prohibited third party liability.¹²⁸ In so holding, the court denied relief to an injured party and shielded both the state and the contractor—the two main actors in this situation—from any responsibility.

This exclusion of liability for canal injuries and damages appears to be the result of the court's desire to maintain canal creation unimpeded by the court system. Unlike property law, where the courts changed the law to promote economic growth, in contract cases, the court's refusal to expand the law promoted economic growth.¹²⁹ In each instance, the governing principle seems to be that the courts should promote the canal, and the state interest. Although the court could have construed the repair of a public work to be an implicit duty of the public, the court chose not to do so, and preserved the status quo, impairing the rights of a private party.

To further illustrate the state's special status, one can look to a case decided eight years later by the same Supreme Court of New York County. The court held that a contract between two private parties could be terminated by the state, even though the state was not a direct party to those particular contracts.¹³⁰ Unlike *Fish*, which adhered strictly to privity in limiting liability, the court here allowed for a third party—the State of New York—to interfere with the contract rights of two private parties. The case involved a contractor for the state who had contracted with an individual to build locks for the canal.¹³¹ The court noted that there was no evidence of any reference to the business's contract with the state in its personal contract with the individual.¹³² Despite this, the court held that when the state suspended the contractor's contract, the individual's contract with the business was thus terminated.¹³³ The court did not mention any rights the individual retained against the state.¹³⁴

This ruling, in direct contradiction with the *Fish* holding, illustrates the influence of the canal's goals on the courts through their changing judicial strategy in each situation. The court claimed to stick to established law in

125. *Id.* at 173.

126. *Id.*

127. *Id.*

128. *Id.*

129. *See supra* Part II.A. The rights of the government in eminent domain were generally expanded so as to allow for easier canal creation. Also, the discretion of the canal commissioner was expanded to make the canal more accessible.

130. *Hildreth v. Buell*, 18 Barb. 107, 111 (N.Y. Sup. Ct. 1854).

131. *Id.* at 110.

132. *Id.* at 111.

133. *Id.* at 110.

134. *See id.* at 110-11.

both instances regarding the rights of privately contracting parties, but reached different results. The policy goals, however, remain the same.

The courts managed to place some limits on their protection of the canal system. The canal commissioners often tried to abuse their newfound powers in order to make the most efficient use of their money. One example of this can be found in *Higgins v. Reynolds*.¹³⁵ Here the plaintiff had contracted with the defendants, who were agents of the canal commissioners, to take stone from the plaintiff's property in exchange for money.¹³⁶ The stone was to be used in building part of the canal enlargement,¹³⁷ but the plaintiff was never paid.¹³⁸ Instead, the commissioners tried to divert a highway running on the plaintiff's land to their use in building the canal, while ceding part of the plaintiff's property to the state.¹³⁹ The commissioners argued that because the land that the stone was taken from had been appropriated, they should be absolved from any contractual liabilities involving payment for the plaintiff's property.¹⁴⁰

The court held chose not to uphold the defendant's claim.¹⁴¹ The court stated that not only did the commissioners try to avoid their liability after they had already taken the stone, they also completely misconstrued eminent domain law.¹⁴² The court effectively limited the seemingly endless powers of the canal commissioners. Although the courts in this area obviously hoped to enhance the rights of the commissioners such that the canal might be built more efficiently and expeditiously, they held here that the lenience has its limits and cannot be taken to extremes. Thus, the goals of the canal in expanding commerce were still evident in the area of contract law but remained limited from fantastic proportions.

III. THE CANAL AS A PLACE

Once the canal was built, issues arose concerning its use. The resulting problems were a natural consequence of the new commerce created by the canal—a commerce which had never been seen or tested by its users. Because the canal brought possibilities for international commerce (or at least interstate commerce) to rural communities for the first time, the courts were forced to invent New York law in response to new issues. These issues are three-fold: What is the liability of shippers on the canal? Can this liability be limited? What is the effect of foreign business in New York? In general, the courts seemed to answer these questions by protecting the newly created commercial competition. There was little judicial paternalism during this

135. 31 N.Y. 151 (1865).

136. *Id.* at 151.

137. *Id.*

138. *Id.* at 152.

139. *Id.* at 154.

140. *Id.*

141. *Id.*

142. *Id.* at 155-56.

time period. The courts allowed the canal commerce system to function on its own without interference from the courts in the hope that it would grow, expand, and benefit the state.

A. *Determining the Liability of Common Carriers on the Canal*

Once the canal was built, the most common legal issue involved common carriers who had lost, destroyed, or damaged goods while in transit on the canal. In general, these contract cases involved lawsuits by the owners of the goods, suing common carriers for their damages.¹⁴³ Goods would often sit in warehouses during transit while awaiting empty vessels to carry them further down the canal.¹⁴⁴ Defendant carriers often tried to recategorize themselves as warehousemen or forwarders instead of carriers, hoping to escape liability.¹⁴⁵ However, the courts maintained a strict separation between the jobs. Warehousemen and forwarders were responsible for finding other shippers to transport the goods. As such, they were liable for lost or damaged goods only upon a showing of negligence.¹⁴⁶ However, common carriers were responsible for the entire shipping route from owner to destination.¹⁴⁷ They were liable for any damage or loss that occurred along the way.¹⁴⁸ Thus carriers, despite warehousing goods during their transport, were liable from the point of receipt of the goods until the goods were delivered to their final destination.¹⁴⁹

This increased liability for common carriers was based on contracts promising delivery from the owners' ports to destination ports on the canal.¹⁵⁰ Forwarders, however, promised to find someone else to ship the goods.¹⁵¹ Thus, the courts enforced liability to the extent of the contracts created by the individual goods' owners.

Because of the limited contractual obligations, forwarders were less likely to face liability.¹⁵² One representative case involved an owner of goods suing a defendant who forwarded goods on the canal.¹⁵³ The goods were lost in the defendant's care and the issue became the liability of the defendant.¹⁵⁴ The court held that as a forwarder the defendant was liable

143. See, e.g., *Blossom v. Griffin*, 13 N.Y. 569, 569 (1856) (concerning an action against a common carrier for damages to goods in a fire at a warehouse of a defendant carrier); *McDonald v. W. R.R. Corp.*, 34 N.Y. 497, 497 (1866) (discussing an action against a common carrier for the loss of goods while in the possession of a defendant carrier); *Goold v. Chapin*, 20 N.Y. 259, 259 (1859) (concerning an action against a common carrier for the loss of goods while in the possession of a defendant carrier).

144. See *McDonald*, 34 N.Y. at 497.

145. See *id.*

146. See *id.* at 502.

147. See *id.* at 500.

148. See *id.* at 500-01.

149. See *supra* note 90.

150. *Blossom*, 13 N.Y. at 569.

151. *Bush v. Miller*, 13 Barb. 481, 488-89 (N.Y. Sup. Ct. 1852).

152. See *id.*

153. *Id.*

154. *Id.*

until the goods were delivered to a shipper (but only for negligence).¹⁵⁵ Previously, the burden was on the defendant or forwarder to prove that he was not negligent in his duties.¹⁵⁶ But this court modified the burden, easing the liability of forwarders on the canal. The court stated that if there is a total loss of the goods, the burden is still on the defendant to show that the proper care was taken.¹⁵⁷ However, if the goods are merely injured or damaged the law will not assume the forwarder's negligence; instead, the plaintiff will be forced to prove it.¹⁵⁸ Shifting the burden further limited the liability of forwarders, and shows the courts' efforts to maintain less strict commerce rules on the canal. During this time of new commerce, the courts wanted to let commercial activities proceed on their own without much judicial interference. Except in cases involving clear contractual liability, as seen with common carriers, the courts attempted to limit the liability of shippers, ensuring the flow of commerce.

B. Contractual Limitations on Liability

The courts enforced the contractual liability of common carriers who had promised to deliver goods from one destination to another.¹⁵⁹ However, what happens when common carriers try to limit the liability contractually? The courts' reaction to this issue is further proof of the lack of paternalism in this area, and the desire of the New York judiciary to let commerce grow on its own.

The most common scenario illustrating this concept involved owners agreeing to limit the liability of their shippers in exchange for lower prices.¹⁶⁰ Often it was argued that these limitations should not be allowed, given the public policy concerns "founded upon the interest of commerce and the protection of the [owners] . . . of property."¹⁶¹ The courts upheld the contracts anyway. The Supreme Court for New York County stated that there is no reason not to enforce these contracts because "[m]en of business generally know what they are doing and what is for their interest . . . [i]f the owner of the goods wishes, or is willing for any reason to incur the risk, it is impossible for me to perceive why he should not be permitted to do so."¹⁶² Thus, the courts clearly felt obliged to enforce individual contracts, despite arguments concerning judicial protection of commerce. The courts favored the nonpaternalistic flow and growth of the new commercial world and allowed individuals acting within this world to contract however they desired.

155. *Id.*; see also *supra* notes 92-93 and accompanying text.

156. *Bush*, 13 Barb. at 489.

157. *Id.* at 489-90.

158. *Id.* at 490-91.

159. See *supra* note 90; *supra* Part III.A.1.

160. See *Parsons v. Monteath*, 13 Barb. 353 (N.Y. 1851); *Mercantile Mutual Ins. Co. v. Calebs*, 20 N.Y. 173 (1859).

161. *Parsons*, 13 Barb. at 359-60.

162. *Id.* at 360.

This is taken even further when courts began upholding covenants not to compete, as illustrated in *Chappel v. Brockway*,¹⁶³ a case announced rather early in the canal's history. In *Chappel*, both the plaintiff and the defendant had been involved in shipping on the canal.¹⁶⁴ The defendant eventually agreed to sell the boats used in his shipping business to the plaintiff for \$12,500.¹⁶⁵ The defendant also agreed never to engage in the shipping business again within one hundred miles of Buffalo, New York.¹⁶⁶

Courts historically disfavored covenants not to compete, holding that they were contrary to the public good.¹⁶⁷ If it could be proved that a particular contract did not adversely affect public policy, the covenant could be upheld, but this rarely occurred.¹⁶⁸ Courts required a showing of a "just reason and compensation."¹⁶⁹

In this instance, the court upheld the validity of the contract to fit the "just reason and compensation" rule.¹⁷⁰ The court's analysis, however, is sparse in distinguishing this instance from the harsher holdings of the past. The court stated that the money was clearly compensation, and that withholding further injury to the purchaser was a "good reason".¹⁷¹ The objections to this case—that a one hundred-mile ban on shipping is overzealous—were noted by the court, but it declared that the distance is of no matter as long as it is reasonable in light of the particular business or industry.¹⁷² Considering that the Erie Canal was the only place to conduct such a business, and that one hundred miles encompasses nearly one-third of the canal, the plaintiff's argument was not without merit.¹⁷³ However, the court did not agree, siding instead with the privately created contractual liabilities established by two sophisticated parties involved in commerce on the canal.

It was further argued by the defendants that the plaintiffs forced them out of business, and that after signing the restrictive covenant, the plaintiffs raised their own prices.¹⁷⁴ The court answered that not only could other competitors enter this area of commerce and bring the prices back down, but that increased prices are not necessarily injurious to the public.¹⁷⁵ The court implied that increased prices could create better products and services, while emphasizing that this contract, no matter how it was created, was not harmful to the public and should be upheld.¹⁷⁶ This analysis, again, demon-

163. 21 Wend. 157 (N.Y. Sup. Ct. 1839).

164. *Id.* at 157.

165. *Id.*

166. *Id.*

167. *See id.* at 159.

168. *See id.*

169. *Id.* at 160.

170. *Id.*

171. *Id.* at 167.

172. *Id.*

173. *See Erie Canal Chronology and Bibliography, supra* note 5 (stating that the canal's total length is 363 feet).

174. *Chappel*, 21 Wend. at 163-64.

175. *Id.* at 164.

176. *Id.*

strates a judicial desire to remain neutral as to the commerce on the canal and to allow business entities to contract for their own benefits. By upholding all types of personal contracts, the courts left paternalism behind and allowed the nature of commerce on the canal to shape and expand on its own.

C. The Effects of Foreign Business in New York and on the Canal

One interesting result of the canal's effect on commerce is in the reaction of the courts to the presence of foreign corporations in New York. In *Merrick v. Brainard*,¹⁷⁷ the court addressed this issue and demonstrated a fear of foreign corporations—and the sole instance in which a paternalist attitude appears. This case involved a suit by a goods owner against certain stockholders in a corporation who normally would be shielded from personal liability by virtue of their incorporation.¹⁷⁸

The court focuses its analysis on the defendant's corporate status. The corporation had been founded in Connecticut, but began doing business exclusively in New York, presumably because of the canal.¹⁷⁹ The court held that because the company moved out of the state in which it had incorporated and, with the exception of officer elections, conducted all of its business within New York, the company had lost its corporate status.¹⁸⁰ The company was thereby immediately transformed to a general partnership and the individual partners now became personally liable for any debts and liabilities of the partnership.¹⁸¹ The court's reasoning stemmed from a desire to protect the state from foreign wrongdoers.¹⁸²

It cannot be necessary to attempt an enumeration of the evils which would result from domesticating corporations over whose creation and conduct we can have no control. They would be without limit as to number, without capital, competing with and unfairly excluding our own citizens from a share in the business of the country, or by combinations aided by aggregated wealth, not only exclude our people from a share in the business of the state, but wield a dangerous influence over our financial and commercial interests.¹⁸³

The paternalistic attitude of the Supreme Court of New York County is clearly illustrated in this case. Despite previous holdings about restrictive covenants and contracts limiting liability which let commerce develop on its own, here the court shows a fear of this economic freedom. This concept of hostility towards out-of-state corporations has clearly been abated in modern times, but is an interesting outgrowth of the canal and the development

177. 38 Barb. 574 (N.Y. Sup. Ct. 1860).

178. *Id.* at 577-78.

179. *Id.*

180. *Id.* at 580-81.

181. *Id.*

182. *See id.* at 584.

183. *Id.*

of a commercial American economy.¹⁸⁴ By trying to control outside influences, the court hoped to protect its own New York economy through judicial control, showing that there are some limits on commercial freedoms.

IV. CONCLUSION

The Erie Canal was a technological marvel and a sight of wonder and awe for New York citizens in the nineteenth century. This new transportation device linked rural America to the rest of the world, and created a myriad of possibilities which had never before existed. With the creation of the canal, a new system of American commerce developed which allowed its citizens to prosper and thrive in an oftentimes international setting.

With this remarkable new spirit, the country changed. Not only was the average citizen affected through new market opportunities, but the American judiciary changed as well. New York law transformed during this time period as a result of the new issues and complexities presented by a changing economy. New judicial philosophies affected substantive areas of the law, including property law, contracts law, and torts. Some of these changes have survived to the present day; many have not. However, the implications of the canal remain.

The cases surrounding the canal evidence the way in which a new commerce influenced a nation, causing it to rethink its goals, desires, and methods. These cases illustrate the importance of the canal not only in the American imagination, but in the American economy and on the American judiciary. The legacy of the canal provides a fascinating look into American life and legal thought throughout the century.

Leah Moren Green

184. FRANKLIN A. GEVURTZ, *BUSINESS PLANNING* 339 (3d ed. 2001).